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The UN Security Council: A Reflection on Institutional Strength

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I. INTRODUCTION

The role and position of the United Nations (UN) Security Council, the central organ for peace in the international order, is undergoing change. With a rejuvenating China, a newly assertive and even aggressive Russia, and a United States retreating under former President Donald Trump, the geopolitical landscape has rapidly transformed and power structures are being rebalanced. What are the implications of a refashioning of world order for the UN Security Council? Has the Security Council's failure to agree on action to resolve the February 2022 Russian invasion exposed its obsolescence?

While at the height of US hegemony, the Security Council was perhaps usefully compared to a matryoshka doll that could be unpacked into ever smaller entities – from representing the international community, to 15 members, to the five permanent members (P5), to a single permanent member[1] – this image of a single permanent member constituting the core of the Security Council's being no longer holds. Even though the United States' Biden Administration is re-engaging with the international legal order,[2] China's arrival on the global stage as an awoken superpower has disrupted the status quo. China's unique character and its unwillingness to placidly blend into the US-designed world order is likely to upset

[1] W. Michael Reisman, 'The Constitutional Crisis in the United Nations', *American Journal of International Law* 87 (1993), 83–100 (85), cited by Isobel Roele, 'Around Arendt's Table: Bureaucracy and the Non-Permanent Members of the UN Security Council', *Leiden Journal of International Law* 33 (2020), 117–37.

[2] See, for a more general analysis, José Alvarez, 'International Law in a Biden Administration', *Institute for International Law and Justice*, November 2020, available at www.iilj.org/wp-content/uploads/2020/11/Alvarez-Biden-and-IL.pdf.

existing structures and arrangements, the questions being how and to what extent.[3]

Commentators have turned to historical parallels to describe the turn of events that is unfolding. Graham Allison has coined the term 'Thucydides Trap' to underline the structural stress that results from the rise of a new superpower.[4] Yet historical analogies, such as with World War I and the failures of diplomacy to accommodate Germany's rise,[5] or labels as a 'new Cold War' can be considered inadequate, given the intense economic and technological mutual interdependencies of today's globalised world. Indeed, rather than returning to a bipolar world, the international order has effectively become multipolar as a consequence of the 'rise of the rest'.[6] And even if the United States and China were to insist on their current efforts to decouple,[7] the full extent of the existing global interconnectedness will not be easily unravelled. Many of today's threats and challenges simply cannot be disentangled.

Nonetheless, the new power constellations will undoubtedly lead to shifts and the development of new norms, as well as to the modification of practices and normative regimes. China refuses to be a passive rule-taker and is already competing with the European Union as a global business regulator, for example on tech. It aims to supersede – or at least juxtapose – the 'Brussels Effect'[8] with its own 'Beijing Effect'.[9] China will continue to demand more space and respect for its own values and policies, surely including in the realm

[3] Subrahmanyam Jaishankar, 'The Lessons of Awadh: The Dangers of Strategic Complacency', in *The India Way: Strategies for an Uncertain World* (New Delhi: Harper Collins, 2020), ch. 1.

[4] Graham T. Allison, *Destined for War: Can America and China Escape Thucydides' Trap?* (Boston: Houghton Mifflin Harcourt, 2017), referring to the fear that Athens' rise instilled in Sparta, ultimately leading to the devastating Peloponnesian War.

[5] Henry Kissinger, 'Epilogue: Does History Repeat Itself?', in *On China* (New York: Penguin, 2011), 514–30.

[6] Fareed Zakaria, *The Post-American World and the Rise of the Rest, Release 2.0* (New York: Penguin, 2011).

[7] Even before Trump started raising the prospect of decoupling the US economy from China in 2019, President Xi Jinping had already initiated policy thinking aimed at greater economic self-sufficiency: Podcast with Steve Tsang, 'What China Makes of "New Cold War" with US', *The Rachman Review* [podcast], 20 August 2020, available at https://play.acast.com/s/therachmanreview/whatchinamakesof-newcoldwar-withus.

[8] Anu Bradford coined the term 'Brussels effect': Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford: Oxford University Press, 2020). The term refers to the European Union's unilateral ability to regulate global business drawing on market forces. As one of the world's largest and most affluent consumer markets, the European Union is in a position to shape regulation and set standards in diverse areas of data privacy, consumer health and safety, and online hate speech. Corporations tend to extend these EU rules to their global operations to avoid the costs of complying with multiple regulatory regimes.

[9] Matthew S. Erie and Thomas Streinz, 'The Beijing Effect: China's Digital Silk Road as Transnational Data Governance', *New York University Journal of International Law and Politics*

of collective security.[10] The rebalancing that is ongoing is therefore bound to have direct ramifications for dynamics at the UN Security Council, and for its function and potential within the system of collective security. More fundamentally, even, and intertwined with all of this, the nature of the system of collective security and its core concerns may mutate to more strongly emphasise power and non-interference, and to relegate human rights to a more peripheral role.[11]

Yet there is also resistance to a move away from current structures and liberal values. Germany and France have launched the Alliance for Multilateralism, which insists on strong and agile international organisations.[12] The Alliance presents multilateralism not as an ideology but as a method. It emphasises the importance and effectiveness of evidence-based and rules-based multilateral cooperation as the means of securing peace, stability, and prosperity, and of guaranteeing sovereign equality.[13] Germany has complemented this idea, then Foreign Minister Heiko Maas suggesting a 'Marshall Plan for Democracy'.[14] During the Trump Administration, Ivo Daalder, the former US ambassador to the North Atlantic Treaty Organization (NATO), also called for a Group of Nine (G9) alliance to 'save the liberal world' and to 'maintain the rules-based order'.[15] The alliance would consist of France, Germany, Italy, the United Kingdom, and the European Union, as well as Australia, Japan, South Korea, and Canada, which together represent the largest economic powers with

54 (2021), 1–91. See also Mercy A. Kuo, 'The Brussels Effect and China: Shaping Tech Standards; Insights from Anu Bradford', *The Diplomat*, 7 January 2021, available at https://thediplomat.com/2021/01/the-brussels-effect-and-china-shaping-tech-standards/. See also Tim Rühling, 'China, Europe and the New Power Competition over Technical Standards', *UI Brief* 1 (2021).

[10] See, e.g., 'Document Number Nine', a document circulated within the Chinese Communist Party in 2013. The status of this document is unclear. See also Rosemary Foot, *China, the UN and Human Protection: Beliefs, Power, Image* (Oxford: Oxford University Press, 2020).

[11] Tom Ginsburg, 'Authoritarian International Law?', *American Journal of International Law* 114 (2020), 221–60.

[12] Mirjam Reiter, 'Germany Champions "Alliance for Multilateralism"', *GPIL Blog*, 2 February 2021, available at https://gpil.jura.uni-bonn.de/2021/02/germany-champions-alliance-for-multilateralism/. On informal coalitions outside institutional structures, see also Alejandro Rodiles, *Coalitions of the Willing and International Law: The Interplay between Formality and Informality* (Cambridge: Cambridge University Press, 2018).

[13] See further www.multilateralism.org. For a critical appraisal, see Reiter, 'Alliance for Multilateralism' (n. 12).

[14] Daniel Brössler, Matthias Kolband, and Max Muth, 'Maas Fordert Allianz gegen Autokraten', *Süddeutsche Zeitung*, 9 March 2021, available at www.sueddeutsche.de/politik/usa-eu-maas-russland-china-desinformation-microsoft-1.5230094; 'Germany Wants "Marshall Plan for Democracy"', *Deutsche Welle*, 9 January 2021, available at www.dw.com/en/germany-wants-us-eu-to-forge-marshall-plan-for-democracy/a-56181438.

[15] Ivo Daalder and James Lindsay, 'The Committee to Save the World Order', *Foreign Affairs*, 30 September 2018, available at www.foreignaffairs.com/world/committee-save-world-order.

strong collective military capabilities that would be surpassed only by those of the United States. Later, in a similar spirit of building a democratic alliance, UK Prime Minister Boris Johnson invited leaders of Australia, India, South Africa, and South Korea to the Group of Seven (G7) summit of June 2021, while US President Joe Biden introduced 'Summits for Democracy'.[16]

China's imprint on the global order and, specifically, on the system of collective security is analysed in more detail by Congyan Cai in this volume.[17] In this chapter, I discuss the fallout from the new Security Council dynamics from an institutionalist perspective. This perspective emphasises the institutional environment in which the UN Security Council operates. It is an inclusive perspective that embraces the voice of middle powers and those more in the periphery, while recognising that those voices do not necessarily always belong to the same chorus. The aim is not to harmonise all those voices as such but rather to reinforce others than the P5 and to make those others – in the words of Tiyanjana Maluwa, in his contribution to this volume – 'effective participants'.[18] As effective participants, those other states can induce and pressure the P5 to act as responsible great powers, which they will not always be inclined to do of their own motion. In the extreme case of one of the P5 being the one to threaten or break the peace, the ten elected members (E10) can play a particularly crucial role, and hence reinforcing the E10 is in large part about creating checks and balances on the P5's raw power. I accept Cai's critique that I do not prove in this chapter in detail how this precisely reduces the 'negative impacts of power politics'[19] on each occasion. My chapter is based instead on a general belief in the inherent value of checks and balances for adequate and proper decision-making.

The institutionalist perspective is thus premised on the idea that, even in the setting of intense power politics in which the Security Council operates, the Council is not entirely unbounded; rather, it is governed by its own institutional and procedural framework. After all, the Security Council is not composed only of the powerful and the permanent, and notions of

[16] The first summit was held virtually on 9–10 December 2021 with 111 participants, including Taiwan, Kosovo, and the European Union. The three main themes were defending against authoritarianism, fighting corruption, and advancing respect for human rights. A subsequent summit was held on 28–30 March 2023.

[17] Congyan Cai, 'The UN Security Council: Maintaining Peace during a Global Power Shift', Chapter 1 in this volume.

[18] Tiyanjana Maluwa, 'The UN Security Council: Between Centralism and Regionalism', Chapter 3 in this volume, section I (p. 188).

[19] Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, section I (pp. 22–23).

participatory and reasoned decision-making are important in recognising the institutional role of the other members. Moreover, the Security Council forms part of the greater organisation of the United Nations, composed of 193 states, and as such it forms part of an international order that is underpinned by a system of international law. Article 24(1) UN Charter underscores that the Security Council operates *on behalf of* member states and hence not in a vacuum.

As Anne Peters notes, the fact that the UN Security Council is a political organ does not render it an extralegal entity as such.[20] Indeed, this chapter proceeds from the premise that the UN Security Council is bound by the UN Charter and by international law. In contrast to Cai, I submit that the less powerful states do not necessarily need to play a secondary role all of the time – in particular, not if they team up, which is what institutional approaches are all about. This chapter is also guided by the idea that less powerful states, in particular, have an interest in international law guiding international relations as a means of constraining power politics. At its core, and as already stated, the institutionalist perspective taken in this chapter is about checks and balances, as well as about the ways in which the 'others' might make sure their interests are taken into account – those others being those that do not have a permanent seat on the Security Council. This involves the elected members, as well as UN members not on the Security Council at all, and even states that are not fully recognised, such as Taiwan, Palestine, and Kosovo, as well as non-state actors. All these 'others' have their own interests, which can be translated into a need to temper the governance dominance of the powerful and a need for a representative Security Council that serves their interests too. These 'others' can be grouped into regions, which is the third perspective taken in this volume by Maluwa: the regional perspective – more specifically, the African perspective.[21] In the present chapter, I take a more pluriform approach that emphasises the *nature* of the perspective – namely an institutionalist perspective – rather than the *entity* having the perspective.

The institutional perspective that this chapter takes is further discussed in section II. It takes as its starting point the view that the UN Security Council is bound by the UN Charter and by international law, as scholars such as Anne

[20] Anne Peters, 'Article 25', 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 71).

[21] Maluwa, 'Between Centralism and Regionalism', Chapter 3 in this volume.

Peters and Erika de Wet have elaborated.[22] It then turns to the work of the International Law Commission (ILC) on ius cogens to illustrate the dynamics behind continuing contestations surrounding the idea of a governed Security Council. How notions such as ius cogens are used to bolster the Security Council's institutional environment is further discussed in section III, with a discussion on new developments regarding the use of veto. That section also points to other working methods that create space for the non-P5 – specifically, the Arria formula.

Subsequently, the institutionalist perspective is applied to the exercise of distinct Security Council powers pertaining to: the use of force (section IV), UN sanctions (section V), and counter-terrorism legislation (section VI). The exercise of these respective powers raises different institutional questions. In relation to the Security Council's war powers, participatory decision-making and other inclusive principles and processes are particularly important. When it comes to the imposition of sanctions, a crucial question that arises from the move away from UN sanctions to a practice of parallel unilateral sanctions is how dominant and exclusive the UN system is and to what extent it allows at all for this move, which goes beyond the UN Charter. For the UN sanctions that are already in place and will likely remain so for the foreseeable future, a persistent question that continues to hover over those sanctions regimes concerns their compatibility with basic legal principles and guarantees – particularly for sanctions targeting individuals. The Security Council's emerging quasi-legislative activities to counter terrorism are also scrutinised in this chapter, because they evoke fundamental questions about whether the Security Council can and should deal with generic phenomena at all instead of only with concrete threats. This section thus examines how those newly assumed powers fit with or stretch preconceived institutional structures.

Section VII explores future trajectories and it maps how the Security Council deals – or does not deal – with unconventional threats related to health, the environment, and cyber activity. Section VIII concludes the chapter with some reflections on whether the Security Council can and should have a role to play in the remainder of this century – or, at least, in times to come.

While discussing how the institutionalist perspective applies to the exercise of these distinct UN Security Council powers under Chapter VII UN Charter,

[22] Peters, 'Article 25' (n. 20); Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart, 2004). For a somewhat more reserved view on legal limits to the Security Council, see Michael Wood and Eran Sthoeger, 'Limits on the Powers of the Security Council', in *The United Nations Security Council and International Law* (Cambridge: Cambridge University Press, 2022), 70–89.

the chapter will particularly examine to what extent those Western states that are very active in professing an attachment to strong institutions (e.g., France, Germany, and the United Kingdom) have been practising what they preach. It will also look at the building blocks that have been put forward by non-Western states – in particular, Latin American states – to contribute to enhanced procedures for the Security Council in the exercise of its powers so as to increase its institutional strength. The discussion in this chapter will focus on situations and practices since the end of the Cold War.

II. AN INSTITUTIONALIST PERSPECTIVE: LIMITS TO THE SECURITY COUNCIL

In his chapter in this volume, Cai underscores that the UN Security Council is a political organ.[23] It has been deliberately tasked with the maintenance and enforcement of *peace*, not law, and it enjoys very wide discretion for doing so. While insisting on the Security Council as a platform for power politics, Cai does not fully dismiss the idea of constraints.[24] Indeed, as an organ of an international organisation, the Council is bound by its constitutive framework, the UN Charter, as also emphasised in Article 25 (decisions must be taken in accordance with the UN Charter) and in Article 24(2), 'the Security Council shall act in accordance with the Purposes and Principles of the United Nations'. It is thus generally agreed – as Maluwa too notes, in his chapter in this volume – that the UN Security Council must act in compliance with the purposes and principles of the UN Charter and with its own procedure.

Building on Peters and De Wet's writings, I regard the purposes and principles of the United Nations, as articulated in Articles 1 and 2 UN Charter, as *substantive* limits to UN Security Council discretion.[25] Even though the purposes and principles are articulated broadly, leaving wide discretion, they are not without meaning – even if their precise legal substance is open to contestation. I also agree with De Wet that the principle of good faith is relevant to the UN Security Council, because it binds states both when acting individually and as an organ of the United Nations.[26] Both Peters and De Wet recognise that there are also legal limits beyond the principles and purposes, particularly in the form of ius cogens, which is what Maluwa too

[23] Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, section II.C.
[24] Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, section II.C.
[25] Peters, 'Article 25' (n. 20); Erika de Wet, 'An Overview of the Substantive Limits to the Security Council's Discretion under Articles 40, 41 and 42 of the Charter', in *The Chapter VII Powers* (n. 22), 178–216.
[26] *Ibid.*, 195–8.

points out. How exactly the principles and purposes and ius cogens limit the UN Security Council depends on the precise power being exercised, and these limits may gain new meaning when the UN Security Council expands its powers. But this then touches precisely on the heart of the matter: *who* decides what the contents of the limits are and *how*?

The dynamics behind ongoing controversies over limits on the UN Security Council came very clearly to the fore in the context of the ILC's work on ius cogens. In the text on first reading of its draft conclusions on peremptory norms, the Security Council was mentioned only in the commentaries to conclusion 16 and not in the conclusion itself, as the Special Rapporteur had initially suggested.[27] Conclusion 16 is a provision that deals with conflicts between acts of international organisations and peremptory norms. The reception of this draft conclusion and its commentaries was telling.[28] Quite a few states, including Austria, Belgium, Brazil, Cyprus, Slovenia, South Africa, Spain, Switzerland, and Togo, expressed support for the idea to explicitly recognise that Security Council decisions may not conflict with ius cogens. South Africa and Spain demonstrated special understanding of fears that unilateral allegations that a resolution conflicted with ius cogens could undermine Security Council authority and effectivity; thus they pointed towards the need for procedural guidance. Other states, such as Australia, Germany, Italy, and the Netherlands, did not object to the application of draft conclusion 16 to the Security Council, but they did more squarely emphasise the importance and need for further elaboration of interpretive presumptions and procedural mechanisms, as included in draft conclusions 20 and 21, to avoid unilateral invocation.

The P5, as well as Israel, objected to draft conclusion 16 and particularly to the reference to the Security Council in the commentaries. The core argument that the P5 advanced was that applying draft conclusion 16 to Security Council resolutions – and hence accepting the idea that Security Council decisions would not have binding effect to the extent that they conflicted with a norm of ius cogens – would jeopardise the work of the Security Council and undermine the system of collective security more broadly. Their main concern related to the risk of unilateral abuse. The legal argument that most of the P5 states put forward was that there was insufficient state practice supporting the proposition that states can unilaterally refuse to comply with Security

[27] Dire Tladi, Special Rapporteur to the ILC, *Third Report on Peremptory Norms of General International Law (Jus Cogens)*, UN Doc. A/CN.4/714, 12 February 2018, 67.

[28] See particularly UN Doc. A/CN.4/748, 9 March 2022. See also UN Doc. A/C.6/74/SR.23, 13 November 2019; UN Doc. A/C.6/74/SR.24, 11 November 2019; UN Doc. A/C.6/74/SR. 25, 20 November 2019; UN Doc. A/C.6/74/SR.26, 18 November 2019.

Council decisions.[29] That may well be true,[30] but there is considerable practice to support the idea that the Security Council is bound to respect norms of ius cogens in its decision-making.[31] The question of what procedure to follow if a state presents the argument that ius cogens has been violated is a separate question that underscores the need for procedural mechanisms – or, as they are called in draft conclusion 21, dispute settlement provisions.[32]

The concerns of the P5 are valid, as is clear from the fact that other states echoed them. However, this does not necessarily need to lead to silence and to leaving the matter of limits unsettled. There is a need to separate the principle that the Security Council is bound by ius cogens from subsequent questions about processes of invocation and legal consequences. Indeed, ultimately, the ILC did adopt conclusion 16 by consensus, albeit after heated discussion, mentioning the Security Council in the commentaries, but also referring to the importance of conclusion 20 on consistent interpretation and application, and of conclusion 21 on procedural requirements. Thus the trajectory of the ILC instrument and its outcomes illustrate that there is, by now, some shared understanding among all states – even if on occasion reluctant understanding, as subsequent developments in the Sixth Committee have shown[33] – about the existence of limits to the Security Council beyond the Charter. The precise contents of those limits, as well as the process of their invocation, leave room for argument. Yet, space for contestation is precisely what an institutional perspective is about.

[29] The United Kingdom, United States, and Israel put forward this argument. In a similar vein, see Daniel Costelloe, 'Peremptory Norms and Resolutions of the United Nations Security Council', in Dire Tladi (ed.), *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (Leiden: Brill, 2021), 441–68.

[30] But see Antonios Tzanakopoulos, *Disobeying the Security Council; Countermeasures against Wrongful Sanctions* (Oxford: Oxford University Press, 2011).

[31] The Special Rapporteur gave several examples of states expressing the view in Security Council meetings that Security Council decisions could not run counter to norms of ius cogens: see, e.g., UN Doc. S/PV.3370, 27 April 1994; UN Doc. S/PV.5474, 22 June 2006; UN Doc. S/PV.5679, 22 May 2007; and UN Doc. S/PV.5779, 14 November 2007. In addition, there are international judgments supporting this view, most expressly ICTY, *The Prosecutor v. Duško Tadic*, Case No. IT-94-1-A, 15 July 1999, para. 296.

[32] See also Michael Wood, 'The Unilateral Invocation of Jus Cogens Norms', in Dire Tladi (ed.), *Peremptory Norms* (n. 29), 366–85.

[33] The Sixth Committee and the General Assembly postponed consideration of the work of the ILC on peremptory norms: Report of the International Law Commission on the Work of its 73rd Session, UN Doc. A/77/415, 18 November 2022; GA Res. 77/103 of 19 December 2022, UN Doc. A/RES/77/103.

III. BOLSTERING THE SECURITY COUNCIL'S INSTITUTIONAL ENVIRONMENT

Counterbalancing the pushback of the P5 against limits, there are a variety of initiatives to bolster the Security Council's institutional environment. In the context of the debates engendered by the ILC's work on ius cogens, Japan offered a noteworthy observation pertaining to the Security Council: the argument that the obligation to cooperate under draft conclusion 19 – mirroring Article 41 of the Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA)[34] – should include an obligation to refrain from using the veto when a serious breach of ius cogens is at stake.[35] Japan underscored that this suggestion was in tandem with ongoing discussions at the United Nations about restraining the use of veto. Interestingly, France has been a prime mover on this issue. Indeed, in addition to launching the Alliance for Multilateralism, France has been one of the driving forces, alongside Mexico, behind initiatives to restrain the use of veto. Thus while the E10, as well as other member states, are often the driving forces behind efforts aimed at institutional strengthening, permanent members may at times also be engaged.

The initiative of France and Mexico was continued by the Accountability, Coherence and Transparency (ACT) Group, comprising 26 small and middle-sized powers.[36] That work ultimately resulted in a code of conduct that the United Kingdom also supported.[37] As signatories to the ACT Code, UN

[34] Article 41(1) ARSIWA reads: 'States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.' Article 40 refers to serious breaches of obligations arising under a peremptory norm of general international law.

[35] UN Doc. A/CN.4/748, 9 March 2022, 87.

[36] For more on this group, see Christian Wenaweser, 'Working from the Outside to Change the Working Methods of the Security Council: Elected Members as a Bridge between the Permanent Members and the Rest of the UN Membership', in Nico Schrijver and Niels Blokker (eds), *Elected Members of the Security Council: Lame Ducks or Key Players?* (Leiden/Boston: Brill Nijhoff, 2020), 279–84.

[37] 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. The list of supporters is published on the website of the Permanent Mission of Liechtenstein to the United Nations. See further Niels Blokker, *Saving Succeeding Generations from the Scourge of War: The United Nations Security Council at 75* (Leiden: Brill Nijhoff, 2020), 47–74. See also Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes* (Cambridge: Cambridge University Press, 2020); Jennifer Trahan, 'UNSC Veto Power Symposium: New Perspective for Tackling a Core Challenge to the UN System on the 75th Anniversary of the United Nations', *OpinioJuris*, 30 November 2020, available at https://opiniojuris.org/2020/11/30/unsc-veto-power-symposium-new-perspective-for-tackling-a-core-challenge-to-the-un-system-on-the-75th-anniversary-of-the-united-nations/.

member states 'pledge to support timely and decisive action by the Security Council aimed at preventing or ending the commission of genocide, crimes against humanity or war crimes', and they 'pledge in particular to not vote against a credible draft resolution before the Security Council on timely and decisive action to end the commission of genocide, crimes against humanity or war crimes, or to prevent such crimes'.[38] Such initiatives explicitly aim at constraining the Security Council in the exercise of its powers and they can be seen as a first step in the direction of abolishing the veto power altogether – or, in the words of Cai, a step towards diminishing the gap between the legal privileges and the political promises that come with P5 status.[39] To no one's great surprise, three permanent members resist them: the United States, China, and Russia.

Some scholars have gone beyond the initiative, making the argument that legal limits already exist to the exercise of a veto in a context of atrocity crime.[40] This is not generally accepted, though, with other scholars, including from the Global South, posing some critical questions, such as on the limitation of a veto restraint to only situations of atrocity crimes, or on how to establish a causal link between the use of veto and the commission of atrocity crimes.[41] Indeed, even if one is generally favourable to the idea of constraining the Security Council and even if one regards the veto power as an inappropriate relic of earlier times, one may disagree on the best way forward.

As for the ACT Code, the notions of 'timely and decisive action' and a 'credible draft resolution' are rather subjective. While it is true that the UN Charter itself advocates 'prompt and effective action' in Article 24, there may be genuine discord on timing and on what the most appropriate action is. In his chapter, Cai notes that Western powers have a tendency to urge swift and coercive enforcement measures, and that others may believe that a more temperate approach will sometimes yield better results, especially in the

[38] Letter dated 14 December 2015 (n. 37).

[39] Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, section VI (pp. 100–101).

[40] Trahan, *Existing Limits* (n. 37).

[41] These critical remarks were made in a discussion of Trahan's book and not of the ACT-initiative or the Code of Conduct as such: see, e.g., Dire Tladi, 'UNSC Veto Power Symposium: Doing Away with the Veto for Atrocity Crimes? Trimming the Edges of an Illegitimate Institution in Order to Legitimise It', *OpinioJuris*, 1 December 2020, available at https://opiniojuris.org/2020/12/01/unsc-veto-power-symposium-doing-away-with-the-veto-for-atrocity-crimes-trimming-the-edges-of-an-illegitimate-institution-in-order-to-legitimise-it/; Charles Jalloh, 'Are There Jus Cogens Limits to UN Security Council Vetoes in Atrocity Crime Contexts?', *OpinioJuris*, 30 November 2020, available at https://opiniojuris.org/2020/11/30/unsc-veto-power-symposium-are-there-jus-cogens-limits-to-un-security-council-vetoes-in-atrocity-crime-contexts/.

longer run.[42] While opposing, or even vetoing, a useful role for the Security Council can be regarded as highly problematic in some situations, it is also true that the legacy of the West's interventionism does not necessarily always swing the balance in favour of immediate forceful action.

Instead of a focus on the veto or a focus on situations of atrocity crime, therefore, more generalised proposals to improve decision-making might be more in tune with the Security Council's discretion, and the context-specific deliberation and judgement that underlie its decisions and the compromises reached. In this sense, Anna Spain's suggestions for a threefold duty to decide, disclose, and consult[43] – to which Maluwa also positively refers in his chapter in this volume[44] – are noteworthy. They align with the idea that the Security Council acts on behalf of others and is thus accountable to those others in relation to *all* of its decision-making, not only for decisions on atrocity crimes.

A special situation arises, however, when it is one of the P5 that creates a threat or breach of the peace and subsequently uses the veto as shield, as happened when Russia invaded Ukraine in 2022. At the meeting of 25 February 2022 – one day after the invasion – the non-P5 group was particularly large, comprising not only the E10 but also 76 other states, pursuant to Rule 37 of the Security Council's provisional Rules of Procedure. The number of participating states is indicative in itself. The majority of the E10-states (Albania, Gabon, Ghana, Ireland, Kenya, Mexico, and Norway) was very articulate, condemning or deploring the invasion, most labelling it as aggression or otherwise as a breach of Article 2(4) UN Charter and the territorial integrity of Ukraine. India and the United Arab Emirates abstained, while Brazil voted in favour but expressed unease with the use of the word 'aggression', because it felt that word might downplay previous uses of force.[45]

The majority of the E10 states underscored in their statements that Russia's position as a permanent member had particular institutional implications. Ghana expressed deep disappointment. It stated that Russia's actions 'have fallen short of the highest standards expected of those states that are considered to be the enduring guardians of international peace and security. Indeed, for those members of the Security Council with a special privilege, there is also a special responsibility.'[46]

[42] Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, section II.D (pp. 37–38).

[43] Anna Spain, 'The UN Security Council's Duty to Decide', *Harvard National Security Journal* 4 (2013), 320–84.

[44] Maluwa, 'Between Centralism and Regionalism', Chapter 3 in this volume, section IV.C (p. 264).

[45] UN Doc. S/PV.8979, 25 February 2022.

[46] *Ibid.*, 10.

Ghana also voiced dissatisfaction over the fact that the Council was not in a position to act, despite broad agreement, solely because of how the Council is functionally structured. According to Norway, it followed from the spirit of the UN Charter that parties to a dispute should abstain from voting. Norway also held that a veto cast by an aggressor undermined the purposes of the Council.[47] Ireland insisted that the veto would not hinder an adequate response from the international community and expressed support for the comprehensive EU sanctions that had been adopted. Ghana saw the ongoing process in the General Assembly as an alternative opportunity to act and encouraged all states to commit to that process.

The Security Council's predictable dysfunction in relation to the Ukrainian crisis given a permanent member involvement thus created an atmosphere in which the gaze shifted to other organs and organisations. The General Assembly stepped into the limelight, emphasising its potential to 're-unite for peace'.[48] When referring the matter to the General Assembly, given the Security Council deadlock, the E10 once again condemned the use of the veto. Mexico was most forthright in explaining why the use of veto was inappropriate, stating: '[P]ower should not be a privilege. In every situation, it constitutes an enormous and highly sensitive responsibility.'[49]

The 11th Emergency Special Session began on 1 March and resulted in a number of resolutions.[50] Prompted by frustration over the improper use of veto, the General Assembly adopted the veto initiative championed by Liechtenstein during its regular session on 26 April 2022.[51] Resolution ES-11/1, which provides the General Assembly with a standing mandate to convene when a veto is cast in the Security Council, was co-sponsored by 83 states from every UN regional group, including the United States, the United Kingdom, and France. The procedure was triggered quite soon after being created, first in the context of non-proliferation and the Democratic People's Republic of Korea (DPRK) on 8 June 2022, and subsequently on cross-border humanitarian assistance in Syria on 21 July 2022.[52]

[47] *Ibid.*, 7/8.

[48] See also the Valedictory Lecture of Nico Schrijver at Leiden University, 'Re-uniting for Peace through International Law', delivered on 1 July 2022.

[49] UN Doc. S/PV.8980, 27 February 2022, 4.

[50] GA Res. ES-11/1 of 2 March 2022, UN Doc. A/RES/ES-11/1; GA Res. ES-11/2 of 24 March 2022, UN Doc. A/RES/ES-11/2; GA Res. ES-11/3 of 7 April 2022, UN Doc. A/RES/ES-11/3.

[51] GA Res. 76/262 of 26 April 2022, UN Doc. A/RES/76/262.

[52] See 'General Assembly Holds Landmark Debate on Security Council's Veto of Draft Text Aimed at Tightening Sanctions against Democratic People's Republic of Korea', UN Doc. GA/12423, 8 June 2022, available at https://press.un.org/en/2022/ga12423.doc.htm; 'Speakers Debate Terms, Merits of Cross-Border Aid Operations in Syria's North-West, as General Assembly

Another procedure that allows others – even those not sitting on the Security Council – to inform this body's decision-making and to voice their ideas and/or concerns is the Arria formula meeting. This type of meeting dates back to 1992, when Venezuelan Ambassador Diego Arria organised an informal meeting in the UN Delegates Lounge to enable a Croatian catholic priest to offer his account of the violence in Bosnia and Herzegovina. Initially organised to allow non-state entities to share their views, in more recent times the formula has also been used to bypass disagreement to hold a formal meeting or as precursor to an Open Debate on a thematic issue.[53] As will be illustrated in this chapter, these meetings provide an opportunity for important conversations about how to improve decision-making and also about future directions for the Security Council in terms of its mandate. In recent years, Arria formula meetings have become increasingly frequent and the variety of states organising them has expanded, which has, in turn, also given rise to claims of a certain politicisation.[54] A significant number of Arria formula meetings have been organised on Ukraine, including on Crimea, by Russia, on the one hand, and by a variety of others states in cooperation with Ukraine, on the other. A considerable number of UN members (some 48 states) have condemned meetings organised by Russia on issues such as alleged violations of humanitarian law committed by Ukraine and on neo-Nazism as abusive and as spreading disinformation.[55]

In sum, the institutional environment has expanded even in dire times. Expansion of the system does not necessarily coincide with its strengthening, as the weaponisation of the Arria formula meetings may illustrate, but it does provide opportunities for other states to participate and to mobilise.

Considers Security Council Text Vetoed by Russian Federation', UN Doc. GA/12436, 21 July 2022, available at https://press.un.org/en/2022/ga12436.doc.htm.

53 Security Council Report, 'Arria-Formula Meetings', 16 December 2020, available at www.securitycouncilreport.org/un-security-council-working-methods/arria-formula-meetings.php.

54 Stéphanie Fillion, 'Does the UN Security Council Have an Arria-Formula Problem?', *PassBlue*, 6 July 2021, available at www.passblue.com/2021/07/06/does-the-un-security-council-have-an-arria-formula-problem/. In a similar vein, inviting civil society representatives to speak to the UN Security Council has been politicised recently, as discussed by Stefan Talmon, 'Blocking and Inviting Civil Society Briefers to the UN Security Council', *GPIL Blog*, 22 December 2020, available at https://gpil.jura.uni-bonn.de/2020/12/blocking-and-inviting-civil-society-briefers-to-the-un-security-council/.

55 See, e.g., Joint Statement following Russia's Arria Formula Meeting on 11 July 2022, available at https://usun.usmission.gov/joint-statement-following-russias-arria-formula-meeting-on-july-11-2022/.

IV. DISPUTED USES OF FORCE AND THE IMPORTANCE OF INCLUSIVE PROCESSES

This section examines the institutional strength of the UN Security Council in relation to its most far-reaching power to maintain peace. The focus of this section is on internal Security Council processes in relation to disputed uses of force. Concrete uses of force, policies, and interpretations that some considered too expansive or even illegal are discussed, with specific attention to the importance of inclusive processes and informed decision-making.

This section discusses, first, the authorised use of force in Libya, based on Resolution 1973, which definitely ended the period of hope and opportunity that had started in the post-1989 moment.[56] Second, it revisits proposals to strengthen use of force discourse in reaction to controversies resulting from the Libya intervention, as well as initiatives of more recent vintage in response to polemics surrounding the exercise of an expanding right to self-defence.

A. *Resolution 1973 and Wavering International Consensus*

Resolution 1973 of 2011 authorised the use of force to protect the civilian population in Libya – especially in Benghazi – excluding foreign occupation forces of any form from any part of Libyan territory. The Resolution was adopted with ten states in favour, none against, and five abstentions – namely, Brazil, China, Germany, India, and Russia. In its immediate aftermath, the ensuing intervention was described by many as successful[57] – but that label very much depends on one's benchmark and may have faded over time. Alex

[56] Jochen von Bernstorff, 'The Decay of the International Rule of Law Project (1990–2015)', in Heike Krieger, Georg Nolte, and Andreas Zimmerman (eds), *The International Rule of Law: Rise or Decline* (Oxford: Oxford University Press, 2019), 33–55. According to von Bernstorff, 'the United States and its Western partners arguably missed out on the opportunity to use the "unipolar" moment in modern world history, to eventually realize and entrench a fair rule of law system in international relations': *ibid.*, 34.

[57] Ivo Daalder and James Stavridis, 'NATO's Victory in Libya: The Right Way to Run an Intervention', *Foreign Affairs* 91 (2012), 2–7; Josef Joffé, 'The Libyan War Was a Success. But It Won't Be a Model For Other Wars', *The New Republic*, 24 August 2011, available at https://newrepublic.com/article/94105/joffe-libya-nato-obama-france. For other positive appraisals, See, e.g., Peter Hilpold, 'Intervening in the Name of Humanity: R2P and the Power of Ideas', *Journal of Conflict & Security Law* 17 (2012), 49–79; Alex Bellamy and Paul Williams, 'The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect', *International Affairs* 87 (2011), 825–80; Thomas Weiss, 'RtoP Alive and Well after Libya', *Ethics & International Affairs* 25 (2011), 287–92; Gareth Evans, 'The Responsibility to Protect after Libya and Syria' Address to Annual Castan Centre for Human Rights Law Conference, Melbourne, 20 July 2012; Paul D. Williams, 'The Road to Humanitarian War in Libya', *Global Responsibility to Protect* 3 (2011), 248–59.

de Waal was quite quick to nuance the appraisal, submitting that 'the bloodshed of Misrata, the persistent insecurity engendered by armed militias, and the disastrous fallout across the Sahara in Mali are not to be discounted in any final reckoning'.[58] To most international lawyers, the Resolution authorising the 2011 Libya intervention is known especially for its ambiguities and its uncertain precedential value[59] – or even as the nail in the coffin of the Responsibility to Protect (R2P).[60] While the authorisation was clear and explicit in using the 'all necessary means' formula, Resolution 1973 was equivocal as to what measures were authorised exactly. Particular discussion arose, while the operations unfolded,[61] over the question of whether the Resolution also offered a basis for arming opposition groups despite the arms embargo of Resolution 1970 and whether it permitted regime change.

Resolution 1973 must be read in conjunction with Resolution 1970. It was, in fact, the swift adoption of Resolution 1970 that set the stage for the further-reaching Resolution 1973.[62] The adoption of those two resolutions was quite exceptional because of the high speed with which they responded to an unfolding situation (they were adopted, respectively, ten days and three weeks after the uprising started) and because of the consensus that allowed their adoption.[63] Resolution 1970 was even adopted unanimously. It concerned the imposition of an arms embargo, individual sanctions on members of the Gaddafi regime, and a referral to the International Criminal Court (ICC).

Interestingly, the composition of the UN Security Council during the Libya crisis reflected geopolitical power balances optimally, with all BRICS countries (i.e., Brazil, Russia, India, China, and South Africa) having a seat, as well

[58] Alex de Waal, 'African Roles in the Libyan Conflict', *International Affairs* 89 (2013), 365–79 (378).

[59] Ashley Deeks, 'The NATO Intervention in Libya – 2011', in Tom Ruys, Olivier Corten, and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford: Oxford University Press, 2018), 749–59 (749).

[60] David Berman and Christopher Michaelsen, 'Intervention in Libya: Another Nail in the Coffin for the Responsibility-to-Protect?', *International Community Law Review* 14 (2012), 337–58.

[61] The military intervention started on 19 March 2011 was named 'Operation Odyssey Dawn' and was conducted by a multilateral coalition led by the United States. Subsequently, NATO stepped in to enforce the no-fly zone and, on 31 March 2011, it took sole command. See 'NATO and Libya (Archived)', last updated November 2015, available at www.nato.int/cps/en/natohq/topics_71652.htm.

[62] Rebecca Adler-Nissen and Vincent Pouliot, 'Power in Practice: Negotiating the International Intervention in Libya', *European Journal of International Relations* 20 (2014), 889–911.

[63] Priscilla Hayner, *The Peacemaker's Paradox: Pursuing Justice in the Shadow of Conflict* (London: Routledge, 2018), 181.

as Germany.[64] Notably, all states with permanent seat aspirations were represented. The fact that those states voted positively for an ICC referral can be explained only by a unique set of circumstances coupled with two very determined permanent members (the United Kingdom and France), who wielded their influence astutely.[65] The factor that was arguably decisive was the defection of Libya's deputy permanent representative, and his call for an ICC referral and no-fly zone in a closed Security Council meeting,[66] coupled with the defection of other Libyan ambassadors.[67] In their explanations to the vote, India, South Africa, Nigeria, and Brazil, among others, cited the pleas of the Libyan representatives as influential in their vote.[68] Those states, as well as China, Russia, and Lebanon, also emphasised that, by adopting Resolution 1970, the Security Council supported and complemented demands already made by the Arab League, the Organization of Islamic Cooperation, and the African Union.[69] Russia stated: 'We exhort the Libyan authorities to comply with the demands of the international community, including the League of Arab States and the African Union, which demands have received the support of the Security Council.'[70]

India was even more explicit in admitting that the views and positions of others had directly informed its voting:

> [W]e would have preferred a calibrated and gradual approach. However, we note that several members of the Council, including our colleagues from Africa and the Middle East, believe that referral to the Court would have the effect of an immediate cessation of violence and the restoration of calm and stability. The letter from the Permanent Representative of Libya of 26 February addressed to you, Madame President, has called for such a referral and strengthened this view. We have therefore gone along with the consensus in the Council.[71]

[64] Karin Wester, *Intervention in Libya: The Responsibility to Protect in North Africa* (Cambridge: Cambridge University Press, 2020), 124, 126, 131.

[65] On the United Kingdom's and France's negotiation powers, see Adler-Nissen and Pouliot, 'Power in Practice' (n. 62). For a critical appraisal of the penholder practice, see also Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, section II.C.

[66] 'Security Council Press Statement on Libya', UN Doc. SC/10180, 21 February 2011. He was followed by the permanent representative, as well as numerous Libyan ambassadors around the world: Wester, *Intervention in Libya* (n. 64), 108–10.

[67] *Ibid.*

[68] UN Doc. S/PV.6491, 26 February 2011, 2, 3, 7.

[69] *Ibid.*, 4.

[70] *Ibid.*

[71] *Ibid.*, 2.

Broad international consensus was thus a crucial factor behind the unanimous vote in favour of Resolution 1970. By contrast, Resolution 1973 was adopted in a much more politically fractured setting. This is clear not only from the voting record but also – and even more so – from the Resolution's ambivalent construction and the statements made upon its adoption. The Resolution veers between political and military solution of the conflict. On the one hand, France, the United Kingdom, the United States, and Lebanon urged swift military action. France linked the uprising to the broader context of the Arab Spring and warned of brutal repression: 'The situation in Libya today is more alarming than ever. [...] We do not have much time left.'[72] The United Kingdom similarly signalled that Gadaffi's regime was 'now preparing for a violent assault on a city of 1 million people that has a history dating back 2,500 years. It has begun air strikes in anticipation of what we expect to be a brutal attack.'[73]

But these premonitions did not gain full traction. India abstained, emphasising that there was no 'objective analysis of the situation on the ground'.[74] Germany also abstained, referring to 'the danger of being drawn into a protracted military conflict that would affect the wider region'.[75] Brazil held a similar view:

> The text of resolution 1973 (2011) contemplates measures that go far beyond [the] call [of the League of Arab States for a no-fly zone]. We are not convinced that the use of force as provided for in paragraph 4 of the resolution will lead to the realization of our common objective – the immediate end to violence and the protection of civilians. We are also concerned that such measures may have the unintended effect of exacerbating tensions on the ground and causing more harm than good to the very same civilians we are committed to protecting.[76]

Russia and China equally abstained, cautioning that many questions regarding the use of force had remained unanswered, such as those regarding the rules of engagements and the limits of the use of force.[77]

The abstaining states attached great importance to the viewpoints and position of the Arab League and the African Union – in particular, the latter's efforts towards political reform and a peaceful solution.[78] Nigeria and South

[72] UN Doc. S/PV.6498, 17 March 2011, 2, 3.
[73] *Ibid.*, 4.
[74] *Ibid.*, 6.
[75] *Ibid.*, 5.
[76] *Ibid.*, 6.
[77] *Ibid.*, 8.
[78] The African Union's efforts – and particularly the AU Roadmap – are discussed in more detail in Maluwa, 'Between Centralism and Regionalism', Chapter 3 in this volume, section III.B (pp. 214–215).

Africa emphasised the language in the resolution that supported a political solution and a role for the Committee established by the African Union.[79] Jointly, these states held the swing vote and so they had a de facto veto power. Nonetheless, despite their preference for a political solution, as proposed by the AU Roadmap, and despite their kingmaker position, the African states greenlit the Security Council resolution authorising force.[80]

The ambiguity that was apparent upon adoption became intractable as the military operations – led first by the United States and then under NATO command – unfolded. The fragile consensus broke almost immediately. As the AU efforts for political solutions were sidelined and those in favour of a military solution formed the Libya Contact Group,[81] South Africa, Russia, and China accused NATO of overreach and mission creep. The interpretive debate over whether Resolution 1973 provided a basis for assistance of the rebels and for regime change was held largely *outside* of the UN Security Council, mainly in newspaper articles and press statements, as well as in the General Assembly dialogue on the R2P.[82] In May 2011, the African Union issued a declaration that rebuked the 'one-sided interpretations of these resolutions', insisting that 'the military and other actions on the ground . . . were clearly outside the scope of these resolutions'.[83] It received short shrift and the declaration had little impact.

International law scholars are divided over the interpretive question, with some emphasising the objective articulated in paragraph 4 (to protect civilians and civilian populated areas under threat of attack) as limiting in character and excluding regime change and rebel support,[84] and others suggesting that the use of force against Gaddafi's regime and the assistance of the rebels who were protecting the civilian population were in line with the overall goal and

79 UN Doc. S/PV.6498, 17 March 2011, 9.

80 In her book, Karin Wester raises the question of why states that had such misgivings about the resolution did not prevent its adoption. Her interlocutors refer to Libya's pariah status and also the unwillingness of the states concerned to be responsible for a potential massacre: Wester, *Intervention in Libya* (n. 64), 179–80.

81 The Libya Contact Group was established at the initiative of France to guide the operations outside the NATO and the Security Council: Letter dated 29 March 2011 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc. S/2011/204, 30 March 2011.

82 Geir Ulfstein and Hege Føsund Christiansen, 'The Legality of the NATO Bombing in Libya', *International and Comparative Law Quarterly* 62 (2011), 159–71.

83 Extraordinary Session of the Assembly of the Union, AU Doc. EXT/ASSEMBLY/AU/DEC/(01.2011), 25 May 2011, as cited by Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 4th edn, 2018), 379.

84 Ulfstein and Christiansen, 'The Legality of the NATO Bombing in Libya' (n. 82), 159–71.

spirit of Resolution 1973.[85] Given that Russia, China, and also South Africa voted for a text that clearly included authorising language, and because they were conscious at the time of voting of how others might interpret the Resolution, their claims of illegality seem far-fetched.[86] Indeed, one of the very reasons Russia mentioned, to explain its abstention, was precisely that too many questions remained on what the limits of the use of force would be. It nevertheless chose not to use its veto and left the Resolution intentionally ambiguous.[87] Russia did not insist on an exclusion of regime change, similar to the explicit exclusion of foreign occupation that was included in paragraph 4 of Resolution 1973. In her autobiography, Hilary Clinton recounts her conversation with Russian Foreign Minister Sergey Lavrov ahead of the vote on Resolution 1973, during which she insisted on the possibility of a forceful response against Gaddafi if need be. On his later claims that he and Russia had been misled, Clinton observes, 'that struck me as disingenuous since Lavrov, as a former Ambassador to the UN, knew as well as anyone what "all necessary measures" meant'.[88] The lesson to be learned from Libya, therefore, is not necessarily to veto any subsequent proposal for the use of force, as Russia and China subsequently did in relation to Syria, but rather that the limits to an authorised use of force need to be spelled out in much more detail in the authorising resolution.

Yet even if Resolution 1973 offered a legal basis for the operation, one could still argue that giving so little quarter to African views and concerns during the process of implementation created tensions with the principle of good faith. After all, Africa was the continent where the actions took place and where repercussions were most immediately felt, and hence the way in which Resolution 1973 was implemented does not seem fully in tandem with a broader institutional perspective that emphasises the importance of inclusive processes.

[85] Deeks, 'The NATO Intervention in Libya' (n. 59), 749–59; Dire Tladi, 'Security Council, the Use of Force and Regime Change: Libya and Côte d'Ivoire', *South African Yearbook of International Law* 37 (2013), 22–45; Christian Henderson, 'International Measures for the Protection of Civilians in Libya and Côte d'Ivoire', *International and Comparative Law Quarterly* 60 (2012), 767–78; Mehrdad Payandeh, 'The United Nations Military Intervention, and Regime Change in Libya', *Virginia Journal of International Law* 52 (2012), 354–403 (387).

[86] See also, for similar claims, Eric Posner, 'Outside the Law', *Foreign Policy*, 25 October 2011, available at https://foreignpolicy.com/2011/10/25/outside-the-law/.

[87] A point also made by Henderson, 'International Measures' (n. 85), with reference to Michael Byers, 'Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity', *Global Governance* 10 (2004), 165–86.

[88] Hillary Rodham Clinton, *Hard Choices* (London: Simon & Schuster, 2014), 372, as cited by Wester, *Intervention in Libya* (n. 64), 169.

De Waal submits that the African Union's diagnosis of the conflict was fundamentally correct.[89] The African leaders of Libya's Sahara neighbouring states appreciated the profound differences between the uprisings in Tunisia and Egypt, on the one hand, versus Libya, on the other. Given Libya's history and its institutional void, there was an enormous risk of escalation into fully fledged civil war.[90] Leaders such as Chadian President Idriss Déby Itno were also keenly aware that loosening Gaddafi's grip on transnational armed groups, in combination with the opening of vast arsenals in military bases, planted seeds for great instability across the region.[91] Had the P3 (i.e., the United States, the United Kingdom, and France) joined forces with the African Union, they would have benefited from enhanced African inside knowledge on the ground. And perhaps the AU plan for a negotiated settlement, backed by the P3 threat of force and the threat of implementing the ICC referral, might have resulted in a better managed transition.[92] Instead, African states bore the brunt of the intervention while European states were very unwelcoming to Libyan refugees escaping the turmoil.[93]

Certainly, the African Union itself is partially to blame for these outcomes, because it suffered from internal divisions and took its time to arrive at a clear-cut position. It did not manage to flex its political and diplomatic muscle sufficiently, and it may have deferred too readily to the Arab League under the loose notion of regional subsidiarity, as Maluwa discusses in his chapter in this volume.[94] But it is also true that ignoring Africa to such an extent does not exhibit a spirit of multilateralism and institutionalism. Maluwa highlights lessons that the African Union might learn from the Libya situation in terms of its relationship with the United Nations.[95] Likewise, the UN Security Council – and particularly the P3 – should learn lessons, including that the views of relevant regional organisations must be taken into account more seriously not least because those organisations will often have relevant understanding of events on the ground. This is a lesson very much in the spirit of the 'Ezulwini Consensus', which Maluwa discusses.[96]

[89] De Waal, 'African Roles in the Libyan Conflict' (n. 58), 379.
[90] See generally, on Libya's trajectory, Dirk Vandewalle, *History of Modern Libya* (Cambridge: Cambridge University Press, 2nd edn, 2012).
[91] Alex de Waal, '"My Fears, Alas, Were Not Unfounded": Africa's Responses to the Libya Conflict', in Aidan Hehir and Robert Murray (eds), *Libya, the Responsibility to Protect and the Future of Humanitarian Intervention* (Berlin: Springer, 2013), 58–82.
[92] De Waal, 'African Roles in the Libyan Conflict' (n. 58), 379.
[93] Wester, *Intervention in Libya* (n. 64), 114–16.
[94] Maluwa, 'Between Centralism and Regionalism', Chapter 3 in this volume, section III.B (p. 211).
[95] *Ibid.*, section III.B.2.
[96] *Ibid.*, section III.A (p. 202).

Remarkably, though, the two countries leading the operation came to very different ex post appreciations regarding their intervention. In a general informative report on Libya of 2015, the French Parliament's Commission of Foreign Affairs concluded that the intervention had unquestionably prevented the announced massacre. As regards the contestation over the implementation of the Resolution, the Commission noted that neither Russia or China nor South Africa had opposed Resolution 1973. The Commission blamed the failure to develop a sound post-intervention plan on the international community as a whole and it singled out Germany for creating 'malaise' in the European position.[97]

In contrast, the Foreign Affairs Committee of the UK House of Commons was much more critical. It held that decision-making regarding the intervention had been 'intelligence-light'. It particularly exposed the failure to identify that 'the threat to civilians was overstated and that the rebels included a significant Islamist element'. The result of the regime change policy, coupled with a lack of strategy for the post-Gaddafi Libya, was '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'.[98]

These contrasting parliamentary commentaries are telling in themselves and reflective of the fact that democratic accountability for the use of military force is much more developed in the United Kingdom than in France.[99] The UK account is most aligned with an institutional perspective: the gist of it underscores the imperative of obtaining a good grasp of the situation before going in, which presupposes relying on international consensus and cooperation. The UK account is also more reflective of an ability to engage critically and the United Kingdom thus seems to display a greater willingness to learn lessons. This difference is remarkable, and it evokes the question of whether

[97] Assemblée Nationale, *Rapport d'Information sur la Libye*, No. 3259 (2015), 17–24.

[98] 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.

[99] Compare Katja Ziegler, 'The Use of Military Force by the United Kingdom', in Curtis Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019), 771–90, and Mathias Forteau, 'Using Military Force and Engaging in Collective Security: The Case of France', in Bradley (ed.), op. cit., 811–28. See also Veronica Fikfak and Hayley Hooper, *Parliament's Secret War* (London: Hart, 2018); Veronica Fikfak, 'War, International Law and the Rise of Parliament: The Influence of International Law on UK Parliamentary Practice with Respect to the Use of Force', in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law: Bridges and Boundaries* (Cambridge: Cambridge University Press, 2021), 299–316.

the international law of peace and security should not be more concerned with *domestic* checks and balances and accountability processes (e.g., inquiries) in relation to the resort to war powers.

B. *Proposals to Refine Decision-Making and Discourse on the Use of Force*

As is well known, Russia used the selective interpretation of Resolution 1973 as an argument against meaningful action in Syria.[100] It has been recognised, though, that the 'Libya pretext' does not fully explain the positions of Russia and China, respectively, regarding Syria, because these were mostly guided by the very different geopolitical interests at stake. Russia's position was informed by its close alliance with Assad and its desire to maintain influence in the Middle East.[101] As for China – as Cai also notes in his chapter in this volume[102] – whereas the stakes in Libya were very high[103] and it could not risk blocking the Libya Resolution in isolation,[104] Chinese economic interests in Syria were much less significant and it vetoed in this context consistently in tandem with Russia. In relation to understanding self-interest, Maluwa makes the very important point that this can also include ideological aspects beyond the immediate financial and economic interests of a state, and he points out that, through their attitude in relation to Syria, both China and Russia have underscored and renewed their commitment to the principle of

[100] Explaining its use of veto for a draft resolution on Syria, Russia stated:

> The situation in Syria cannot be considered in the Council separately from the Libyan experience. The international community is alarmed by statements that compliance with Security Council resolutions on Libya in the NATO interpretation is a model for the future actions of NATO in implementing the responsibility to protect. It is easy to see that today's "Unified Protector" model could happen in Syria.

See UN Doc. S/PV.6627, 4 October 2011, 4.

[101] Alex J. Bellamy, 'From Tripoli to Damascus? Lesson Learning and the Implementation of the Responsibility to Protect', *International Politics* 51 (2014), 23–44; Sarah Brockmeier, Oliver Stuenkel, and Marcos Tourinho, 'The Impact of the Libya Intervention Debates on Norms of Protection', *Global Society* 30 (2016), 113–33.

[102] Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, section V.B (p. 80).

[103] While voting in favour of Resolution 1970 (2011) – which included the imposition of UN sanctions – as well as the ICC referral, the Chinese delegation insisted that 'the safety and interests of foreign nationals in Libya must be assured': UN Doc. S/PV.6491, 26 February 2011, 4. China then had approximately 36,000 workers on the ground in Libya working mainly in oil, construction, and telecommunications, and they were evacuated in an unprecedented evacuation operation. See also *ibid.*, cons. 12, 14, which refer to the need to protect foreign nationals and workers, thus taking Chinese concerns in this respect into account.

[104] Yun Sun, 'China's Acquiescence on UNSCR 1973: No Big Deal', *Stimson Center*, 31 March 2011, available at www.stimson.org/2011/china-acquiescence-unscr-1973-no-big-deal/.

non-interference[105] – as well as, it might be added, to a rather absolute and statist understanding of this principle.

Following the disquiet over the Libya controversy, proposals aimed at achieving more structural ambitions of a procedural nature emerged. In essence, these proposals aimed at refining Security Council decision-making on matters related to the use of force. Brazil and, informally, China put forward separate proposals.

1. Responsibility while Protecting and Responsible Protection

Most prominently, Brazil introduced the concept of 'Responsibility while Protecting' (RWP) to complement the R2P.[106] In the wake of the authorised Libya intervention, Brazil's proposal sought to assure that collective security measures meant to implement the R2P would not be abused. It referred to the 'growing perception that the concept of the responsibility to protect might be misused for purposes other than protecting civilians, such as regime change'.[107] Brazil proposed fundamental principles, parameters, and procedures to ensure that the two concepts, R2P and RWP, would evolve hand in hand:

> (a) Just as in the medical sciences, prevention is always the best policy; it is the emphasis on preventive diplomacy that reduces the risk of armed conflict and the human costs associated with it;
> (b) The international community must be rigorous in its efforts to exhaust all peaceful means available in the protection of civilians under threat of violence, in line with the principles and purposes of the Charter and as embodied in the 2005 World Summit Outcome;
> (c) The use of force, including in the exercise of the responsibility to protect, must always be authorized by the Security Council, in accordance with Chapter VII of the Charter, or, in exceptional circumstances, by the General Assembly, in line with its resolution 377 (V);
> (d) The authorization for the use of force must be limited in its legal, operational and temporal elements and the scope of military action must abide by the letter and the spirit of the mandate conferred by the Security Council or the General Assembly, and be carried out in strict

[105] Maluwa, 'Between Centralism and Regionalism', Chapter 3 in this volume, section III.B (p. 205).

[106] Annex to the letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, UN Doc. A/66/551–S/2011/701, 11 November 2011 ('Responsibility while Protecting: Elements for the Development and Promotion of a Concept').

[107] *Ibid.*, para. 10.

conformity with international law, in particular international humanitarian law and the international law of armed conflict;

(e) The use of force must produce as little violence and instability as possible and under no circumstance can it generate more harm than it was authorized to prevent;

(f) In the event that the use of force is contemplated, action must be judicious, proportionate and limited to the objectives established by the Security Council;

(g) These guidelines must be observed throughout the entire length of the authorization, from the adoption of the resolution to the suspension of the authorization by a new resolution;

(h) Enhanced Security Council procedures are needed to monitor and assess the manner in which resolutions are interpreted and implemented to ensure responsibility while protecting;

(i) The Security Council must ensure the accountability of those to whom authority is granted to resort to force.[108]

Brazil's proposal aimed at both improving decision-making in a substantive sense by suggesting concrete criteria and conditions, as well as in an institutional sense by putting forward suggestions for the creation of new procedures, including elements of oversight.

In response to Brazil's proposal and also to justify its position in relation to Syria, China unofficially launched the concept of 'Responsible Protection'.[109] The concept was introduced in a publication by Ruan Zongzhe, vice-president of the China Institute for International Studies (CIIS), which is the official think tank of China's Ministry of Foreign Affairs. The concept proposed six elements: four concerned substantive criteria to guide the UN Security Council in determining the appropriateness of military action for humanitarian purposes; one related to post-intervention responsibilities; and another proposed mechanisms for the monitoring and supervision of any military intervention.[110]

The RWP proposal lost momentum when Brazil's term on the Security Council ended and when it lost the support of its two main champions, President Dilma Roussef and Foreign Minister Antonio Patriota.[111] Neither

[108] *Ibid.*, para. 11.

[109] See also Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, section V.D (p. 92).

[110] 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.

[111] Jeremy Farrell, Marie-Eve Loiselle, Christopher Michaelsen, Jochen Prantl, and Jeni Whalan, 'Elected Member Influence in the United Nations Security Council', *Leiden Journal of International Law* 33 (2020), 101–15 (107). See also Andrés Serbin and Andrei Serbin

did China formally adopt the concept of Responsible Protection or advocate it otherwise. Both proposals to refine use-of-force decision-making post Libya were discontinued.

2. Article 51 Reporting as a Means of Enhancing Decision-Making and Discourse on the Use of Force

Other states not (permanently) on the UN Security Council have, more recently, revived the call for improved use-of-force decision-making. These new calls concern the exercise of the right to self-defence, and they zero in on greater transparency and on increasing the conversation on the law governing the use of force.

While originally in tandem with Brazil, Mexico is currently taking the lead. Its call aims to create possibilities for more inclusive debates. Mexico's concern around this topic emerged from its discontent with the 'unable and unwilling' doctrine, which then incumbent US President Trump had also referred to in a tweet regarding the movement of migrants from Central America, exclaiming that 'Mexican soldiers hurt, were unable, or unwilling to stop Caravan'.[112] Being a US neighbour, Mexico thus had special interests in circumscribing a doctrine that was developed in the context of other situations. Yet while its proposals originated from anxiety over the 'unable and unwilling' doctrine in the context of self-defence justifications, Mexico framed its questions in a more generic way pertaining to self-defence and Article 51 reporting more broadly. Mexico's concern has thus expanded into a broader commitment to creating more space at the Security Council for proper discourse on the law of peace and war.

In the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, Mexico noted the increase of Article 51 communications, and it introduced a fully fledged proposal that sought to create space for discussion by all UN member states on Article 51 UN Chapter and its interrelationship with Article 2(4). Mexico's concrete aim was

Pont, 'Brazil's Responsibility while Protecting: A Failed Attempt of Global South Norm Innovation?', *Pensamiento Proprio* 20 (2015), 171–92; Kai Michael Kenkel and Cristina G. Stefan, 'Brazil and the Responsibility while Protecting Initiative: Norms and the Timing of Diplomatic Support', *Global Governance* 22 (2016), 41–58.

[112] Pablo Arrocha Olabuenaga, 'An Insider's View on the Life-Cycle of Self-Defense Reports by UN Member States: Challenges Posed to the International Order', *Just Security*, 2 April 2019, available at www.justsecurity.org/63415/an-insiders-view-of-the-life-cycle-of-self-defense-reports-by-u-n-member-states/.

to provide more clarity as to the implementation of Article 51's reporting requirement and it subdivided the relevant questions into three groups:

(a) **Substantive issues**: Given that under Article 51 the right to self-defence may only be invoked if there has been an armed attack:

  (i) What must be included in reports submitted to the Security Council under Article 51?
  (ii) What level of detail is required in reports under Article 51 as a precondition for the invocation of self-defence?
  (iii) How should Article 51 be interpreted with regard to attacks perpetrated by non-State actors, in particular, but not exclusively, terrorist attacks?
  (iv) Under Article 51 of the Charter, can self-defence be invoked in respect of another State when that State is considered to lack the capacity or the will to address an armed attack?

(b) **Procedural issues**: Given that the inherent right to self-defence may be exercised, under Article 51, 'until the Security Council has taken measures necessary to maintain international peace and security', and that 'measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council':

  (i) What is a reasonable time frame for the submission of a report under Article 51 following an armed attack?
  (ii) Must a report under Article 51 be submitted before the use of force in self-defence, or can it be submitted afterwards?
  (iii) Is it desirable and necessary for the Security Council to discuss, examine and consider reports submitted to it under Article 51?
  (iv) Is it necessary for the Security Council to take measures necessary to maintain international peace and security after a State has invoked its right to self-defence?
  (v) How can a lack of action by the Security Council following receipt of a report under Article 51 be interpreted, in particular with regard to recurring reports concerning the same situation?

(c) **Transparency and publicity issues**: Since reporting under Article 51 is an obligation under the Charter and is directly related to issues of international peace and security, it serves the interests of all Member States. In this regard:

  (i) How can the transparency and publicity of reports submitted under Article 51 be improved?

(ii) What can be done to facilitate the access of Member States to these reports?
(iii) What can be done to facilitate the access of Member States to any responses and reactions to these reports?
(iv) What can be done to improve access to information, taking into account the delay in the publication of the Repertoire of the Practice of the Security Council?
(v) How can the lack of responses from Member States to reports submitted under Article 51 be interpreted, taking into account the current lack of transparency and publicity?[113]

Within the General Assembly's Charter Committee, however, there was no consensus to transpose this item from the category of new proposals to the main agenda. One of the arguments barring consensus was that it was for the Security Council to deal with those matters. As a non-permanent member elected to sit on the Security Council in 2021–22, Mexico then pursued its quest at that level and expressed its ambition to address 'the opacity with which the Security Council has been handling situations on which States have invoked their right to self-defence in accordance with Article 51 of the UN Charter'.[114] It effectively organised an Arria formula meeting to this effect on 24 February 2021, which is discussed below.[115]

3. Substantiating the Reporting Requirement: The Importance of Facts

The first question that Mexico raised was: what must be included in reports submitted to the Security Council under Article 51? One element of this question regards factual substantiation: to what extent are states required to release information substantiating their legal claims? As a starting point, one may argue that the prohibition on the use of force is a cornerstone of the international legal order and non-authorised use of force is the exception. This starting point implies that states using force – and thus violating a central norm – should provide appropriate justification not only in legal terms but also

[113] Annex to the Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organisation, UN Doc. A/76/33, 25 February 2021, para. 14.

[114] Pablo Arrocha Olabuenga and Ambassador H.E. Juan Ramón de la Fuente, 'Mexico's Priorities as an Elected Member to the Security Council for 2021–2022', *Just Security*, 7 July 2020, available at www.justsecurity.org/71241/mexicos-priorities-as-an-elected-member-to-the-security-council-for-2021-2022/.

[115] See 'Upholding the Collective Security System of the UN Charter: Security Council Open Arria Formula Meeting, 24 February 2021', 16 March 2021, available at www.unmultimedia.org/avlibrary/asset/2604/2604457/.

with facts supporting their legal claims. Specifically in the context of self-defence against non-state actors, the Leiden Policy Recommendations on Counterterrorism and International Law, which offer expert perspectives aimed at clarifying the law and which highlight areas in which greater consensus needs to be pursued, underscore this obligation of states to justify their actions and insist that states using force in self-defence bear the burden of making their case:

> Self-defence may also be necessary if the armed attack cannot be repelled or averted by the territorial State. States relying on self-defence *must therefore show* that the territorial State's action is not effective in countering the terrorist threat.
>
> As the application of [the principle of necessity and proportionality] is heavily fact-dependent, States using force in self-defence should be prepared to make publicly available information and data that will support the necessity and proportionality of their conduct. International law does not prevent third States from scrutinizing the necessity and proportionality of self-defence operations from requesting further evidence.
>
> Any use of force in anticipatory self-defence should be justified publicly by reference to the evidence available to the State concerned; the facts do not speak for themselves, and the State should explain, as fully as it is able to do, the nature of the threat and the necessity for anticipatory military action.[116]

The Chatham House Principles of International Law on the Use of Force by States in Self-Defence also emphasise the eminence of facts, including in cases of anticipatory self-defence.[117] Principle 4 states that 'force may be used only on a proper factual basis and after a good faith assessment of the facts', and it elaborates thus:

> Each case will necessarily turn on its own facts.
>
> [. . .]
>
> The determination of 'imminence' is in the first place for the relevant state to make, but it must be made in good faith and on grounds which are capable of objective assessment. Insofar as this can reasonably be achieved, the

[116] Larissa van den Herik and Nico Schrijver, 'Leiden Policy Recommendations on Counterterrorism and International Law', *Netherlands International Law Review* 57 (2010), 531–50 (paras 42, 44, 48, respectively) (emphasis added).

[117] Elizabeth Windhurst, 'The Chatham House Principles on the Use of Force in Self-Defence', *International and Comparative Law Quarterly* 55 (2006), 963–72. Positively referenced too by, e.g., the Australian Attorney-General Senator the Hon. George Brandis QC, in his lecture 'The Right to Self-Defence against Imminent Armed Attack in International Law', *EJIL: Talk!*, 25 March 2017, available at www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/.

> evidence should be publicly demonstrable. Some kinds of evidence cannot be reasonably produced, whether because of the nature or source, or because it is the product of interpretation of many small pieces of information. But evidence is fundamental to accountability, and accountability to the rule of law. The more far-reaching, and the more irreversible its external actions, the more a state should accept (internally as well as externally) the burden of showing that its actions were justifiable on the facts. And there should be proper internal procedures for the assessment of intelligence and appropriate procedural safeguards.[118]

Whatever one's opinion on the permissibility of self-defence against non-state actors, the 'unable and unwilling' doctrine, or anticipatory self-defence, the general idea that states invoking an exception must make their case in a legal sense supported by facts is not extravagant. In fact, it is precisely the obligation to provide a substantiated legal justification to the entire international community that positions other states to react and offer their views on legality and permissibility.

Yet, at the Mexico Arria formula meeting of February 2021, states expressed very different views on this matter. Liechtenstein upheld the idea that states invoking self-defence owe the international community of UN members a 'thorough and convincing' justification that, at a minimum, includes evidence of proportionality and necessity – and imminence, if applicable.[119] Austria too emphasised that Article 51 letters should not only report measures but also include relevant background information so as to enable assessments of proportionality, necessity, and imminence.[120] The United States, in sharp contrast, insisted that Article 51 did not prescribe what should be included in reporting letters other than a description of measures taken. It noted that state practice varies and that these letters may include a detailed legal justification but that this is not required. The purpose of the letters, according to the United States, was only to put the Security Council on notice.[121] With fewer words, France took the same position,[122] and the United Kingdom echoed that the UN Charter does not impose a specific form. The United Kingdom observed that even oral notification was allowed.[123] These positions are not easily

[118] Windhurst, 'The Chatham House Principles' (n. 117), 968.

[119] Letter dated 8 March 2021 from the Permanent Representative of Mexico to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2021/247, 16 March 2021, 47. See also n. 115 for the full statement.

[120] *Ibid.*, 14.

[121] *Ibid.*, 30–1.

[122] *Ibid.*, 35. The Netherlands also plainly noted that 'the Charter does not specify how to notify or what to include in a notification under Article 51': *ibid.*, 55.

[123] *Ibid.*, 64.

aligned with the calls by these very same states for strong institutions and multilateralism. In particular, the position of France that Article 51 does not impose formalism, and hence does not call for evidence-based reporting, stands in quite some contrast with France's call for agile organisation as part of the Alliance for Multilateralism. The same is true of Germany's absence in the debate.

In the specific context of cyber operations, too, the question of whether there is a legal obligation to release underlying evidence has been openly disputed. On the one hand, the 2015 UN Group of Experts noted that 'accusations of organizing and implementing wrongful acts brought against States should be substantiated'.[124] Yet, in contrast, US Legal Adviser Brian J. Egan stated in 2016 that:

> [T]here is no legal obligation to reveal evidence on which attribution is based prior to taking appropriate action. There may, of course, be political pressure to do so, and States may choose to reveal such evidence to convince other States to join them in condemnation, for example. But this is a policy choice – it is not compelled by international law.[125]

British legal adviser Jeremy Wright articulated similar views: 'There is no legal obligation requiring a state to publicly disclose the underlying information on which its decision to attribute hostile activity is based, or to publicly attribute hostile cyber activity that it has suffered in all circumstances.'[126]

These views, however, particularly concern cyber operations below the use-of-force threshold. They are informed by the classified nature that specifically surrounds the cyber capabilities and vulnerabilities of states, and especially the interests of accusing states not to disclose the sources and methods used by their law enforcement and intelligence agencies. In addition to the United States and the United Kingdom, other Western states and allies, such as France and the Netherlands, have also insisted that there is no legal obligation to disclose evidence in the context of cyber accusations.[127] Russia and China,

[124] 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 UNGGE Report), para. 28(f); GA Res. 70/237 of 30 December 2015, UN Doc. A/RES/70/237.

[125] Brian J. Egan, 'International Law and Stability in Cyberspace', *Berkeley Journal of International Law* 35 (2017), 169–80.

[126] Jeremy Wright QC MP, 'Cyber and International Law in the 21st Century', 23 May 2018, available at www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century.

[127] French Ministry of the Armies, *Droit International Appliqué aux Opérations dans le Cyberspace* [*International Law Applicable to Operations in Cyberspace*], September 2019;

in contrast, have instead pushed for a requirement to substantiate.[128] This is easily explained by the fact that these latter two states are generally on the receiving end of such accusations, which they tend to deny.[129] These two states also take the position that attribution is almost impossible – a view also taken by Cai in his chapter in this volume[130] – which would mean that a requirement to substantiate would effectively create an insurmountable burden.

The divergence of views on the obligation to substantiate has been recognised in the Tallinn Manual 2.0.[131] Kristen Eichensehr has made compelling arguments against the Western positions that block the development of evidentiary standards for cyber accusations. She underscores that clarity on facts can ultimately contribute to clarity about what is permissible state behaviour.[132] Martha Finnemore and Duncan Hollis have also predicted that demands for documentations will rise as public cyber accusations become more common, which will then likely result in efforts to normalise and streamline informational practices.[133] In its position paper of March 2021 on the application of international law to cyberspace, Germany paves the way for such a future development:

> Germany agrees that there is no general obligation under international law as it currently stands to publicize a decision on attribution and to provide or to submit for public scrutiny detailed evidence on which an attribution is based. This generally applies also if response measures are taken. Any such publication in a particular case is generally based on political considerations and does not create legal obligations for the State under international law. Also, it is within the political discretion of a State to decide on the timing of a public act of attribution. Nevertheless, Germany supports the UN Group of Governmental Experts' position in its 2015 report that accusations of cyber-related misconduct against a State *should* be substantiated. States should

Letter dated 5 July 2019 from the Minister of Foreign Affairs to the President of the House of Representatives on the international legal order in cyberspace, available at www.government.nl/documents/parliamentary-documents/2019/09/26/letter-to-the-parliament-on-the-international-legal-order-in-cyberspace.

128 See, e.g., Draft GA Res. A/C.1/73/L.27 of 22 October 2018 on developments in the field of information and telecommunications in the context of international security, para. 10.

129 Kristen E. Eichensehr, 'The Law and Politics of Cyberattack Attribution', *UCLA Law Review* 67 (2020), 520–98.

130 Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, section IV.C (p. 72).

131 Michael N. Schmitt and Liis Vihul (eds), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge: Cambridge University Press, 2nd edn, 2017), 83.

132 Eichensehr, 'Cyberattack Attribution' (n. 129).

133 Martha Finnemore and Duncan B. Hollis, 'Beyond Naming and Shaming: Accusations and International Law in Cybersecurity', *European Journal of International Law* 31 (2020), 969–1003.

> provide information and reasoning and – if circumstances permit – attempt to communicate and cooperate with the State in question to clarify the allegations raised. This may bolster the transparency, legitimacy and general acceptance of decisions on attribution and any response measures taken.[134]

Similarly, even if less expressly, Italy stressed the importance of transparency, and maintained that attribution of wrongful cyber activities should be reasonable and credibly based on factual elements related to relevant circumstances of the case, even if there is no general international requirement for this.[135] In the same vein, the report of the UN on Developments in the Field of Information and Telecommunications in the Context of International Security also stated in its 2021 report that accusations should be substantiated.[136]

While the law on attribution and substantiation in the context of cyber operations below the use-of-force threshold is as yet rather immature and cannot be extrapolated to more generic settings nor to the broader law on peace and war, it is still notable that core ideas on substantiation are ever more present in this still very unsettled cyber context. Interestingly, in the same position paper, Germany took a firm position on the reporting requirement in the context of self-defence actions against malicious cyber-attacks. It held that the determination of whether a certain malicious cyber operation was comparable to a traditional armed attack in scale and effects, thereby justifying resort to the use self-defence, was not a decision left to the discretion of the victim state. Instead, according to Germany's position, such a determination 'needs to be comprehensively reported to the international community, i.e., the UN Security Council, according to art. 51 UN Charter'.[137]

Proceeding on this premise that the obligation to release some evidence is inherent in the exceptional nature of non-authorised use of force and thus

[134] The Federal Government, *On the Application of International Law in Cyberspace* [Position Paper], March 2021, available at https://documents.unoda.org/wp-content/uploads/2021/12/Germany-Position-Paper-On-the-Application-of-International-Law-in-Cyberspace.pdf, 12 (footnotes omitted). No specific position was taken on this point in the 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.

[135] Italy, *On International Law and Cyberspace* [Position Paper], 4 November 2021, available at www.esteri.it/mae/resource/doc/2021/11/italian_position_paper_on_international_law_and_cyberspace.pdf. See also Switzerland, *On the Application of International Law in Cyberspace* [Position Paper], 27 May 2021, available at www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/20210527-Schweiz-Annex-UN-GGE-Cybersecurity-2019-2021_EN.pdf, para. 6.1.

[136] UNGGE Report (n. 124), para. 71(g).

[137] *Ibid.*, 15.

indirectly flows from Article 2(4)'s cornerstone status, as well as that it is also consistent an institutional perspective, the next question that emerges is: what exactly needs to be shown? Obviously, this depends on the legal basis used to justify the use of force and the precise claims made.[138] The evidentiary requirement may even differ among claims based on the same overall legal ground. For instance, Article 51 provides the legal basis for a host of very different claims, ranging from traditional inter-state self-defence to anticipatory self-defence, and from self-defence against non-state actors to the protection of own nationals. What the application of legal principles of, for example, necessity and proportionality precisely entail in these different situations remains contested, but those different scenarios of self-defence may clearly call for different types of necessity and proportionality test. The question how these different tests can be met in practice also remains unclear, but the differentiation in legal tests does presuppose varied factual assessments.[139] Thus the type of legal ground invoked to justify a use of force entails its own informational requirements.

In practice, though, most states' reporting on the use of force are very elusive and, regardless of the precise legal claim, they offer little factual detail. States tend to make rather generic statements.[140] The practice of not substantiating legal claims and of greatly varying assessments of the same situation is clearly not limited to use-of-force situations involving self-defence. Even use of force authorised by the Security Council can (subsequently) be deemed improper on the basis that the underlying situation was assessed inadequately. Indeed, as noted elsewhere in this chapter, the UK Foreign Affairs Committee came to harsh conclusions on the Security Council's authorisation of the Libya intervention. It found that 'the scale of the threat to civilians was presented with unjustified certainty'.[141] The Committee also stated:

> We have seen no evidence that the UK Government carried out a proper analysis of the nature of the rebellion in Libya. It may be that the UK

[138] For a more theoretical analysis of why legal justifications are made at all, see Dino Kritsiotis, 'Theorizing International Law on Force and Intervention', in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press, 2016), 655–83.

[139] See, more elaborately, Larissa van den Herik, 'Article 51's Reporting Requirement as a Space for Legal Argument and Factfulness', in Claus Kress and Robert Lawless (eds), *Necessity and Proportionality in International Peace and Security Law (Lieber Studies)* (Oxford: Oxford University Press, 2020), 221–44.

[140] James A. Green, 'The Article 51 Reporting Requirement for Self-Defense Actions', *Virginia Journal of International Law* 55 (2015), 563–624 (604). See also Van den Herik, 'Article 51's Reporting Requirement' (n. 139).

[141] House of Commons Foreign Affairs Committee, *Libya* (n. 98) para. 37.

> Government was unable to analyse the nature of the rebellion in Libya due to incomplete intelligence and insufficient institutional insight and that it was caught up in events as they developed. It could not verify the actual threat to civilians posed by the Gaddafi regime; it selectively took elements of Muammar Gaddafi's rhetoric at face value; and it failed to identify the militant Islamist extremist element in the rebellion. UK strategy was founded on erroneous assumptions and an incomplete understanding of the evidence.[142]

The Committee further held that insufficient attention had been paid to the possibility that militant groups would benefit from the rebellion[143] and that political ways of dealing with the crisis had been insufficiently explored.[144]

Processes to scrutinise or expose facts, assessments, and reason-giving for a certain use of force that later appeared not to match the situation on the ground, such as the UK parliamentary process or other types of domestic inquiry, are not a given at Security Council level. Indeed, the centralisation of the power to maintain international peace and security in the Council has not been accompanied by the establishment of a universal or collective fact-finding agency to find facts ex ante or to make an assessment ex post.[145] The absence of such a body has, at times, undermined the credibility, authority, and stability of the whole collective security system, whose proper functioning hinges on the establishment of accurate factual information and a shared appreciation and evaluation of facts. On several occasions, the Security Council has also been presented with or acted upon the basis of misinformation, such as the claims regarding the presence of weapons of mass destruction in Iraq in 2003[146] and the attribution of the Madrid terrorist attacks to Basque separatist group ETA in 2004.[147] Yet while the speech of Colin Powell is still the most referred-to example of misleading the Security Council, exaggerated claims, counterfactuals, and denials continue to be presented in Council

[142] *Ibid.*, para. 38.
[143] *Ibid.*, para. 28.
[144] *Ibid.*, para. 57.
[145] There are, of course, ad hoc examples of inquiries, such as the UN Secretary-General's Inquiry regarding the Fall of Srebrenica (Report of the Secretary-General pursuant to General Assembly Res. 53/35, UN Doc. A/54/549, 15 November 1999) and on the United Nations' failure to prevent the genocide in Rwanda (Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, UN Doc. S/1999/1257, 16 December 1999). See, more generally, Catherine Harwood and Larissa van den Herik, 'Commissions of Inquiry and *Jus ad Bellum*', in Leila Nadya Sadat (ed.), *Seeking Accountability for the Unlawful Use of Force* (Cambridge: Cambridge University Press, 2018), 171–93.
[146] UN Doc. S/PV.4701, 5 February 2003.
[147] SC Res. 1530 of 11 March 2004, UN Doc. S/RES/1530(2004).

debates without much repercussion, including Russia's denials of international crimes being committed by its forces in Ukraine[148] and its unsubstantiated genocide claims against Ukraine.[149] The question of whether there is a right not to be subjected to false claims is currently being litigated before the International Court of Justice (ICJ) and, if granted, this could – in theory, at least – have some sanitising effect on Security Council debates.[150]

Because the legality of a use of force often hinges on the establishment and appreciation of facts as much as, or even more than, the precise legal claim that is being made, there is merit in rethinking structures and processes that build in some more structural (semi-)independent elements in fact-finding and threat appreciation at Security Council level rather than only outsourcing this to states or using ad hoc fact-finding missions. Other international organisations can play enhanced roles for fact-finding, such as the International Atomic Energy Agency and the Organisation for the Prohibition of Chemical Weapons (OPCW).[151] Moreover, and by way of comparison, it may be noted that all UN sanctions regimes do have – on paper – independent elements in the form of panels of experts. These

[148] For example, the denial of responsibility for killed civilians in Bucha: UN Doc. S/PV.9011, 5 April 2022, 16. The Independent International Commission of Inquiry on Ukraine came to contrasting findings in its report of 18 October 2022 to the UN General Assembly: UN Doc. A/77/533, paras 65–74.

[149] UN Doc. S/2022/154, 24 February 2022. For earlier examples in relation to a different conflict, see also Russia's intervention on hostilities in Georgia in August 2008, referring to the death of 2,000 innocent civilians and asking whether this counted as genocide ('How many people, how many civilians must die before we describe it as genocide?'): UN Doc. S/PV.5953, 10 August 2008, 8. The Independent International Fact-Finding Mission on the Conflict in Georgia, established by the Council of the European Union later stated:

> The number of casualties among the Ossetian civilian population turned out to be much lower than claimed at the beginning. Russian officials stated initially that about 2000 civilians had been killed in South Ossetia by the Georgian forces, but later on the number of overall South Ossetian civilian losses of the August 2008 conflict was reduced to 162.

See Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, vol. I, September 2009, 21.

[150] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation), order of 16 March 2022. Particularly relevant is the separate opinion of Judge Robinson, who points out that there is nothing in practice or doctrine that would preclude the Court from making a finding that a breach has not been committed: *ibid.*, para. 16.

[151] See, e.g., on fact-finding processes regarding the use of chemical weapons in Syria and particularly also the question of individual attribution, Gregory D. Koblentz, 'Chemical-Weapon Use in Syria: Atrocities, Attribution, and Accountability', *The Nonproliferation Review* 26 (2019), 575–98.

experts are appointed by the Secretary-General after consultation with the relevant sanctions committee. Typically, the experts assist the committee in carrying out its mandate, including by providing information relevant to the potential designation of individuals and entities, and they also assist the committee in refining and updating information on the list of individuals subject to the assets freeze, travel ban, and targeted arms embargo, including by providing identifying information and additional information for the publicly available narrative summary of reasons for listing. The experts thus have a strong fact-finding mandate, and they are tasked with gathering, examining, and analysing information from states, relevant UN bodies, regional organisations, and other interested parties regarding the implementation of the sanctions.

It is already the case that information gathered by sanctions panels of experts may have ius ad bellum relevance. For example, the panel of experts for Yemen has reported on the relationship between Iran and the Houthis – a factor of relevance to assessments in the context of the consent-based use of force by the Gulf Coalition Forces.[152] And the panel of experts for Libya reported critically on arms deliveries by third states in contravention of the arms embargo imposed by Resolution 1970.[153] The panel of experts for the Central African Republic (CAR) reported on violations of international humanitarian law by Russian military instructors operating in CAR with the consent of the CAR government.[154] And, finally, the panel of experts for

[152] See, e.g., several findings of the Panel of Experts on Yemen of the UN sanctions regime regarding the allegations of linkages between the Houthi rebels and Iran and Iranian shipments of missiles and rockets: Letter dated 20 February 2015 from the Panel of Experts on Yemen established pursuant to Security Council Resolution 2140 (2014) addressed to the President of the Security Council, UN Doc. S/2015/125, Annex (Final Report); Letter dated 22 January 2016 from the Panel of Experts on Yemen established pursuant to Security Council Resolution 2140 (2014) addressed to the President of the Security Council, UN Doc. S/2018/192, Annex (Final Report) (formerly issued as UN Doc. S/2016/73); Letter dated 27 January 2017 from the Panel of Experts on Yemen addressed to the President of the Security Council, UN Doc. S/2018/193, Annex (Final Report) (formerly issued as UN Doc. S/2017/81). Most recently, on alleged Iranian supplies, see Letter dated 22 January 2021 from the Panel of Experts on Yemen addressed to the President of the Security Council, UN Doc. S/2021/79, 25 January 2021, Annex (Final Report), para. 21. See also Benjamin Nußberger, 'Military Strikes in Yemen in 2015: Intervention by Invitation and Self-Defence in the Course of Yemen's "Model Transitional Process"', *Journal on the Use of Force and International Law* 4 (2017), 110–60 (139).

[153] The Panel of Experts concluded that the arms embargo was totally ineffective: Letter dated 8 March 2021 from the Panel of Experts on Libya established pursuant to Resolution 1973 (2011) addressed to the President of the Security Council, UN Doc. S/2021/229.

[154] Final Report of the Panel of Experts on the Central African Republic extended pursuant to Security Council Resolution 2536 (2020), UN Doc. S/2021/569, 25 June 2021, paras 83–96. For more on the operation of Russian private military contractors, including the Wagner Group

the Democratic Republic of Congo (DRC) spelled out in quite some detail Rwanda's support for M23 rebels – even finding substantial evidence of the Rwandan Defence Force intervening directly on DRC territory to reinforce M23 or to conduct military operations against the Forces démocratiques de libération du Rwanda (FDLR).[155]

In his chapter in this volume, Cai questions whether reporting requirements can have any meaning in the absence of objective mechanisms or 'institution immune from great powers'.[156] This is, of course, a valid query. But it is also an invitation to recognise the potential of panels of experts as building blocks for an independent and objective fact-finding mechanism, as well as an encouragement to ensure that their institutional independence is secured and further strengthened, especially to resist interference by the great power. Moreover, the very fact that states must report opens the possibility for anyone, including civil society actors, to scrutinise states and hold states to account, as the *New York Times*' investigation of the erroneous drone strike in Afghanistan of 29 August 2021 illustrates.[157] This does presuppose a free press, though.

Obviously, the legal framework governing UN sanctions is very different from the rules on ius ad bellum. UN sanctions have come to be more focused on individuals, which has been one of the incentives for the push towards proceduralisation, as will be discussed in the next section. Nonetheless, some of the elements of the UN sanctions architecture may still be useful as a very general blueprint for thinking about ways of designing an enabling and 'factful' environment for use-of-force discourse.[158]

in the CAR and other African states, see Maluwa, 'Between Centralism and Regionalism', Chapter 3 in this volume, section III.D.

155 Letter dated 16 December 2022 from the Group of Experts on the Democratic Republic of the Congo addressed to the President of the Security Council, UN Doc. S/2022/967, Annex (Midterm Report).

156 Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, section IV.A. (p. 102).

157 Eric Schmitt and Helene Cooper, 'Pentagon Acknowledges Aug. 29 Drone Strike in Afghanistan Was a Tragic Mistake that Killed 10 Civilians', *New York Times*, 16 October 2021, available at www.nytimes.com/2021/09/17/us/politics/pentagon-drone-strike-afghanistan.html.

158 The word 'factful' is inspired by the book of Hans Rosling, which highlights contrasts between worldly understandings informed by instincts, preconceptions, and biases with those based on data acquired through statistics, graphs, and questionnaires: Hans Rosling, Anna Rosling Rönnlund, and Ola Rosling, *Factfulness: Ten Reasons We're Wrong about the World and Why Things are Better than You Think* (London: Sceptre, 2018).

4. Broadening the Reporting Requirement to Other Uses of Force[159]

Mexico's proposal was tethered to Article 51's reporting requirement, which is expressly written down in the UN Charter. Yet use-of-force reporting does not need to be intrinsically limited to cases of self-defence. Brazil's RWP proposals suggested enhanced Security Council procedures to monitor and assess the manner in which authorising resolutions are interpreted and implemented. These proposals correspond with earlier arguments made by Niels Blokker and Erika de Wet in favour of reporting on authorised use of force to ensure the validity of the authorisation.[160] Indeed, during their Libya intervention, France, the United Kingdom, Italy, and the United States reported to the UN Secretary-General in line with paragraph 4 of Resolution 1973.[161] As noted, the panel of experts of the Libya sanctions regime also informed the UN Security Council of actions by third states relating to the delivery of arms and other military material.[162]

Unlike self-defence and Security Council authorisation, intervention by invitation is not anchored in the UN Charter. The requirements governing this legal basis to use force thus cannot be derived from a concrete provision and there is no treaty obligation to report similar to Article 51, second sentence. One may, however, still consider a parallel reporting requirement for consent-based use of force – or at least reflect on how a practice of reporting on consent-based use of force could be stimulated.

The initial rationale of Article 51's reporting requirement was to alert the Security Council that force had been used in self-defence and to place the

[159] Note that this and the following sections of this chapter draw on the present author's earlier publications – namely, Van den Herik, 'Article 51's Reporting Requirement' (n. 139) and Larissa van den Herik, 'Replicating Article 51: A Reporting Requirement for Consent-Based Use of Force', *Heidelberg Journal of International Law* 79 (2019), 707–11.

[160] Niels M. Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"', *European Journal of International Law* 11 (2000), 541–68; De Wet, *The Chapter VII Powers* (n. 22), 270.

[161] The UN Secretary-General was notified by the following general letters: 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.

[162] See also Letter dated 15 February 2013 from the Panel of Experts on Libya established pursuant to Resolution 1973 (2011) addressed to the President of the Security Council, UN Doc. S/2013/99, 9 March 2013.

matter on the international agenda, with a view to enabling the Council to exercise its primary responsibility to maintain peace and security.[163] As the system of collective security becomes more decentralised, and as the Security Council adopts a new role whereby it condones and/or blesses non-authorised uses of force rather than authorising use of force itself,[164] the reporting requirement is taking on new meaning. In such a constellation, the purpose of the reporting requirement is not mainly to notify or alert so that the Council can take over but rather to report in the ordinary sense – namely, to offer information and to account for the action, such that the Security Council and the international community at large can discuss whether the use of force was in accordance with the applicable rules and requirements.

The use of force by invitation also often occurs in situations in which the Security Council refrains from authorising use of force itself. Instead, the Council may appraise the circumstances surrounding the formulation of the invitation, thereby endorsing the consent. Whether the Security Council makes such appraisal in concrete situations depends, among other things, on whether the use of force is reported and whether the matter is placed on the Security Council's agenda. This raises the question of whether reporting on consent-based use of force is or should be mandatory.

Since the UN Charter is silent on intervention by invitation, any legally binding reporting requirement would have to be construed under customary international law. Scholarly arguments have been made in this respect, proposing that Article 51's reporting requirement should be applied mutatis mutandis to consent-based use of force.[165] In its resolution on military assistance on request, the Institut de Droit International also stated that 'any request that is followed by military assistance shall be notified to the Secretary-General of the United Nations'.[166] Suggesting the UN Secretary-General as recipient of notifications rather than the Security Council might be explained by political sensitivities and the reluctance of states to accept any hard-core reporting

[163] Green, 'The Article 51 Reporting Requirement' (n. 140), 568.

[164] As also discussed by Monica Hakimi, 'The Jus Ad Bellum's Regulatory Form', *American Journal of International Law* 112 (2018), 151–90.

[165] Karine Bannelier and Théodore Christakis, 'Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict', *Leiden Journal of International Law* 26 (2013), 855–74 (870). See also, more tentatively, Olivier Corten, 'Intervention by Invitation: The Expanding Role of the UN Security Council', in Dino Kritsiotis, Olivier Corten, and Gregory H. Fox, *Armed Intervention and Consent*, Max Planck Trialogues on the Law of Peace and War (Anne Peters and Christian Marksen, series eds), vol. 4 (Cambridge: Cambridge University Press, 2023), 101–78.

[166] IDI, *Present Problems of the Use of Force in International Law, Sub-Group C – Military Assistance on Request*, Rhodes, 2011 (Rapporteur: Gerhard Hafner).

obligation. In this vein, the following US statement may be noted when reporting on missile strikes in Houthi-controlled territory in Yemen in 2016:

> These actions were taken with the consent of the Government of Yemen. Although the United States therefore does not believe notification pursuant to Article 51 of the Charter of the United Nations is necessary in these circumstances, the United States nevertheless wishes to inform the Council that these actions were taken consistent with international law.[167]

This can be read as implying that no reporting requirement exists at all or that Article 51 cannot serve as a legal basis for a reporting requirement on consent-based use of force.

It is, in any event, not self-evident that a legally binding reporting requirement for consent-based use of force can be construed under customary international law. Even if there is a certain practice of informing the Security Council of forceful action taken pursuant to an invitation,[168] there are also clear examples of non-reporting.[169] Reporting on consent-based use of force may be particularly sensitive when the consent is not public. In considering a reporting requirement for consent-based use of force, specifically, other complex questions also arise on timing and modalities, as well as on when and how consent-based use of force that is very temporary or which involves a one-off action must be reported, and on what exactly must be reported under this heading – that is, whether a reporting requirement would also cover pure aiding. These questions mirror the questions raised by Mexico, slightly altered to a consent setting.

To construe a customary reporting rule for consent-based use of force, there needs to be opinio iuris, which does not seem to clearly exist (yet). States outside the Security Council, as well as non-permanent members, could

[167] Letter dated 15 October 2016 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2016/869, 17 October 2016.

[168] For example, Saudi Arabia in Yemen, the United States in Iraq, Russia in Syria, France in Mali, and Senegal in The Gambia.

[169] See Ashley Deeks, 'A Call for Article 51 Letters', *Lawfare*, 25 June 2014, available at www.lawfaremedia.org/article/call-article-51-letters. On the United States' non-reporting of its drone strikes and other operations in Yemen, Somalia, and Pakistan, see Columbia Law School Human Rights Clinic and Sana'a Center for Strategic Studies, *Out of the Shadows: Recommendations to Advance Transparency in the Use of Lethal Force*, June 2017, available at https://hri.law.columbia.edu/sites/default/files/publications/out_of_the_shadows.pdf, 54; James Cavallaro, Stephan Sonnenberg, and Sarah Knuckey, *Living under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan* (Stanford, New York: International Human Rights and Conflict Resolution Clinic, Stanford Law School; NYU School of Law, Global Justice Clinic, 2012), 123. See also David L. Bosco, 'Letters from the Front Lines: State Communications to the U.N. Security Council During Conflict', *Columbia Journal of International Law* 54 (2016), 341–81.

perhaps play a role in contributing to the expression and formation of such opinio iuris. In this regard, Brazil's statements in 2018 in the Sixth Committee are noteworthy. It insisted on a more meaningful reporting requirement for Article 51,[170] as well on the need for periodic reporting on military operations pursuant to Article 42 UN Charter,[171] thus suggesting a more holistic reporting requirement that disregards the exact legal basis upon which force is used. Overall, the aim of such proposals and thinking is to broaden use-of-force discourse and to enable wider participation on the contents and application of rules that are of concern to the entire international community.

5. The Potential Backlash against Insisting on Reporting

Despite the absence of a fully fledged institutional environment and of a clear requirement to report on consent-based use of force thus far, states nonetheless tend to report to the Security Council, and they often rely on multiple justifications, including consent. Given this existing practice, the issue whether a perceived duty to explain translates into a hard legal obligation to report and whether this obligation extends to consent-based use of force in addition to self-defence is perhaps not the most pressing one. Even absent overall agreement that reporting on all uses of force is legally required, states have in fact reported beyond Article 51's requirement – or at least they are, at times, still inclined to make statements that are meant to be explanatory. The problem is therefore not necessarily absence of reporting[172] – although, with the rise of low-intensity conflicts, the question of what to report, as well as when and how, often does become more pressing.[173] In any event, this is not

[170] Statement by Brazil in the UN General Assembly (Sixth Committee) debate on the Report of the Special Committee on the Charter on the United Nations, 15 October 2018, available at http://statements.unmeetings.org/media2/20303642/brazil-85.pdf.

[171] Statement by H.E. Ambassador Mauro Vieira in the UN Security Council open debate on upholding international law within the context of the maintenance of international peace and security: UN Doc. S/PV.8262, 17 May 2018, at 44–5. On effective monitoring and accountability, see also Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, with an Annex on Responsibility while Protecting: Elements for the Development and Promotion of a Concept, UN Doc. A/66/551–S/2011/701, 11 November 2011, para. 11(h) and (i).

[172] But see Report of Special Rapporteur Agnes Callamard on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/44/38, 29 June 2020, paras 65–82.

[173] For a description of key developments in 2019 of the low-intensity conflict between the United States and Iran, see Miloš Hrnjaz, *The War Report: The United States of America and the Islamic Republic of Iran – An International Armed Conflict of Low Intensity*, Geneva Academy, December 2019, available at www.geneva-academy.ch/joomlatools-files/docman-files/The%20United%20States%20Of%20America%20And%20Islamic%20Republic%20Of%20Iran%20An%20International%20Armed%20Conflict%20Of%20Low%20Intensity.pdf.

the only problem: a perhaps bigger problem lies in the absence of central publication of reports. As Mexico's legal adviser has noted, reporting letters are not standardly circulated to all UN member states and they are difficult to find without the official document symbol, which the Repertoire of the Practice of the Security Council is incomplete, omitting reactions, and has a huge backlog.[174] These are mundane and basic, yet very real, shortcomings. Private actors may try to remedy and plug the gap. The Harvard catalogue of Article 51 Communications serves as an excellent example,[175] but this still leaves responding practice disorganised and it lacks formality. As a result, letters reporting the use of force with excessive and/or elusive legal claims often remain largely uncontested, apart from the victim state's response. An encouragement to report without an enabling structure for other states to react might thus ricochet, since reporting states will have a tendency to broaden possibilities to use force.

Indeed, the Community of Latin American and Caribbean States has expressed concern over 'the increase in the number of letters to the Security Council under Article 51 of the Charter submitted by some States in order to have recourse to the use of force in the context of counter-terrorism, most of the times "ex post facto"'.[176] The Non-Aligned Movement has underlined that 'Article 51 of the UN Charter is restrictive and should not be re-written or re-interpreted'.[177] One-sided Article 51 letters can indeed have the effect of rewriting the exception of self-defence. Many of the states participating in Mexico's Arria formula debate recognised the proliferation of Article 51 letters and underscored the need to improve accessibility, with a view to ensuring an inclusive and transparent dialogue. A variety of states, including Austria,

[174] Arrocha Olabuenaga, 'An Insider's View' (n. 112).

[175] The catalogue is presented in Dustin A. Lewis, Naz K. Modirzadeh, and Gabriella Blum, *Quantum of Silence: Inaction and* Jus ad Bellum, Harvard Law School Program on International Law and Armed Conflict, 2019, available at https://pilac.law.harvard.edu/quantum-of-silence, as introduced in Dustin A. Lewis, Naz K. Modirzadeh, and Gabriella Blum, 'Silence and the Use of Force in International Law', *EJIL:Talk!*, 18 July 2019, available at www.ejiltalk.org/silence-and-the-use-of-force-with-a-new-catalogue-of-article-51-communicationsl/. For compilations of reactions on concrete operations, see, e.g., Mehrnusch Anssari and Benjamin Nussberger, 'Compilation of States' Reactions to US and Iranian Uses of Force in Iraq in January 2020', *Just Security*, 22 January 2020, available at www.justsecurity.org/68173/compilation-of-states-reactions-to-u-s-and-iranian-uses-of-force-in-iraq-in-january-2020/.

[176] Measures to Eliminate International Terrorism: Statement by the Permanent Mission of El Salvador to the United Nations on Behalf of the Community of Latin American and Caribbean States (CELAC), 2 October 2017, available at https://enaun.cancilleria.gob.ar/en/measures-eliminate-international-terrorism.

[177] Final Document of the 17th Summit of Heads of State and Government of the Non-Aligned Movement (NAM), Doc. NAM 2016/CoB/DOC.1.Corr.1, 17–18 September 2016, para. 25.2.

Liechtenstein, the United Kingdom, and Russia, emphasised that lack of reaction or follow-up to a letter either by the Security Council or by other states did not lead to legality or the formation of a new norm.[178] Austria even stated that silence had to be 'unequivocally intentioned' to have legal meaning and not simply occur.[179] These comments build on the work of the ILC on customary international law and subsequent practice – particularly views expressed in that context on how to weigh silence.

Often, third states – and especially those not on the Security Council nor otherwise directly implicated, for example as a regional actor – may (choose to) remain silent on a certain issue because they have no diplomatic or political interest or imperative to speak out in the situation at hand. While, logically, silence is best regarded as an absence of confirming practice, it has often rather been implicitly equated with support.[180] In the ius contra bellum setting, the questions of how to weigh lack of protest and what the legitimising effects of silence are have been particularly relevant in the context of discussions on drones and targeted killing,[181] as well as regarding the scope of the right to self-defence more generally and specifically the status of the 'unable and unwilling' test.[182]

In a generic sense, the question of silence's relevance for the formation of customary international law was discussed by ILC Special Rapporteur Sir Michael Wood in his third report, under the heading 'Inaction as practice and/or evidence of acceptance as law'.[183] Given the politics and methodological challenges involved (how does one prove silence?), the Special Rapporteur indicated that only 'qualified silence' could have meaning and that inaction (or passive practice) had to be determined in relative terms.[184] Relative factors

[178] UN Doc. S/2021/247 (n. 118), 14, 48, 64, and 68.
[179] See n. 115 for the full statement.
[180] Gray, *International Law and the Use of Force* (n. 83), 11.
[181] Anthony Dworkin, 'Drones and Targeted Killing: Defining a European Position', European Council on Foreign Relations Policy Brief, July 2013, available at https://ecfr.eu/wp-content/uploads/ECFR84_DRONES_BRIEF.pdf; Jessica Dorsey and Christophe Paulussen, 'Towards a European Position on Armed Drones and Targeted Killing: Surveying EU Counterterrorism Perspectives', ICCT Research Paper, April 2015, available at www.icct.nl/publication/towards-european-position-armed-drones-and-targeted-killing-surveying-eu-counter. See also Elisabeth Schweiger, 'The Risks of Remaining Silent: International Law Formation and the EU Silence on Drone Killings', *Global Affairs* 1 (2015), 269–75.
[182] Olivier Corten, 'The "Unwilling or Unable" Test: Has it Been, and Could it Be, Accepted?', *Leiden Journal of International Law* 29 (2016), 777–99; Jutta Brunnée and Stephen J. Toope, 'Self-Defence against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?', *International and Comparative Law Quarterly* 67 (2018), 263–86.
[183] UN Doc. A/CN.4/682, 27 March 2015, paras 19–26.
[184] *Ibid.*, para. 22.

whereby a given inaction might be found legally meaningful included the questions of whether a response was called for in the circumstances, whether the silent state was aware of the underlying practice to which it was silent, and whether the silence or inaction was sustained over a sufficient period of time.[185]

Ultimately, draft conclusion 6, paragraph 1, of the ILC's Draft Conclusions on the Identification of Customary International Law state that '[p]ractice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.'[186]

The commentary specifies that:

> Paragraph 1 . . . makes clear that inaction may count as practice. The words 'under certain circumstances' seek to caution, however, that only deliberate abstention from acting may serve such a role: the State in question needs to be conscious of refraining from acting in a given situation, and it cannot simply be assumed that abstention from acting is deliberate. [187]

In relation to establishing opinio iuris, the ILC Draft Conclusions also set out that '[f]ailure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction'.[188]

Some scholars have reflected on the meaning of silence specifically in an ius contra bellum context. They have argued – in tandem with the ILC provisions and the remarks by states during the Arria formula meeting referred to above – that silence should not so easily be considered as acquiescence and as generating in itself 'norm-evolutionary effects'.[189] Silence may have some legal value only if a third state could have legitimately been expected to take a position and did not.[190] A legitimate expectation, Paulina Starski argues, arises only if certain strict conditions apply that relate to the nature, clarity, and

[185] *Ibid.*, paras 23–5.

[186] ILC, *Draft Conclusions on the Identification of Customary International Law*, Report on the Work of its 70th Session, UN Doc. A/73/10(2018).

[187] *Ibid.*, draft concl. 6, commentary para. 3.

[188] *Ibid.*, draft concl. 10, para. 3; Similarly, para. 2 reads:

> 2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, para. 3 (b), may vary. Silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction.

[189] Paulina Starski, 'Silence within the Process of Normative Change and Evolution of the Prohibition on the Use of Force: Normative Volatility and Legislative Responsibility', *Journal on the Use of Force and International Law* 14 (2017), 14–65.

[190] *Ibid.*

specific circumstances of the legal claim made by the state using force and of the reactions of other states, as well as the capacity of the silent state to act, and on timing.[191] Elisabeth Schweiger, in turn, develops the following four contextual parameters to determine the communicative value of silence: the presence of a prompt; the perceived deliberateness of silence; the assumed relevance of the unsaid; and the expectation of speech by those who interpret silence.[192] It has also been suggested that the acquiescence of specially affected states or a large number of states is more meaningful than the silence of a third state that is only remotely linked to the situation,[193] but even then it is not always easy to determine what exactly to infer from the silence or inaction of those states. Indeed, in her work, Schweiger draws attention to the politics involved in attributing meaning to silence, and to the one-sidedness and potential subjectivity of making a claim that there actually is silence.[194] In particular, when operations are covert and/or justified by ambiguous and inconsistent legal claims, the subsequent silence may remain without 'legal quality'.[195] Moreover, states may be selectively silent and, to illustrate this point, Schweiger contrasts the great number of states that have protested within the Security Council against Israeli targeted killing practices[196] with the absence of discussion of US targeted killing in that same arena. This absence shifted the debate into the Human Rights Council instead.[197]

It remains altogether unclear what properly counts as silence and what the legal value is in a concrete setting of alleged silence. For that reason, it is

[191] *Ibid.*

[192] Elisabeth Schweiger, 'Listen Closely: What Silence Can Tell us about Legal Knowledge Production', *London Review of International Law* 6 (2020), 293–411 (398).

[193] Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge: Cambridge University Press, 2010), 38.

[194] See, e.g., Schweiger, 'Listen Closely' (n. 192), 398; Elisabeth Schweiger, '"Targeted Killing" and the Lack of Acquiescence', *Leiden Journal of International Law* 32 (2019), 741–57.

[195] Schweiger, 'Targeted Killing' (n. 194), 742.

[196] See, e.g., UN Doc. S/PV.4929, 23 March 2004, in response to the killing of Sheik Ahmed Yassin; UN Doc. S/PV.4945, 19 April 2004, in response to the killing of Abdel Aziz Al-Rantisi, as cited by Schweiger, 'Targeted Killing' (n. 194). This still leaves a very high number of other Israeli targeted killings out of the loop, as detailed in Roonen Bergman, *Rise and Kill First: The Secret History of Israel's Targeted Assassinations* (New York: Random House, 2018).

[197] See, e.g., Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson, submitted in accordance with General Assembly Resolution 66/171 and Human Rights Council Resolution 15/15, UN Doc. A/68/389, 18 September 2013. On targeted killing and the co-applicability of international humanitarian law and human rights, see also Helen Duffy, 'Trial and Tribulations: Co-applicability of IHL and Human Rights in an Age of Adjudication', in Ziv Bohrer, Janina Dill, and Helen Duffy, *Law Applicable to Armed Conflict*, Max Planck Trialogues on the Law of Peace and War (Anne Peters and Christian Marxsen, series eds), vol. 2 (Cambridge: Cambridge University Press, 2020), 15–105.

imperative that transparency on reporting go hand in hand with the development of more overarching procedures. If circulation of Article 51 letters is enhanced, Liechtenstein's observation that procedures must be developed so that states can provide a reaction also becomes more important to break the silence.

Whether Mexico, on its own, will be able to pursue this matter successfully remains to be seen. Effectively, Mexico's proposal aims to overturn the norm of secrecy in the ius contra bellum and replace it with the norm of transparency. Yet, as Orna Ben-Naftali and Roy Peled astutely observe, '[t]elling truth to power is a tall order. Demanding power to tell the truth is taller.'[198] These scholars have equally pointed out that '[i]njecting transparency into the normative framework of war is, therefore, likely to be resisted and, in the short run, may well generate less compliance'.[199] Thus even if Mexico were to succeed and structures facilitating use of force discourse were implemented, there are significant follow-up questions on the table. It is, for example, of great importance to recognise that the new structures could also entail that the silence of states and failure to react to excessive reporting might be more heavily weighted. The more formal structures exist at Security Council level to engage in use-of-force discourse, the more states are 'in a position to react', and hence the sooner failure to react can be regarded as 'qualified silence' indicating some acceptance.[200] Mexico's proposal thus presupposes continued engagement from all states, not only to materialise the proposals as such but also for substantive follow-up.

V. SANCTIONS OUTSIDE AND INSIDE THE UN INSTITUTIONAL FRAMEWORK

Proposals for improved decision-making and better procedures have also been put forward in the context of the exercise of a different Chapter VII power – namely, the imposition of UN sanctions. In this context, Western European states were generally in the lead and not Latin American states, which might be explained by the reservations of these latter states towards the tool of sanctions as such. In this section, I first examine the reticence of non-Western states towards the tool of sanctions: specifically, the question of whether the imposition of sanctions is within the exclusive domain of the

[198] Orna Ben-Naftali and Roy Peled, 'How Much Secrecy Does Warfare Need?', in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge: Cambridge University Press, 2013), 321–64 (363).

[199] *Ibid.*, 363.

[200] UN Doc. A/CN.4/682, 27 March 2015, paras 19–26, esp. para. 22.

United Nations and whether non-UN sanctions should be regarded as a challenge to the system – particularly to the UN Security Council. I then turn to UN sanctions and discuss the sanctions reform efforts of the past three decades, mapping the development of better procedures for the imposition of UN sanctions, including persistent shortcomings.

A. *Non-UN Sanctions as a Challenge to the Security Council's Prerogative?*

Not all states embrace the tool of sanctions as a legitimate instrument. Many states of the Global South remain aloof, if not outright opposed to it. In contrast, states of the Global North can be described as quite sanctions-eager and they regard it as one of their most compelling foreign policy tools. Given the Security Council's inability to act, non-UN sanctions constituted the core of the Western response to the aggression against Ukraine, together with military assistance.

The centrality of sanctions in the reaction of the West to Russia's aggression against Ukraine in 2022 underscored three moves in relation to sanctions that had already been ongoing – namely:

(i) a move *towards* sanctions as a key instrument to address international crises;
(ii) a move *away* from UN Security Council sanctions; and
(iii) a move *back* to more comprehensive sanctions.

States on the receiving end of sanctions and states from the Global South more generally have, in the past decades, advanced arguments against sanctions, labelling them unilateral coercive measures and therefore contrary to international law. As of 1996, the UN General Assembly has annually adopted resolutions explicitly stating that unilateral coercive measures are contrary to international law.[201] In those resolutions, the General Assembly urges states not to adopt unilateral measures that are not in accordance with the UN Charter – in particular, coercive measures.[202] These serial resolutions do not

[201] More recently, the Human Rights Council (HRC) has started adopting resolutions with a similar bearing. See e.g., HRC, *The Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights*, UN Doc. A/HRC/RES/49/6, 12 April 2022, as well as the work of the UN Special Rapporteurs on this matter. See also the Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, 25 June 2016, para. 6.

[202] See, e.g., GA Res. 75/181 of 16 December 2020, UN Doc. A/RES/75/181; GA Res. 74/154 of 18 December 2019, UN Doc. A/RES/74/154; GA Res. 73/167 of 17 December 2019, UN Doc. A/RES/73/167. For the first of the series, see GA Res. 51/103 of 12 December 1996, UN Doc. A/RES/51/103.

specify what type of unilateral measure is not in accordance with the UN Charter, however, or when a measure can be considered coercive.

In 2019, then Special Rapporteur on Unilateral Coercive Measures Idriss Jazairy held that, as a basic principle, the Security Council should be recognised as having the *exclusive* power to impose financial, economic, and other non-forcible measures.[203] Yet, in a more recent report, new Special Rapporteur Alena Douhan – albeit referring to the Security Council's unique powers – did recognise that states are free to decide with whom to entertain economic relations, and she also appreciated the legality of retorsions and proportional countermeasures taken by directly affected states.[204] According to this latter view – which is in line with mainstream understandings of international law and, specifically, the law on state responsibility – non-UN sanctions are not illegal as such and should not be regarded as a challenge to the UN Security Council or the UN Charter. The UN Charter does not explicitly prohibit economic pressure in the same way as it prohibits the use of force. This does not mean that any type of sanction is allowed, of course, and core concerns related to their humanitarian impact may evoke serious questions of proportionality (depending on the violation of international law to which they react) and other international law principles. Moreover, the question of the legality of third-party countermeasures has not been fully settled.

In the discussions during the General Assembly's 11th Emergency Special Session on the Russian invasion of Ukraine, those states that are generally weary of non-UN sanctions drew attention to their core concerns. Brazil, for example, emphasised that Resolution ES-11/1 should not be seen as permitting the *indiscriminate* application of sanctions.[205] Likewise, Egypt rejected sanctions adopted outside a multilateral framework *because of* the dire humanitarian consequences and suffering for civilians.[206] States also expressed concern over the consequences of sanctions for the global economy. As Maluwa also notes in his chapter in this volume, African states were particularly worried about the collateral impact of the sanctions on their populations.[207] Such concerns relate more to the form and scope of the sanctions than to the legality of the sanctions instrument as such.

Interestingly, Colombia put forward the view that the General Assembly should recommend that all member states impose sanctions simultaneously

[203] UN Doc. A/HRC/42/46/Add.1, 29 August 2019, para. 5.
[204] UN Doc. A/HRC/48/59, 18 July 2021, paras 71–3.
[205] UN Doc. A/ES-11/PV.5, 2 March 2022, 17.
[206] *Ibid.*, 25.
[207] Maluwa, 'Between Centralism and Regionalism', Chapter 3 in this volume, section IV.B (p. 263).

and comprehensively, possibly pursuant to the obligation to cooperate to bring to an end, using lawful means, Russia's serious breach of ius cogens.[208] This suggestion aims at reviving the General Assembly's historic practice of recommending sanctions, as it did against Apartheid South Africa. That earlier practice stands in sharp contrast with the Assembly's more recent series of resolutions against unilateral sanctions just referred to.[209] A role for the General Assembly in recommending sanctions would fit with the new balance that is being struck between the Security Council and the General Assembly by the resumed resort to the 'Uniting for Peace' procedure.

Specifically in relation to the sanctions imposed on Russia, I generally agree with Maluwa's observations on their legality and legitimacy as a response to a particularly serious breach of ius cogens by a permanent member. Without making a detailed assessment of each sanctions measure, it can be noted that many of those measures qualified as retorsions. For those that should be justified as countermeasures, it is unfortunate that the ILC has, on repeated occasions, not pronounced on the legality of third-party countermeasures as a response to serious violations of ius cogens despite prevalent state practice.[210] As a consequence, these measures remain largely unregulated. Recognising that third-party countermeasures are legal under customary international law given the existing state practice would open the door to further regulation and a more detailed understanding of how Articles 49–53 of the Articles of State Responsibility apply. Such regulation of third-party countermeasures could also make room for rules about their relationship with the UN system. Suggestions have been made for a reporting requirement to the UN General Assembly analogous to Article 51;[211] one might also conceive of a role for the

[208] UN Doc. A/ES-11/PV.3, 1 March 2022, 2.

[209] As discussed by Rebecca Barber, 'An Exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions', *International & Comparative Law Quarterly* 70 (2021), 343–78.

[210] Linos-Alexander Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility', *European Journal of International Law* 13 (2002), 1127–45. The ILC ignored a Dutch call to revisit its 2001 position, as maintained in 2011 for the Articles on the Responsibility of International Organizations: Dutch Advisory Committee on International Law, *Advisory Report on the Draft Conclusions of the International Law Commission on Peremptory Norms of General International Law*, 27 July 2020. In a subsequent report, the Dutch Advisory Committee expressly discussed the legality of third-party countermeasures: Dutch Advisory Committee on International Law, *Legal Consequences of a Serious Breach of a Peremptory Norm: The International Rights and Duties of States in Relation to a Breach of the Prohibition of Aggression*, 17 November 2022. Both reports are available at www.advisorycommitteeinternationallaw.nl/. The author is chair of the Committee.

[211] Tom Ruys, 'Sanctions, Retortions and Countermeasures: Concepts and International Legal Framework', in Larissa van den Herik (ed.), *Research Handbook on UN Sanctions and International Law* (Cheltenham: Edward Elgar, 2017), 19–51.

General Assembly in impact assessment. Additionally, the General Assembly could act as a forum in which states can exercise their right to consult when confronted with special economic problems arising from the sanctions, analogous to Article 50 UN Charter.

Whatever may come of such suggestions, unilateral sanctions, whether recommended by the General Assembly or not, should not be regarded as a challenge to the UN Security Council but rather as a correction in the event of inactivity (i.e., dysfunction)[212] or perhaps as complementary. They are an inevitable consequence of Security Council deadlock.

B. *UN Sanctions and the Development of Procedures and Remedies*

Even if it may not be exclusive, the power of the UN Security Council to impose sanctions, as well as its primacy in this regard, is undisputed. Article 41 creates a basis on which the UN Security Council can maintain international peace and security by means of measures short of the use of force. Such measures may include the interruption of economic relations in the form of UN sanctions.[213] Post-1990, UN sanctions have become the instrument of choice for maintaining peace, with typically between 10 and 15 UN sanctions regimes in operation at any given moment.[214] However, since the sanctions relating to the situation in Mali in 2017,[215] no new UN sanctions regimes were created until October 2022, when the Haiti sanctions regime was established.[216] Instead, as noted, there has been a move towards coordinated unilateral sanctions facilitated, inter alia, by the emergence of multiple Magnitsky-style sanctions regimes in different Western jurisdictions.[217] Most recently, both China and Russia have adapted the US approach of using

[212] Address by New Zealand Prime Minister Jacinda Ardern, *A Pacific Springboard to Engage the World: New Zealand's Independent Foreign Policy*, Lowy Institute, Sydney, 7 July 2022, available at www.lowyinstitute.org/publications/address-new-zealand-prime-minister-jacinda-ardern.

[213] See, on terminology and conceptualisation of UN sanctions, Ruys, 'Sanctions, Retortions and Countermeasures' (n. 211).

[214] Erika de Wet, 'Article 41', in Simma et al. (eds), *The Charter of the United Nations* (n. 20), MN 15–25.

[215] SC Res. 2374 of 5 September 2017, UN Doc. S/RES/2374(2017).

[216] Through SC Res. 2653 of 21 October 2022, UN Doc. S/RES/2653(2022), the Security Council created the Haiti sanctions regime for individuals, armed groups, and criminal networks engaged in criminal activities and violence.

[217] In addition to the United States, Canada, the United Kingdom, and the European Union have all adopted Magnitsky-style sanctions regimes for the potential designation of individuals for violating human rights norms.

individualised asset freezes and travel bans to target foreign nationals in retaliation for sanctions on their own nationals.[218]

One could argue that this decentralisation of sanctions decreases the importance of reform processes at UN level. Yet this section is premised on precisely the opposite view. It presents an argument for further UN sanctions reform despite the recent decline in the adoption of new UN sanctions regimes. In fact, precisely because the future of targeted sanctions may be (partly) unilateral, the general principle that all sanctions imposed on persons should be governed by fair and clear procedures, regardless of the exact political and jurisdictional context in which they are adopted, becomes even more imperative.[219] The United Nations has an important role to play in setting the global standards for appropriate listing criteria and due process, and for facilitating the emergence of general norms regarding fair and clear procedures for individuals who have been subjected to sanctions.

1. Three Types of UN Sanctions Regime and the Move from Comprehensive to Targeted Sanctions – and Back

At the UN level, a distinction can be made between three types of UN sanctions regime, depending on the kind of threat they aim to address – that is, (i) counter-terrorism sanctions, (ii) counter-proliferation sanctions, and (iii) conflict resolution or armed conflict sanctions. As Maluwa also notes, this third type of sanction was often imposed in African internal conflicts.[220]

The three types of regime vary in many respects, including political sensitivity, and the appetite to impose new sanctions in contexts of internal conflict particularly may be in decline. A quintessential difference among the three types concerns the origin of the primary threat. Counter-terrorism sanctions, such as the so-called Islamic State of Iraq and the Levant (ISIL, also known as Da'esh) and Al-Qaeda sanctions regime, aim to curb a threat that emanates

[218] See, e.g., Federal Law of the Russian Federation on Coercive Measures for Individuals Violating Fundamental Human Rights and Freedoms of the Citizens of the Russian Federation, Russian Federation Collection of Legislation, 2012, No. 53, Item 7597; Amendments to Federal Law on Measures against Individuals Complicit in Violation of Fundamental Human Rights and Freedoms of the Citizens of the Russian Federation, and to Article 27 of the Federal Law on the Procedure to Exit and Enter the Russian Federation of 4 March 2022.

[219] For the argument that the individualisation of sanctions, i.e., the targeting of individuals rather than states, requires a greater formalisation and proceduralisation, see Larissa van den Herik, 'The Individualization and Formalization of UN Sanctions', in Van den Herik (ed.), *UN Sanctions* (n. 211), 1–16.

[220] Maluwa, 'Between Centralism and Regionalism', Chapter 3 in this volume, section III.C (pp. 237–238).

from a non-state actor, and this regime has been territorially delinked over time, thus gaining a universal focus. In contrast, the counter-proliferation sanctions regimes are still very much state-focused because the threat that they confront stems principally from a state. Yet even the counter-proliferation regimes are individualised in their design and they list individuals closer or further removed from the state apparatus – albeit that a return to more comprehensive sanctions has taken place in recent years.[221]

As is well known, the comprehensive sanctions that were imposed twice during the Cold War and reused in situations regarding Iraq, Haiti, and the former Yugoslavia post-1990, were criticised for their disproportional humanitarian consequences for the civilian population. In reaction, the model of targeted sanctions emerged, focused on individual decision-makers and other principal actors, as well as their supporters.[222] Switzerland, Germany, and Sweden have been the main drivers of the evolution from comprehensive to targeted sanctions. They sponsored three sanctions reform processes, the Interlaken, Bonn-Berlin, and Stockholm processes, to discuss the design and implementation of targeted sanctions.[223]

2. The Procedural Deficit of Targeted Sanctions

The transition from comprehensive to targeted sanctions was thus justified by reference to legitimacy concerns over broad Security Council measures and the strong public backlash. However, the individualised targeted sanctions came with their own legitimacy deficit. The state-oriented institutional framework within which the Security Council operates was architecturally unprepared to accommodate the individual as a new target of sanctions. While Rule 37 of the Council's provisional Rules of Procedure makes sure that a state whose interests are affected by a matter discussed in the Council is invited to present its view and Article 50 of the UN Charter grants third states that are confronted with special economic problems arising from the sanctions a right to consult, targeted individuals initially had no access to the Security Council whatsoever. It took some time before it came to be understood that the shift towards targeting individuals also presupposes a broader refashioning of

[221] This recomprehensivation of UN sanctions can occur through a series of rounds, eventually culminating in unprecedented tough and comprehensive sanction packages, or because UN sanctions are complemented by further-reaching unilateral sanctions, e.g., by the United States and the European Union: see Sue Eckert, 'The Evolution and Effectiveness of UN Targeted Sanctions', in Van den Herik (ed.), *UN Sanctions* (n. 211), 52–71 (67).

[222] Van den Herik, 'Individualization and Formalization' (n. 219).

[223] As also discussed in Eckert, 'Evolution and Effectiveness' (n. 221).

procedures and accountability mechanisms – an understanding that may still be resisted in some quarters.

Famously, the issue became particularly pressing in the context of the 1267 sanctions regime. The regime was established in 1999 as a regular sanctions regime. Similar to other regimes, it imposed sanctions on elite decision-makers exercising de facto control in Afghanistan – namely, the Taliban. After the events of 11 September 2001 (i.e., 9/11), Resolution 1390 reinvigorated the 1267 regime and extended it to address the threat posed by Al-Qaeda. Effectively, Resolution 1390 severed the regime's geographical ties and turned it into a thematic sanctions regime with global reach.[224] This development was facilitated by the Security Council's generic determination of terrorism as a threat to international peace. In the immediate post-9/11 moment, the list was flooded with names in a quest to respond decisively.[225] This resulted in many flawed designations lacking adequate documentation to support the listing, which exposed the institutional shortcomings of the targeted sanctions machinery.

The excessive and flawed listings, in turn, generated worldwide litigation, with the *Kadi* case in the Court of Justice of the European Union (CJEU) at the apex.[226] The threat of non-compliance with UN sanctions by all EU states propelled institutional and procedural reform at Security Council level. The Watson reports of Thomas Biersteker and Sue Eckert, sponsored by Switzerland, Germany, and Sweden, made great contributions towards realising reform by putting forward concrete proposals.[227] Biersteker and Eckert highlighted the key elements of a proper listing process – namely, proper

[224] This move towards global sanctions was modelled on the US sanctions framework, as observed by Lisa Ginsborg, 'UN Sanctions and Counter-Terrorism Strategies: Moving towards Thematic Sanctions against Individuals?', in Van den Herik (ed.), *UN Sanctions* (n. 211), 73–104.

[225] For more on why the Bush Administration did this, see Thomas Biersteker and Sue Eckert, '(Mis)Measuring Success in the Financial "War" on Terrorism', in Peter Andreas and Kelly M. Greenhill (eds), *Sex, Drugs, and Body Counts: The Politics of Numbers in Global Crime and Punishment* (Ithaca: Cornell University Press, 2010), 247–65.

[226] As discussed, e.g., in Larissa van den Herik, 'Peripheral Hegemony in the Quest to Ensure Security Council Accountability for its Individualized UN Sanctions Regimes', *Journal of Conflict and Security Law* 19 (2014), 427–49.

[227] Thomas Biersteker and Sue Eckert, *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, 30 March 2006 (the Watson Report), available at www.files.ethz.ch/isn/27118/Strengthening_Targeted_Sanctions.pdf and as official UN Doc. A/60/887–S/2006/331; Thomas Biersteker and Sue Eckert, *Addressing Challenges to Targeted Sanctions: An Update of the 'Watson Report'*, October 2009, available at www.files.ethz.ch/isn/111057/2009_10_FB09_sanctionsreport.pdf; Thomas Biersteker and Sue Eckert, *Due Process and Targeted Sanctions: An Update of the 'Watson Report'*, December 2012. The present author drafted the legal chapters of these reports.

designation criteria, a requirement for a narrative summary or a statement of reasons for listing, evidentiary standards, notification, and periodic review. The key elements for the delisting process that they emphasised concerned specification of delisting criteria, access to independent and impartial review mechanisms, a hearing, access to counsel, impartial review of an evidentiary base on which designations are made and maintained, independent review, and a binding decision. In their 2006 report, Biersteker and Eckert offered a roster of institutional options to ensure review in accordance with those elements, ranging from increased roles for the monitoring team and the panel of experts to judicial review proper. While the first two options were considered insufficiently independent, the latter was too intrusive for the Security Council setting to be acceptable, particularly for the P5.

Drawing on Scandinavian experiences, one suggestion concerned an ombudsperson. The ombudsperson would be independent and directly accessible to listed individuals, yet not able to render binding decisions; for that reason, it would be more palatable for certain states. As it became clear that some reform was inevitable given the litigation, the outcry, and the many reports, the work of like-minded and committed states ultimately led to the creation of the Ombudsperson (first as the 'Ombudsman') in December 2009 through Resolution 1904, as well as to other procedural improvements concerning listing and periodic review.[228] While the other sanctions regimes have gradually 'copied and pasted' many of the procedural improvements, the Ombudsperson's mandate remains confined to the 1267 regime. In this regime only, listed individuals can turn to the Ombudsperson with a petition to be delisted. Upon receiving such a request, the Ombudsperson gathers information and enters into dialogue with the relevant actors, including the petitioner and relevant states, and presents a report of its observations and arguments concerning the delisting request.

Within a decade, the combined threat that the Taliban and Al-Qaeda posed in 2001 gradually morphed. The distinction between the two groups became more predominant than their mutual connections, which made their grouping into one sanctions regime less obvious. Furthermore, with a view to promoting the comprehensive peace process in Afghanistan, the Afghan government requested a more flexible and expedient approach to delisting requests for those Taliban members engaged in reconciliation efforts who had severed their ties with Al-Qaeda. In light of these developments, the Security

[228] The Group of Like-Minded States for Targeted Sanctions comprised Austria, Belgium, Chile, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden, and Switzerland.

Council split the 1267 regime into two separate regimes – one targeting the Taliban as a national movement (the sanctions regime established by Resolution 1988); another targeting Al-Qaeda as a global actor (the sanctions regime established pursuant to Resolution 1989) – with a reinforced role for the Ombudsperson (but only for the regime targeting Al-Qaeda). Within the Taliban regime, the Afghan government was given greater ownership, as requested, and Resolution 1988 explicitly stipulated that due regard had to be given to its delisting requests as part of the reconciliation process.

The separation of these two regimes emphasised the different nature and rationale that guide counter-terrorism and armed conflict sanctions regimes, respectively. While the view is tenable that differences between types of sanctions regime should have consequences for the manner in which delisting and review is organised in each type, the decision to fully exclude a role for the Ombudsperson for the Taliban sanctions is mostly indicative of the aversion of some Security Council members towards independent review as such.

3. Additional Flaws in the UN Sanctions Regimes

Recent developments have also brought another flaw to light. With the fall of the Afghan government in August 2021 and the Taliban takeover, questions arose about the extent of the UN sanctions regime – particularly what the implications were of the fact that key officials in the Taliban Administration had long been listed under UN and unilateral sanctions regimes. The argument has been made that individual sanctions against persons who become a minister do not extend to the ministry as such and hence that payments to the ministry can continue to be made.[229] In this respect, it is to be noted that, in contrast to the United States and in contrast to the Haqqani Network, the UN sanctions regime did not list the Taliban as an entity. Nonetheless, the confusion that arose on this matter specifically, and on the extent of the UN and other sanctions more generally, put payments on hold and has had immense chilling effect.[230] This has been exacerbated by the prolonged unwillingness of Security Council members to create a general carve-out for humanitarian action, as existed in the 751 sanctions regime for Somalia and as was finally created for the 1988 regime for Afghanistan with Resolution 2615 of

[229] Emanuela-Chiara Gillard, 'Learnings Must Become Practice as the Taliban Return', *Chatham House*, 7 September 2021, available at www.chathamhouse.org/2021/09/learnings-must-become-practice-taliban-return.

[230] Sue Eckert, 'Afghanistan's Future: Assessing the National Security, Humanitarian and Economic Implications of the Taliban Takeover', Testimony before the US Senate Committee on Banking, Housing and Urban Affairs, 5 October 2021.

December 2021, as well as for the Haiti sanctions regime in Resolution 2653 of October 2022. Thus, in these three cases, the matter was addressed on an ad hoc basis for one specific sanctions regime only.

Meanwhile, the Al-Qaeda sanctions regime had taken its own route. Another major turning point for this sanctions regime came with Resolution 2253 in 2015, which expanded the regime further to cover ISIL/Da'esh. The regime was renamed the '1267/1989/2253 ISIL (Da'esh) and Al-Qaeda' sanctions regime. The regime thus targeted quite different groups, including groups that actually opposed each other, and its targeting loop included those that were relatively loosely associated with them, such as the organisation of Al-Qaida in the Islamic Maghreb, as well as others operating in Mali and the Sahel region.[231] It has been observed that 'the current 1267 regime has evolved into the realm of the permanent exception'.[232] This permanence may be in tune with the ongoing terrorist threat as an enduring reality, with expanding scope and geographical reach. It is, however, more difficult to shoehorn it into Chapter VII's exceptional emergency status. For this reason, it has been suggested that a separate body (and not a sanctions committee) might be more appropriate to address this threat.[233] With the situation in the Middle East evolving, it remains to be seen what will ultimately happen to the 1267 regime. Given that the Ombudsperson is exclusively linked to the 1267/1989/2253 sanctions regime, the fact is that – as things stand now – once, if ever, this regime ceases to exist, the institution of the Ombudsperson will fade with it.

The Ombudsperson for the ISIL/Al-Qaeda sanctions regime is thus unique in many ways: unique in the sense of exclusive, because it reviews listings for only one regime, but also unique in the sense of unprecedented and extraordinary, because it is the first time that the Security Council openly and explicitly agreed to constrain itself and to be reviewed. Many international lawyers tend to underline the fact that, ultimately, the Ombudsperson cannot make binding decisions, but this emphasis underappreciates the unparalleled nature and potential of the Ombudsperson – in theory. Moreover, while scholars and litigators have challenged the sufficiency of the Ombudsperson's role as a non-judicial process, they have so far largely ignored the restrictions on its scope and particularly the fact that the review it does provide is connected to one sanctions regime only. Yet the weak institutional embedding of the Ombudsperson within the greater UN bureaucracy and its very limited mandate for a single sanctions regime are fundamentally problematic. The third person to fulfil the role of

[231] SC Res. 2295 of 29 June 2016, UN Doc. S/RES/2295(2016).
[232] Eckert, 'Evolution and Effectiveness' (n. 221).
[233] *Ibid.*

Ombudsperson, Daniël Kipfer Fasciati, gave notice of his resignation mid-2021 because of the lack of institutional independence of his office.[234] In addition to the institutional weaknesses, the political decision to limit the Ombudsperson mandate to the ISIL/Al-Qaeda regime only is plainly at odds with the underlying principle established through litigation that any listed individual should have a remedy and a meaningful opportunity to challenge their listing. Several attempts have been made by the like-minded states to expand the mandate of the Ombudsperson to other UN sanctions regimes, but so far to no avail.[235]

4. Improving the UN Sanctions Architecture: Attempts and Accomplishments

In this context of a stalemate, new avenues are being explored. In 2018, the UN University Centre for Policy Research published a report commissioned by the Swiss Federal Department of Foreign Affairs' Directorate of International Law. This report was entitled *Fairly Clear Risks: Protecting UN Sanctions' Legitimacy and Effectiveness through Fair and Clear Procedures*.[236] One of its proposals was a different type of review mechanism, which it called a context-sensitive non-judicial review arrangement. The main idea was that different types of UN sanctions regime – that is, the counter-terrorism regimes, the armed conflict regimes, and the non-proliferation regimes – operated in different political and informational contexts, which also warranted a different review setting. The idea pursued a suggestion made during the Australia-led assessment of the High-Level Review – namely, 'to focus on the expansion of the Ombudsperson's *functions* to non-counter-terrorism sanctions regimes, rather than seek immediate agreement on an expanded Ombudsperson mandate'.[237]

[234] UN Doc. S/2021/676, 23 July 2021. See also Colum Lynch, 'How a Dream Job Became a Bureaucratic Nightmare for a Top U.N. Lawyer', *Foreign Policy*, 27 July 2021, available at https://foreignpolicy.com/2021/07/27/un-terrorism-lawyer-resigning-ombudsperson-bureaucracy/.

[235] See, e.g., Statement delivered by Ambassador Olof Skoog of Sweden on behalf of the Group of Like-Minded States on Targeted Sanctions at the UN Security Council Open Debate on Working Methods of the Security Council, 6 June 2019. See also High-Level Review of United Nations Sanctions, UN Doc. A/69/941–S/2015/432, 12 June 2015, 32, recommendation no. 24.

[236] James Cockayne, Rebecca Brubaker, and Nadesha Jayakody, *Fairly Clear Risks: Protecting UN Sanctions' Legitimacy and Effectiveness Through Fair and Clear Procedures* (New York: United Nations University, 2018).

[237] Identical letters dated 21 June 2017 from the Permanent Representative of Australia to the United Nations addressed to the Secretary-General and the President of the Security

The publication of the report illustrates that the like-minded states remain committed to the idea of integrating a rule-of-law dimension into all UN sanctions regimes and to keeping the matter on the agenda. Indeed, in June 2021, the like-minded states (namely, Austria, Belgium, Chile, Costa Rica, Denmark, Finland, Germany, Ireland, Liechtenstein, Netherlands, Norway, Sweden, and Switzerland) submitted a letter to the Security Council promoting the idea of a context-sensitive review mechanism for the other sanctions regimes.[238] Ultimately, their efforts led to renewed appreciation of the Ombudsperson, so as not to overcomplicate the system. Notably, Resolution 2653 establishing a Haiti sanctions regime explicitly stated, in its 20th preambular paragraph, that it 'Recogniz[ed] the need to ensure that fair and clear procedures exist for delisting individuals, groups, undertakings, and entities designated pursuant to this resolution and expressing its intent to consider authorizing the Ombudsperson to receive such delisting requests'. The persistent efforts of states such as Switzerland seem to have paid off with this noteworthy openness to the idea of a broader role for the Ombudsperson.

The *Fairly Clear Risks* report also made some other suggestions. One of them that is, at the very least, of equal importance concerned strengthening groups or panels of experts.[239] As already noted, panels of experts are typically established for each UN sanctions regime to gather information and to monitor implementation of the sanctions.[240] They have an independent fact-finding mandate, and thus they play an important role in establishing the facts that are pertinent for the design and the evolution of the sanctions regime at stake. As such, these panels have the potential to contribute considerably to the institutional strength of the UN sanctions machinery and, as suggested in the previous section, they could also be considered a blueprint for a more fact-based environment for use-of-force discourse. Yet the legal and institutional situation of experts has always been precarious, especially when compared with other UN officials and consultants. Despite their perilous work terrain, they do not enjoy the privileges of medical evacuation insurance or health care

Council, UN Doc. A/71/943-S/2017/534, 23 June 2017, Annex, 11, Recommendation 5, as cited in Cockayne et al., *Fairly Clear Risks* (n. 236), 30 (emphasis added).

238 UN Doc. S/2021/567, 14 June 2021.

239 Cockayne et al., *Fairly Clear Risks* (n. 236), 28.

240 The first panel of experts was created as part of the Angola sanctions regime under SC Res. 1237 of 7 May 1999, UN Doc. S/RES/1237(1999), pursuant to a recommendation by Canadian Ambassador to the United Nations Robert Fowler. See, more generally on innovations in UN sanctions architecture, Joanna Weschler, 'The Evolution of Security Council Innovations in Sanctions', *International Journal: Canada's Journal of Global Policy Analysis* 65 (2010), 31–43.

nor do they carry an official UN passport.[241] Moreover, their resources may be curtailed by the UN budget committees.[242]

Panels of experts affiliated with different sanctions regimes each operate on the basis of their own differing procedural guidelines. Some panels of experts have been exceptionally bold in publicly naming individuals, even including photographs in their reports. Such steps emphasise the need for fair procedures as part of investigation and listing, not only for delisting. Indeed, in the context of commissions of inquiry, there have been calls for caution regarding the practice of 'naming names' as a short-track accountability measure.[243] Reforms regarding listing processes currently occur on an ad hoc basis within regimes, depending on which state chairs the sanctions committee.

The question of procedural reform regarding delisting, the strengthening of panels of experts, and the need to include some type of independent review mechanism for sanctions regimes other than the 1267/1989/2253 regime does not, at present, enjoy the spotlight. Even if there is litigation at the EU courts rather similar to the *Kadi* case, as the *Fairly Clear Risks* report describes (particularly the *Aisha Qadaffi* case[244]), the issue is not squarely on the radar and states do not feel pressed to engage in further reform. The pace and level of reforms in this respect therefore largely depend on the stamina of the like-minded states and other actors, and their ability to create and expand alliances.

Reform is possible, though. An initiative very successfully led by Ireland – jointly with the United States, and advocated by special rapporteurs and humanitarian organisations – resulted in Resolution 2664 of 9 December 2022. The Resolution created a standing humanitarian exception applicable to all existing UN financial sanctions and those yet to be established. Paragraph 1 of Resolution 2664 states that:

> [T]he provision, processing or payment of funds, other financial assets, or economic resources, or the provision of goods and services necessary to

[241] Colum Lynch, '"The Worst Bloody Job in the World"', *Foreign Policy*, 20 October 2021, available at https://foreignpolicy.com/2021/10/20/sanctions-enforcers-united-nations-panel-experts/.

[242] Colum Lynch, 'Sunset for UN Sanctions?', *Foreign Policy*, 14 October 2021, available at https://foreignpolicy.com/2021/10/14/sanctions-united-nations-expert-panels-russia-china-africa-western-countries/.

[243] Carsten Stahn and Catherine Harwood, 'What's the Point of "Naming Names" in International Inquiry? Counseling Caution in the Turn towards Individual Responsibility', *EJIL:Talk!*, 11 November 2016, available at www.ejiltalk.org/whats-the-point-of-naming-names-in-international-inquiry-counseling-caution-in-the-turn-towards-individual-responsibility/.

[244] CJEU, *Aisha Muammer Mohamed El-Qaddafi v. Council of the European Union*, Case T-322/19, 21 April 2021.

> ensure the timely delivery of humanitarian assistance or to support other activities that support basic human needs … are permitted and are not a violation of the asset freezes.

This breakthrough is all the more remarkable given the Security Council's overall malfunction after the Ukraine aggression. The Resolution was co-sponsored by 53 states from different regions and adopted with P5 consensus and 14 votes in favour. India was the only state to abstain. It recorded its reservations referring to the risk of terrorist groups taking advantage of the humanitarian carve-out.[245]

Thus like-minded states mostly from Europe are taking the lead on reform issues for UN sanctions regimes. The fear that their initiatives could be hampered by the international community's divide over the sanctions tool as such has not proven well founded. This divide particularly relates to unilateral sanctions: a policy tool mostly used by the West.[246] Perhaps the turn to unilateral sanctions in response to the Russian aggression has prompted states to take UN sanctions reform more seriously. Indeed, UN sanctions that are governed by fair and clear procedures could also – in theory, at least – undercut the turn to unilateralism in this domain; if not, they could serve as a model. Clearly, from a perspective of institutional strength, a centralised sanctions machinery premised on independent fact-finding capacity is to be preferred over unilateral measures.

VI. SECURITY COUNCIL ACTION ON TERRORISM AND EXTREMISM: STRETCHING PREROGATIVES BEYOND BREAKING POINT?

The Security Council's sanctions against ISIL and Al-Qaeda can be regarded as part of the broader UN sanctions machinery that developed post Cold War. Yet they are also an indelible component of the counter-terrorism architecture that the Security Council constructed in the immediate aftermath of 9/11. Indeed, while the UN General Assembly had, up until that moment, been the motor of the UN's counter-terrorism efforts through its resolutions and promotion of treaties, 9/11 was a game-changer in many ways.[247] Specifically regarding the UN's counter-terrorism work, it was the moment when the

[245] UN Doc. S/PV.9214, 9 December 2022, 8.

[246] See, e.g., Alexandra Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?', *Chinese Journal of International Law* 16 (2017), 175–214.

[247] Sebastian von Einsiedel, 'Assessing the UN's Efforts to Counter Terrorism', Occasional Paper 8, United Nations University Centre for Policy Research, October 2016, available at https://collections.unu.edu/eserv/UNU:6053/AssessingtheUNsEffortstoCounterterrorism.pdf.

UN Security Council took the driver's seat. In response to 9/11, the UN Security Council accepted the idea of a counter-terrorist right to self-defence[248] and it universalised the existing 1267 sanctions regime, disconnecting it from a particular conflict. While these were all bold moves, the most groundbreaking step was undoubtedly the adoption of Resolution 1373. With this Resolution, the UN Security Council started legislating, and it imposed generic and temporally unlimited counter-terrorist obligations on states.[249] It also developed an organic institutional structure to monitor the implementation of those obligations, the Counter-Terrorism Committee (CTC), which was later joined by the Counter-Terrorism Committee Executive Directorate (CTED).[250] Over time, the formal structures were complemented with informal platforms and taskforces – most notably, the Financial Action Task Force, which entertained an opaque and unregulated relationship with the UN Security Council.[251]

Hinojosa-Martínez distinguishes between three sets of obligations in Resolution 1373.[252] First, and most innovatively, the Resolution contained obligations that were transposed from the UN Convention for the Suppression of the Financing of Terrorism, which had been adopted by the General Assembly without a vote but had not yet entered into force. These obligations concerned asset freezing and the criminalisation of funding terrorism.[253] Secondly, there was an amalgam of other binding obligations concerning denial of safe haven and prevention of movement, but also obliging states to criminalise terrorism as a *serious* crime with punishment duly reflecting its seriousness.[254] Thirdly, Resolution 1373 stipulated a set of measures that states were called upon to perform, such as ratifying treaties and intensifying cooperation, but also aiming to prevent them offering refugee status to terrorism suspects.[255] In its

[248] See, for a discussion, Mary Ellen O'Connell, Christian J. 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).

[249] As welcomed by Paul Szasz, 'The Security Council Starts Legislating', *American Journal of International Law* 96 (2002), 901–05. For an appraisal of the Council's legislative activity and its limits, see also Stefan Talmon, 'The Security Council as World Legislature', *American Journal of International Law* 99 (2005), 175–93.

[250] Luis M. Hinojosa-Martínez, 'Security Council Resolution 1373: The Cumbersome Implementation of Legislative Acts', in Ben Saul (ed.), *Research Handbook on International Law and Terrorism* (Cheltenham: Edward Elgar, 2020), 564–87.

[251] Alejandro Rodiles, 'The Design of UN Sanctions Through the Interplay with Informal Arrangements', in Van den Herik (ed.), *UN Sanctions* (n. 211), 177–93.

[252] Hinojosa-Martínez, 'Security Council Resolution 1373' (n. 250), 564.

[253] SC Res. 1373 of 28 September 2001, UN Doc. S/RES/1373(2001), para. 1.

[254] *Ibid.*, para. 2.

[255] *Ibid.*, para. 3.

supervision, the CTC did not clearly distinguish between these three types and hence it blurred the legal distinctions among them in practice.[256]

Resolution 1373 was unique and unprecedented at its adoption, but it did not remain so. It was followed by a string of resolutions imposing on states ever bolder obligations to address terrorism and associated activity. Unlike Resolution 1373, these resolutions did not originate from a consensually adopted General Assembly document. Most notably, in 2005, Resolution 1628 called upon states to prohibit incitement of terrorism; in 2014, Resolution 2178 imposed obligations on states to respond to the threat of foreign fighters – obligations further elaborated on in 2017, in Resolution 2396, including an obligation to create global watch lists and databases of suspected terrorists. In 2019, Resolution 2462 built on Resolution 1373 by requiring states to enact domestic laws to counter terrorism financing.

Objections to the Security Council's exercise of quasi-legislative powers as ultra vires that were raised upon the adoption of Resolution 1373[257] have been muted by this sustained subsequent practice.[258] Notably, Resolution 2178 was adopted at summit meeting level and co-sponsored by 103 states. Yet widespread criticism against the substance of the resolutions, such as that expressed by special rapporteurs, has remained steadfast ever since Resolution 1373 was adopted.[259] The definitional deficit and the expansive approach to criminal law are considered ill at ease with the core principle of legality.[260] By obliging – on the basis of its Chapter VII powers – states to adopt legislation criminalising

[256] Hinojosa-Martínez, 'Security Council Resolution 1373' (n. 250), 564–65.

[257] See, e.g., Happold, who argued that, based on the structure of the UN Charter and previous practice, the Security Council could respond only to a particular situation or conduct: Matthew Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations', *Leiden Journal of International Law* 16 (2003), 593–610. See also Derek W. Bowett, 'Judicial and Political Functions of the Security Council and the International Court of Justice', in Hazel Fox (ed.), *The Changing Constitution of the United Nations* (London: British Institute for International and Comparative Law, 1997), 79–80; Björn Elberling, 'The Ultra Vires Character of Legislative Action by the Security Council', *International Organizations Law Review* 2 (2005), 337–60.

[258] Luis M. Hinojosa-Martínez, 'The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political and Practical Limits', *International and Comparative Law Quarterly* 47 (2008), 333–59; Bart S. Duijzentkunst, 'Interpretation of Legislative Security Council Resolutions', *Utrecht Law Review* 4 (2008), 188–209.

[259] See, e.g., Helen Duffy and Larissa van den Herik, 'Terrorism and the Security Council', in Robin Geiß and Nils Melzer (eds), *The Oxford Handbook of the International Law of Global Security* (Oxford: Oxford University Press, 2021), 193–212. See also Arianna Vedaschi and Kim Lane Scheppele (eds), *9/11 and the Rise of Global Anti-Terrorism Law: How the UN Security Council Rules the World* (Cambridge: Cambridge University Press, 2021).

[260] Martin Scheinin, 'A Proposal for a Kantian Definition of Terrorism: Leading the World Requires Cosmopolitan Ethos', in Vedaschi and Scheppele (eds), *9/11* (n. 259), 15–33; Lisa Ginsborg, 'Moving toward the Criminalization of "Pre-crime": The UN Security Council's

all types of behaviour, some of which might be quite tenuously related to a terrorist act (which, as already noted, has been left undefined), the Security Council allows – arguably even encourages – states to bypass regular parliamentarian discussion and other domestic checks and balances that aim to put theories of criminal law and its limits into practice. The question of to what extent the criminalisation of pre-crime behaviour creates tension with fundamental principles of criminal law is then left undebated. Under the guise of a Security Council mandate, states have engaged in intense normative activity resulting in the labelling of political dissent, artistic or journalistic expression, humanitarian assistance, and environmental activity, among other actions, as terrorist in nature; the Security Council's resolutions have also generated far-reaching administrative measures, such as stripping of citizenship.[261] In his chapter in this volume, Maluwa adds that the participation of Russia and China in UN efforts to fight terrorism affords them 'a cover of legitimacy for their own campaigns against alleged terrorist groups at home (for China) or in the so-called near abroad (for Russia)'.[262]

In a 2019 report, the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism linked the shrinking of space for civil society directly with the proliferation of security measures prompted by the Security Council, and she offered numerous examples of how the Security Council's counter-terrorism resolutions have provided states with extraordinary latitude and have effectively been misused to suppress dissent.[263] The Special Rapporteur expressed her concern about using Security Council resolutions as a 'legal super highway'.[264] Operating as 'supranational legal dictates', these legislative resolutions pay

Recent Legislative Action on Counterterrorism', in Vedaschi and Scheppele (eds), *9/11* (n. 259), 133–54.

261 Christophe Paulussen, 'Countering Terrorism Through the Stripping of Citizenship: Ineffective and Counterproductive', 17 October 2018, available at www.icct.nl/publication/countering-terrorism-through-stripping-citizenship-ineffective-and-counterproductive. See also Dana Burchardt and Rishi Gulati, 'International Counter-terrorism Regulation and Citizenship-Stripping Laws: Reinforcing Legal Exceptionalism', *Journal of Conflict and Security Law* 23 (2018), 203–28.

262 Maluwa, 'Between Centralism and Regionalism', Chapter 3 in this volume, section III.C (p. 236).

263 Impact of Measures to Address Terrorism and Violent Extremism on Civic Space and the Rights of Civil Society Actors and Human Rights Defenders: Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/HRC/40/52, 1 March 2019.

264 Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism on the human rights challenge of states of emergency in the context of countering terrorism, UN Doc. A/HRC/37/52, 1 March 2018, para. 63.

insufficient attention to rule-of-law requirements within domestic systems.[265] The Special Rapporteur also submitted that the quasi-legislative character of the resolution presupposes broad consultation rather than fast-track adoption through closed procedures. She has recommended an a priori human rights review or some other internal procedural mechanism to ensure that core concerns regarding legitimacy, legality, and proportionality are addressed.[266]

Despite these grave concerns that the Security Council intrudes on a healthy state–society relationship and participatory decision-making at the domestic level,[267] the passing of 20 years since landmark Resolution 1373 was marked by a presidential statement reaffirming its significance.[268] In the ensuing videoconference meeting, certain states shared some of their distress over Resolution 1373, while others sturdily rebutted any alarm. The great majority of states underscored the importance of abiding by human rights law in the fight against terrorism and they warned that counter-terrorism measures should not be misused to silence or to prevent legitimate humanitarian action. The United Kingdom explicitly mentioned the detention of 1 million people in Xinjiang. In contrast, India and China insisted that no distinction should be made between good and bad terrorists. Russia boldly stated that 'the use of human rights as a pretext to refuse cooperation with foreign partners is not acceptable' and that 'the Security Council pays too much attention to the human rights aspects of counter-terrorism, to the detriment of ensuring security'.[269]

Within the panoply of viewpoints and approaches over time, the term 'violent extremism' emerged as some kind of twin notion of terrorism. The concept of 'Countering Violent Extremism' was initially developed under the administration of US President Barack Obama as a counterweight to the earlier militarised approach and it was included in Resolution 2178, mentioned earlier in this discussion. The Resolution was adopted by the Security Council during its US presidency at a session chaired by President Obama

[265] *Ibid.*, para. 20.

[266] Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/73/45453, 3 September 2018, para. 50(e).

[267] On the crucial relevance of a proper balance between state and society, see Daron Acemoglu and James A. Robinson, *The Narrow Corridor: States, Societies, and the Fate of Liberty* (New York: Penguin, 2019).

[268] UN Doc. S/PRST/2021/1, 12 January 2021.

[269] '20 Years after Adopting Landmark Anti-Terrorism Resolution, Security Council Resolves to Strengthen International Response against Heinous Acts, in Presidential Statement', UN Doc. SC/14408, 12 January 2021.

himself.[270] Secretary-General Ban Ki-moon lauded the turn towards more emphasis on prevention and adopted the Plan of Action for Preventing Violent Extremism.[271] This plan dovetailed with the United Nations' long-standing emphasis on prevention, yet it met with intense resistance from many sides. Overall, the plan was seen to risk the securitisation of development and the politicisation of the humanitarian space.[272] The plan's most prominent failure was – again – the absence of a definition of 'violent extremism'.

In 2020, the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism presented a report specifically dealing with violent extremism. She underlined that the target population for measures concerning the prevention of extremism was much broader than that of counter-terrorism measures. The Special Rapporteur noted how the discourse of countering (violent) extremism had increasingly become part and parcel of the post-9/11 globalised security regime. She expressed particular concern over the opaque nature of the notion of violent extremism and indicated that it was highly contested. The Special Rapporteur underlined that the absence of a definition became even more problematic if the term were used without the adjective of 'violent' in policy and legal terrains with purposes other than prevention. Referring, for example, to the use of the term in the Shanghai Convention – a cooperation convention of 2001, updated in 2017[273] – the Special Rapporteur emphasised that, if operative as a criminal legal category, the term 'extremism' is incompatible with the principle of legal certainty, which requires that criminal behaviour be proscribed clearly and foreseeably.

The outsized role of a non-democratic and non-representative Security Council on counter-terrorism and its engagement in detailed standard-setting has thus been subject of intense criticism, and it has also, in some sense, been counter-productive, deepening grievances rather than truly addressing them.[274] The Security Council's activity on counter-terrorism

[270] David H. Ucko, 'Preventing Violent Extremism Through the United Nations: The Rise and Fall of a Good Idea', *International Affairs* 95 (2018), 251–70.

[271] UN Doc. A/70/764, 24 December 2015.

[272] Ucko, 'Preventing Violent Extremism' (n. 270), 251–70. See also Naz Modirzadeh, 'If it's 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.

[273] For an appraisal of this convention from a human rights perspective, see OSCE, Note on the Shanghai Convention on Combating Terrorism, Separatism and Extremism, Warsaw, 21 September 2020.

[274] Recommendations to 'right-size' the Security Council's approach were offered by the Securing the Future Initiative: Eric Rosand, Alistair Millar, and Naureen Chowdhury Fink, *Counterterrorism and the United Nations Security Council since 9/11: Moving beyond*

could be regarded as the product of a strong and united institution, but it is actually deeply problematic from a human rights perspective. It is in tension with the very purposes and principles of the UN Charter that are meant to guide the Council. The sweeping obligations on states to criminalise all kinds of non-violent conduct, such as travelling and supportive behaviour, has encouraged states to assume repressive modes and it has given a pretext to already repressive states to further suppress dissent. From an institutionalist perspective, the Security Council might well have overstepped its mandate, and the way forward should therefore be a gradual turn away from the use of comprehensive and detailed Chapter VII resolutions as quasi-legislation for counter-terrorism purposes. This is indeed quite the opposite view from Cai's suggestions in his chapter in this volume for more Chinese norm entrepreneurship on counter-extremism.[275]

VII. FUTURE TRAJECTORIES AND UNCONVENTIONAL GLOBAL THREATS

In addition to terrorism, the Security Council has labelled other global phenomena as threats to peace. An early example of a non-traditional threat on the Security Council's agenda was HIV/AIDS. In 2000, in the unanimously adopted Resolution 1308, the Security Council stressed 'that the HIV/AIDS pandemic, if unchecked, may pose a risk to stability and security'.[276] It did not label HIV/AIDS as a threat to peace as such, but it did make some recommendations bearing in mind its primary responsibility. It particularly recognised the potential damaging impact of HIV/AIDS on peacekeeping personnel, thus linking back to concerns that came within its more traditional purview. The UN Security Council came back to the issue in 2022, in Resolution 1983.[277] In 2014, in Resolution 2177, and again in 2018, in Resolution 2439, the Council considered Ebola.[278] Resolution 2439 concerned the armed conflict in the DRC and was thus intrinsically linked to a more traditional military threat, but Resolution 2177 zeroed in on the outbreak of Ebola in West Africa as such, the Security Council determining

the 2001 Paradigm – Findings and Recommendations, September 2022, available at https://sfi-ct.org/wp-content/uploads/2022/09/SFI-Report_Summary.pdf.

275 Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, section V.D.4. Such a leading role by China might, in fact, be quite alarming from a rule-of-law perspective and given the fierce criticisms voiced by, among others, 51 UN Special Rapporteurs against the (then still draft) Hong Kong National Security Law of 26 May 2020.

276 SC Res. 1308 of 17 July 2000, UN Doc. S/RES/1308(2000).

277 SC Res. 2177 of 18 September 2014, UN Doc. S/RES/2177(2014).

278 SC Res. 2439 of 30 October 2018, UN Doc. S/RES/2439(2018).

that the 'unprecedented extent of the Ebola outbreak in Africa constituted a threat to international peace and security'.[279]

It was against this background that Resolution 2532 was adopted in 2020 on COVID-19.[280] While this Resolution was also adopted unanimously, it was considerably more hard-won, with US–China contestations over the origins and name of the virus seeping into the negotiations, as well as the by-then-politicised question of a reference to the role of the World Health Organization (WHO).[281] Because it concerned a pandemic, the Resolution was global in scope and not regionally limited, as had been Resolution 2177. In other respects, the COVID 19-Resolution was more modest in its approach in comparison with the Ebola resolutions. Resolution 2532 considered that 'the unprecedented extent of the COVID-19 pandemic is likely to endanger the maintenance of international peace and security' – a more careful framing than in Resolution 2177. It focused on one core demand concerning a cessation of hostilities. A caveat was included for military operations against ISIL, Al-Qaeda, and Al Nusra, and affiliated individuals and entities, as well as other terrorist groups designated by the Security Council, thus implicitly construing a hierarchy of threats.

Western states have been important drivers of the inclusion of unconventional global threats on the Security Council's agenda. Besides global health, the Security Council has also considered the climate crisis. In contrast to the resolutions concerning transnational health crises, though, the Security Council's engagement with the climate crisis has been much more contested. In 2007, the Security Council held its first ministerial-level open debate – organised by the United Kingdom – on the relationship between energy, security, and climate. A great number of states expressed discomfort with the Security Council's mission creep, fearing that it would undermine other bodies of the UN system. Speaking on behalf of the Group of 77 (G77) and China, Pakistan stated:

> The issues of energy and climate change are vital for sustainable development. Responsibilities in the field of sustainable development belong to the General Assembly, the Economic and Social Council, their relevant subsidiary bodies, including the Commission on Sustainable Development, and

[279] SC Res. 2177 of 18 September 2014, UN Doc. S/RES/2177(2014), cons. 5.

[280] SC Res. 2352 of 1 July 2020, UN Doc. S/RES/2352(2020). See also Erin Pobjie, 'COVID-19 and the Scope of the UN Security Council's Mandate to Address Non-Traditional Threats to International Peace and Security', *Heidelberg Journal of International Law* 1 (2021), 117–46.

[281] Security Council Report, 'Security Council Resolution on COVID-19', 30 June 2020, available at www.securitycouncilreport.org/whatsinblue/2020/06/security-council-resolution-on-covid-19.php.

> the United Nations Environment Programme. Climate change is the subject of a binding multilateral agreement – the United Nations Framework Convention on Climate Change – and a supportive protocol – the Kyoto Protocol. No role was envisaged for the Security Council.[282]

Speaking on behalf of the African Group, Sudan added:

> The Group also stresses that the increasing and alarming encroachment of the Security Council on the mandates of other United Nations bodies – which the Security Council tries to justify by linking all issues to the question of security – compromises the principles and purposes of the United Nations Charter and is also undermining the relevant bodies.[283]

While part of the G77, the small Pacific islands of Fiji, Nauru, Micronesia, Marshall Islands, Palau, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu, and Papua New Guinea took an autonomous position linking the climate crisis to the R2P. On their behalf, Papua New Guinea stated:

> The Security Council, charged with protecting human rights and the integrity and security of States, is the paramount international forum available to us. We do not expect the Security Council to get involved in the details of discussions in the Framework Convention on Climate Change, but we do expect the Security Council to keep the matter under continuous review so as to ensure that all countries contribute to solving the climate change problem and that their efforts are commensurate with their resources and capacities. We also expect that the Security Council will review particularly sensitive issues, such as implications to sovereignty and to international legal rights from the loss of land, resources and people.[284]

A 2011 debate on climate change gave rise to similar oppositions.[285] Brazil stated: 'Security tools are appropriate to deal with concrete threats to international peace and security, but they are inadequate to address complex and multidimensional issues such as climate change.'[286]

In reaction to these concerns, states wishing to discuss the climate crisis at Security Council level have changed strategy and Arria formula meetings have assumed a greater role. In addition, open debates on climate security risks have continued to take place in the Security Council. The issue of Security Council mandate and overlap or interference with the work of other bodies was still

[282] UN Doc. S/PV.5663, 17 April 2007, 24.
[283] *Ibid.*, 12.
[284] *Ibid.*, 29.
[285] UN Doc. S/PV. 6587, 20 July 2011.
[286] *Ibid.*, 8.

discussed, and contested most vigorously by Russia, but more states acceded that the Security Council had also a role to play.[287] During the High-Level Open Debate on Climate and Security, chaired by Ireland on 23 September 2021,[288] and the Arria Formula Meeting on Sea-Level Rise, organised by Viet Nam, Ireland, Saint Vincent and the Grenadines, and Tunisia. and co-sponsored by several non-Council members on 18 October 2021, only Russia, China. and India continued to hold the view that the Security Council should not engage with this issue on a thematic level.[289]

The 2019 debate notably introduced the notion of 'threat multiplier' to describe the impacts of the climate crisis on global security, in the form of extreme weather events, warming temperatures, and rising sea levels.[290] Resolution 2349 of 2017, on the Lake Chad basin, also illustrates that the Security Council is not entirely agnostic to the theme and that there is a willingness to consider the security implications of the climate crisis in concrete situations.[291] In that Resolution, the Security Council explicitly recognised 'the adverse effects of climate change and ecological changes among other factors on the stability of the Region, including through water scarcity, drought, desertification, land degradation, and food insecurity'.[292]

Language on the climate crisis is now increasingly included in Security Council outcomes and the number of signature events on this topic has risen remarkably since mid-2020.[293] This development may be further encouraged by the United States' change of stance on this matter. If so, particular attention should be paid to the views and input of African states on this issue, given that they suffer its consequences keenly despite not having contributed to it most, as Maluwa also suggests in his chapter in this volume.[294]

[287] UN Doc. S/PV.8307, 11 July 2018.
[288] UN Doc. S/PV.8864, 23 September 2021.
[289] Russia vetoed Draft SC Res. S/2021/990 of 13 December 2023 on climate change and security for this reason. India also voted against, while China abstained.
[290] UN Doc. S/PV.8451, 25 January 2019. See also Valentine Bourghelle, 'Climate Change in the Security Council: On the Road to Qualifying Climate Change as "Threat Multiplier"', *Völkerrechtsblog*, 9 December 2019, available at https://voelkerrechtsblog.org/climate-change-in-the-security-council/.
[291] SC Res. 2349 of 31 March 2017, UN Doc. S/RES/2349(2017). See also Somalia: SC Res. 2408 of 27 March 2018, UN Doc. S/RES/2408(2018); West Africa and the Sahel: UN Doc. S/PRST/2018/3 of 30 January 2018; Mali: SC Res. 2423 of 28 June 2018, UN Doc. S/RES/2423(2018); and Darfur: SC Res. 2429 of 13 July 2018, UN Doc. S/RES/2429(2018).
[292] SC Res. 2349 of 31 March 2017, UN Doc. S/RES/2349(2017), para. 26.
[293] Security Council Report, 'Resolution on COVID-19' (n. 281).
[294] Maluwa, 'Between Centralism and Regionalism', Chapter 3 in this volume, section IV.D (pp. 268–274).

Despite this greater openness to considering the climate crisis in the setting of the Security Council, it is still important to recognise that noting linkages between environmental or health factors and insecurity in concrete situations that have been characterised as a threat to peace on other grounds is one thing; making generic determinations that the climate crisis or pandemics in themselves constitute a threat to peace to be addressed by the Security Council is quite another. Generic determinations potentially open the door to equally generic and thus far-reaching measures, such as measures aimed at ensuring equitable global access to vaccines and medical technology.[295] While the COVID-19 pandemic has underlined the need for such measures, the discussion on legislative resolutions has also indicated that the Security Council is not necessarily able to produce comprehensive and generic resolutions that are balanced, adequate, and in the interests of all states, as well as all the societies they represent.[296]

Arguments against the securitisation of health and climate crises have also been advanced, and they are not without merit. In response to the Ebola resolutions, WHO legal counsel Gian Luca Burci indicated that Security Council engagement on global health is premised on a direct link between infectious diseases and political instability, which has in fact been disproved by scholars on the basis of historical examples. Panicked or coercive government reactions to diseases may present a danger in themselves, but framing a disease as a national security issue may also stimulate such reactions rather than create a conducive political environment in which to address the disease.[297] While Burci appreciates the increase in political profile, political commitment, and financial resources that Security Council attention may entail, he also cautions that the risks of securitising public health should not be ignored.[298]

One new 21st-century threat that the Security Council has addressed only marginally is cyber-security. At the 2017 annual workshop for newly elected members, the UN Secretary-General urged the Security Council to

[295] Erin Pobjie, 'COVID-19 as a Threat to International Peace and Security: The Role of the UN Security Council in Addressing the Pandemic', *EJIL:Talk!*, 27 July 2020, available at www.ejiltalk.org/covid-19-as-a-threat-to-international-peace-and-security-the-role-of-the-un-security-council-in-addressing-the-pandemic/.

[296] See also Jordan Street, 'Bringing Climate and Terrorism Together at the UN Security Council: Proceed with Caution', *Just Security*, 6 December 2021, available at www.justsecurity.org/79443/bringing-climate-and-terrorism-together-at-the-un-security-council-proceed-with-caution/. On the risks of the climate security narrative, see particularly Eliana Cusato, 'Of Violence and (In)Visibility: The Securitisation of Climate Change in International Law', *London Review of International Law* 10 (2022), 203–42.

[297] Gian Luca Burci, 'Ebola, the Security Council and the Securitization of Public Health', *Questions of International Law* 10 (2014), 27–39.

[298] *Ibid.*

conceptualise its role in dealing with the issue.[299] The matter has been discussed in five Arria formula meetings, with Estonia and Ukraine being particularly active players.[300] Compared to global health and climate crises, cyber-security has more in common with traditional threats. Despite these clear linkages to its primary responsibility, however, the Security Council has largely remained inactive. This is easily explained by the fact that the P5 are among the most prominent cyber-actors and hence their veto power generally prevents the Security Council's consideration of the matter unless unconventional approaches are taken. This happened, for example, when Georgia notified the Security Council of a large-scale cyber-attack on 28 October 2019 against the websites, servers, and other operating systems of the Administration of the President of Georgia, courts, various municipal assemblies, state bodies, and the private sector.[301] In May 2020, when Estonia chaired the Security Council as an elected member, it – together with the United States and the United Kingdom – raised this matter under the standing agenda item 'Any Other Business',[302] and it attributed the attacks to Russia's military intelligence service, the GRU. The three states held that 'these cyber-attacks are part of Russia's long-running campaign of hostile and destabilizing activity against Georgia and are part of a wider pattern of malign activity'.[303] This action formed part of a coordination approach to publicly attribute the attack to and accuse Russia.[304]

Such surprise moves aside, it is far from likely that the Security Council will develop a leading role in this domain, for the obvious reasons just mentioned.

[299] 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 ('"Hitting the Ground Running": Fifteenth Annual Workshop for Newly Elected Members of the Security Council, 2 and 3 November 2017, Greentree Foundation, New York').

[300] The five Arria formula meetings were organised, respectively, by: Senegal and Spain on cybersecurity and international peace and security, and specifically on the protection of critical infrastructure against terrorist attacks by Ukraine, both in 2016; Ukraine on hybrid wars as a threat to international peace and security also organised in 2017; and Estonia on cyber-stability, conflict prevention and capacity building, and Indonesia, in cooperation with Belgium, Estonia, Viet Nam, and the International Committee of the Red Cross (ICRC), on cyber-attacks against critical infrastructure, both in 2018.

[301] Letter dated 21 February 2020 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. A/74/714–S/2020/135, 24 February 2020.

[302] Security Council Report, 'In Hindsight: Making Effective Use of "Any Other Business"', 1 April 2016, available at www.securitycouncilreport.org/monthly-forecast/2016-04/in_hindsight_making_effective_use_of_any_other_business_1.php.

[303] Joint Press Statement by Estonia, the United Kingdom, and the United States on Russian Cyberattacks in Georgia, 5 May 2020.

[304] Eichensehr, 'Cyberattack Attribution' (n. 129).

There have been calls for establishment of a centralised international agency to focus on cyber operations outside the Security Council. Some of the earlier proposals, such as the 2016 Microsoft proposal, still advocated a role for the P5 in such an institution, but later proposals focused more on technical fact-finding somewhat similar to the OPCW technical secretariat and perhaps legal attribution.[305] If established, the Security Council could draw on such findings for follow-up action, which would be in line with other suggestions regarding better fact-finding structures for the Security Council.

VIII. CONCLUDING REFLECTIONS

What is a proper role and function for the UN Security Council in an accelerated 21st-century world that is leaning eastwards?[306] Can the Council preserve peace while a deeply interconnected world is turning at warp speed and tilts towards permanent instability?[307] Will a less US-dominated era witness fewer unnecessary wars and less overseas interventionism[308] – ventures so closely linked to the continued post-colonial hegemony of the West after World War II?[309] Will an Eastphalian world, instead, inevitably be more authoritarian and marked by internal repression?[310] In short: what will the

[305] See, on the Microsoft proposal, Kristen E. Eichensehr, 'Digital Switzerlands', *University of Pennsylvania Law Review* 167 (2019), 665–732. For a more recent proposal, see Michael N. Schmitt and Yuval Shany, 'An International Attribution Mechanism for Hostile Cyber Operations?', *International Law Studies* 96 (2020), 196–222.

[306] See also the analysis of Gideon Rachman, *Easternisation: War and Peace in the Asian Century* (London: Penguin, 2016).

[307] See, for the suggestion that an open and fast world is by definition unstable, Fareed Zakaria, 'Buckle Up', in *Ten Lessons for a Post-Pandemic World* (New York: WW Norton & Co., 2020), 13–28.

[308] The term 'unnecessary war' in relation to Iraq comes from John J. Mearsheimer and Stephen Walt, 'An Unnecessary War', *Foreign Policy* 134 (2003), 51–9. On the United States' militarised efforts to remake the world more generally, see John J. Mearsheimer, *The Great Delusion: Liberal Dreams and International Realities* (New Haven: Yale University Press, 2018).

[309] For an account of the birth of the US quest for global supremacy, see Stephen Wertheim, *Tomorrow, the World: The Birth of US Global Supremacy* (Cambridge: Harvard University Press, 2020).

[310] On the features of an Eastphalian world, see Tom Ginsburg, 'Eastphalia as the Perfection of Westphalia', *Indiana Journal of Global Legal Studies* 17 (2010), 27–45, suggesting that a China-centred world would be more peaceful, in the sense of reduced chances for international conflict, but also more violent as a result of lesser emphasis on individual protection. For the role of international law in an authoritarian world, see also Ginsburg, 'Authoritarian International Law?'(n. 11), 221–60.

world look like in the remainder of this century and what are the main insecurities that the UN Security Council should be concerned with in the future?

This chapter did not seek to provide a definitive answer to these daedal questions. It merely suggests that a spiralling world needs structure more than anything else and it presented a perspective in favour of further institutionalisation for the near future – precisely because it is so unclear what the world will look like 50, or even 25, years from now. The main premise of this chapter is that an inclusive and deliberative environment based on and guided by international law is required to safeguard somewhat controlled next steps that are to the benefit of all. This is quite the opposite of what is proposed in the recent Joint Statement by the Foreign Ministers of China and Russia on Certain Aspects of Global Governance in Modern Conditions, which is aimed at releasing the P5 from its institutional setting and which proposes to deliberate on platforms rather than through fully fledged international organisations.[311] Likewise, the repeated invocations of a rules-based order by Western states may, inadvertently, open the door to a pick-and-choose approach that deviates from the idea of the Security Council operating within a broader and universal system of international law.[312]

As the technology and wealth gap between East and West shrinks and US influence wanes, it is clear that some states, particularly in the West, have to reposition to accommodate the rise of China, as well as the 'rise of the rest'. New power constellations have led French President Macron to observe that 'the United Nations Security Council no longer produces useful solutions today'.[313] But calls for multilateralism also recognise that the way forward is still to reinvigorate and to strive for greater

[311] Joint Statement by the Foreign Ministers of China and Russia on Certain Aspects of Global Governance in Modern Conditions, 23 March 2021, paras 3 and 4. See, for a critical appraisal, Achilles Skordas, 'Authoritarian Global Governance? The Russian-Chinese Joint Statement of March 2021', *Heidelberg Journal for International Law* 81 (2021), 293–302.

[312] *Cf.* John Dugard, 'The Choice before Us: International Law or "Rules-Based Order"?', Lecture delivered at the University of Minas Gerais in Brazil, XVIII Edition of Brazilian International Law Winter Program, 19 July 2022, published in the *Leiden Journal of International Law* 36 (2023), 223–32. See also Stefan Talmon, 'Rules-Based Order v. International Law?', *GPIL Blog*, 20 January 2019, available at https://gpil.jura.uni-bonn.de/2019/01/rules-based-order-v-international-law/.

[313] Le Grand Continent, 'La doctrine Macron: une conversation avec le Président français', 16 November 2020, available at https://legrandcontinent.eu/fr/2020/11/16/macron/.

institutionalisation with a view to securing 'a historic balance between human civilisations'.[314]

In this chapter, I have discussed the Security Council's institutional strength by looking at the Security Council's exercise of its distinct powers from an institutional perspective, acknowledging that the Council operates in an ever-more-uncertain and restless world. Recognising that the world is becoming increasingly antagonistic and that it is repolarising, I first discussed the authorised Libya intervention, which, in hindsight, became a turning point for the Security Council. It is submitted that, while the use of force was not clearly illegal, neither was the operation the product of enlightened multilateralism. In response to Libya, as well as to controversial exercises of the right to self-defence, proposals have been presented to enhance use-of-force discourse and to embed such discourse better institutionally. These proposals could most certainly enhance the Council's inclusiveness and they may also help to avoid a world in overdrive spinning out of control. States calling for multilateralism and an evidence-based legal order would do well to seriously engage with such proposals, including with ideas for a centralised cyber fact-finding agency.

In the sanctions domain, greater procedural reforms have been implemented over time – most notably, the panels of experts and the Ombudsperson. Sanctions reform tends to be performed in a very ad hoc and also arbitrary fashion, but states might feel a need to up their game within the United Nations to regain ground from the unilateral sanctions that are increasingly used as the alternative. Sanctions reform is therefore a work in progress, at best, and while some important steps have been made in recent years, the risk of backsliding remains. Further institutionalisation in this domain is certainly warranted. Here, again, states advocating democracy, the rule of law, and multilateralism in the abstract – including, at the time of writing, the United States – should ensure that: proper remedies exist at the UN level in the form of a truly independent office of the Ombudsperson – not someone who is sidelined through precarious contracts and a consultancy status only; and that adequate remedies exist for UN sanctions regimes across the board. In addition, they should further provide humanitarian exceptions that reach beyond financial sanctions;[315] they

[314] The suggestion that the world is returning to something like a historic balance among different human civilisations comes from Kishore Mahbubani, 'Introduction', in *Has China Won? The Chinese Challenge to American Primacy* (New York: Hachette, 2020), 1–24.

[315] Emanuela-Chiara Gillard, 'Humanitarian Exceptions: A Turning Point in UN Sanctions', *Chatham House*, 20 December 2022, available at www.chathamhouse.org/2022/12/humanitarian-exceptions-turning-point-un-sanctions.

should also reinforce the mandates of panels of experts with a view to guaranteeing, and underscoring the importance of, independent fact-finding as a basis for decision-making.

The most worrisome developments since the end of the Cold War, from an institutionalist perspective, are the Security Council's pervasive counter-terrorism activities. These practices go well beyond preconceived institutional structures, and they create significant tensions with the principle of legal certainty and the domestic rule of law. More generally, the Council's securitisation measures have allowed – perhaps even incentivised – states to pursue immensely repressive strategies, which is hardly compatible with the United Nations' purposes and principles.

The Security Council's still-prevalent consensus on terrorism as a threat stands in sharp contrast with the Council's near-inability to tackle new challenges – in particular, those related to cyber activity and new technologies. Yet as societies digitalise and with malicious state-sponsored cyber operations on the rise, traditional distinctions between the notion of peace and war erode. An organ entrusted with the primary responsibility to maintain peace and security that is incapable of broaching the greatest threats risks becoming incredible. This is not to say that the Security Council should be the central organ for cyber operation fact-finding or attribution; this is indeed better left to a specialised mechanism. But, on the basis of such independently established facts, the Security Council should be able to discuss massive, concrete, hostile cyber-attacks if they occur and it is clear that these need to be discussed in an inclusive setting if deliberations are to be balanced deliberations. It is also clear that the veto issue and its propriety is at stake here as well.

The suggestions for institutional strengthening and reorientation that are made in this chapter reveal a certain expectation that the Security Council will remain the world's primary organ for peace in the near future and that it is worthwhile investing in it. Yet recent events have once again underscored the Security Council's imperfection. That does not necessarily have to lead to the conclusion that the Security Council has already become *permanently* and *fully* dysfunctional, bearing in mind that such a view risks playing into the hands of those states that prefer to take an extra-institutional turn. An institutional perspective implies that further strengthening is desirable for Security Council activity in those areas in which it is still possible, requiring a continued commitment to working on checks and balances and holding space for the non-permanents. Yet whenever the Security Council fails to exercise its primary function – and those instances are becoming more

prevalent – the gaze will shift elsewhere. A future-oriented institutional perspective will thus also be about opening up and about finding a new balance between the UN Security Council and the UN General Assembly, as well as between the UN Security Council and other international organisations, including those at the regional level.