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The UN Security Council: Between Centralism and Regionalism

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I. INTRODUCTION

The view that the UN Security Council is the linchpin of the United Nations' collective security system may seem straightforward and incontrovertible. Under Article 24 UN Charter, UN member states have conferred on the Security Council the primary responsibility for the maintenance of international peace and security. One of the issues that arise from this, which lies at the centre of the Max Planck Trialogues on the Law of Peace and War book series, relates to the Security Council's contribution to the law of peace and war. Discussions in previous contributions to the Trialogues and the preceding chapters in this volume have dealt with various aspects of this question. This chapter examines the practice of the Security Council in its interactions with regional organisations in the context of collaborative peace operations. The discussion does not cover all of the regional organisations that the Security Council has collaborated with, which might have the advantage of a broad sweep but the disadvantage of a shallow and fragmented focus.[1] Instead, I focus on one regional organisation, the African Union, to offer a specific yet illustrative perspective.

In discharging its responsibility for the maintenance of international peace and security, the Security Council plays a critical role in two respects. First, using its powers under Chapter VII UN Charter, it determines the existence of security threats and the required responses, authorises the establishment of UN missions to deal with the threats, and oversees their operation. Secondly, it determines the role, if any, of regional organisations and authorises the action

[1] These include the Economic Community of West African States (ECOWAS), the European Union, the League of Arab States (LAS), the North Atlantic Treaty Organization (NATO), the Organization of American States (OAS), and the Organization for Security and Co-operation in Europe (OSCE).

they can take to address threats to peace in their regions in partnership with the United Nations or on their own, within the terms of Chapter XIII. Although political and diplomatic power rests with the states that serve on the Security Council – especially the five permanent members (P5) who hold the veto – in the changing international political landscape of the post-Cold-War world, other powers have begun to challenge their influence. These include the elected non-permanent members (E10) and other formal and informal coalitions within this group, such as the three African members (A3), who are increasingly asserting their voices and interests, along with other UN members outside the Security Council. This suggests, to borrow Larissa van den Herik's words in this volume, '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'.[2] The contestations between them in their various permutations – say, P5 vs E10, P5 vs A3, or France, United Kingdom, and United States (P3) vs China and Russia (P2) – revolve around the power to set the agenda and determine global policy and action under the formal UN mandate.

Since its founding, the United Nations has carried out numerous missions in collaboration with several regional organisations or has authorised operations by these organisations. Largely because of the prevalence of intra-state conflicts in the continent, Africa has hosted the largest number of UN peace missions. Africa provides not only the site for the type of conflicts that have necessitated the establishment of UN peace operations but also hosts a regional organisation that has engaged the most with the United Nations in the maintenance of international peace and security. The African Union is thus an appropriate regional body whose partnership with the world body forms a framework within which to address the Security Council's continuing primacy, vis-à-vis regional organisations, in the collective security system of the post-Cold-War era.

In his chapter in this volume, Congyan Cai explores the changing power dynamics in the Security Council in the wake of the rise of China both as a global economic and political power and as a more assertive (or 'reawakened') P5 member. In a broad sense, he presents the unique perspectives of this new global power over the vanishing unipolar hegemony of the immediate post-Cold-War period. The present chapter shares the multilateralist perspective that Van den Herik advances in her own, but through a specific regional lens. To be sure, the objective of this chapter is not to

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

present specifically African or AU perspectives on *every* aspect of Security Council decisions and actions relating to peace and security issues in Africa, nor is this a general discussion of UN peacekeeping as such. I agree with Van den Herik's general submission that the less powerful states do not need to play a secondary role all the time. That sentiment lies behind the increasing efforts of African states to make themselves heard more loudly in the United Nations and other global forums. Yet, as I aim to demonstrate in this chapter, regional organisations – or at least the African Union – recognise and reaffirm the primacy of the Security Council, insofar as peacekeeping and other partnerships for the maintenance of international peace and security are concerned. The African Union's perspectives are themselves collective positions forged from the multilateralist perspectives of its member states. Examples discussed in this chapter include the common positions of the African states on issues such as the right of humanitarian intervention, counter-terrorism, Security Council reform, and climate-related security risks.

I argue that, as a general matter, the concern of regional organisations and their members is not so much to challenge the supremacy of the United Nations or the primacy of the Security Council by establishing their own competing norms and institutions but to complement the role of the Council. Further, and more importantly, they seek to become more effective participants in the Security Council's decision-making on the issues of peace and war that affect them and their regions, and to push for necessary normative and institutional reforms. My overarching argument is that, notwithstanding the disruptions and changes in the international political landscape of the post-Cold-War period, as witnessed by the rise of other voices from the periphery, the status of the Security Council as custodian of the collective security system has not been diminished.

At the same time, however, the responsibility of the Security Council for the maintenance of international peace and security has been tested on several occasions since the end of the Cold War, the most recent being the Russian invasion of Ukraine in 2022. The Security Council's failure to agree on measures to bring the war to a speedy end has renewed questions about its efficacy and continuing relevance as custodian of the collective security system. I discuss aspects of the war as they relate to some of the issues covered in this chapter.

This chapter has a double objective. First, it seeks to examine the role of the Security Council in managing collective security in the post-Cold-War era through the prism of its peacekeeping collaborations with the African Union. As already stated, this is not a discussion on peacekeeping in general or of every aspect of UN peace operations in Africa. Secondly, it aims to highlight the

extent to which the Security Council's practice, as manifested through both the adoption of resolutions and its substantive actions, has contributed, or not, to the confirmation and further development of the international law as it relates to collective security. Both objectives aim to reinforce the view that recent practice has reaffirmed the centrality and primacy of the Security Council.

One way of understanding the decision-making process of the Security Council is to study the debates and voting patterns of the members. As a rule, among the P5, the three Western powers, the P3, tend to stand on one side from the non-Western powers, the P2. While the P3 generally represent the Global North, which claims to set great store by its commitment to the rule of law and human rights, the P2 seek to prioritise solidarity with the Global South, emphasising the principles of the primacy of state sovereignty and non-interference in domestic affairs of states. Cai makes the same points in his discussion of the 'new Cold War' and the influence of China's international legal policies on its behaviour in the Security Council.[3] Interestingly, both sides claim to base their positions on the provisions of the UN Charter and norms of international law to provide legitimacy to their voting decisions. Thus international legal norms are invoked to explain and justify political choices and decisions that may simply reflect national and coalition interests.

Understanding the national and coalition interests at play lends context to the decision-making processes in respect of individual UN peace operations established or authorised by the Security Council. Methodologically, I adopt a positivist approach to unpack Security Council decision-making by examining not only the texts of resolutions but also records of Security Council meetings and, where relevant, individual statements that the members may give to provide insight into their voting decisions on a resolution – especially on negative votes or abstentions.

I proceed as follows. In section II, following this introduction, I briefly review the historical debates of regionalism versus centralism as they played out at the San Francisco Conference leading to the adoption of the UN Charter. The Charter confirmed centralism as the paradigm underpinning the new post-war era until the end of the Cold War around 1990, when the United Nations adopted the concept of partnership peacekeeping as a matter of policy and in practice. Partnership peacekeeping represents a return to regionalism. In addition, I discuss an issue relevant to the centralism and primacy of the Security Council – namely, the concept of the 'international rule of law'.

[3] Congyan Cai, 'The UN Security Council: Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, sections III.C and V.C.

In section III, I turn to the post-Cold-War phase of partnership peace operations involving the United Nations and the African Union. This is not a discussion about UN peacekeeping or peace operations in general; rather, I have limited myself to three case studies: Libya, Mali, and Somalia. These cases provide lenses through which to focus on some normative and policy issues arising from UN–AU peace operations.

First, why Libya? The conflict of 2011 implicated the right of intervention incorporated in the African Union's constituent instrument and its implications for the primacy of the Security Council over the regional organisation. Furthermore, the principle of the Responsibility to Protect (R2P) loomed large in the debates surrounding the Security Council's authorisation of the intervention in Libya, creating the most significant challenge that the African Union had faced since its establishment. I discuss the African Union's response, as the regional body most directly connected to the Libyan crisis, and the post-intervention ramifications not only for AU member states, but also for the policy positions of other members of the Security Council.

Secondly, I have selected Mali and Somalia as case studies to explore another set of related issues also at the heart of the collaborations between the United Nations and the African Union: peacekeeping and the fight against terrorism and violent extremism in these countries. In temporal terms, Somalia represents the oldest UN–AU peacekeeping collaboration, while Mali is the most recent. In this respect, I examine some normative and policy developments in the fight against international terrorism in more detail than the other issues. Counter-terrorism is a shared objective between the African Union and the United Nations, which has been a significant factor in Security Council decisions to authorise certain peace operations in Africa. I also discuss China's role in African peacekeeping to highlight China's changing perspective on collective security, as examined by Cai, and its engagement with Africa.[4] While China has not played a role in the AU peace operation in Somalia, it was involved in the UN-led mission in Mali.

Section IV turns to three issues that exemplify current challenges and future trajectories, and which are also relevant for the unfinished business of UN reform: the quest for a permanent African seat on the Security Council; the problem of Security Council inaction; and climate as a new, unconventional threat to global security. I also discuss the Russian invasion of Ukraine in this section.

Section V concludes the discussion.

[4] *Ibid.*, sections V.C.3 and VI.B.

II. THE UNITED NATIONS AND REGIONAL ORGANISATIONS: PARTNERING FOR THE MAINTENANCE OF PEACE

The role played by the Security Council in the various instances in which it has collaborated with regional organisations draws out two overarching issues that underlie this discussion. The first is the dichotomy between law and politics – that is, how law and politics play out in the Security Council's decision-making on collective security operations; the second is the tension between the centre (the Security Council) and the periphery (the regional organisations). These two issues sometimes come to the fore when regional organisations claim to be better interpreters and arbiters of regional disputes or threats to the peace than the Security Council, notwithstanding its primary responsibility for dealing with such issues. The Security Council has often authorised operations by regional organisations (and/or, in some cases, member states acting individually or within the framework of a regional organisation) acting under Chapter VII, and not under Article 53, of the UN Charter.[5]

A. *Historical Debates of Centralism versus Regionalism*

The arrangement set out in Articles 52–54 of the Charter represents an international consensus reached, although not fully worked out, at the Dumbarton Oaks Conference in late 1944 and at the San Francisco Conference that adopted the Charter in June the following year. Anthony Arend's summary of the early debates about a 'new world order' that preceded the establishment of the United Nations is instructive – particularly on the evolution of the thinking on the part of the major powers at the time on the role of regional organisations in conflict management.[6] There were two opposing views. One, championed by British Prime Minister Winston Churchill, advocated the idea of both a centralised organisation and a series of 'regional councils', but with the regional councils assuming primary responsibility for the maintenance of international peace and security in their regions and the centralised organisation playing a supporting role. The other view, favoured by US Secretary of State Cordell Hull, was for a strong global

[5] See Christian Walter, 'Regional Arrangements, Article 53', 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 33.

[6] Anthony C. Arend, 'The United Nations, Regional Organizations, and Military Operations: The Past and the Present', *Duke Journal of Comparative & International Law* 7 (1996), 3–33 (5–8).

organisation that would play the primary role in conflict management, while 'regional agencies' could play a part in addressing local conflicts, but in a clearly subordinate role and consistent with the authority of the global body.

At the Dumbarton Oaks Conference, which prepared the first draft of the UN Charter, the four powers that subsequently became permanent members of the Security Council – namely, China, the United Kingdom, the United States, and the Union of Soviet Socialist Republics (USSR) – adopted Hull's vision in its totality.[7] They did so despite concerns from Latin American states, which advocated for the incorporation of a provision requiring states to submit regional disputes to regional organisations *before* submitting them to the United Nations and which were opposed to the proposal that regional organisations should undertake enforcement action *only with the authorisation* of the Security Council.[8]

B. *Partnership Peacekeeping as a Return of Regionalism*

The four powers thus opted for a model that accorded the proposed Security Council primary responsibility over the management of conflicts and the maintenance of international peace and security, and which granted regional organisations a *subordinate* role. They privileged the centre at the expense of the periphery, thereby ordaining centralism as the paradigm for the management of the post-war order. Leaving aside the concessions to regionalism, the UN Charter vested the key organ of the newly established global organisation with unprecedented authority and paramountcy over the management of conflicts.

Since the creation of the United Nations, the Security Council has authorised the establishment of 71 peacekeeping operations as part of its function of maintaining international peace and security. Just over half of these operations (36) have been authorised in the period since 1995.[9] There are two main explanations, both reflecting a changing politics, for this explosion in UN peacekeeping operations. First is the change of power dynamics in the Security Council following the end of the Cold War. For roughly the next two decades, this change unblocked the political impasse between the two

[7] See generally 'Dumbarton Oaks Conversations on World Organization', reprinted in Royal Institute of International Affairs, *United Nations Documents 1941–1945* (London: Royal Institute of International Affairs, 1946), 92–101.

[8] *Ibid.*, 98–9.

[9] See UN Department of Peace Operations (DPO), 'List of Peacekeeping Operations, 1948–2017', available at https://peacekeeping.un.org/sites/default/files/unpeacekeeping-operationlist_1.pdf.

superpowers that had made it difficult for the veto-carrying permanent members to agree on major decisions affecting international peace and security. Second is the rise in complex conflicts around the world, including intra-state civil conflicts, crying out for attention and action from the reinvigorated and activist Security Council.

The change of power dynamics in the Security Council resulted, first and foremost, in the disappearance of the old East–West ideological rivalries led by the USSR and the United States, respectively. Another consequence was the increasing assertiveness of a hitherto fairly inactive permanent member, China, as well as the non-permanent members of the Security Council, discussed by Cai and Van den Herik in their chapters in this volume. I return to this later. In the realm of peace operations, these developments enabled the emergence of the notion of partnership peacekeeping, which involves two models:

(i) the 'subcontracting' model, whereby the United Nations outsources peace operations to regional agencies; and
(ii) the 'collaborative' model, whereby the United Nations and regional organisations deploy peace operations jointly and, among other things, share planning, personnel, and resources.

In a sense, partnership peacekeeping represents a return to regionalism – although not a diminution of the centrality of the Security Council in the maintenance of international peace and security as such. The pivotal development was the adoption of General Assembly Resolution 49/57, the Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security.[10] The Declaration was adopted based on the conviction that it would help to strengthen the role and enhance the effectiveness of both the United Nations and regional arrangements or agencies in the maintenance of international peace and security.

The adoption of Resolution 49/57 was a logical follow-up to the proposals laid out by UN Secretary-General Boutros Boutros-Ghali in his report *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping* in 1992.[11] Among other things, *Agenda for Peace* recognised that part of the solution to the problems faced by the United Nations in its post-Cold-War management of conflicts lay in reconsidering how regional organisations

[10] GA Res. 49/57 of 9 December 1994, UN Doc. A/RES.49/57.
[11] *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping*, Report of the Secretary-General, UN Doc. A/47/277/S/241111, 17 June 1992.

interacted with the global organisation, including in matters relating to the maintenance of international peace and security.

C. *Relevance of the International Rule of Law in the Security Council's Operations and Decision-Making Processes*

Before turning in section III to the Security Council's practice in selected partnership operations with the African Union, a related question for preliminary consideration concerns the relevance and application of the 'international rule of law' in the operations of the Security Council. This question is significant because the ability of the Security Council to impose its authority and primacy on regional organisations such as the African Union may – at a political level, at least – be influenced by perceptions of the legitimacy of its actions and decision-making processes. Legitimacy is a relevant factor for understanding the meaning of the 'international rule of law', especially in the context of international institutions.

I do not propose to offer a detailed analysis of this question in this limited discussion. Suffice it to say that the issue has recently received some attention in the legal literature, and it has been invoked by member states in their statements both in the Security Council and General Assembly.[12] At the national level, the rule of law requires a government of laws, the supremacy of the law, and equality before the law – that is, the idea that both the governors and the governed are subject to regulation by the same law. Yet this is only a shorthand description: there are differences in how, at the domestic level, the rule of law is understood in common law and civil law systems, as well as in other legal traditions.

When applied to the international system, the rule of law may be understood as the application of some, although not all, of the principles of the domestic concept of the rule of law to relations between states and other subjects of international law.[13] This, too, is a sweeping description that does not precisely define the term. Adopting a very specific meaning for the purposes of their discussion, Heike Krieger and Georg Nolte acknowledge the difficulty of defining 'the international rule of law' thus: 'We are aware that the term "the international rule of law" has been given many meanings, just

[12] See generally Sherif Elgebelly, *The Rule of Law in the United Nations Security Council Decision-Making Process: Turning the Focus Inwards* (London: Routledge, 2017). See also Clemens Feinäugle (ed.), *The Rule of Law and Its Application to the United Nations* (Oxford/Baden-Baden: Hart/Nomos, 2016).

[13] Simon Chesterman, 'An International Rule of Law?', *The American Journal of Comparative Law* 56 (2008), 331–61 (355).

like the term "rule of law" itself."[14] Needless to say that the understanding of the international rule of law I have noted above, which I share, is adequate only for the purposes of this chapter.

While the domestic model arose as a response to the dangers of centralised authority by the state, the international rule of law arose as an institutional solution to the opposite problem of decentralised authority. Under the latter, numerous independent, legally equal, and sovereign states interact and produce decisions separately or through institutions that they have collectively established and endowed with certain powers.[15] The most significant and powerful such institution is the Security Council, which is empowered by the UN Charter to decide if a given situation constitutes a threat to peace and security, and if so, what action to take to address such a threat. In this sense, the Security Council enjoys an unassailable status in the international system, sitting atop an international legal hierarchy. Yet this does not mean that it is unconstrained by international law when exercising its powers. Although there has been a long-running debate on how far the Security Council is bound by international law, there seems to be agreement on two basic propositions: first, that the powers of the Security Council are constrained by the Charter; and secondly, that, at the very least, it is also bound by rules of international law that have the status of ius cogens. This is a cautious position, which recognises that the Charter itself does not, as such, spell out the relationship between the Security Council and international law more generally.[16] I agree with this position.

Although the General Assembly adopted a declaration calling for the rule of law to be applied internally to the United Nations in 2012, the Security Council is yet to establish a rule-of-law framework to govern its decision-making process.[17] Some commentators have proposed a set of specific criteria for determining the international rule of law in the context of Security Council decision-making, drawing from some of the elements of the domestic model.[18] A common thread running through these discussions is the notion of

[14] Heike Krieger and Georg Nolte, 'The International Rule of Law: Rise or Decline? Approaching Current Foundational Challenges', in Heike Krieger, Georg Nolte, and Andreas Zimmermann (eds), *The International Rule of Law: Rise or Decline?* (Oxford: Oxford University Press, 2019), 3–30 (6 and fn. 16).

[15] Ian Hurd, 'The UN Security Council and the International Rule of Law', *The Chinese Journal of International Politics* 7 (2014), 1–19 (16).

[16] *Ibid.*, 13. See also Michael Wood and Eran Sthoeger, *The Security Council and International Law* (Cambridge: Cambridge University Press, 2022), 70–89.

[17] GA Res. 67/1 of 30 November 2012, UN Doc. A/RES/67/1 (Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels).

[18] See Elgebelly, *Rule of Law in the United Nations* (n. 12).

legitimacy: the argument that satisfaction of these elements ensures legitimacy and enhances acceptance of the Security Council's decisions, in the same way as perceptions of compliance with the rule of law in domestic systems increases the chances of obedience to the law.

Legitimacy is an elusive concept. In the context of institutions, such as the Security Council, it has more to do with how certain audiences perceive the acceptability of the institution's particular acts or decisions, sometimes from a purely political point of view, than about their normative goodness or moral rightness. Despite this subjectivity, I would argue that perceptions of legitimacy should matter as a core defining feature of the international rule of law for the Security Council. As Ian Hurd puts it:

> The power of the UN Security Council is a function of both its legal and its political settings. The first is derived from the Charter, and the second from the political interests of powerful states and the legitimacy that the institution commands in the international system. [This] legal authority comes into action only when the permanent members of the Council are sufficiently in agreement to allow it to happen, *and only when the broader audience for Council resolutions sees the action as legitimate*.[19]

The broader audience for the Security Council resolutions for whom the question of compliance with the international rule of law potentially matters is the entire UN membership. A substantive part of my discussion in the next section is on Resolution 1973, which authorised intervention in Libya.[20] The paradox of this Resolution is that it was at once one of the most consequential decisions ever adopted by the Security Council in the context of UN–AU relations and the most contested in terms of its legitimacy and, by implication, its compliance with some of the presumed international rule-of-law requirements among the most affected audience for the Resolution – namely, the African states.

III. THE SECURITY COUNCIL'S PRACTICE IN SELECTED PARTNERSHIP PEACE OPERATIONS WITH THE AFRICAN UNION

The evolution of the Security Council's policy on partnership peacekeeping with regional organisations since the end of the Cold War has focused on Africa. Under Resolution 1631, adopted on 17 October 2005, the Security Council specifically expressed its determination 'to take appropriate steps to

[19] Hurd, 'The UN Security Council' (n. 15), 18–19 (emphasis added).
[20] SC Res. 1973 of 17 March 2011, UN Doc. S/RES/1973(2011).

the further development of cooperation between the United Nations and regional and subregional organisations in maintaining international peace and security, consistent with Chapter VIII of the [UN Charter]'.[21] Although the Resolution addressed cooperation between the United Nations and regional organisations broadly, it also put a particular focus on strengthening the capacity of '[African] regional and subregional organisations in conflict prevention and crisis management, and post-conflict [stabilisation]'.[22]

On 12 January 2012, the Security Council held an open debate on the partnership between the United Nations and the African Union. Resolution 2033, adopted after the debate, welcomed more regular and meaningful meetings and interactions between the UN Secretariat and the AU Commission, and it supported a stronger working relationship between the Security Council and the AU Peace and Security Council (PSC), which was established in 2002 and is responsible for the regional organisation's peace operations.[23]

These two resolutions, which are only select examples, speak to the multi-faceted aspects of the role of the UN peacekeeping operations and the role that regional and subregional organisations can play. This role goes beyond the specific function of peacekeeping to embrace the entire gamut of conflict prevention and management, peacemaking, peacekeeping, peace enforcement, and peacebuilding. In Libya, Mali, and Somalia, this has involved engaging with the post-conflict political processes.

A. *Article 4(h) of the Constitutive Act of the African Union and the Primacy of the Security Council*

On 11 July 2000, members of the Organisation of African Unity (OAU) – the African Union's predecessor – adopted the Constitutive Act of the African Union in Lomé, Togo.[24] Article 4(h) AU Constitutive Act provides for 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. Further, Article 4(j) provides for 'the right of Member States to request intervention from the Union in order to restore

[21] SC Res. 1631 of 17 October 2005, UN Doc. S/RES/1631(2005), para. 1.

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

[23] Protocol Relating to the Establishment of the Peace and Security Council, adopted on 9 July 2002, entered into force on 26 December 2003, available at https://au.int/en/treaties/protocol-relating-establishment-peace-and-security-council-african-union (hereinafter Peace and Security Protocol).

[24] Constitutive Act of the African Union of 11 July 2000, 2158 UNTS 3.

peace and security'. The incorporation of the right to intervention in Article 4(h) was partly a response to African states' disappointment over the failure of the Security Council to deal with the most traumatic event to have occurred on African soil since the end of the Cold War: the Rwanda genocide of 1994.

By incorporating the right to intervene in Article 4(h), African states sought to move beyond the OAU era, when adherence to the principle of non-interference in the internal affairs of member states precluded intervention, and the shadow of the Rwanda genocide. While the debate over the status of the right of humanitarian intervention continues, Article 4(h) nevertheless represents a substantial legal innovation. Although it is phrased as a 'right to intervene', in essence it should be construed as a 'right of *humanitarian* intervention'. The provision has crystallised into a treaty norm a diffuse set of ideas and concepts that are similar to, and form the basis of, the related R2P principle, but it is not an expression of that principle as such. I return to the R2P in the next section.

I have previously argued that, in an era in which post-independence Africa had witnessed the horrors of genocide and ethnic cleansing on its own soil and against its own kind, with memories of the Rwanda genocide still fresh, it would have been absolutely remiss for the AU Constitutive Act to remain silent on the question of the right to intervene in respect of grave circumstances such as genocide, war crimes, and crimes against humanity.[25] Before discussing the implications of Article 4(h) for the relationship between the Security Council and the African Union in the maintenance of international peace and security, it is worth recalling the two interventions carried out by the Economic Community of West African States (ECOWAS) without prior Security Council authorisation. ECOWAS intervened in Liberia and Sierra Leone in 1990 and 1998, respectively.[26] These interventions undoubtedly contravened Article 53(1) UN Charter, which provides in part: 'The Security Council shall, where appropriate, utilise such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security [Council].' Nevertheless, the Security

[25] Tiyanjana Maluwa, 'Reimagining African Unity: Some Preliminary Reflections on the Constitutive Act of the African Union', *African Yearbook of International Law* 9 (2001), 3–38 (28–9).

[26] Cyril Obi, 'Economic Community of West African States on the Ground: Comparing Peacekeeping in Liberia, Sierra Leone, Guinea Bissau, and Côte d'Ivoire', *African Security* 2 (2009), 119–35 (122–6).

Council neither condemned them nor, significantly, did it expressly grant them ex post facto authorisation.[27]

The question of whether the Security Council, having failed to act, subsequently helped to legitimise ECOWAS's interventions in Liberia and Sierra Leone has been the subject of debate. Some scholars have suggested that, by means of this action, African states were the first to force the pendulum to swing towards a 'regional' doctrine of intervention that overrides state sovereignty to protect human rights and democracy. Jeremy Levitt has argued that the Security Council placed a '*retroactive de jure seal* on the ECOWAS intervention'.[28] Ben Kioko shares this interpretation and has asserted that 'the UN Security Council has never complained about its powers being usurped, [apparently] because the interventions were in support of popular causes and were carried out partly because the Security Council had not taken action or was unlikely to do so at the time'.[29] Ademola Abass and Mashood Baderin have gone further to assert that the absence of protest by the Security Council and members of the regional organisation, in the case of such a 'quasi-Article 39' of the UN Charter determination, 'must be accepted as a development of new norms of State practice'.[30] Abass and Baderin are referring to practice purporting to support a new norm of intervention by regional organisations without Security Council authorisation. Like Levitt and Kioko, they conclude that the absence of condemnation by the Security Council implies that it effectively endorsed the practice. I do not share this view. If the Security Council had wanted to endorse these interventions ex post facto, it would have done so by way of an explicit decision, instead of letting such a consequential conclusion be inferred from its silence.

I would also argue that the proposition that there is now a regional norm permitting the African Union to use force for humanitarian intervention *without* Security Council authorisation, based on either Article 4(h) AU Constitutive Act or new state practice, rests on a faulty premise. It suggests that a regional treaty norm can usurp the UN Charter, which would

[27] SC Res. 788 of 19 November 1992, UN Doc. S/RES/788(1992); SC Res. 1162 of 17 April 1998, UN Doc. S/RES/1162(1998).

[28] Jeremy Levitt, 'Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone', *Temple International and Comparative Law Journal* 12 (1998), 333–76 (347) (emphasis original).

[29] Ben Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention', *International Review of the Red Cross* 85 (2003), 807–25 (821).

[30] Ademola Abass and Mashood Baderin, 'Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the African Union', *Netherlands International Law Review* 49 (2002), 1–38 (22–3).

contravene its Article 103. Alternatively, it suggests that the Charter prohibition of the use of force in Article 2(4) – generally characterised as a rule of ius cogens or a peremptory norm of international law – can be superseded by a new customary rule permitting humanitarian intervention based on changes in state practice. As a legal matter, a peremptory norm can be changed only by another peremptory norm. There is no agreement that the right of humanitarian intervention has attained that status.

In my view, Article 4(h) AU Constitutive Act purports to establish a right of humanitarian intervention of an auto-determinative nature. Unsurprisingly, following its adoption, there was concern that a regional organisation was attempting to usurp the authority of the Security Council and that this did not accord with the view that regional arrangements can never, under any circumstances, override the primacy of the Security Council, in terms of Article 53(1) UN Charter.[31] As it happens, in the two decades since the adoption of its Constitutive Act, the African Union has not actually invoked Article 4(h) intervention *involving the use of force* in any situation, despite the existence of at least four occasions on which it could arguably have done so. For a host of different reasons in each of these cases, the African Union did not find it either expedient or pertinent to invoke Article 4(h) and intervene unilaterally without Security Council authorisation.[32] The fear that it would usurp the authority of the Security Council has not materialised, and I argue that this is unlikely ever to happen and that such action would violate the UN Charter.[33]

To appreciate the potential ramifications of Article 4(h) on the AU–UN relationship, and my prediction that the African Union is not likely to usurp the authority of the Security Council, it is necessary to examine the Protocol Relating to the Establishment of the Peace and Security Council of the African Union.[34] The Peace and Security Protocol was adopted in 2002 to establish the operational structure to implement effectively the decisions taken by the AU Assembly pursuant to the authority conferred upon it by

[31] See Jean Allain, 'The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union', *Max Planck Yearbook of United Nations Law* 8 (2004), 237–89 (264–87); Martin Kunschak, 'The African Union and the Right to Intervention: Is There a Need for UN Security Council Authorisation?', *South African Yearbook of International Law* 31 (2006), 195–208; Gabriel Amvane, 'Intervention Pursuant to Article 4(h) of the Constitutive Act of the African Union without United Nations Security Council Authorisation', *African Human Rights Law Journal* 15 (2015), 282–98.

[32] Tiyanjana Maluwa, 'Reassessing Aspects of the Contribution of African States to the Development of International Law through African Regional Multilateral Treaties', *Michigan Journal of International Law* 41 (2020), 327–415 (391–3, fns 284–9).

[33] See Walter, 'Regional Arrangements' (n. 5), MN 66.

[34] Peace and Security Protocol (n. 23).

Article 9(1)(g) AU Constitutive Act regarding the 'management of conflicts, war and other emergencies and the restoration of peace'.[35]

Under Article 17(1) Peace and Security Protocol, AU member states pledge that, in fulfilment of the African Union's mandate to promote and maintain peace and security in Africa, the PSC 'shall cooperate and work closely with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security'.[36] However, in his reading of the subsequent clauses of Article 17, Jean Allain concludes that the relationship envisaged between the PSC and the Security Council is neither on an equal footing nor one that places the latter over the former.[37] Furthermore, he asserts that, for the PSC, the Security Council is simply one of many UN bodies that it is supposed to work with closely, and that its interaction is meant to be first and foremost of a logistical nature.[38] To the latter point, he notes that, in fact, Article 17(2) does not speak of the need to seek Security Council authorisation to use force; rather, it calls on the United Nations to provide assistance.[39] Allain sees a diffusion and dilution of the primacy of the Security Council, vis-à-vis the PSC, in the wording of Article 17(3) and (4), whose essence is that the role of the Security Council is to assist the PSC and not vice versa.[40] He concludes categorically:

> As a result of the fact that the Protocol, while paying lip-service to the primacy of the UN Security Council, seeks, at every turn, to dissipate its pre-eminence makes clear that intervention as envisioned by the Constitutive Act of the African Union usurps the ultimate control vested in the United Nations System over the use of force.[41]

I disagree with Allain. As a practical matter, it is inconceivable that if the African Union were to invoke Article 17(1) Peace and Security Protocol, the United Nations would be satisfied with its role being limited merely to that of providing financial, logistical, and military support without allowing the Security Council to address the issue of authorisation of the use of force. The argument that, by enshrining Article 4(h) in its Constitutive Act, the African Union has subverted the primacy of the Security Council rests on an interpretation of two seemingly

[35] Art. 3(a)–(c) *ibid.*
[36] Art. 17(1) *ibid.*
[37] Allain, 'The True Challenge' (n. 31), 286.
[38] *Ibid.*
[39] Art. 17(2) provides, in part: 'Where necessary, recourse will be made to the United Nations to provide the necessary financial, logistical and military support for the African Union's activities in the promotion and maintenance of peace, security and stability [in Africa].'
[40] See Allain, 'The True Challenge' (n. 31), 286.
[41] *Ibid.*, 287.

irreconcilable provisions. While Article 17(1) recognises the primacy of the Security Council in the maintenance of international peace and security, Article 16(1) provides that the African Union 'has the primary responsibility for promoting peace, security and stability in Africa'. From this, Christian Wyse, like Allain, has concluded that, despite the AU Peace and Security Protocol's repeated references to cooperation with the United Nations, it never actually states that the African Union should seek the approval of the Security Council prior to intervention and it fails to clarify how the latter is viewed.[42] Wyse reached this conclusion despite the fact that the African Union had clarified the issue in 2005, when it adopted 'The Common African Position on the Proposed Reform of the United Nations: "The Ezulwini Consensus"'.[43]

The 'Ezulwini Consensus' was endorsed by a decision of the AU Assembly three years later as a common policy position addressing various issues, including, principally, Security Council reform.[44] In this context, it addresses the issue of collective security and the use of force. In terms of this common policy, the African Union reaffirmed the primacy of the Security Council in matters of collective security, including the R2P and the legality of the use of force.

Three points in the 'Ezulwini Consensus' deserve emphasis. First, the AU Executive Council agreed that, since the General Assembly and the Security Council are often far from the scenes of conflicts and may not be in a position to undertake effectively a proper appreciation of the nature and development of conflict situations, it is imperative that regional organisations, in areas of proximity to conflicts, are empowered to take actions in this regard. Secondly, the AU Executive Council also agreed that intervention by regional organisations should take place only with the approval of the Security Council. At the same time, however, it recognised that, in some situations and in circumstances requiring urgent action, the Security Council could grant its approval ex post. Thirdly, it acknowledged the potential tension between the R2P principle and state sovereignty by reiterating the obligation of states to protect their citizens but not use this principle as a pretext to undermine the sovereignty, independence, and territorial integrity of states.[45] In sum, the 'Ezulwini Consensus' reaffirmed the UN Charter's provisions on collective security, the circumstances circumscribing the use of force, the primacy of the

[42] Christian Wyse, 'The African Union's Right of Humanitarian Intervention as Collective Self-Defense', *Chicago Journal of International Law* 19 (2018), 295–332 (311).

[43] The Common African Position on the Proposed Reform of the United Nations, AU Doc. Ext/EX.CL/2 (VII), 8 March 2005 (hereinafter Ezulwini Consensus).

[44] Decision on Reform of the United Nations Security Council, AU Doc. Assembly/AU/Dec.184 (X), 2 February 2008.

[45] *Ibid.*, para. B(i).

Security Council in the maintenance of international peace and security, and the obligation incumbent upon the African Union to seek the Council's approval before invoking Article 4(h).

The AU Assembly endorsed the Executive Council's recommendations at its summit in July 2005, thus making the 'Ezulwini Consensus' a formal AU policy decision.[46] I argue that this policy framework provides the broader context for understanding Article 4(h) AU Constitutive Act, and I do not share the view that 'the statements about intervention therein are no more than either political manoeuvring or a statement of what would be true if the UNSC were actually effective'.[47]

B. *The Security Council, the African Union, and the Libyan Conflict of 2011*

1. Resolution 1973 and the NATO Intervention: The Responsibility to Protect?

On 17 March 2011, as Colonel Muammar Gaddafi's forces closed in on the eastern city of Benghazi in response to the rebel uprising against his regime, the Security Council adopted Resolution 1973.[48] The Resolution authorised member states that had informed the UN Secretary-General and the Secretary-General of the League of Arab States (LAS), acting alone or through regional organisations, to 'take all necessary measures [to] protect civilians and civilian populated areas under threat of [attack]'.[49] It also requested that member states notify them of all necessary measures taken to implement the Resolution.[50] Critically, Resolution 1973 established a no-fly zone over Libya, which the LAS had requested five days prior to its adoption.[51] Within two days

[46] Decision on the Expansion of the Follow-up Mechanism on the Reform of the United Nations, AU Doc. Assembly/AU/Dec.87 (V), 5 July 2005.

[47] Wyse, 'The African Union's Right of Humanitarian Intervention' (n. 42), 312.

[48] SC Res. 1973 of 17 March 2011, UN Doc. S/RES/1973(2011).

[49] *Ibid.*, para. 4.

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

[51] See Arab League Statement on Libya, No. 7360, Cairo, 12 March 2011 ("The outcome of the Council of the League of Arab States meeting at Ministerial level in its extraordinary session on the implications of the current events in Libya and the Arab position"). Opening para. 1 reads:

> [Decides] *To call on* the Security Council to bear its responsibilities towards the deteriorating situation in Libya, and to take the necessary measures to impose immediately a no-fly-zone on Libyan military aviation, and to establish safe areas in places exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nationals residing in Libya, while respecting the sovereignty and territorial integrity of neighbouring States.

of the adoption of Resolution 1973, British and French military forces – later joined by forces from Canada, the United States, and other allies – launched aerial bombing raids against Gaddafi's military and intelligence forces and resources. On 31 March 2011, the North Atlantic Treaty Organization (NATO) formally took command of the operation, which ended on 31 October 2011 after seven months of almost non-stop daily bombings. By the end of the NATO operation, Gaddafi's regime had fallen; he had been killed by a group of insurgents on 20 October 2011.

Resolution 1973 followed Resolution 1970, adopted on 26 February 2011. The earlier resolution had condemned the Gaddafi government's use of violence against civilian populations and imposed sanctions on Libya.[52] Both resolutions signified the Security Council's new approach to civilian protection, bringing together the two still-evolving norms of the R2P and protection of civilians in the same peace operation. The Security Council's resolutions and actions on Libya – in particular, Resolution 1973 – raised some questions, including the role of politics in Security Council decision-making and the ability of powerful members to manipulate the decision-making to advance their national interests under the guise of advancing the common good, and so on.[53]

All three chapters in this book discuss Resolution 1973 from each author's perspective and in varying degrees of detail. Cai focuses attention on China's role, in the context of its rising power and re-engagement in the Security Council. Van den Herik examines the adoption of the Resolution in the face of wavering international consensus. I discuss at greater length the position of the African Union, as a regional body, the role of the A3, and the implications of the implementation of the Resolution and NATO's involvement for the AU–UN collaborative relationship in the management of threats to peace and security in Africa. I think it is fair to say that, in general, we agree on the narrative accounts and analyses of Resolution 1973. Differences of interpretation are more a matter of emphasis and nuance than substance. I briefly address some of these.

Cai and I share the view that the adoption of Resolution 1973 demonstrated starkly that the behaviour of states and the decisions they take as members of the Security Council are inevitably driven by their national interests. The power dynamics and balance of power matter. Sometimes, these interests

[52] SC Res. 1970 of 26 February 2011, UN Doc. S/RES/1970(2011).

[53] See Tom Keating, 'The UN Security Council on Libya: Legitimation or Dissimulation?', in Aidan Hehir and Robert Murray (eds), *Libya, the Responsibility to Protect and the Future of Humanitarian Intervention* (London: Palgrave Macmillan, 2013), 162–90 (163).

converge, in which case the Security Council can adopt decisions unanimously or without any of the P5 casting their veto. But even where they do not converge, states may nevertheless calculate that the outcome of a particular decision will not adversely affect their differing national interests or concerns. I believe the latter explains why some members of the Security Council either supported Resolution 1973 or elected not to veto it even though their national interests diverged from those of the three Western powers that pushed for its adoption and, moreover, even though they may have had misgivings about the decision. Cai has described Resolution 1973 as representing a turning point for China's voting in the Security Council from the perspective of power politics and identified two lessons that China has learned from this episode: first, that despite its growing power, Western powers such as the United States still pay little regard to China's interests; and secondly, that China's global interests are more likely to be affected by the workings of the Security Council.[54] I agree that China's experience concerning Libya has had a direct impact on its behaviour in the Security Council regarding Syria. As I point out below, this was also the case with other key actors, such as Russia and South Africa. Beyond Syria, this has had an impact on subsequent disagreements in the Security Council over the crises in Myanmar and Yemen.

Interestingly, in staking out its opposition to draft resolutions aimed at authorising intervention in Syria, China has repeatedly proclaimed that it has 'no self-interest' in addressing the Syrian crisis. Cai appears to accept this disavowal at face value, while also accepting that, unlike China, Russia has strategic interests in Syria. It seems to me that part of the problem in examining these issues lies in our understanding of how states define or perceive their 'national interests'. China's national interests circumscribing its support for Security Council actions, for example, on Mali, Sudan (Darfur), and South Sudan, and its opposition to action on Syria and Myanmar, are largely understood in terms of its economic, trading, and financial interests in these countries. Yet a broader definition of 'self-interest' or 'national interest' might include a state's belief in, and promotion of, certain normative values and principles that underpin its commitment to the international rule of law. To the extent that China proclaims, as both Cai and I accept, commitment to the principles of state sovereignty and non-interference as core pillars of its foreign policy, I would argue that China *does* have a 'self-interest' in upholding its position on Syria. Part of this is its avowed opposition to foreign-imposed regime change – a key interest it formally shares with Russia and other allies.

[54] Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, section V.B.

In her discussion of Resolution 1973, Van den Herik also provides a brief discussion of Resolution 1970, which preceded the former. She offers two interesting insights in this regard. The first is the observation that, at the time of the Libyan crisis and the adoption of Resolution 1970, the composition of the Security Council reflected an optimal geopolitical balance, including as it did all the BRICS countries and Germany, all of which have permanent seat aspirations.[55] There is an implied suggestion that the ease with which the Security Council agreed to impose sanctions on Libya and refer the situation to the International Criminal Court (ICC) was, at least in part, due to the eagerness of these countries to demonstrate responsible leadership in the Security Council. Yet this consideration does not seem to have held up when these same members came to vote on Resolution 1973 barely a month later. Not all of them supported the Resolution.

The second issue that Van den Herik points to is the role played by the then Libyan deputy permanent representative to the United Nations, Ibrahim Dabbashi, who defected from the Gaddafi regime. On 21 February 2011, Ambassador Dabbashi, backed by other Libyan diplomats, supported the proposal to impose a no-fly zone over Libya, an investigation into human rights violations, and a referral of the situation to the ICC.[56] This might suggest the value of personal dynamics in diplomatic calculations in decision-making even by a body with such formalised authority and procedures as the Security Council. Van den Herik is right to characterise Dabbashi's defection, and his call for an ICC referral and a no-fly zone, as 'the factor that was arguably decisive' in the Security Council meeting.[57] Individual personality and character clearly matter in diplomacy, and Ambassador Dabbashi's move galvanised other Libyan diplomats, both at the United Nations and in various missions around the world, to abandon the Gaddafi regime. Yet I would not overplay this factor. I think it equally important here that the African Union, which had rallied around President Omar Al-Bashir of Sudan in 2005 to oppose his referral to the ICC over the crimes committed in Darfur, did not raise collective opposition against the Libyan referral. In the end, this accounted for the fact that the three African members of the Security Council, Gabon, Nigeria, and South Africa, supported the referral, despite ongoing tensions between African states and the ICC over the Court's Darfur

[55] The BRICS grouping was founded by Brazil, Russia, India, and China in 2006 as an informal association of major emerging national economies, with South Africa joining in 2010.

[56] See Colin Moynihan, 'Libya's U.N. Diplomats Break with Gaddafi', *New York Times*, 21 February 2011, available at www.nytimes.com/2011/02/22/world/africa/22nations.html.

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

and Kenyan investigations, as well as lingering resentment over the fact that three of the P5 members voting for the referral were not even parties to the Rome Statute of the ICC.

This last point ties in with another observation that Van den Herik makes: '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.'[58] I partly address this issue in my discussion of the African Union's response to the Security Council decision and action on Libya later in this section. A relevant point to make here is that the African Union had also accepted that there was a major difference between the Libyan situation and the earlier uprisings in Tunisia and Egypt: the authorities in those countries did not respond to the protestors with the kind of force that Gaddafi's regime unleashed on its population, with the declared aim of exterminating the protestors, thus triggering a full-scale civil war and possible violations of Article 4(h) AU Constitutive Act.

In the section that follows, I turn to two other questions that I consider particularly relevant to the objectives of this chapter. The first concerns the roles that the Security Council and the African Union played in responding to the Libyan crisis and discharging their responsibilities under the UN Charter and the AU Constitutive Act, respectively. This question goes to the legal and political dynamics of the relationship between the United Nations and the African Union – to the relationship between the centre and the periphery – as it relates to collaborative action for the maintenance of international peace and security.

The second question – going to the overarching theme of this book series – is whether, in adopting and implementing Resolution 1973, the Security Council contributed to the advancement of the R2P norm, which would be an aspect of the advancement of the law of peace and war. In addressing this second question, it is important to recall that although the Security Council has subsequently referred to the R2P in the context of certain peace-keeping operations, in the case of Libya in 2011 it authorised military action to protect civilians *without* explicit reference to the R2P. It made only passing reference to it in the Preamble to the Resolution, reiterating 'the responsibility of the Libyan authorities to protect the Libyan population'.[59]

Some commentators have nevertheless argued that the desire to implement the R2P principle provided the underlying rationale for Resolution 1973.[60]

[58] *Ibid.*, section IV.A.

[59] SC Res. 1973 of 17 March 2017, UN Doc. S/RES/1973(2017), cons. 4.

[60] See Paul R. Williams and Colleen Popken, 'Security Council Resolution 1973 on Libya: A Moment of Legal and Moral Clarity', *Case Western Reserve Journal of International Law* 44 (2011), 225–50 (227, fn. 7). See also Pierre Thielbörger, 'The Status and Future of International

Indeed, following its adoption, UN Secretary-General Ban Ki-Moon also emphasised the historic dimension of the Resolution, as 'affirm[ing], clearly and unequivocally, the international community's determination to fulfil its responsibility to protect civilians from violence perpetrated upon them by their own government'.[61]

An analysis of the debates surrounding the adoption of Resolution 1973 and the NATO intervention in Libya, and the questions set out above, serves to remind us of the legal realist's claim that law happens in a context and that this context is circumscribed by politics. Another way of framing this claim is to ask: does international law, in certain respects, constrain international political discourse and decision-making (e.g., by the Security Council), or does the existence of an international political consensus on a proposed course of action trigger a push to legitimise that action through the formulation of suitable international law? This calls for a better understanding of the relationship between international law (as expressed in the emerging, but contested, R2P norm) and international politics (as evidenced in the decisions and actions of the Security Council). Put differently, how did international politics on Libya influence the interpretation and application of international law?

A recap of the voting pattern on Resolution 1973 provides a useful context and departure point. The Resolution was adopted with the affirmative vote of ten members of the Security Council: the P3 and seven non-permanent members, comprising the A3 (i.e., Gabon, Nigeria, and South Africa) plus Bosnia-Herzegovina, Colombia, Lebanon, and Portugal. These countries believed that the Resolution was necessary to prevent Gaddafi's forces carrying out further attacks against the Libyan opposition and considered it an appropriate response to the Gaddafi regime's disregard of Resolution 1970. While no member voted against the Resolution, five abstained: Brazil, Germany, and India, along with the two remaining permanent members, China and Russia. Collectively, these states abstained for a variety of reasons, including fears of a protracted military conflict that could involve the broader region, the risk of massive loss of civilian life, uncertainty about the methods and mechanisms for enforcing the no-fly zone, the need to protect Libya's territorial integrity and unity, and lack of unanimity among the members on the appropriateness of invoking – even if only impliedly – the R2P principle in this situation.

Law after the Libya Intervention', *Goettingen Journal of International Law* 4 (2012), 11–28 (23–6), noting the Security Council's ambivalence in invoking the doctrine.

[61] 'Secretary-General Says Security Council Action on Libya Affirms International Community's Determination to Protect Civilians from Own Government's Violence', UN Docs SG/SM 13454, SC/10201, AFR/2144, 17 March 2011.

Specifically, Germany felt that it was necessary to tighten the international sanctions imposed by the previous resolution, and it was concerned that implementation of Resolution 1973 would result in large-scale loss of life and 'protracted military conflict'.[62] Brazil was concerned that the Resolution contemplated measures that went beyond the minimum needed to protect the civilian population, and it believed that humanitarian intervention would exacerbate the situation in Libya, 'causing more harm than good [to] civilians'.[63] China, India, and Russia preferred more political dialogue and processes to secure a ceasefire and resolve the conflict peacefully. In addition, Russia warned against 'unpredicted consequences', and it expressed concerns about who would enforce the no-fly zone and how they would do so.[64] Similarly, India was concerned about the implementation of the Resolution and its unintended consequences, calling for full respect for the sovereignty, unity, and territorial integrity of Libya.[65] China was generally opposed to the Resolution for authorising force before all peaceful means had been exhausted, recalling that it '[has] always emphasised that, in its relevant actions, the Security Council should follow the UN Charter and the norms governing international law, respect the sovereignty, independence, unity and territorial integrity of Libya and resolve the current crisis through peaceful means'.[66]

Two observations may be made. First, as major or rising economic powers, some of the abstaining states appear to have made a calculation based on their respective economic or special interests in the Libyan energy industry. They were therefore more inclined to avoid direct confrontation with the Libyan government, unlike the A3. Secondly, they were at the same time mindful that once the international community – including the relevant regional organisations, the African Union and the LAS – agreed that there was a need to intervene on humanitarian grounds, it would be unconscionable to vote against the Resolution. In the end, members of the Security Council either voted for the Resolution or abstained on the basis of national political interests, in some cases influenced by their existing or potential trade and economic interests in Libya.[67] This much was made clear when India's representative noted that:

[62] UN Doc. S/PV.6498, 17 March 2011, 4–5.
[63] *Ibid.*, 6.
[64] *Ibid.*, 8.
[65] *Ibid.*, 5–6.
[66] *Ibid.*, 10.
[67] For example, during the period January–November 2010, Germany and China accounted for 10 per cent and 11 per cent, respectively, of Libya's oil exports by destination. See US Energy Information Administration, 'Today in Energy', 21 March 2011, available at www.eia.gov/todayinenergy/detail.php?id=590#. See also Christopher Davidson, 'Why Was Muammar Qadhafi Really Removed?', *Middle East Policy* 24 (2017), 91–116, (110–11).

> [The] financial measures that are proposed in the resolution could impact directly or through indirect routes the ongoing trade and investment activities of a number of Member States, thereby affecting the economic interests of the Libyan people and others dependent on these trade and economic ties.[68]

The NATO intervention in Libya became the subject of controversy almost as soon as it started and has remained so since. Much of this discussion has revolved around NATO's role in implementing Resolution 1973. Although NATO was not explicitly mentioned anywhere in the Resolution, it soon became apparent that it had anticipated its involvement. On 22 March 2011, five days after the adoption of Resolution 1973, NATO Secretary-General Anders Fogh Rasmussen announced: '[NATO] has completed plans to enforce the no-fly zone – to bring our contribution, if needed, in a clearly defined manner, to the broad international effort to protect the people of Libya from violence of the Gaddafi regime.'[69] Meanwhile, the British-French-US coalition had initiated the bombing on 19/20 March.[70] The subsequent decision that NATO would become formally involved and take full command of the Libya operation on 31 March 2011 was thus hardly a surprise. The counterpoint to NATO's involvement was the marginalisation of the African Union and total disregard by the P3 of its efforts to mediate among the Libyan protagonists with a view to resolving the conflict peacefully and securing a democratic transition.[71]

When the PSC first discussed the Libyan conflict at its meeting on 23 February 2011, it did not recommend intervention on humanitarian grounds. On paper, the crisis in Libya offered the African Union a legal basis to invoke Article 4(h) AU Constitutive Act. The PSC strongly condemned the indiscriminate and excessive use of force and lethal weapons in violation of human rights and international humanitarian law, and it acknowledged the loss of human life.[72] Yet it did not determine that these violations amounted to any of the crimes enumerated in Article 4(h). Indeed, there is nothing on the record to suggest that the PSC addressed this possibility. One commentator, however, has

[68] UN Doc. S/PV.6498, 17 March 2011, 6.

[69] 'Statement by the NATO Secretary-General on Libya Arms Embargo', 22 March 2011, available at www.nato.int/cps/en/natolive/news_71689.htm.

[70] Patrick Terry, 'The Libya Intervention (2011): Neither Lawful nor Successful', *Comparative and International Law Journal of Southern Africa* 48 (2015), 162–82 (165–6).

[71] See generally Sandy Africa and Rantia Pretorius, 'South Africa, the African Union and the Responsibility to Protect: The Case of Libya', *African Journal of Human Rights* 12 (2012), 394–416; Alex de Waal, 'African Roles in the Libyan Conflict', *International Affairs* 89 (2013), 365–79; Geir Ulfstein and Hege Christiansen, 'The Legality of the NATO Bombing in Libya', *International and Comparatively Law Quarterly* 62 (2013), 159–71.

[72] AU Peace and Security Council, Communiqué of 261st Meeting, AU Doc. PSC/PR/COMM. (CCLXI), 23 February 2011.

posited that Gaddafi's government had not, at that point, committed any of these crimes.[73] It is reasonable to conclude that the PSC made the same assumption. Having thus decided not to invoke its right to intervene, the African Union embarked on its ultimately unsuccessful search for a peaceful solution to the crisis. Despite the criticism levelled against it for failing to use military force to intervene against the Gaddafi regime, the African Union believed that it proceeded correctly to protect human lives and broker a peaceful and democratic transition among the warring parties in Libya.

In my view, another political consideration that drove the PSC's decision – albeit one not articulated openly – was the possibility of the African Union finding itself on the opposite side from the LAS within the Libyan crisis. For most of the years of his rule and particularly in his last two decades, Gaddafi had pivoted away for a variety of reasons from the LAS in favour of the African Union. Yet Libya remained nominally a member of the LAS, even if Gaddafi was shunned by most of his fellow Arab leaders. When the conflict broke out, the African Union and the LAS had an equal interest in its speedy resolution, both being concerned that the conflict should not engulf the broader region. This was the context in which the PSC let the LAS take the lead in coordinating with the Security Council, based on a loose notion of regional subsidiarity: that the LAS was closer to the problem and better placed to address it. More importantly, however, both organisations agreed that there should be no external military occupation of Libya – a demand that was incorporated in Resolution 1973.[74] With the prospect of the LAS opposing any intervention by the African Union based on Article 4(h) AU Constitutive Act, the PSC had no choice politically but to opt for a peaceful and diplomatic solution to the crisis.

Finally, there is another reason why the African Union did not – indeed, could not – sidestep the Security Council and unilaterally launch a military intervention in Libya. In assessing the AU response, one should also not overlook the policy that guided the organisation: the 'Ezulwini Consensus'. As discussed earlier, under this policy, the African Union acknowledged the primacy of the Security Council in matters of international peace and security, even as it reaffirmed its role as a regional organisation under Article 53 UN Charter and pursuant to the powers established under Article 4(h) AU Constitutive Act. The African Union could not have usurped the role of the Security Council by unilaterally invoking Article 4(h) to intervene in Libya

[73] Ademola Abass, 'The African Union's Response to the Libyan Crisis: A Plea for Objectivity', *African Journal of Legal Studies* 7 (2014), 123–47 (128, 132–3).

[74] SC Res. 1973 of 17 March 2011, UN Doc. S/RES/1973(2011), para. 4.

even if it had wished to do so, and even if it had the requisite political will and resources needed to implement such a decision.

All of this answers the question of why the African Union did not invoke the norm of intervention that it has uniquely established in Article 4(h) AU Constitutive Act. My argument is that, leaving aside the factual question of whether the violations in Libya had reached the threshold set out in Article 4(h), the African Union's ability to invoke its own normative instrument was constrained by the realpolitik of the AU–LAS relationship and the political desire not to upset intra-regional cooperation between the two organisations. The African Union achieved this with a diplomatic sleight of hand, characterising the violations in Libya as not amounting to the prescribed crimes justifying Article 4(h) intervention.

Some commentators have offered different perspectives on this question. For example, Ademola Abass suggests that the disagreement between the African Union and its critics on its handling of the Libyan crisis highlights the doctrinal uncertainty about the nature of the international responsibility to protect a people when their governments have failed in their primary responsibility to do so.[75] Another commentator has argued that the African Union's response simply reflected the tendency of African organisations to prioritise politics over human lives, peer solidarity over effective action, and unwillingness to hold one of the organisation's main funders to account for the egregious international crimes committed by his own government.[76]

These arguments may be legitimate – but only up to a point. I think they oversimplify the African Union's position on the Libyan crisis in some respects. The argument that the African Union was simply protecting one of the organisation's main funders might seem tendentious. Gaddafi was notorious for spreading his financial largesse among those African leaders whose loyalty he sought to cultivate; he also funded impecunious rulers – notably, when they urgently needed to pay their dues to the African Union, so that they could vote at summit meetings on issues in which he had a particular interest. The claim that some commentators make, that he was the African Union's principal benefactor, sometimes conflates his financial backing of individual 'client states' with his supposed funding of the organisation. Libya never funded the African Union beyond its assessed budget contributions.[77]

[75] Abass, 'The African Union's Response' (n. 73), 138.

[76] See generally Eki Yemisi Omorogbe, 'The African Union, the Responsibility to Protect and the Libyan Crisis', *Netherlands International Law Review* 59 (2012), 141–63.

[77] In 2011, Libya was only one of five top contributors to the African Union's regular budget (accounting for 60 per cent of the budget) – along with Algeria, Egypt, Nigeria, and South Africa – based on the Union's scale of assessment for member states' contributions.

In mandating the intervention in Libya, the Security Council acted wholly within its Chapter VII powers and authority under the UN Charter, as the UN organ with primary responsibility for the international community's collective security. The possibility that the P3 and their NATO allies went beyond the intended objective of Resolution 1973 in carrying out the enforcement action could not as such have delegitimised the authority of the Security Council in adopting the Resolution. But this is separate from the questions regarding the P3's good faith and the supposed unlawfulness of the NATO action.[78] In my view, the African Union acted properly by not invoking Article 4(h) to intervene in Libya without Security Council authorisation, because that would have been a usurpation of the Council's authority and a violation of Article 53 UN Charter.

I do not address the argument that the NATO intervention in Libya was altogether unlawful in any detail here. While it is true that Resolution 1973 did not mention NATO by name, it authorised national governments 'acting alone or through regional organisations'. This provided the basis for France, the United Kingdom, and the United States to involve NATO, as a regional organisation, in the Libyan crisis. There was nothing in Resolution 1973 to suggest that the reference to 'regional organisations' was limited to the African Union or the LAS. I thus disagree with the view that characterises NATO's involvement in the Libyan intervention as illegal as such. There was a legal basis for the use of force to the extent that it was properly authorised by the Security Council acting within its Chapter VII powers. Nonetheless, one can argue that the abuse of that authorisation by NATO subsequently rendered its intervention illegal. Although the matter has been much debated by scholars and politicians alike, there is no consensus on whether NATO went beyond what Resolution 1973 permitted. I believe this to be the case – but, for reasons of scope and space, I do not reprise this debate here.[79]

2. The African Union's Response to the Security Council's Decision and Action on Libya

When the PSC first met to discuss the uprising in Libya, it decided not to invoke Article 4(h) AU Constitutive Act; rather, it focused on the repression of demonstrations by the Libyan authorities and Gaddafi's threats against the

[78] See, e.g., Terry, 'The Libyan Intervention' (n. 70).

[79] See Tiyanjana Maluwa, 'Stalling a Norm's Trajectory? Revisiting U.N. Security Council Resolution 1973 on Libya and Its Ramifications for the Principle of the Responsibility to Protect', *California Western International Law Journal* 53 (2022), 69–114 (81–94).

opposition.[80] There was also no question of invoking Article 4(j) AU Constitutive Act. Unlike Article 4(h), this provision grants AU member states the right to request intervention from the African Union to restore peace and security. Gaddafi's government, which was still the legitimate authority in Libya, had not requested any such intervention.

On 10 March 2011, the PSC met again, at the level of heads of state and government, to forge the African Union's response to the growing crisis. This meeting developed a four-point plan, which became known as the 'AU Roadmap'. The elements of the plan were:

(i) the immediate cessation of all hostilities;
(ii) the cooperation of the competent Libyan authorities to facilitate the timely delivery of humanitarian assistance to the needy populations;
(iii) the protection of foreign nationals, including the African migrants living in Libya; and
(iv) the adoption and implementation of the political reforms necessary for the elimination of the causes of the crisis.[81]

The PSC expressed deep concern that the situation in Libya posed a serious threat to peace and security in that country and in the region. While it once again strongly and unequivocally condemned the indiscriminate use of force and lethal weapons, and it deplored the loss of human life, it also reaffirmed the African Union's strong commitment to the respect of the unity and territorial integrity of Libya, as well as its rejection of any foreign military intervention, whatever its form.[82]

The African Union established an ad hoc High-Level Committee on Libya, chaired by President Jacob Zuma of South Africa. The Committee's mandate was to 'engage with all the parties in Libya and continuously assess the evolution of the situation on the ground', to 'facilitate an inclusive dialogue among the Libyan parties on the appropriate reforms', and to 'engage AU's partners, in particular the League of Arab States, the Organisation of the Islamic Conference, the European Union and the United Nations to facilitate coordination of efforts and seek their support for the early resolution of the crisis'.[83]

[80] AU Peace and Security Council, Communiqué of 261st Meeting, AU Doc. PSC/PR/COMM. (CCLXI), 23 February 2011, para. 2.
[81] AU Peace and Security Council, Communiqué of 261st Meeting, AU Doc. PSC/PR/COMM.2 (CCLXV), 10 March 2011, para. 7.
[82] *Ibid.*, paras 5–6.
[83] *Ibid.*, para. 8. See also Report of the Chairperson of the Commission on the Activities of the AU High-Level Ad Hoc Committee on the Situation in Libya, AU Doc. PSCPR/2 (CCLXXV), 26 April 2011.

Several attempts at shuttle diplomacy by the ad hoc Committee – which involved meetings with the major actors in the Libyan conflict, including Gaddafi – failed to persuade any of the parties to the conflict, as well as the P3 and their allies in the Security Council, to accept the 'AU Roadmap'. As these failed efforts went on, the Transitional National Council (TNC) of Libya, established by the anti-Gaddafi forces as an alternative government, began to gain support among many states. But it was not before mid-August 2011 that some major powers, including the United States, recognised it as the de facto government, with China and the African Union following suit in late September.

In my view, the African Union's response to the Libya crisis was doomed to fail. In one sense, throughout the crisis, the African Union was responding to the initiatives of the Security Council, on the one hand, while simultaneously trying to mediate the opposing postures of some of its own leading members, on the other. As chair of the ad hoc Committee, South Africa was caught in the middle, but generally inclined towards supporting Gaddafi for reasons largely to do with his previous support for the anti-Apartheid struggle. For South Africa, the situation was complicated by the fact that, like Nigeria, it had supported Resolution 1973. Disagreement between two of the African Union's leading members over their preferred outcomes and the associated divisions that they created within the organisation served not only to exacerbate already-fragile political loyalties but also to weaken the African Union's negotiating hand vis-à-vis interested external actors – especially the P3, who were most invested in the success of the NATO operation.

Within the Security Council and subsequently in the General Assembly, the debate on Libya turned on the different understandings of the permission given to UN member states under Resolution 1973 to use 'all measures necessary'. In the Security Council, the A3 accused the P3 of deliberately misinterpreting the Resolution to carry out a predetermined NATO agenda of regime change in Libya. There was no disguising what many African states came to view as NATO's conceited posturing. At the start of its military operation in March 2011, NATO expressed its position thus: 'NATO is not engaged in Libya to decide the future of the Libyan people. That is up to the Libyans themselves.'[84] Three months later, in a change of tone, NATO was proclaiming: '[The] game is over for Gaddafi. He should realise sooner than later that there is no future for him or his regime.'[85] US President Barack

[84] 'Joint Press Briefing on Libya', 31 March 2011, available at www.nato.int/cps/en/natolive/news_71907.htm.

[85] Statement attributed to NATO Secretary-General Anders Fogh Rasmussen, cited in Alberto Arce, 'NATO Says Gaddafi's Time is Up', *The Sydney Morning Herald*, 9 May 2011, available at www.smh.com.au/world/nato-says-gaddafis-time-is-up-20110509-1eeit.html.

Obama had made a similar statement a month earlier, when he insisted that only after regime change in Libya could 'a genuine transition from dictatorship to an inclusive constitutional process [really] begin' and that, 'in order for that transition to succeed, Colonel Gaddafi must go, and go for good'.[86]

Alex de Waal and Tom Keating have argued that the subsequent actions of the P3 indicated that their disavowal of regime change 'was an exercise in dissimulation'.[87] Similarly, Dire Tladi argues that the implementation of Resolution 1973 and Resolution 1975[88] (also adopted in March 2011, authorising intervention in Côte d'Ivoire) led to the collapse of the Muammar Gaddafi and Laurent Gbagbo regimes, respectively, and suggests that these resolutions appeared to authorise regime change through the use of force for the purposes of protecting civilians.[89] I agree with these writers' readings and characterisation of the resolutions. The outcomes in these two instances, intended or not, validated the concerns that China and Russia had expressed – namely, that humanitarian intervention should not be manipulated to achieve ulterior ends. Further Security Council practice in this direction can only erode the trust and confidence of the less powerful states in the system of collective security of which it is the custodian.

From their perspective, African leaders felt aggrieved that the P3 and other Western governments thwarted and misrepresented the African response to the Libyan conflict. The anger against the P3's perceived deception and selective interpretation of Resolution 1973 was widely shared among AU member states other than the A3. In his report to the AU Executive Council in June 2011, the AU Commission's chairperson to this issue, charging that it was becoming increasingly clear that the pursuit of the military operations would not only undermine the very purpose for which Resolution 1970 and Resolution 1973 were adopted – that is, the protection of civilians – but also compound any transition to democratic institutions. He also argued that the military campaign was 'significantly expanding beyond the objectives for which it was in the first place authorised, raising questions about the legality

[86] See op-ed article co-authored by the US President Barack H. Obama, French President Nicholas Sarkozy, and the British Prime Minister David Cameron, 'Libya's Pathway to Peace', *New York Times*, 14 April 2011, available at www.nytimes.com/2011/04/15/opinion/15iht-edlibya15.html.

[87] De Waal, 'African Roles' (n. 71), 368. See also generally Keating, 'The UN Security Council on Libya' (n. 53).

[88] SC Res. 1975 of 30 March 2011, UN Doc. S/RES/1975(2011).

[89] Dire Tladi, 'Security Council, the Use of Force and Regime Change: Libya and Côte d'Ivoire', *South African Yearbook of International Law* 37 (2012), 22–45 (45); cf. Mehrdad Payandeh, 'The United Nations, Military Intervention, and Regime Change in Libya', *Virginia Journal of International Law* 52 (2012), 355–403 (387–9).

and legitimacy of some of the actions being carried out and the agenda being pursued'.[90]

In fact, prior to this report, South Africa's president had been criticised for voting in favour of the Resolution apparently despite counsel from his own advisers that 'all measures necessary' was open to very flexible interpretation and thus threatened to negate the AU initiative for a peaceful resolution of the conflict that he had led.[91] South Africa justified its affirmative vote for Resolution 1973 in the context of the discourse on UN peacekeeping reform, which emphasised the principle of civilian protection. It also pointed out that it supported the Resolution after ensuring that its operative paragraphs precluded any foreign occupation and unilateral external military action, which was consistent with the position adopted earlier by the African Union.[92] We can reasonably speculate that, because of its regional superpower status, had South Africa led the other African members on the Security Council to abstain or vote against it, Resolution 1973 might never have been adopted. As already noted, although South Africa carried along its fellow African non-permanent members, all of its BRICS partners – Brazil, China, India, and Russia – abstained. I return to the BRICS position in the Security Council and on the R2P in the next section.

Resolution 1973 has been described as 'spongy' and 'vague', and as employing 'very broad language' in its wording, which revealed 'a mismatch of the intervention's rationale expressed in the text of the resolution as opposed to the one which shone through its execution'.[93] Thielbörger has noted, first, that the Security Council determined – as it had done in respect of previous resolutions – that the situation in Libya constituted a 'threat to international peace and security' without providing explanations of why the situation in Libya had an international dimension. Secondly, he also notes that, in authorising 'all necessary measures to [protect] civilians and civilian populated areas under threat of attack', the Resolution was very indistinct and extraordinarily wide in determining which actions it permitted, while explicitly ruling out

[90] African Union Executive Council, Report of the Chairperson to the Executive Council, 19th Ordinary Session of 23–28 June 2011, para. 11.

[91] See de Waal, 'African Roles' (n. 71), 371, citing Eusebius McKaiser, 'Looking an International Relations Gift Horse in the Mouth: [South Africa's] Response to the Libyan Crisis', 2011 Ruth First Memorial Lecture, Johannesburg, 17 August 2011. See also Sean Christie, '[South Africa] at the UN: Do They Jump or Are They Pushed?', *Mail & Guardian*, 6 May 2011, available at https://mg.co.za/article/2011-05-06-do-they-jump-or-are-pushed/.

[92] Statement by Spokesperson of the South African Department of International Relations and Cooperation, Pretoria, 18 March 2011, quoted in Garth Abraham, 'South Africa and R2P', in Doutje Lettinga and Lars van Troost (eds), *Shifting Power and Human Rights Diplomacy* (Amsterdam: Amnesty International Netherlands, 2016), 69–78 (72).

[93] Thielbörger, 'Status and Future' (n. 60), 18.

only one thing in absolute terms – namely, 'any foreign occupation force of any kind'.[94] This diplomatic 'fudging', which Van den Herik also discusses in her chapter, is hardly surprising:[95] the Security Council, as Thielbörger and other legal scholars recognise, operates as a political body and does not engage in a legal analysis or clarification as might be the case in judgments by international courts. The vague wording of Resolution 1973 gave rise to several questions that elicited much debate and diverse commentary. Did Resolution 1973, for example, permit, or even enable, the NATO allies to supply rebels with weapons, as France explicitly assumed[96] and others rejected?[97] Could NATO deploy ground forces to train or assist the rebels, or protect civilians, as long as they did not turn into occupation forces?[98] And were targeted attacks on senior Libyan officials, including the assassination of Gaddafi, justified if such attacks were necessary to protect civilians?[99] I agree with Van den Herik's observation about the 'ambivalent construction' of the Resolution, and that it veered between political and military solution of the conflict.

94 *Ibid.*, 19–20.

95 The ambiguity and vagueness of the language resulted from the desire to reach a compromise between the members of the Security Council – especially France and the United Kingdom, who advocated for robust military action, and China and Russia, who would have used their veto had the resolution authorised measures that were not constrained by at least explicitly precluding foreign occupation forces. See *ibid.*, 22. See also Van den Herik, 'A Reflection on Institutional Strength', Chapter 2 in this volume, section IV.A (pp. 124, 127–28).

96 See David Jolly and Kareem Fahim, 'France Says it Gave Arms to the Rebels in Libya', *New York Times*, 29 June 2011, available at www.nytimes.com/2011/06/30/world/europe/30france.html. For the view that the NATO coalition's military support for the rebels was legal within the terms of Resolution 1973, see Dapo Akande, 'Does SC Resolution 1973 Permit Coalition Military Support for the Libyan Rebels?', *EJIL:Talk!*, 31 March 2011, available at www.ejiltalk.org/does-sc-resolution-1973-permit-coalition-military-support-for-the-libyan-rebels/. Contra this view, see Olivier Corten and Vaios Koutroulis, 'The Illegality of Military Support to the Rebels in the Libyan War: Aspects of *Jus contra Bellum* and *Jus in Bello*', *Journal of Conflict and Security Law* 18 (2013), 59–93 (66–77).

97 Russian Foreign Minister Sergey Lavrov criticised the French military support for Libyan rebels as 'a very crude violation of UN Security Council Resolution 1970': 'Russia Decries French Arms Drop to Libya Rebels', *BBC News*, 30 June 2011, available at www.bbc.co.uk/news/world-europe-13979632.

98 For example, a group of British international law scholars and experts was convened by a British newspaper on 21 March 2011 to analyse the UK government's Note on the Legal Basis for Deployment of UK Forces and Military Assets. Professors Ryszard Piotrowicz, Malcom Shaw, and Nick Grief, and Mr Anthony Aust generally agreed that although Resolution 1973 did not permit a foreign occupation force, it did not exclude the use of ground forces to protect civilians: see 'Our Panel of Experts Discuss UK's Basis for Military Action in Libya', *The Guardian*, 21 March 2011, available at www.guardian.co.uk/law/2011/mar/21/international-law-panel-libya-military.

99 *Ibid.* Professors Shaw and Piotrowicz supported this position.

There is little doubt that NATO's involvement in the Libyan conflict displeased the African Union. I take the view that the African Union was, in large measure, the author of its own displeasure. Principally, this was because of the inability of its members to speak with one voice and to coalesce around its new security structure and the R2P norm implied in Article 4(h) AU Constitutive Act. The PSC made no effort to verify with specificity any violation of the crimes under Article 4(h), even as it acknowledged ongoing violations of human rights and international humanitarian law in the conflict. A determination that the Libyan government was in violation of Article 4(h) would, at the very least, have opened the door to the *possibility* of the African Union invoking its right to intervene, subject to the necessary consultations with the Security Council, consistent with the 'Ezulwini Consensus' and the requirements of Article 53 UN Charter.

From this, one can draw the conclusion that the African Union could act neither as a legitimate peace-broker nor as a capable peace-enforcer in Libya. Related to this, the disagreements over the interpretation and implementation of Resolution 1973 revealed that there was a need to agree on a set of principles aimed at clarifying the UN–AU relationship, which should revolve around support for African ownership, and the division of labour and sharing of responsibilities in the collaborative peace operations involving the two organisations. This was no doubt the motivation for South Africa's decision to convene a meeting of the Security Council during its rotating presidency in January 2012 – namely, to discuss ways of strengthening the cooperation and partnership between the two. The United Nations did not disagree with this thinking. Indeed, in his statement, UN Secretary-General Ban Ki-Moon agreed that cooperation between the African Union and the United Nations demands 'common strategic objectives and a clear division of responsibilities, based on shared assessments and concerted decisions of the two organisations'.[100]

Still, it is by no means certain that the efforts made by both sides since then, consisting of mostly non-institutionalised consultations between the Security Council and the PSC, have achieved the aspirations expressed by Secretary-General Ban Ki-Moon. A recent empirical study by the International Crisis Group (ICG) on the relationship between the Security Council and the PSC has addressed the issue of mistrust between the two organs. It concludes that, although the leadership of both organisations has made the deepening of the AU–UN partnership a priority, the two bodies often fail to coordinate their positions during major crises threatening peace and security for a combination

[100] SC Res. 2033 of 12 January 2012, UN Doc. S/RES/2033(2012).

of political and procedural reasons, and that continuing tensions between the A3 and P5 have exacerbated the differences.[101] The ICG's report captures the crux of the matter succinctly:

> Proposals to improve PSC and A3 diplomacy are unlikely to make much difference unless Security Council members pay the AU's views greater heed. Discussions of problems between the two councils frequently circle back to PSC members' frustration that their counterparts do not treat their views with respect. PSC members often scan Security Council resolutions to see if they echo the language of AU decisions at all, but seldom find traces of their views.[102]

This diagnosis is correct. But it is also important to underscore that disagreements and tensions between the two sides have not impacted *every* instance of Security Council decision-making in relation to Libya since 2011. As Table 1 shows, the A3, P3, and P2 have voted in support of all key resolutions since the P3 and the P2 abstained on Resolution 1973. The P2 have abstained on two subsequent resolutions only: Resolution 2441 of 2018, extending by a year the mandate of the Panel of Experts assisting the 1970 Libya Sanctions Committee; and Resolution 2542 of 2020, which extended for a year the United Nations Support Mission in Libya (UNSMIL). Russia alone abstained on Resolution 2509 of 2020, also extending the mandate of the Panel of Experts. These abstentions reflect opposition to a prolonged UN presence in Libya.

Undoubtedly, the NATO intervention in Libya, based on a skewed interpretation of Resolution 1973 by the P3, has lessons for the African Union in its relations with the Security Council. Understanding the respective roles of the African Union and the Security Council in the Libyan conflict is important for framing the limits of the possibilities for the collaborative relationship between the United Nations and the African Union in the maintenance of international peace and security. The shared objectives of the P3 members

[101] International Crisis Group, 'A Tale of Two Councils: Strengthening AU–UN Cooperation', Africa Report No. 279, 25 June 2019, available at www.crisisgroup.org/africa/279-tale-two-councils-strengthening-au-un-cooperation, 2.

[102] *Ibid.*, 22. To this point, after the unanimous adoption of Resolution 2568 on 12 March 2021, reauthorising the African Union Mission in Somalia, Niger nevertheless complained on behalf of the African members (Kenya, Niger, and Tunisia) and Saint Vincent and the Grenadines – known informally as the A3+1 – that their views had been rejected without explanation. He implored the Security Council to listen more to the African Union, and he criticised the penholder system as outmoded and at odds with managing peace and security. See 'Security Council Reauthorizes African Union Mission in Somalia, Unanimously Adopting Resolution 2568 (2021)', UN Doc. SC/14467, 12 March 2021.

TABLE 1 *Key Resolutions and Votes on Libya, 2011–21*

SC Resolution	Security Council Action/Decision	Votes Y (Yes); A (Abstention)			
		A3	China	Russia	P3
Res. 1970 (2011)	Imposes sanctions; calls for humanitarian aid; refers case to ICC	YYY	Y	Y	YYY
Res. 1973 (2011)	Establishes no-fly zone; imposes more sanctions	YYY	A	A	YYY
Res. 2009 (2011)	Acts to stop proliferation of portable surface-to-air missiles and other arms	YYY	Y	Y	YYY
Res. 2146 (2014)	Bans illicit export of crude oil from Libya	YYY	Y	Y	YYY
Res. 2298 (2016)	Authorises member states to destroy Libya's chemical weapons	YYY	Y	Y	YYY
Res. 2357 (2017)	Renews measures on arms embargo for a year	YYY	Y	Y	YYY
Res. 2441 (2018)	Extends mandate of experts panel on measures on illicit export of crude oil from Libya until 15 February 2020	YYY	A	A	YYY
Res. 2509 (2020)	Extends mandate of experts panel on measures on illicit export of crude oil from Libya until 30 April 2020	YYY	Y	A	YYY
Res. 2542 (2020)	Extends mandate of mission in Libya until 15 September 2021	YYY	A	A	YYY
Res. 2546 (2020)	Renews for a year authorisation for member states to inspect vessels on high seas off coast of Libya suspected of migrant smuggling	YYY	Y	Y	YYY
Res. 2570 (2021)	Strongly urges member states to withdraw all foreign forces and mercenaries without delay	YYY	Y	Y	YYY
Res. 2571 (2021)	Renews ban on illicit export of crude oil from Libya and extends mandate of experts panel until 15 August 2022	YYY	Y	Y	YYY

also coincided with the relative lack of strategic interest of the P2 in Libya, thus facilitating the NATO military action. Moreover, for the African Union, the Libyan crisis revealed the limitations of its still-evolving mechanisms for

managing peace and security, collectively termed the African Peace and Security Architecture (APSA), established pursuant to the Peace and Security Protocol. The African Union could not invoke its own new normative guidelines, let alone trigger its nascent APSA mechanisms in probably the most significant crisis it has faced to date.

If Libya was intended to be the crucible in which the international community hoped to test the R2P principle, the outcome was far from a success. This has had catastrophic consequences for the ability of the Security Council to achieve consensus, especially among the P5, on how to address subsequent conflicts. The reluctance of four of the five BRICS countries to support Resolution 1973 foreshadowed a suspicion towards Western humanitarian intervention; this has led to normative resistance and become a barrier to the implementation of the R2P elsewhere.

After the Libyan intervention, all of the BRICS countries opposed the adoption of strong Security Council resolutions against Syria. The representative of Russia, speaking in a Security Council meeting on Syria on 4 October 2011, stated that the Syrian situation could not be considered separately from the Libyan experience, and worried that the NATO interpretation of Resolutions 1970 and 1973 could be a model for NATO actions in implementing the R2P principle in Syria.[103] The representative of South Africa also objected to the proposed Syrian resolutions on the basis that recent Security Council resolutions had been abused and that their implementation had gone beyond what was intended.[104] Unsurprisingly, on three occasions, China and Russia successively vetoed draft resolutions on Syria in the aftermath of the Libya campaign: on 4 October 2011,[105] 4 February 2012,[106] and 19 July 2012.[107] There is some agreement among commentators that perceptions of NATO's military overreach and overstepping of the UN mandate in Libya doomed the R2P, and that this may turn out to have been both the first and last use of the principle.[108] As I noted earlier, there is no consensus on the charge that NATO overstepped the UN mandate. I do think, however, that, from the perspective of international politics, perceptions of NATO's abuse of the authorisation are as important as the reality, and it is arguable that, besides Syria, the situations in Myanmar and Yemen might have invited R2P intervention but for Libya.

[103] UN Doc. S/PV.6627, 4 October 2011, 4.
[104] *Ibid.*, 11.
[105] *Ibid.*
[106] UN Doc. S/PV.6711, 4 February 2012.
[107] UN Doc. S/PV.6810, 19 July 2012.
[108] Ulfstein and Christiansen, 'The Legality of the NATO Bombing' (n. 71), 171.

The Security Council action on Libya has proved to be a setback in its role as a promoter of normative developments. The future trajectory of the R2P remains to be seen, but it is fair to say that it currently stands on a perilous porch. In the next section, I discuss the short-lived efforts made by two of the BRICS countries to advance their own alternative visions of the R2P following the Libya intervention: in the one case, as an official proposal; and in the other case, semi-officially. For the African Union, Libya did not prove to be a ready ground for testing its norm entrepreneurship either, as the promoter of the right of humanitarian intervention. Article 4(h) AU Constitutive Act had been hailed as evidence that the African Union could be a norm-creator and not just a norm-taker. Libya exposed the African Union's limitations in enforcing its own norms.

3. The BRICS Countries and the Responsibility to Protect Post-Libya

With the relative decline of the influence of the United States in the international realm over the last decade, new coalitions of states, dubbed 'rising powers', have emerged. The BRICS countries form one such coalition. Over the period since its first annual summit in 2009, the group has been viewed as progressing economically and strengthening the members' network of political influence, with the potential to establish new forms of security cooperation in line with their own normative perspectives. The rise of the BRICS has attracted the attention of international law scholars too. Some have asked questions such as whether the BRICS countries, as a set of rising powers, can contribute to the development of international law, and what their influence would entail for the conceptualisation and development of international law in the future.[109] In this context, attention has focused on the voting patterns of the BRICS countries in the United Nations as a way of empirically assessing their convergences and consensus in international norm-creation and policy-making. I pay attention to the BRICS in this discussion because they represent an alliance comprising the P2, who share views and voting patterns on many issues concerning Africa, and three states that are frontrunners among those aspiring to permanent seats on a reformed Security Council. Their collective positions, where appropriate, matter. As Aniruddha Rajput puts it: '[The] impact of BRICS countries on the future development of international law can be analysed on the basis of their participation and positions in existing

[109] See, e.g., Aniruddha Rajput, 'The BRICS as "Rising Powers" and the Development of International Law', in Krieger et al., *The International Rule of Law* (n. 14), 105–24 (105).

institutions and participation in norm-creation, along with the articulation of their vision of these institutions and norms.'[110]

As already noted, although Resolution 1973 made only a passing reference to the R2P, the common view is that the Resolution was in effect an operationalisation of it. Below, I briefly recap the positions that the BRICS countries adopted on the R2P and the limited efforts to reconceptualise it since the Libya intervention.

The 2005 World Summit Outcome, which sets out the R2P framework negotiated by states since 2001, was adopted unanimously.[111] As endorsed by world leaders at the General Assembly in 2005, the R2P consists of three mutually reinforcing pillars.

- 'Pillar One' states that each state has a responsibility to protect its population from mass atrocity crimes (i.e., genocide, war crimes, crimes against humanity, and ethnic cleansing).
- 'Pillar Two' stipulates that the international community should encourage and assist states failing in their 'Pillar One' obligations.
- 'Pillar Three' provides that if a state is manifestly failing to protect its populations, the international community is prepared to take timely and decisive collective action on a case-by-case basis, in accordance with the UN Charter.[112]

Cai has noted that China's position on the R2P has evolved. He points out that, in its position paper issued in June 2005, China generally expressed its support for the R2P while requiring that any R2P action be authorised by the Security Council.[113]

Although China supported the 2005 World Summit Outcome, China stated in the first General Assembly debate on the R2P in 2009 that its implementation should be limited to the circumstances provided for in the World Summit Outcome, and should not contravene the principles of state sovereignty and non-interference in internal affairs of states. China stated categorically: 'No state must be allowed to unilaterally implement R2P.'[114] From its point of view, '[the]

[110] *Ibid.*, 111.

[111] 2005 World Summit Outcome, GA Res. 60/1 of 24 October 2005, UN Doc. A/RES/60/1.2005.

[112] *Ibid.*, paras 138–40.

[113] Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, section V.D.2. See People's Republic of China, Position Paper on the United Nations Reforms, 7 June 2005, available at www.china.org.cn/english/government/131308.htm, sect. III.1. See also Rosemary Foot, 'The Responsibility to Protect (R2P) and its Evolution: Beijing's Influence in Norm Creation in Humanitarian Areas', *St. Antony's International Review* 6 (2011), 47–66 (49–50).

[114] UN Doc. A/63/PV.98, 24 July 2009, 23.

responsibility to protect remains a concept and does not constitute a norm of international law'.[115] China's position on the R2P has been consistent: it has time and again rejected it as a legal rule. China's unwillingness to embrace the R2P as an international legal norm is consistent with its espousal of the principles of state sovereignty and non-interference in the internal affairs of states, and with its preference for diplomatic and peaceful solutions to conflicts that threaten international peace and security. Thus, while not positively obstructing the development of this concept as such, China broadly and reluctantly endorsed the idea of invoking the concept only in certain exceptional circumstances to respond to gross human rights violations. Furthermore, China emphasised the capacity-building functions of the R2P and the need to ensure its limited application and differentiation from humanitarian intervention.

Russia, like China, formally espouses the position that maintaining the sovereignty of existing states is the most fundamental principle of diplomacy in the modern world. Thus while Russia also generally supported the R2P in both 2005 and 2009, it expressed concern about its implications on state sovereignty, noting that the development and implementation of the principle 'could significantly shape key trends that will determine the entire system of international relations and the international rule of law'.[116] It also warned 'against taking rash and hasty steps to apply that idea arbitrarily to specific countries and interpreting it too broadly'.[117] Russia shares with China its preference for diplomacy as the best route for resolving civil conflicts and crises, and insists that humanitarian intervention should only ever be sanctioned through the Security Council.[118]

As with China, Russia also favours the involvement of relevant regional organisations when making decisions on whether a particular situation really does represent a threat to international peace and security – or at least ensuring that the regional organisation legitimises them. This explains why Russia (along with China and South Africa) opposed a Security Council draft resolution on Myanmar in 2007,[119] which one regional organisation – namely, the Association of Southeast Asian Nations (ASEAN) – opposed, but abstained

[115] *Ibid.*, 24.
[116] UN Doc. A/63/PV.10, 28 July 2009, 12.
[117] *Ibid.*
[118] This claim was contradicted by Russia's behaviour when it justified its brief war with Georgia in 2008 as an act of humanitarian intervention to prevent mass killings in the disputed region of South Ossetia. The action was not authorised by the Security Council. See generally Gareth Evans, 'Russia, Georgia and the Responsibility to Protect', *Amsterdam Law Forum* 1 (2009), 25–8.
[119] 'Security Council Fails to Adopt Draft Resolution on Myanmar, Owing to Negative Votes by China and Russian Federation', UN Doc. SC/8939, 12 January 2007.

on Resolution 1973, which had the support of the two relevant regional organisations (i.e., the African Union and the LAS). Despite their initial hesitancy towards the R2P, Russia and China have come to formally embrace it, but they both remain wary of Western intervention in internal conflicts after the Cold War and are critical of armed intervention for humanitarian purposes. They are hesitant about supporting the third pillar of the R2P.

Of the remaining BRICS countries, India shares Russia's and China's positions in insisting that the R2P should not be used as a pretext to weaken the sovereignty of states and the principle of non-interference. Brazil and South Africa also signed up to the 2005 consensus despite their misgivings but have continued to insist that implementation of the concept should not exceed the framework agreed at the World Summit.[120] As members of the Security Council in 2011, the BRICS countries were therefore united both in their formal support for the R2P and in their misgivings about the potential for its abuse by powerful states intent on pursing a regime change agenda masquerading as humanitarian intervention. For the four BRICS countries that abstained from the vote, the eventual removal of the Gaddafi regime confirmed their worst fears. In the immediate aftermath of the adoption of Resolution 1973, India issued a statement expressing its strong belief that 'the Security Council had passed a resolution authorising far-reaching measures under Chapter VII of the Charter, with relatively little credible information on the situation on the ground in Libya'.[121] As noted earlier, after its affirmative vote, South Africa subsequently expressed concern about the way in which the Resolution had been implemented.[122] Brazil and China responded in ways that may yet impact the ongoing debate on the R2P.

Apart from the fact that the post-Libya backlash against the R2P was partly responsible for the deadlock in the Security Council over Syria, as I suggest, another consequence was that it reignited a debate about the strengths and weaknesses of the third pillar of the R2P norm. In November 2011, Brazil presented an initiative proposing a series of decision-making criteria and monitoring mechanisms to guide the implementation of the R2P's coercive measures under the third pillar.[123] Brazil's proposed alternative principle, the

[120] UN Doc. A/63/PV.10, 28 July 2009, 16–17.

[121] UN Doc. S/PV.6498, 17 March 2011, 6.

[122] UN Doc. S/PV.6627, 4 October 2011, 11.

[123] On 9 November 2011, the Brazilian permanent representative to the United Nations, Ambassador Maria Luisa Viotti, presented a letter with a concept note titled 'Responsibility while Protecting: Elements for the Development and Promotion of a Concept' during the 12th Security Council Debate on the Protection of Civilians in Armed Conflict. See 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:

'Responsibility while Protecting' (RwP), was regarded as a conceptual advancement on the R2P and was welcomed as a norm innovation from the Global South. However, Brazil's attempt at norm entrepreneurship did not last long, because of a combination of factors, including rejection by Western powers, different priorities and interests among the major Global South players, and, ironically, lack of follow-up by Brazil itself. Brazil effectively abandoned its advocacy of the RwP when its term on the Security Council ended and it lost its two main champions, Brazilian President Dilma Rousseff and Foreign Minister Antonio Patriota. Nevertheless, I agree with Van den Herik in characterising the RwP as an example of efforts by a non-permanent member of the Security Council to refine use-of-force decision-making and contribute to norm-making.[124]

The RwP was an attempt to articulate the need for responsible means of protection when military force is used in the name of collective security and humanitarianism. Part of the explanation for its short life and failure to generate sustained interest is scepticism on the part of some analysts, politicians, and policy-makers who questioned whether it represented an attempt to challenge or substitute the R2P, or was an addendum or complementary contribution to the R2P.[125] While most states welcomed it, the P3 were initially critical of it, seeing it as a direct criticism of the R2P and a challenge to the narrative that NATO's operation was a success.[126]

Although RwP as a political project is no longer on the United Nations' radar, its discursive influence can be seen in the General Assembly debate on the R2P in 2012, at which numerous states spoke favourably of the proposal as an advance on the R2P. Moreover, the UN Secretary-General explicitly addressed the Brazilian initiative and the concept in his report.[127] The limited

Elements for the Development and Promotion of a Concept, UN Doc. A/66/551–S/2011/701, 11 November 2011.

[124] Van den Herik, 'A Reflection on Institutional Strength', Chapter 2 in this volume, section IV.B.1 (p. 132). See generally Andrew Garwood-Gowers, 'The BRICS and the Responsibility to Protect in Libya and Syria', in Rowena Maguire, Bridget Lewis, and Charles Sampford (eds), *Shifting Global Powers and International Law: Challenges and Opportunities* (London: Routledge, 2013), 81–99.

[125] For a comprehensive analysis of RwP, see Andrés Serbin and Andrei Serbin Pont, 'Brazil's Responsibility while Protecting: A Failed Attempt of Global South Innovation?', *Pensamento Propio* 41 (2015), 171–92; Alyse Prawde, 'The Contribution of Brazil's "Responsibility while Protecting" Proposal to the "Responsibility to Protect" Doctrine', *Maryland Journal of International Law* 29 (2014), 184–209 (200–8).

[126] See Marcos Tourinho, Oliver Stuenkel, and Sarah Brockmeier, '"Responsibility while Protecting": Reforming R2P Implementation', *Global Society* 30 (2016), 134–50 (140).

[127] *Responsibility to Protect: Timely and Decisive Response*, Report of the Secretary-General, UN Doc. A/66/874-S/2012/578, 25 July 2012, paras 49–58.

academic commentary on the proposal suggests that, although short-lived, the RwP has helped to broaden and deepen policy debates about the R2P.[128] Some have suggested that it is the most significant recent development in the evolution of the R2P doctrine,[129] describing Brazil as an example of those non-Western agents whose contributions usually go overlooked, yet which are the most likely to address the legitimacy deficits of norms like the R2P.[130] Brazil's proposal may have suffered from the fact that, as some commentators argue, '[the] idea of responsibility while protecting remained largely abstract and was never sufficiently developed to materialise into specific proposals that could address the problems of collective security and human protection in practice'.[131] This assessment is correct: the constituent elements of RwP remained to be fleshed out from the abstract to the concrete, to distinguish it more clearly from the R2P.

China's decision not to veto Resolution 1973 came as something of a surprise to many observers, given its insistence on the primacy of the principles of sovereignty and non-intervention, and on the primacy of the first and second pillars of the R2P. I have argued already why the P2 found it unconscionable to veto the Resolution once it had the support of the A3. Unlike Brazil, post-Libya, China did not officially articulate an alternative principle to the R2P. However, at about the same time as Brazil's proposal was losing steam, in mid-2012, the official think tank of China's Ministry of Foreign Affairs floated a proposal titled 'Responsible Protection' (RP).[132] To date, China has not explicitly adopted the concept as its formal policy statement on the R2P. Nevertheless, there seems to be little doubt that, because of the official status of the think tank, China has endorsed it implicitly. The RP proposal is thus, to all intents and purposes, a 'semi-official' initiative of the Chinese government.[133] As a 'semi-official' initiative that China has not

[128] See, e.g., Tourinho et al., '"Responsibility while Protecting"' (n. 126).

[129] Derek McDougall, 'Responsibility while Protecting', *Global Responsibility to Protect* 6 (2014), 64–87.

[130] Cristina Stefan, 'On Non-Western Norm Shapers: Brazil and the Responsibility while Protecting', *European Journal of International Security* 2 (2017), 88–110.

[131] Tourinho et al., '"Responsibility while Protecting"' (n. 126), 149.

[132] The originator of this proposal was Ruan Zongze, vice president of the China Institute for International Studies. He first published this as an op-ed article: Ruan Zongze, 'Responsible Protection', *China Daily News*, 15 March 2012, available at www.chinadaily.com.cn/opinion/2012-03/15/content_14838467.htm. He expanded and republished it as Ruan Zongze, 'Responsible Protection: Building a Safer World', *China International Studies* 34 (2012), 19–41.

[133] For an overview of the origins and analysis of the RP concept, see generally Andrew Garwood-Gowers, 'China's "Responsible Protection" Concept: Reinterpreting the Responsibility to

formally advanced, the RP has been the subject of only limited public discussion and scholarly commentary.

Van den Herik and Cai both discuss this initiative in their contributions. One of the points on which we all converge is the characterisation of the rising China as a norm entrepreneur, even if we do not all use the specific term. One example that we all mention to varying degrees of detail is the RP proposal. Analysis of this putative doctrine by non-Chinese scholars is very limited, at least in the English language. This is an issue that might have benefited from a more expansive discussion in Cai's chapter in this volume, drawing upon his insights as a Chinese international law scholar and his familiarity with relevant Chinese-language sources, both official and unofficial. But it is also plausible that, given that the Chinese government did not deem it necessary to advance the proposal formally, there is not much else to excavate or opine about. This might explain the limited scholarly interest in or discussion of the RP concept: engagement with the issue might seem like a purely speculative exercise for the sake of continuing scholarly debate.

I would add only that the RP proposal is primarily concerned with the R2P's third pillar. Specifically, it provides a set of guidelines to constrain the implementation of non-consensual, coercive measures comprising six principles mostly drawn from, inter alia, just war theory, earlier R2P proposals, and Brazil's RwP. Not surprisingly, some have described the RP proposal as a repackaging of previous ideas, rather than an entirely original initiative, which seeks to narrow the circumstances in which non-consensual use of force can be applied for humanitarian purposes.[134] Since the Libya intervention, China has continued to engage with other states on the R2P instead of advancing its own proposal.

I conclude that the BRICS countries have not advanced a coordinated initiative on the R2P in the period since the Libyan conflict. They supported the RwP in the informal interactive discussions on the R2P in the General Assembly not only as members of the BRICS group but also as members of other alliances constituted for the purposes of advocating for common interests on global issues in the United Nations, such as the 'G77 and China'. Notwithstanding the demise of the RwP initiative and the absence of an officially sanctioned RP proposal, the elements advanced in these initiatives will remain relevant to future debates on the R2P. China's RP and Brazil's RwP demonstrate the growing assertiveness of rising, non-Western powers,

Protect (R2P) and Military Intervention for Humanitarian Purposes', *Asian Journal of International Law* 6 (2016), 89–118.

[134] See generally *ibid.*

such as the BRICS countries, in the post-Cold War international order and their readiness to advance their own normative choices and preferences on issues relating to collective security, sovereignty, and intervention.

I have not discussed the issue of regime change in any detail in this chapter. And certainly not in as much detail as Cai discusses it in relation to the implementation of Resolution 1973, the R2P principle, and the subsequent Security Council debates over the failed draft resolutions on Syria. Nevertheless, I am intrigued by two things in Cai's discussion: first, the choice of the descriptive label he attaches to China as a 'norm "antipreneur"'; and secondly, the suggestion that the Security Council might have served as a site for the creation of a new norm of regime change, which China resisted. As he puts it: 'In short, China has endeavoured to resist regime change as the norm within or through the Security Council.'[135] As a metaphor, the notion of 'norm "antipreneur"' is quite novel, but it is not clear to me if it means anything more than the more familiar notion of 'persistent objector' in customary international law. Substantively, the argument that, in this specific instance, China has acted to disrupt an emerging norm suggests that the Western powers that pursued regime change in Libya – and presumably sought to do the same in Syria – based their position on the assertion of the existence of such a norm or a conscious disposition to establish it as a new norm.

I have argued that although the Libyan NATO intervention ended in regime change with the fall of Gaddafi's regime, it was not designed as such – at least in terms of Resolution 1973. This is not to dispute the fact that, subsequently, political leaders of the P3 powers did not disguise their preference for Gaddafi's departure nor that it was unreasonable to impute regime change motives from their statements.[136] One would be hard put to deny that, whatever its original motivation, the NATO operation quickly descended into a project for regime change once Gaddafi's vulnerability and the possibility of his being dislodged by the rebels became obvious. But none of these states made statements on the record in the formal deliberations in the Security Council proclaiming this objective. After Libya, China, Russia, and South Africa were justified in being wary of the P3's motives in Syria.

The conclusion that China wants to resist the emergence of a new norm of regime change in or through the Security Council implicates a broader question about the legislative role of the Security Council in creating international law. The authority of the Security Council to adopt decisions with

[135] Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, section V.D.3 (p. 95).

[136] See Obama et al., 'Libya's Pathway to Peace' (n. 86).

binding effect on the UN member states pursuant to Article 25 UN Charter is not in doubt. But, as Vera Gowland-Debbas opines, the Security Council's resolutions are not generally legislative in the sense of applying outside the framework of particular cases of restoration of international peace and security; moreover, unlike General Assembly resolutions, they cannot be said to reflect an emerging opinion or generality of the requisite state practice for the formation of customary international law.[137] It is simply inconceivable that the Security Council could ever use its powers under this provision to impose a new norm of regime change, for that would necessarily result in the violation of one or more principles of the Charter. The principles of non-intervention and the prohibition of the use of force clearly preclude the forcible removal of a government of a state by other states, unless the action is authorised by the Security Council as a case of self-defence against the concerned state, consistent with Article 51 UN Charter.

In my reading, China was not so much acting as a norm 'antipreneur' by opposing the proposed Security Council decisions on Syria but as a 'defender' of *existing* norms of international law, which purportedly underpin its foreign policy, including the principles of state sovereignty and non-intervention. China shares its formal commitment to these principles with Russia and its allies in the developing world – a point both Cai and I articulate in our discussions of the apparent partnership between the P2 members.[138]

C. *China's Position in the Security Council Regarding UN Peacekeeping in Africa*

Cai has examined China's expanding power and global interests, and its growing engagement within the Security Council. He has argued that, since the 2010s, China has exhibited a new image in the Security Council as evidenced by, among other things, its growing financial and personnel contributions to UN peacekeeping operations,[139] as well as its more frequent use of the veto.[140] I propose to build on these insights specifically with reference to the role that China currently plays in the Security Council with regard to the

[137] Vera Gowland-Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance', *European Journal of International Law* 11 (2000), 361–83 (377).

[138] See Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, sections III.B (pp. 48–9, 56–8) and II.C.

[139] *Ibid.*, section V.A (p. 78–9).

[140] *Ibid.*, pp. 77–8

AU–UN partnership and peacekeeping operations in Africa in the post-Cold-War era.

As a P5 member, China has traditionally taken a reactive position on issues relating to peace and security in Africa, with the result that it has not been able to set the agenda let alone take up the role of penholder in the Security Council. Nevertheless, because of its advocacy and support for African causes, and its growing economic and strategic interests in Africa, the P3 often do consider China's (along with Russia's) positions to ensure smooth passage of proposed resolutions on situations in Africa. As Cai has noted, for the first decade of its membership of the Security Council – from 1971, when it replaced the Republic of China, until 1980 – China was largely a passive member, sitting on the fence when it came to peacekeeping issues. It usually abstained from voting on peacekeeping resolutions and did not contribute funds or personnel to UN missions. For some scholars, this stance of neutrality sometimes translated into inactivity, if not outright hostility to UN peace operations.[141] This changed in 1980, with Deng Xiaoping's policy of opening up to the West.[142] China launched this new policy with its first contribution to the United Nations's assessed funds for peacekeeping in 1982.

Since the end of the Cold War, China has increasingly deployed units to participate in UN peace operations. Beginning in 2000, China has contributed enabler units, such as engineering, logistics and medical personnel, to various UN missions around the world.[143] More recently, it has also deployed force protection units and troops, mostly in Africa, even as it has reiterated repeatedly its strict interpretation of the twin principles of respect for state sovereignty and non-interference in the internal affairs of states. While the numbers are relatively modest compared to those of other traditional troop-contributing countries, China's contributions to UN peace operations today surpass those of Russia, as well as the P3 members, who prefer to contribute funds, equipment, and logistics rather than military personnel. China's deployments in Africa have included UN missions in the Central African Republic (the Multidimensional Integrated Stabilization Mission in the Central African Republic, or MINUSCA), the Democratic Republic of the Congo (the Organization Stabilization Mission in the Democratic Republic

[141] See generally Zhengyu Wu and Ian Taylor, 'From Refusal to Engagement: Chinese Contributions to Peacekeeping in Africa', *Journal of Contemporary African Studies* 29 (2011), 137–54.

[142] Marissa Mastronianni, 'Growing Numbers of Chinese Blue Helmets: China's Changing Role within the Security Council', *Florida Journal of International Law* 27 (2015), 121–59 (128–9).

[143] Courtney Richardson, 'A Responsible Power? China and the U.N. Peacekeeping Regime', *International Peacekeeping* 18 (2011), 286–97 (288).

of the Congo, or its French acronym MONUSCO), Mali (the Multidimensional Integrated Stabilization Mission in Mali, or MINUSMA), Sudan (the UN–AU Mission in Darfur, or UNAMID), South Sudan (the United Nations Mission in South Sudan, or UNMISS), and Western Sahara (United Nations Mission for the Referendum in Western Sahara, or its French acronym MINURSO). As of 31 May 2021, the total personnel contributions of the P5 to UN peace missions worldwide stood at: China, 2,471; France, 622; United Kingdom, 550; Russia, 71; and United States, 31. The P2 powers have tended to adopt a common approach to African causes and to support the positions of the A3, and the African Union, in the Security Council. Yet China's participation in peacekeeping operations in Africa is well ahead that of Russia. Table 2 offers a snapshot of this comparison in six current or recent UN peace operations in Africa (the UNAMID mission ended on 31 December 2020).[144]

I should note that, outside the UN framework, China's support for the African Union in security matters is also manifested in the financial and logistical assistance it has given to AU peacekeeping missions, for example in Sudan and Somalia. Moreover, starting with a US$100 million pledge in 2015, China is committed to supporting the African Standby Force, which the African Union has been developing since 2004 as a key part of its APSA.[145]

TABLE 2 *China and Russia in African UN Peace Operations: Personnel Contributions as at 31 May 2021*

	Police and Staff		Military Experts on Mission		Troops	
UN Mission	China	Russia	China	Russia	China	Russia
MINUSCA	2	10	0	3	0	0
MINUSMA	9	0	0	0	413	0
MINURSO	0	0	15	10	9	0
MONUSCO	0	8	13	7	221	0
UNAMID	0	0	0	0	370	0
UNMISS	23	10	5	2	1031	0

[144] UN Peacekeeping, 'Troop and Police Contributors as at 31 May 2021', available at https://peacekeeping.un.org/en/troop-and-police-contributors.

[145] Symbolically, Chinese President Xi Jinping made the pledge for the contribution to AU peacekeeping at a Leaders' Summit on Peacekeeping at the United Nations, alongside other pledges to contribute to a UN peace and development fund. See 'President Xi Jinping Pledges at UN Show that China Can Meet its Global Responsibilities', *South China Morning Post*, 1 October 2015, available at www.scmp.com/comment/insight-opinion/article/1863079/president-xi-jinpings-pledges-un-show-china-can-meet-its/.

I think four factors explain China's change of policy and attitude towards engagement with UN peacekeeping in Africa. First, in the same year that the African states adopted the AU Constitutive Act establishing the African Union in 2000, China initiated the Forum on China–Africa Cooperation (FOCAC) as part of its new drive for economic cooperation with the African continent.[146] In his opening speech to the first ministerial FOCAC meeting on 10 October 2000, President Jiang Zeming reaffirmed the two principles of state sovereignty and non-interference as among the guiding principles of its relations with African states.[147] At the same time, one of the most significant normative changes brought about by establishment of the African Union was the move away from the principle of non-interference, which had been enshrined in Article III(2) OAU Charter, to the principle of non-indifference articulated in Article 4(h) AU Constitutive Act. This normative shift allowed China to adopt a more flexible approach towards the question of non-interference and primacy of state sovereignty, and it removed the pretext for China's reluctance to get involved in peace operations in Africa as a violation of these principles.

The second factor is China's growing economic power and its extensive economic, investment, and trading relations across Africa – especially over the two decades since FOCAC's inception.[148] China has been the African continent's largest trading partner and source of direct foreign investment since 2000.[149] By 2016, for example, China's exports to and imports from Africa stood in real terms at 15 per cent and 20 per cent of Chinese global trade estimates, respectively; roughly this translated to US$82.9 billion, while imports from the continent were valued at US$54.3 billion.

The need to protect its economic interests in some of the fragile states in Africa that face security challenges is driving China's increasing participation in, and contributions to, peacekeeping in Africa. To this point, in 2011 a non-governmental organisation noted:

> [In] some more general ways, peacekeepers do serve China's economic interests: they promote peace in countries where Chinese banks and

[146] Garth Shelton and Farhana Paruk, *The Forum on China–Africa Cooperation: A Strategic Opportunity*, ISS Monograph No. 156 (Pretoria: Institute of Security Studies, 2008), available at www.files.ethz.ch/isn/103618/mono156full.pdf, 74.

[147] Jiang Zemin, 'China and Africa Usher in the Century Together', Opening speech to Forum on China-Africa Cooperation, First Ministerial Conference, Beijing, 10 October 2000, available at www.focac.org/chn/ljhy/dyjbzjhy/hyqk12009/.

[148] See generally Ian Taylor, *The Forum on China-Africa Cooperation (FOCAC)* (London: Routledge, 2012).

[149] Wenjie Chen, David Dollar, and Heiwai Tang, 'Why is China Investing in Africa? Evidence from the Firm Level', *The World Bank Economic Review* 32 (2018), 610–32.

> commercial actors have made significant investments and have an interest in restoring stability. They also improve bilateral relations with governments that have given their consent to peace-keeping missions.[150]

Three years after publication of this commentary, unconfirmed reports emerged in 2014 to the effect that China had sought to deploy UN peacekeepers to protect its oil instalments in South Sudan following allegations that Chinese workers had suffered terrorist attacks there.[151]

Thirdly, China's growing support for, and participation in, peacekeeping in Africa can be seen as an aspect of its ideological positioning and self-identification as a leader of the Global South and a champion of South–South cooperation. Its new assertiveness as a P5 member has not, however, diminished its preference for diplomatic and peaceful solutions in inter-state and intra-state conflicts in Africa or its traditional support for the principle of 'African solutions to African problems'. By maintaining this position, China can demonstrate not only that its national economic interests in Africa are not the sole determining factor in its decision-making, but also that it is a responsible power invested in African development and security. Furthermore, unlike some of the P5 powers that have been accused of imposing paternalistic solutions in Africa, China is more inclined to take its cue from African states when addressing peace and security issues there. It is thus more willing to participate in peace operations that have unmistakable buy-in and support from the A3 and the African Union, recognising the central role of the African states themselves. Significantly, China has never used its veto to block a resolution on peace and security issues or peacekeeping in Africa. My discussion here reinforces Cai's analysis of China's growing assertiveness in the Security Council, as evidenced in its increasing participation in voting on resolutions and contributions to UN peacekeeping missions in terms of budget and personnel.[152]

Fourthly, China's concerns about security in some states in Africa go beyond the protection of its economic interests and investments. For example,

[150] Saferworld, *China's Growing Role in African Peace and Security*, January 2011, available at www.saferworld.org.uk/resources/publications/500-chinas-growing-role-in-african-peace-and-security.

[151] This led to domestic pressure on the government to protect its citizens abroad. See Nicholas Bariyo, 'China Deploys Troops in South Sudan to Defend Oil Fields, Workers', *Wall Street Journal*, 9 September 2014, available at www.wsj.com/articles/china-deploys-troops-in-south-sudan-to-defend-oil-fields-workers-1410275041; Alice Su, 'China's Business and Politics in South Sudan', *Foreign Affairs*, 6 June 2016, available at www.foreignaffairs.com/articles/south-sudan/2016-06-06/chinas-business-and-politics-south-sudan.

[152] See Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, section V.A.

one can explain its participation in the operation in Mali (MINUSMA) in terms of another phenomenon: the global fight against terrorism. It is trite that the events of 11 September 2001 (i.e., 9/11) galvanised an international consensus on the fight against terrorism. Some commentators have observed that the 2001 terrorist attacks helped to forge a more united front between the P2 and P3 in peace operations on the African continent, especially when the conflicts in question have an element of international terrorism.[153] To this, I would add that China's support for such operations becomes more certain when African states themselves request the involvement of the Security Council to authorise action to help them deal with terrorist threats or attacks in their territories.

I also believe that, for China, as for Russia, participation in UN-led efforts to fight terrorism in Africa and elsewhere affords 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). The P2 supported all of the resolutions on Mali and the somewhat controversial re-hatting of AU peacekeepers to establish MINUSMA. Like the other members of the Security Council, they viewed the crisis as arising not only from a failure of governance that lay the conditions for a coup d'état but also, and more importantly, because of a terrorist insurgence mounted by three groups operating in northern Mali and across the Sahel region. They understood that the insurgency by Al-Qaeda in the Islamic Maghreb (AQIM), the Movement for Unity and Jihad in West Africa (MUJWA), and Ansar Dine posed a serious threat to the peace and security of the broader region, and they supported the ECOWAS and AU plans for political negotiations, as well as, later, the Security Council proposal for a robust mission.[154] To be sure, both had concerns with some aspects of the mission – in particular, the African Union was not altogether happy with the timing and process of handing over an AU peace operation to the United Nations. Yet neither China nor Russia considered abstaining from, let alone vetoing, the re-hatting resolution.[155] Moreover, neither raised their usual concerns about interventionist action that ignored state sovereignty. In any case, any objection on that ground would have been untenable because the

[153] Not all conflicts that have an element of international terrorism in Africa have led to the establishment of UN peace operations. An example is the jihadist terrorist group so-called Islamic State in West Africa (commonly known as Boko Haram), which has been operating for two decades in north-eastern Nigeria and, intermittently, in Chad, Niger, and Cameroon. In addition to Boko Haram, terrorist organisations operating in the Sahel region include Al-Qaeda in the Islamic Maghreb, Al-Mourabitoun, and Movement for Unity and Jihad in West Africa.

[154] SC Res. 2100 of 25 April 2013, UN Doc. S/RES/2100(2013).

[155] SC Res. 2295 of 29 June 2016, UN Doc. S/RES/2295(2016).

beleaguered Mali government had requested the intervention by the United Nations and France.[156]

In conclusion, I submit that the new Chinese assertiveness in the Security Council that Cai has comprehensively discussed has not been detrimental to the African Union's efforts to forge an institutionalised and more effective strategic partnership with the United Nations. On the contrary, China has been among the foremost advocates in the Security Council for strengthening this partnership and for the notion of connecting the centre to the periphery in matters pertaining to the maintenance of international peace and security – perhaps more so than any other P5 member. With the pivot to the principle of non-indifference by African states under the AU Constitutive Act, China has increasingly adopted a more flexible position regarding the principle of state sovereignty and become more tolerant of African peace operations, including robust peacekeeping mandated by the Security Council. The outcome of the convergence of China's economic and strategic interests in Africa and its rise as a global power and a more assertive P5 member has been the elevation of issues and positions advocated by the African Union, the A3, and key African actors to the Security Council for debates. These debates do not always yield the desired outcomes – but they do open the door for China and the A3, along with other like-minded members, to act collectively as agenda-setters and norm-shapers, rather than simply as norm-takers following an agenda and resolutions crafted by others as penholders.

The other chapters in this volume also both comprehensively address the issue of sanctions, albeit from different perspectives. Cai has offered a comprehensive history of China's participation in the adoption of sanctions resolutions by the Security Council and its general opposition to the imposition of sanctions. Van den Herik has noted that there is a divide regarding unilateral sanctions, which she describes as a tool mostly used by the West.[157] African states have tended to join China in opposing unilateral sanctions, especially, viewing the trend as encouraging a turn to unilateralism.

The reticence of African states towards some UN sanctions must be understood in its proper context. In the post-Cold-War era, the highest number of

[156] This element makes the Mali operation, in part, a case of intervention by invitation. See Olivier Corten, 'Intervention by Invitation: The Expanding Role of the 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 (146–60).

[157] Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, sections V.A and V.C.4; Van den Herik, 'A Reflection on Institutional Strength', Chapter 2 in this volume, section V.B.4.

UN sanctions have targeted African states, entities, groups of people, and individuals. A recent study found that, of the 63 UN targeted sanctions imposed in the first decade after the Cold War, between 1991 and 2013, 43 (68 per cent) were applied against African states.[158] The data also reveals that UN sanctions in Africa are characterised by features that set them apart from other UN sanctions regimes and practice. In particular, whereas non-African sanctions pursue a variety of goals, UN sanctions in Africa are imposed to support the Security Council's primary objective of addressing threats to international peace and security in the form of internal armed conflicts, mostly in the context of UN peace support operations.[159]

I agree with Van den Herik that unilateral sanctions are likely to remain a divisive issue in the United Nations. African members of the Security Council may continue to oppose or abstain on sanctions resolutions (as South Africa did on Resolution 1706 on Darfur and on a draft resolution on Myanmar, which China and Russia vetoed in 2007). The exceptions are situations in which the AU member states themselves have requested the sanctions, for example to deal with rebel and terrorist groups, such as Al-Shabab in Somalia, as part of the African Union's peace operations supported or authorised by the United Nations.

D. *Russia's Rising Presence in Africa*

I have noted above that China and Russia share a self-image as advocates and supporters of Africa's causes in the Security Council. In their relations with Africa, both seek to present themselves as an alternative to the West, while playing down accusations that they wish to recreate Cold-War-era proxy state clientelism or to initiate a neo-colonial partition. As the world's second biggest economy and superpower, China has a clear advantage over Russia in its quest for influence. Given that, in the decade between 2005 and 2015, its trade and investment in Africa witnessed a growth of 185 per cent, however, the phenomenon of Russia's rising presence in Africa cannot be doubted.[160]

This rise can be examined from three perspectives: economic/trade (the entry of Russian companies in the extractive industries); diplomatic/political (engagement between Russia and African countries bilaterally and multilaterally

[158] See generally Thomas Biersteker, Sue Eckert, Marcos Tourinho, and Zuzana Hudáková, 'UN Targeted Sanctions Datasets (1991–2013)', *Journal of Peace Research* 55 (2018), 404–12.

[159] See Andrea Charron and Clara Portela, 'The UN, Regional Sanctions and Africa', *International Affairs* 91 (2015), 1369–85 (1371–4).

[160] Ronak Gopaldas, 'Russia and Africa Meet Again', *ISS Today*, 13 March 2018, available at https://issafrica.org/iss-today/russia-and-africa-meet-again/.

through the Russia–Africa summit format); and military/security (direct involvement by the state and through state-linked private military contractors). These engagements enable Russia to pursue three goals: projecting power on the global stage, accessing raw materials and natural resources, and increasing its arms exports and security footprint. These interests are intertwined, but since the focus of this chapter is on issues of peace and security, in this section I will limit my brief comments to Russia's involvement in the military and security sectors.

In October 2019, Russia hosted the inaugural Russia–Africa Summit in Sochi, which was attended by 43 heads of state or government. In hosting the summit, Russia was following the template of organising and institutionalising Africa summits set by other powers who seek to increase their engagement on the African continent, such as the European Union, China, France, India, Japan, and Turkey. According to Russian sources, the summit spawned $12.5 billion business deals, largely in arms and grains.[161] Despite half of the AU membership voting to condemn its invasion of Ukraine at the United Nations,[162] Russia still sees Africa as a powerful voting bloc that can strengthen the Kremlin's image on the international stage. Unsurprisingly, even as the war in Ukraine was ongoing, Russia hosted the second Russia–Africa Summit, initially scheduled for October 2022, in St. Petersburg on 27 and 28 July 2023.[163]

Since 2015, Russia has been the most dominant supplier of arms to Africa, accounting for 49 per cent in sales to at least 21 countries.[164] In terms of its military presence through participation in UN peacekeeping missions in Africa, Russia lags way behind China, as Table 2 shows. But even its relatively modest personnel contributions to UN peacekeeping worldwide, which stood at 71 as at 31 May 2021, is more than that of the United States, at 31. More than

[161] Danielle Paquette, 'As the U.S. Looks Elsewhere, Russia Seeks a Closer Relationship with Africa', *Washington Post*, 25 October 2019, available at www.washingtonpost.com/world/africa/as-the-us-looks-elsewhere-russia-seeks-a-closer-relationship-with-africa/2019/10/25/7e329124-f69e-11e9-b2d2-1f37c9d82dbb_story.html.

[162] See below, section IV.B.

[163] In what was seen by some commentators as evidence of Russia's waning influence and the political fallout from the war in Ukraine, the second Russia–Africa Summit was attended by only 17 African heads of state (out of 49 delegations) – a significant drop from the 43 who attended the 2019 Summit. See, e.g., Vadim Zaytsev, 'Second Russia–Africa Summit Lays Bare Russia's Waning Influence', *Carnegie Politika*, 31 July 2023, available at https://carnegieendowment.org/politika/90294.

[164] See Mark Episkopos, 'How Russia Became Africa's Dominant Arms Dealer', *The National Interest*, 23 February 2021, available at https://nationalinterest.org/blog/buzz/how-russia-became-africa%E2%80%99s-dominant-arms-dealer-178656.

half of these personnel are deployed in Africa.[165] As regards the presence of Russian private military contractors, the Wagner Group has become the vanguard of a major Russian push into Africa and is currently operating in several states, including Central African Republic (CAR), Libya, Madagascar, Mali, Mozambique, and Sudan. The Wagner Group's operations were said to be funded by a company owned by the late Yevgeny Prigozhin, a Kremlin-linked oligarch and former close confidant of Russian President Vladimir Putin. Prigozhin died in a plane crash on 23 August 2023. The company's involvement in the mining, gas, and oil industries in CAR, Libya, Mali, and Sudan helps to finance its operations.[166] It is possible to draw the general conclusion that Russia's resurgence in Africa has benefited largely from the rise of Islamist terrorism in parts of the continent, from the Sahel in the west to Mozambique in the east. Russia has taken advantage of fragile states and ongoing conflicts to secure arms deals and concessions, formally through negotiating military agreements with governments and informally through deals negotiated by private military contractors – principally, the Wagner Group.[167]

The presence of private military contractors in these countries raises certain questions from an international law perspective and presents political problems for Russia, the concerned African states, and international community. First, legally speaking, private military contractors are not mercenaries, provided that they are properly registered as business entities under the relevant laws of the concerned states. The Wagner Group, which operates as a network of companies and individuals, does not officially exist because it is not registered in Russia or anywhere else. Yet it is common cause that, as a paramilitary group, it operates in support of Russian interests or foreign policy and has close links to the Russian government. Consequently, it is generally regarded by the outside world as a network of Russian-backed mercenaries.

Howsoever one views the Wagner Group, its operations raise questions under international law, including its status as a non-state actor involvement in armed conflict, its responsibility for violations of international humanitarian law and international human rights law, and the prohibition of

[165] See above, n. 143.

[166] See Kimberly Marten, 'Russia's Use of Semi-State Security Forces: The Case of the Wagner Group', *Post-Soviet Affairs* 35 (2019), 181–204 (196–8); Declan Walsh, 'How Russia's Wagner Group is Expanding in Africa', *New York Times*, 31 May 2022, available at www.nytimes.com/2022/05/31/world/africa/wagner-group-africa.html.

[167] Marten, 'Russia's Use of Semi-State Security Forces' (n. 166). See generally Ahmed Albassoussy, 'The Growing Russian Role in Sub-Saharan Africa: Interests, Opportunities and Limitations', *Journal of Humanities and Applied Social Sciences* 4 (2021), 251–70.

mercenarism under relevant UN[168] and AU[169] treaties. The Wagner Group has been accused of human rights violations, including extrajudicial killings and torture, and civilian massacres in the CAR and Mali, by other governments and UN human rights experts.[170] Russia's use of Wagner Group mercenaries creates an enabling environment in which countries that are parties to the UN convention (Libya) and the OAU convention (Libya, Madagascar, and Sudan) can violate their treaty obligations.

Secondly, there are political problems arising from alleged contacts and interactions between private military contractors and UN peacekeepers, which the host governments encourage. In both the CAR and Mali, UN human rights experts have been alarmed by the 'proximity and interoperability' between the contractors and the UN peacekeepers.[171] The United States and the European Union have also complained about their presence and activities, leading them to impose sanctions against the Group.[172]

Overall, from the perspective of African states, Russia's increasing presence in Africa is beneficial. For many, Russia is a partner they are familiar with from their anti-colonial struggles. For some, Russia allows them to diversify their sources of foreign investment to avoid becoming too dependent on their Western partners or China, India, and others. For others still, an even more attractive aspect of these engagements is that, unlike Western governments, Moscow does not offer them its economic and military support with political conditionalities requiring them to respect democracy, human rights, and the rule of law. On the contrary, Russia mostly seems to target countries with abysmal records of democracy and good governance.

[168] International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, 2163 UNTS 75.

[169] OAU Convention for the Elimination of Mercenarism in Africa, 3 July 1977, 1490 UNTS 95.

[170] See Jason Burke and Emmanuel Akinwotu, 'Russian Mercenaries Linked to Civilian Massacres in Mali', *The Guardian*, 4 May 2022, available at www.theguardian.com/world/2022/may/04/russian-mercenaries-wagner-group-linked-to-civilian-massacres-in-mali. See also Stephanie Nebehay and Aaron Ross, 'U.N. Experts Alarmed by Russian Security Contractors' "Abuses" in Central Africa', *Reuters*, 31 March 2021, available at www.reuters.com/article/us-centralafrica-security-russia/u-n-experts-alarmed-by-russian-security-contractors-abuses-in-central-africa-idUSKBN2BN288.

[171] UN Office of the High Commissioner for Human Rights, 'CAR: Experts Alarmed by Government Use of "Russian Trainers", Close Contacts with UN Peacekeepers', 31 March 2021, available at www.ohchr.org/en/press-releases/2021/03/car-experts-alarmed-governments-use-russian-trainers-close-contacts-un.

[172] Robin Emmott, 'EU Hits Russian Mercenary Group Wagner with Sanctions', *Reuters*, 13 December 2021, available at www.reuters.com/world/europe/eu-hits-russian-mercenary-group-wagner-with-sanctions-2021-12-13/.

E. *AU–UN Collaboration in Fighting International Terrorism through Peace Operations*

1. The OAU Convention on the Prevention and Combating of Terrorism

The OAU, the African Union's predecessor, began addressing the threat of international terrorism about a decade prior to the 9/11 terrorist attacks in the United States. The outbreak of the Algerian civil war in late 1991 awakened other African countries to the potential threat posed by religious fundamentalism and extremism to peace and security within their territories and regions. In response to this, the OAU adopted two instruments: first, the Resolution on the Strengthening of Cooperation and Coordination among African States, adopted on 1 July 1992;[173] and secondly, the Declaration on a Code of Conduct for Inter-African Relations of 15 June 1994.[174] Although non-binding, both instruments called upon the OAU member states to increase their cooperation and coordination to combat terrorism, and both condemned those states that were sponsoring terrorism.[175]

On 7 August 1998, terrorist bombings targeting American embassies in Nairobi and Dar es Salaam went off within minutes of each other, killing many people. These attacks prompted a debate within the OAU on the need to elaborate a legally binding instrument to promote international cooperation on all aspects of counter-terrorism. The following year, at its summit in Algiers, the OAU adopted the OAU Convention on the Prevention and Combating of Terrorism.[176]

Under the OAU Terrorism Convention, states parties undertake to enact national legislation and establish as criminal offences certain acts as required. The OAU Terrorism Convention is significant, especially because it seeks to codify counter-terrorism norms and to consolidate common standards for the fight against terrorism in Africa. The Algiers summit also adopted the Algiers Declaration, which, among other things, acknowledged that terrorism is a '[flagrant] violation of human rights and fundamental freedoms' and '[poses] serious threats to the stability of [states] as well as to international peace and security'.[177]

The OAU Terrorism Convention entered into force on 6 December 2002 – six months after the inauguration of the African Union. The African Union thus

[173] OAU Doc. AHG/Res. 213 (XXVIII), 1 July 1992.
[174] OAU Doc. AHG/Decl. 2 (XXX), 15 June 1992.
[175] *Ibid.*, para. 10.
[176] Adopted 14 July 1999, entered into force 6 December 2002.
[177] OAU Doc. AHG/Decl. 1 (XXXV), 14 July 1999.

inherited the legacy of the OAU in addressing terrorism and the challenge of implementing the normative framework set out in the Convention. A glaring omission, however, was that the treaty did not provide for a monitoring mechanism to track states' compliance with it. Two different instruments subsequently remedied this omission. The first was the Peace and Security Protocol, adopted in 2002, which designated the PSC as the monitoring mechanism.[178] This decision followed logically from the African Union's characterisation of the fight against terrorism as an aspect of the maintenance of regional peace and security (thus following the approach of the United Nations, where responsibility for dealing with terrorism matters rests with the Security Council).

Following the adoption of the Peace and Security Protocol, and in anticipation of the ratification of the OAU Terrorism Convention, the African Union adopted a Plan of Action of the African Union for the Prevention and Combating of Terrorism in Algiers on 14 August 2002. The Plan of Action addresses some key provisions of Security Council Resolution 1373,[179] and it establishes a network of cooperation and exchange of information among AU member states on various aspects of counter-terrorism activities. Alongside the adoption of the Plan of Action, the meeting also considered a proposal to establish the African Centre for the Study and Research on Terrorism (ACSRT).[180]

In 2004, the African Union adopted the second binding instrument, the Protocol to the OAU Convention for the Prevention and Combating of Terrorism.[181] The Protocol on Terrorism reaffirmed the role of the PSC as the mechanism for monitoring the implementation of the OAU Terrorism Convention and established the ACSRT. The ACSRT's mandate includes conducting assessment missions to various AU member states, to ascertain their counter-terrorism capacity and compliance with the OAU Terrorism Convention and other international legal instruments, and providing advice on necessary action. One of the international pre-eminent partners that the ACRST has engaged with since its establishment is the UN Office of Counter-Terrorism.[182]

[178] Art. 7(1)(i) Peace and Security Protocol (n. 23).

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

[180] The African Centre for the Study and Research on Terrorism (ACSRT) was established under section H, paras 19–21 of the AU Plan of Action and pursuant to relevant decisions adopted by the AU Assembly and Executive Council: AU Doc. Assembly/AU/Dec.15 (II); AU Doc. EX.CL/Dec.13 (II); AU Doc. EX.CL/Dec.82 (IV); and AU Doc. EX.CL/Dec.126 (V). It was inaugurated on 14 October 2004.

[181] Protocol to the OAU Convention for the Prevention and Combating of Terrorism; adopted 2 July 2004, entered into force 26 February 2014, 3269 UNTS.

[182] The most recent engagement between the two bodies was the joint Online Workshop on Protecting Vulnerable Targets against Terrorist Attacks, 12–13 December 2022. See 'UNOCT and ACSRT Convene African Union Member States to Strengthen Resilience of Vulnerable

The African Union's policy to combat terrorism rests on three assumptions. The first is that the fight to prevent, and eventually eradicate, terrorism in Africa requires cooperation at every level and in every respect. The second premise is that the United Nations has the primary responsibility for leading the fight for the prevention and combatting of terrorism globally. Thirdly and relatedly, as a regional body, the African Union must prosecute its fight against terrorism on the continent in coordination with the international community, as part of the global anti-terrorism regimes led by the United Nations. Consequently, the African Union's actions and initiatives in counter-terrorism are influenced not only by the realities within African states but also by the global realities and the policies and actions of the United Nations, as decided and mandated by the Security Council.

To my mind, the peacekeeping operations in Mali and Somalia provide the most appropriate illustration of the cooperation between the African Union and the United Nations in responding to threats to peace and security arising wholly or partly from transnational terrorism in Africa. But I should qualify this with recognition that the 2015 Report of the UN Secretary-General's High-Level Independent Panel on Peace Operations explicitly recommended that UN peacekeeping forces not be mandated to conduct counter-terrorism operations and that, where a UN mission operates in parallel with counter-terrorism forces, the respective roles of each presence be clearly delineated.[183] UN Secretary-General António Guterres subsequently echoed this, noting: '[We] need to understand that UN peacekeeping has limits. We face more and more situations where we need peace enforcement and counter-terrorism operations that can only be carried out by our partners – namely, the African Union and various subregional configurations."[184] The Secretary-General was right to point out that UN peacekeeping has limits. The question is: should it be left to the African Union and subregional organisations to lead counter-terrorism operations?

An analysis of AU peace operations shows that, from the first deployment in Burundi in 2003 until 2010, all AU missions deployed by the African Union – other than the African Union Mission in Somalia (AMISOM) – were similar to traditional UN peacekeeping, with no counter-terrorism mandates. As Jide

Targets against Terrorist Attacks', available at www.un.org/counterterrorism/events/unoct-and-acsrt-convene-african-union-member-states-strengthen-resilience-vulnerable-targets.

[183] *Uniting Our Strengths for Peace: Politics, Partnership and People*, Report of the High-Level Independent Panel on United Nations Peace Operations, UN Doc. A/70/95-S/2015/446, 16 June 2015, 47–8.

[184] Statement of Secretary-General on Strengthening Peacekeeping Operations in Africa, UN Doc. S/PV.8407, 20 November 2018, 4.

Okeke has noted, the African Union increasingly began authorising counter-terrorism operations in 2011; by 2015, it was authorising more counter-terrorism operations than traditional peacekeeping missions.[185] But authorising such missions is not necessarily the same thing as leading them or carrying out the counter-terrorism operations. Quite apart from the issue of resources and capabilities, I think it is wrong for the African Union to assume that responsibility. The AU peacekeepers should no more be leading counter-terrorism operations than should UN peacekeepers. The human and financial costs associated with such operations in Africa – as the African Union learned during its AMISOM operations – are simply beyond the organisation's means and are unsustainable in terms of its envisaged role under its own counter-terrorism regime.

Returning to the question I posed above, it is my view that the PSC and the Security Council should work collaboratively to authorise counter-terrorism operations when required in AU-led peace operations. Authorising an operation is necessary to give it political legitimacy, to facilitate more enablers and supporters for the operation, but the authorising organ does not assume full responsibility for or command and control of the operation and resources. The African Union's responsibility should be to provide support to states rather than to take full command and control of counter-terrorism operations. By complementing the host state's own military and security institutions, instead of substituting for them, the AU peacekeeping operations would be consistent with the objectives and policy of the AU counter-terrorism strategy set out in its normative instruments. That said, it should be possible, within the framework of AU–UN collaboration, for the two organisations to share the role of mandating authority, understanding that UN peacekeeping has its limits.

Although they do not engage in counter-terrorism operations as such, in carrying out their mandate of protection of civilians against imminent attacks and enabling national militaries to defend their populations against armed terrorist attacks, UN peacekeepers in effect contribute to the counter-terrorism fight, broadly speaking. This has been the case with the UN peace operation in Mali and the UN-authorised AU mission in Somalia. The transitioning of an AU-led mission to a UN-led operation in Mali demonstrates both the possibilities and challenges of collaboration between the periphery, the African Union, and the centre, the Security Council, in the shared objective of the maintenance of international peace and security.

[185] Jide Okeke, *Policy Brief: Repositioning the AU's Role in Counter-Terrorism Operations* (Pretoria: Institute for Security Studies, 2019), 4.

2. AU and UN Peace Operations as Responses to Threats of International Terrorism in Africa

a) the multidimensional integrated stabilisation mission in mali (minusma). In early January 2012, a Tuareg separatist movement that had emerged in November 2011, Mouvement national de libération de l'Azawad (MNLA), started attacking and capturing villages and localities in northern Mali amidst an emerging political and security crisis in the country. The crisis resulted from unhappiness among the military with a faltering civilian government. The MNLA proclaimed an 'independent state of Azawad' on 6 April 2012.[186] The declaration of the separatist state came on the heels of a military coup that overthrew President Amadou Toumani Touré's government on 21 March.

With the African Union's backing, ECOWAS initiated negotiations to put in place a military plan to deal with the crisis. The Security Council initially supported the ECOWAS and AU efforts, encouraging them to coordinate with the transitional authorities of Mali for the restoration of constitutional order.[187] Subsequently, it adopted a resolution endorsing UN military support for the ECOWAS mission, and it requested the Secretary-General to provide military and security planners to assist ECOWAS and the African Union, in close consultation with Mali's neighbours, interested bilateral partners, and international organisations.[188] Later, in December 2012, the Security Council authorised the deployment of the African-led International Support Mission in Mali (AFISMA), which subsumed the ECOWAS mission, with a mandate to support the national military forces.[189] Between July 2012 and June 2020, the Security Council adopted ten resolutions on Mali unanimously, with no expressions of concern by any of the Security Council members regarding their content or language.

The unanimity over the Mali resolutions can be explained in several ways. First of all, the resolutions were approving or endorsing intervention requested by the host government, which therefore met one of the basic principles of UN peacekeeping – namely, consent by the host state.[190] The legitimacy of the new authorities in Bamako to request assistance from the Security Council and the international community, although initially questioned by some states, was accepted by the Security Council as providing a provisional basis

[186] See Baz Lecocq and Georg Klute, 'Tuareg Separatism in Mali', *International Journal* 68 (2013), 424–34 (430).
[187] SC Res. 2056 of 5 July 2012, UN Doc. S/RES/2056(2012), para. 1.
[188] SC Res. 2071 of 12 October 2012, UN Doc. S/RES/2071(2012).
[189] SC Res. 2085 of 20 December 2012, UN Doc. S/RES/2085(2012).
[190] Corten, 'Intervention by Invitation' (n. 156).

for the military operation. Members of the Security Council – in particular, the P2, who had traditionally been loath to support interventions or peacekeeping operations that they viewed as a violation of the principles of non-interference and state sovereignty – were assuaged by this.

Secondly, the support of the A3 and both ECOWAS and the African Union for the proposals was critical. Indeed, it helped that the A3 states, Morocco, South Africa, and Togo, partnered with other Security Council members, including the traditional penholders, France, the United Kingdom, and the United States, in drafting the resolutions.[191]

Thirdly, and most importantly, the United Nations and the African regional and subregional organisations, as well as other major actors, all regarded the Mali operation as a necessary collective fight against transnational terrorism with a potential to destabilise the greater Sahara–Sahel region. As noted earlier, the P2 states have been as keen to join the post-9/11 international consensus on the fight against terrorism as the African states. China contributed staff and troops to MINUSMA. Although it did not contribute troops to the mission or supported it financially, Russia supported the establishment of MINUSMA because of – to paraphrase the words of its representative – the gravity of the complex situation, the consent of the host state, and the involvement of relevant regional organisations.[192]

Despite this convergence of opinion on the level of the threat to regional peace and security posed by the Mali crisis, the African Union's peace enforcement mission stalled because of limited operational capacity. This prompted France – which was concerned about the risk of the AQIM-linked terrorist groups, such as the MNLA, overwhelming the Mali government – to launch its own military operation, 'Operation Serval'. Officially, France did not characterise its intervention as aimed at suppressing the Azawad secession but as a force to assist the Malian authorities to fight against international terrorism. France notified both the UN Secretary-General and the President of the Security Council as follows:

> France has responded to a request for assistance from the Interim President of the Republic of Mali, Mr. Dioncounda Traoré. Mali is facing terrorist elements from the north, which are currently threatening the territorial integrity and very existence of the State and the security of its population.[193]

[191] UN Doc. S/PV.6846, 12 October 2012; UN Doc. S/PV.6898, 20 December 2012.

[192] UN Doc. S/PV.6952, 25 April 2013, 2.

[193] Identical letters dated 11 January 2013 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/1013/17.

Because of the focus France placed on the fight against terrorism as the justification for its positive response to Mali's request for assistance, both ECOWAS and the AU Assembly endorsed it.[194]

The Security Council set aside questions regarding the legitimacy of the new government in Bamako and its authority to grant host state consent to the intervention. The Security Council confirmed its support in Resolution 2085 thus:

> [9.] *Decides* to authorise the deployment of an African-led Support Mission in Mali (AFISMA) for an initial period of one year [to carry out the following tasks]:
>
> [(b)] To support the Malian authorities in recovering the areas in the north of its territory under the control of terrorists, extremist and armed groups and in reducing the threat posed by terrorist organisations, including AQIM, MUJWA and associated extremist groups, while taking appropriate measures to reduce the impact of military action upon the civilian population.[195]

In a statement issued just before France launched Operation Serval, the Security Council reiterated its call to UN member states to assist the Malian military and security forces to reduce the threat posed by terrorist organisations and associated groups.[196] At the end of Operation Serval, the Security Council welcomed the swift action by the French forces in stopping the terrorist offensive, denounced terrorist groups, and called on rebel groups to cease hostilities.[197]

I earlier noted that although the United Nations refrains from undertaking counter-terrorism operations itself, where there is need for peace enforcement and counter-terrorism operations to go hand in hand, the United Nations supports its partners, such as the African Union and various subregional configurations or third states, to carry these out. The Mali situation confirms this approach, evidenced in some of the Security Council's resolutions. In Resolution 2391, the Security Council noted that 'the activities of terrorist organisations, including those benefiting from transnational organised crime, in the Sahel region constitute a threat to international peace and security', and it pledged UN support to the G5 Sahel (G5S) countries. Also referred to as the FC-G5S, the G5S is a grouping of five countries – Burkina Faso, Chad, Mali, Mauritania, and Niger – coordinating with France to strengthen development

[194] Statement of ECOWAS Authority of Heads of State and Government, 42nd Ordinary Session, 27–28 February 2013, para. 25. See also AU Doc. Assembly/AU/Decl.3 (XX), 2, para. 5.
[195] SC Res. 2085 of 20 December 2012, UN Doc. S/RES/2085(2012).
[196] 'Security Council Press Statement on Mali', UN Doc. SC/10878-AFR/2505, 10 January 2013.
[197] SC Res. 2100 of 25 April 2013, UN Doc. S/RES/2100(2013).

and security, and to combat the threat of jihadist organisations in the Sahel region. The Security Council:

> [12]. *Stresses* that the efforts of the FC-G5S to counter the activities of terrorist groups and other organised criminal groups will contribute to create a more secure environment in the Sahel region, and thus facilitate the fulfilment by MINUSMA of its mandate to stabilise Mali, and *further stresses* that operational and logistical support from MINUSMA [has] the potential to allow the FC-G5S, given its current level of capacities, to enhance its ability to deliver on its mandate.[198]

In Resolution 2531, which extended the mandate of MINUSMA to 30 June 2021, the Security Council reiterated its support for other security presences in Mali and the Sahel region, and it requested the UN Secretary-General '[to] ensure adequate coordination, exchange of information and, where applicable, support within their respective mandates and through exiting mechanisms between MINUSMA, the MDSF, the FC-G5S, the French Forces and the European Union missions [in Mali]'.[199]

The shared objective of fighting international terrorism expressed in the various resolutions and statements by the Security Council, the African Union, and ECOWAS reveals a strong consensus at international, regional, and subregional institutional levels that facilitated the multidimensional peace operation in Mali and sustained it until its termination in 2023.

The risk posed by transnational terrorist groups in Mali and the Sahel region remains, and sustained international cooperation is indispensable in the fight against this scourge. This requires cooperation and unity of purpose among the members of the Security Council. Such cooperation must involve all of the P5, other key players such as the A3 and the ten elected members (E10), who are asserting their voices ever more strongly in the Security Council, and the various national, subregional, regional, and international actors invested in the fight against terrorism.

[198] SC Res. 2391 of 8 December 2017, UN Doc. S/RES/2391(2017).

[199] SC Res. 2531 of 29 June 2020, UN Doc. S/RES/2531(2020), para. 30. MINUSMA's mandate was extended for another one year on 30 June 2021: see SC. Res. 2584 of 30 June 2021, UN Doc. S/RES/2584(2021). On 15 May 2022, Mali announced its withdrawal from the FC-G5S. Despite this, the Security Council once again renewed the mandate for one year, until 30 June 2023: see SC Res. 2640 of 29 June 2022, UN Doc. S/RES/2640(2022). On 30 June 2023, at the request of the Malian authorities, the Security Council unanimously approved the termination of MINUSMA's mandate and requested MINUSMA to immediately commence, on 1 July 2023, the cessation of its operations, to be phased over a six-month period: see SC Res. 2690 of 30 June 2023, UN Doc. S/RES/2690(2023).

b) the au mission in somalia (amisom) Following consultations with the Security Council, in January 2007, the PSC decided to establish AMISOM as a peace support operation with a broad threefold mandate:

(i) to facilitate dialogue and reconciliation;
(ii) to provide humanitarian assistance; and
(iii) to create conducive conditions for long-term stabilisation, reconstruction, and development in the country.[200]

The Security Council authorised the AU member states to establish the operation for a period of six months.[201]

In recent years, reauthorisations of the mission have expanded its mandate to include targeted operations against Al-Shabaab and other groups. Although, as we have seen, the Security Council refrains from mandating counter-terrorism actions in UN peace operations, it authorised AMISOM to '[reduce] the threat posed by Al-Shabaab and the other armed opposition groups'.[202]

AMISOM was a perfect example of what the UN Secretary-General has called 'partnership peacekeeping': the type of peacekeeping that involves several international organisations, individual states, local authorities, and other actors. For the African Union, AMISOM was its longest lasting, largest, most expensive, and deadliest peace operation; for the United Nations, AMISOM remains its most profound experiment with providing logistical support to a regional organisation in a conflict zone and collaborating on the political front, and it is the only AU-led operation with counter-terrorism objectives mandated by the Security Council.[203]

The African Union did not conceive of or deploy AMISOM as a unilateral intervention to respond to the occurrence of the crimes stipulated in Article 4(h) AU Constitutive Act, as one commentator has it.[204] The Transitional Federal Government of Somalia requested the African Union to intervene with a 'strong peace-making force', not a traditional peacekeeping

[200] AU Peace and Security Council, Communiqué of 69th Meeting, AU Doc. PSC/PR/COMM. (LXIX), 19 January 2007, para. 8.
[201] SC Res. 1744 of 20 February 2007, UN Doc. S/RES/1744(2007).
[202] SC Res. 2372 of 30 August 2017, UN Doc. S/RES/2372(2017). Subsequent resolutions modified the language of this provision to read: '[Reduce] the threat posed by Al-Shabaab and the other armed opposition groups, including through mitigating the threat posed by improvised explosive devices.' See SC Res. 2431 of 30 July 2018, UN Doc. S/RES/2431(2018).
[203] Paul D. Williams, *Lessons for 'Partnership Peacekeeping' from the African Union Mission in Somalia* (New York: International Peace Institute, 2019), 1–2.
[204] See Abou Jeng, *Peace Building in the African Union: Law, Philosophy and Practice* (Cambridge: Cambridge University Press, 2012), 261.

or peace enforcement force, to help to restore peace and order.[205] Formally, the African Union deployed AMISOM as an 'intervention by invitation' by the internationally recognised government of Somalia, consistent with Article 4(j) AU Constitutive Act.

AMISOM's mandate evolved significantly in its 15-year existence to include the fight against Al-Shabaab, which both the African Union and the United Nations regard as a terrorist organisation that poses a threat not only in Somalia but also to the broader region.[206] The Security Council validated this shift in all of its resolutions renewing AMISOM. In similar language, Resolutions 2371,[207] 2341,[208] 2472,[209] and 2520[210] authorised the mission to 'reduce the threat posed by Al-Shabaab and other armed opposition groups, including through mitigating the threat posed by improvised explosive devices'.

As Okeke has rightly observed, 'reduction of threats posed by specific terrorist groups' has progressively been included since 2008 in political mandates by the African Union or United Nations when authorised in Africa's peace support operations.[211] The AMISOM operation, however, met with limited success, at a relatively substantial financial and human cost. When the PSC first requested the Security Council to authorise the deployment of AMISOM in 2007, it also urged the Council to consider authorising a UN operation that would take over from AMISOM at the expiration of its proposed six-month mandate.[212] The Security Council did not consider the request and this remained the case for the next 15 years. In May 2020, the Security Council decided – and the African Union concurred – to renew AMISOM with a scheduled termination date and handover of security to Somalia's security forces by the end of 2021.[213] In renewing the mandate, the Security Council

[205] Report of the Chairperson of the Commission on Conflict Situations in Africa to the Seventh Ordinary Session of the Executive Council, AU Doc. EX.CL/191 (VII), 28 June–2 July 2005, para. 13.

[206] On 12 April 2010, the Security Council's Committee established pursuant to Resolution 751 (1992) concerning Somalia placed Al-Shabaab on its '1844 Sanctions List' as a terrorist entity, in accordance with para. 8 of Resolution 1844 of 20 November 2008.

[207] SC Res. 2372 of 30 August 2017, UN Doc. S/RES/2372(2017).

[208] SC Res. 2431 of 30 July 2018, UN Doc. S/RES/2431(2018).

[209] SC Res. 2472 of 31 May 2019, UN Doc. S/RES/2472(2019).

[210] SC Res. 2520 of 29 May 2020, UN Doc. S/RES/2520(2020).

[211] Okeke, *Repositioning the AU's Role* (n. 185), 5.

[212] SC Res. 2520 of 29 May 2020, UN Doc. S/RES/2520(2020), para. 14.

[213] *Ibid.*, paras 5, 9. The Security Council reauthorised AMISOM with the same end date on 12 March 2021. See SC. Res. 2568 of 12 March 2021, UN Doc. S/RES/2568(2021); 'Security Council Reauthorizes African Union Mission in Somalia, Unanimously Adopting Resolution 2568 (2012)', UN Doc. SC/14467, 12 March 2021.

reiterated that Al-Shabaab posed a serious threat to the stability of Somalia and its neighbours and condemned its terrorist attacks.

As was the case in Mali, the United Nations' endorsement of the fight against terrorism complements its support for a political process aimed at bringing the Federal Government of Somalia (FGS), the Federal Member States (FMS), and Somali political factions to an inclusive political settlement to end the country's decades-long political crisis. In Resolution 2520, the Security Council:

> *Reiterates* that Al-Shabaab and other armed groups will not be defeated by military means alone, and in this regard, *calls on* the FGS, FMS, AMISOM, the UN and international partners to work closer together to take a comprehensive approach to security which is collaborative, gender-responsive and stabilising, and *calls on* international partners to provide support to the FGS to counter Al-Shabaab's finance, procurement and propaganda efforts.[214]

Clearly, the African Union's approach to counter-terrorism differs from the United Nations'. While the United Nations has been careful to distinguish peace support operations from counter-terrorism and counter-insurgency, the African Union has not been as discerning. Furthermore, as has been noted, the United Nations has not authorised UN-led operations with mandates to undertake counter-terrorism and counter-insurgency operations as such, beyond providing support to national security institutions involved in such activities. AMISOM, however, morphed into just such an operation, evolving from a passive to an active recognition of terrorism-related threats as part of its mandate.

AMISOM was replaced by the AU Transition Mission in Somalia (ATMIS) on 1 April 2022.[215] The termination of the AMISOM operation did not mark the triumph of the African Union's counter-terrorism objectives, as envisaged under its counter-terrorism normative framework. The growing frustration of the African Union, United Nations, and donors, compounded by a sense of mission fatigue, determined the fate of the African Union's longest and most costly, but also least successful, peace support operation. For both the African Union and the United Nations, the existence of Al-Shabaab and other terrorist groups elsewhere in Africa constitutes a continuing threat to peace and security on the continent and a challenge to the system of collective security generally.

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

[215] SC Res. 2628 of 31 March 2022, UN Doc. S/RES/2628(2022), endorsed the AU Peace and Security Council's decision to reconfigure AMISOM and replace it with ATMIS. The Security Council authorised, for an initial period of 12 months, the member states of the African Union, inter alia, to carry out its mandate to reduce the threat posed by Al-Shabaab.

In concluding this section, I turn briefly to the issue of violent extremism, to which both Cai and Van den Herik have also briefly turned. Both reiterate the widely accepted view that terrorism and violent extremism have emerged as related phenomena – indeed, as twin notions. Cai notes that this interrelatedness has not resulted in the incorporation of counter-extremism measures into the UN Counter-Terrorism Strategy and concludes that neither the General Assembly nor the Security Council has developed any meaningful rules on counter-extremism.[216] Van den Herik underscores the point that the most prominent failure of the UN Plan of Action for Preventing Violent Extremism is the absence of a definition of 'violent extremism'.[217] I generally agree with these observations. The lack of a definition of the phenomenon has implications for the principle of legal certainty. This also leads to lack of transparency and accountability, as was noted by the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.[218]

The African Union has also engaged with the issue of violent extremism, but in a more limited manner than it has with terrorism. There is recognition among African states that the two issues are separate and thus require separate counter-strategies. The PSC has discussed the threat of violent extremism in Africa at various levels.[219] Some proposals have been floated, but none have been adopted yet. These include developing a new peace support operations doctrine that would empower the African Union to deploy counter-terrorism and counter-violent extremism measures as part of its peacekeeping missions, and which would obviate the need to carry out such operations on an ad hoc basis, as is currently the case. The other is for the African Union to reach an understanding with the UN Security Council that will enable AU counter-terrorism operations to access UN assessed contributions.[220] Both of these scenarios present considerable challenges for

[216] Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, section IV. B (p. 65–6).

[217] Van den Herik, 'A Reflection on Institutional Strength', Chapter 2 in this volume, section VI (p. 174).

[218] Office of the High Commissioner for Human Rights, *Report on the Human Rights Policies and Practices Aimed at Preventing and Countering Violent Extremism*, UN Doc. A/HRC/43/46, 21 February 2020.

[219] See, e.g., AU Peace and Security Council, Communiqué of 812th Meeting (on the fight against terrorism and violent extremism in Africa), AU Doc. PSC/PR/COMM. (DCCCXII), 6 December 2018; AU Peace and Security Council, Communiqué of 749th Meeting, AU Doc. PSC/AHG/COM.(DCCXLIX), 27 January 2018 (held at the level of Heads of State and Government); AU Peace and Security Council, Communiqué of 687th Meeting, AU Doc. PSC/PR/COMM. (DCLXXXVII), 23 May 2017.

[220] See Institute for Security Studies, 'Will Africa Adapt its Counter-Terrorism Operations to Changing Realities?', *Peace and Security Council Report* 129 (2020), 1–4.

the African Union. While the Security Council has increasingly depended on the AU deployments to collaborate with it in response to terrorism in Africa, such as in AMISOM, the United Nations continues to insist that UN-mandated peace support operations cannot take part in military responses to terrorism.

I would thus suggest that, as far as the issue of combating violent extremism is concerned, as a regional organisation the African Union faces a challenge. The first aspect of this challenge is doctrinal, with implications for the principle of legal certainty raised by Van den Herik: neither the African Union nor the United Nations has agreed on a common definition of violent extremism. The second is operational: the African Union cannot undertake its own counter-violent extremism operations as part of UN-mandated peace operations. In the final analysis, the issue is not about the tension between the Security Council's authority and the principle of non-intervention, as Cai suggests; rather, it is the failure within the United Nations to find common ground and to anchor the Security Council's standard-setting in core principles of law, thereby achieving legal certainty, as Van den Herik has argued.

IV. CONTINUING CHALLENGES, FUTURE TRAJECTORIES, AND THE NEED FOR REFORM

A. *The African Quest for Permanent Seats on the Security Council*

As an organisation whose members comprise the largest regional bloc of the UN membership, with 54 of the 193 members, the African Union has pushed for greater visibility, influence, and recognition of its interests within the world body. Apart from efforts by the A3 to assert their voices on issues of direct concern to Africa in Security Council decision-making and calls for strengthening the AU–UN relationship, the African Union has also demanded permanent seats for the African region on the Security Council. The African Union regards this as a necessary step to make the Security Council more representative and legitimate, and to give Africa its rightful place in the balance of power in a reformed United Nations.

Reform of the Security Council has been back on the agenda since 2005, following the collapse of the Razali Plan in 1997.[221] UN Secretary-General

[221] Report of the Open-Ended Working Group on the Question of Equitable Representation on and Increase in Membership of the Security Council and Other Matters Related to the Security Council, UN Doc. A/51/47(SUPP), 8 August 1997, 6–9. The Razali Plan called for

Kofi Annan presented his report, *In Larger Freedom*, in March 2005 to set the agenda for the September 2005 World Summit. The report proposed an agenda involving a broad package of institutional reforms, including two models for the Security Council.[222] Under either model, all UN geographical regions except Africa would have at least one member with veto power.

The 'Ezulwini Consensus', to which I referred earlier in connection with Article 4(h) AU Constitutive Act, is premised on the argument that the current configuration of the Security Council is undemocratic and unable to protect weaker states against the major powers. This characterisation of the Security Council is, of course, not limited to the African states; other UN member states have expressed similar sentiments in the debates that have ensued over the years and have also responded with their own counter-proposals. I sketch the core demands of these respective groups only briefly.[223]

- The G4 plan (of Brazil, India, Germany, and Japan) seeks to add to the Security Council six permanent members, who would forgo the veto for the first 15 years of their membership or possibly longer, and four-non-permanent members.
- The Uniting for Consensus (UfC) group (comprising 12 members, including Argentina, Canada, Italy, Mexico, Pakistan, South Korea, Spain, and Turkey) opposes the G4 proposal to add any new permanent seats and advocates instead for the addition of only ten non-permanent seats, bringing the total membership of the Security Council to 25, and for the abolition of the veto or at least restricting its use.
- The L69 group (consisting of 25 developing countries from various regions of the world, and including Brazil and India) proposes six new permanent seats and six new non-permanent seats, distributed across the regions. Like the African group, the L69 would prefer to abolish the veto or extend it to all permanent members.
- A group of 22 Arab states demands a permanent seat for the Arab region but offers no suggestions about the veto, although it is highly critical of it.

expanding membership of the Security Council by adding five permanent and four non-permanent seats. It did not extend the veto to the new permanent members, regarding it as anachronistic; instead, it urged current permanent members to refrain from using their veto.

222 *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General, UN Doc. A/59/2005, 21 March 2005, paras 167–70.

223 Each of these groups introduced their proposals as draft resolutions to the General Assembly, which were not voted on: G4 Group, Draft GA Res. A/59/L.64 of 6 July 2005; African Group, Draft GA Res. A/59/L.67 of 18 July 2005; Uniting for Consensus Group, Draft GA Res. A/59/L.68 of 21 July 2005; S5 Group, Draft GA Res. A/60/L.49 of 17 March 2006.

In 2013, a group of states emerged as an informal caucus to advocate for improved Security Council working methods. The group replaced an earlier group of five small states (S5) – namely, Jordan, Liechtenstein, Costa Rica, Singapore, and Switzerland. The Accountability, Coherence and Transparency (ACT) Group, as the larger group is known, was launched on 2 May 2013, comprising small and medium-sized countries from all continents. It aims at enhancing the effectiveness of the Security Council by means of improvement of its working methods, including limiting the use of the veto. Coordinated by Switzerland, the ACT Group builds on the S5's many years of effort and addresses both the Security Council's internal functioning, as well as its relations to the broader UN membership. The ACT Group's core objective is to ensure that the Security Council really 'acts on their behalf', as stated in Article 24(1) UN Charter, and is a well-functioning organ that keeps all UN members involved in the decision-making process. The Group has also proposed a code of conduct on the use of the veto by the P5 that I discuss below.[224]

The African Union has rejected the models presented in Secretary-General Annan's proposals – especially the lack of a veto power for an African member. Instead, it demands the allocation of two permanent seats to Africa, with all of the prerogatives and privileges of permanent membership, including the right of veto. It also demands five non-permanent seats, in what would become a 26-member Security Council. Notably, the 'Ezulwini Consensus' spells out that '[even] though Africa is opposed in principle to the veto, it is of the view that so long as it exists, and as a matter of common justice, it should be made available to all permanent members of the Security Council'.[225] Furthermore, overlooking the selection criteria proposed in the report, *In Larger Freedom*, the African Union has demanded the right to establish its own criteria for African members and to select its representatives to the Security Council. The African Union, however, has not yet defined these criteria nor has it clarified if it expects other regions too to establish their own criteria. The 'Ezulwini Consensus' provides only that it shall take into consideration 'the representative nature and capacity of those chosen'.[226] The AU Assembly reaffirmed this position at its summit on 9–10 February 2020.[227]

The General Assembly has debated Security Council reform annually since 2009, based on Decision 62/557, adopted by the General Assembly in 2008 'to

[224] Van den Herik, 'A Reflection on Institutional Strength', Chapter 2 in this volume, section III.
[225] Ezulwini Consensus (n. 43), sect. C(e), para. 3.
[226] *Ibid.*, para. 5.
[227] Decision on the Reform of the United Nations Security Council, AU Doc. Assembly/AU/Dec.766 (XXXIII), 9–10 February 2020, para. 8.

commence intergovernmental negotiations (IGN) in informal plenary of the General Assembly'.[228] The Decision stipulates that the negotiations should seek 'a solution that can garner the widest possible political acceptance by Member States'.[229] The most recent debate, which took place on 16–17 November 2020 during the 75th Session of the General Assembly, once again heard many delegates call for limits on the veto power and improved geographical representation in the Security Council, particularly for Africa. As in previous debates, African delegates, to a person, echoed the long-standing position of the African Group, as expressed in the 'Ezulwini Consensus'. Significantly, support for the common African position during this debate did not come only from countries of the Global South but also from Global North members, including Denmark, Germany, Ireland, Japan, and the United Kingdom.[230]

Formally, almost all UN member states continue to profess their support for reform. Yet, because of obvious self-interest, there does not appear to be any prospect of imminent consensus on what that reform should look like. Clearly, the P5 members, which have a stake in maintaining the status quo, will prefer to guard jealously their coveted positions and the veto power in the Security Council, effectively resisting any change that threatens their hegemony. Their critics accuse them of engaging in double-speak: they speak publicly of their support for reform in official diplomacy, while pursuing their real agenda behind the scenes in unofficial diplomacy.[231] I argue that regional rivalries and the multiplicity of alliance groups with seemingly irreconcilable proposals have been just as culpable in stalling reform.

[228] GA Res. 62/557 of 15 September 2008, UN Doc. A/RES/62/557 (on the question of equitable representation on, and increase in the membership of, the Security Council and related matters).

[229] *Ibid.*, para. (d).

[230] 'Security Council Must Reflect Twenty-First Century Realities, Delegates Tell General Assembly, with Many Calling for Urgent Expansion of Permanent Seats', UN Doc. GA/12288, 16 November 2020, available at https://press.un.org/en/2020/ga12288.doc.htm; 'Delegates Call for Veto Power Limits, More Permanent Seats for Africa, as General Assembly Concludes Debate on Security Council Reform', UN Doc. GA/12289, 17 November 2020, available at https://press.un.org/en/2020/ga12289.doc.htm.

[231] In September 2022, President Joe Biden told the UN General Assembly that '[the] United States supports increasing the number of both permanent and non-permanent members in the Council. This includes permanent seats for those nations we've long supported and permanent seats for countries in Africa, Latin America, and the Caribbean.' See 'Remarks by President Biden before the 77th Session of the United Nations General Assembly', 21 September 2022, available at www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/21/remarks-by-president-biden-before-the-77th-session-of-the-united-nations-general-assembly/.

For the African Union, Security Council reform appears to have become a debate without end, but the African states cannot escape blame. I see the maximalist positions that many member states have adopted on this question – and this includes the common African position – as an added problem. The paradox here is that the 'Ezulwini Consensus' demands a share in the veto power while reiterating the African Union's opposition to the veto as a matter of principle. At the same time, anecdotal evidence suggests that '[it] seems many African countries are more interested in having increased influence when it comes to peacekeeping missions on the African continent, than they are in obtaining the veto right'.[232] Assuming this to be the case, I would agree with Bjarke Winther's observation that the addition of veto rights to more countries would be more a symbolic act than a measure equalising the current zenith of global power.[233] Even in an expanded Security Council with more veto-possessing members, none of the other members would match the global power and influence that goes with the military might of China, Russia, and the United States. They also would be hard-pressed to justify using their veto on the pretext of protecting their national interests to prevent the global community from taking action to deal with situations threatening international peace and security – which is quite possibly part of the explanation why France and the United Kingdom effectively do not use their veto power.

In my view, the maximalist demand that the African Union should set its own criteria for selection of its representative and that the African Union select them is problematic. The Security Council is empowered to take decisions that bind all UN members in terms of Article 25 UN Charter. Allowing one region alone to select its representatives to the Security Council and denying all other UN members a vote in their selection would ironically negate the democracy and legitimacy that the African Union claims to be the motivation for its demand for Security Council reform.

B. *The Russian Invasion of Ukraine: Ramifications for African Perceptions of the Security Council*

For the African Union and African states, nothing exemplifies the unfairness of the current Security Council structure and the potential of the P5 members to abuse the veto power better than the failure of the Council to adopt a decision condemning the Russian invasion of Ukraine. On 25 February 2022, the day

[232] Bjarke Zinck Winther, 'A Review of the Academic Debate about United Nations Security Council Reform', *The Chinese Journal of Global Governance* 6 (2020), 71–101 (100).

[233] *Ibid.*, 101.

following the invasion, the Security Council held a debate.[234] Russia vetoed a draft resolution that would have demanded Moscow immediately stop its attack on Ukraine and unconditionally withdraw all of its troops. While 11 of the Council's 15 members voted in favour of the draft text,[235] China, India, and the United Arab Emirates abstained. Russia vetoed it, even though the word 'condemns' was replaced by 'deplores' and a reference to Chapter VII UN Charter was deleted to water it down to gain more support.

In the context of the foregoing discussion, I would make two observations. The first is that the A3 – namely, Gabon,[236] Ghana,[237] and Kenya[238] – all spoke unequivocally in their condemnation of the invasion as a violation of Ukraine's territorial integrity and sovereignty, and as a violation of both the UN Charter and international law. They were, of course, neither speaking for the African Union nor conveying a collective African common position. The second observation is that China abstained rather than use its veto in support of its P2 ally. Notably, however, in his statement to the Council, China's representative reaffirmed its respect for the sovereignty and territorial integrity of all states and the need to uphold the purposes and principles of the Charter. China also called upon all parties to resolve their problems peacefully and encouraged efforts for a diplomatic solution through negotiations between Russia and Ukraine.[239]

On its part, on the day of the invasion, the African Union issued a joint statement by AU chair, President Macky Sall of Senegal, and the chairperson of the AU Commission expressing 'their extreme concern at the very serious and dangerous situation created in Ukraine', calling upon 'the Russian Federation and any other regional or international actor to imperatively respect international law, the territorial integrity and national sovereignty of Ukraine', and urging 'the two Parties to establish an immediate ceasefire and to open political negotiations without [delay]'.[240] It is plausible to argue that the joint statement outlined a possible common stance. The reality is that the African Union did not adopt an African common position on the Ukraine war.

234 UN Doc. S/PV.8979, 25 February 2022.

235 Albania, Brazil, France, Gabon, Ghana, Ireland, Kenya, Mexico, Norway, United Kingdom, and United States.

236 UN Doc. S/PV.8979, 25 February 2022, 4–5.

237 *Ibid.*, 9–10.

238 *Ibid.*, 11.

239 *Ibid.*

240 Statement from Chair of the African Union, H.E. President Macky Sall, and Chairperson of the AU Commission, H.E. Moussa Faki Mahamat, on the situation in Ukraine, 24 February 2022, available at https://au.int/en/pressreleases/20220224/african-union-statement-situation-ukraine.

After the failure of the Security Council to adopt the draft resolution, some members called for an emergency session of the General Assembly to discuss the matter. On 27 February 2022, the Council members voted in favour of the General Assembly convening to discuss the crisis.[241] By an overwhelming majority of 141 in favour, 5 against, and 35 abstentions, on 2 March 2022, the 11th Emergency Session of the General Assembly adopted a resolution deploring the Russian invasion of Ukraine and demanding that Russia immediately end its military operations there.[242] In doing so, the General Assembly utilised the 'Uniting for Peace' procedure to address a situation representing a grave breach of international peace and security after the Security Council's failure to take a decision, consistent with Article 11(2) UN Charter, which empowers it to discuss any questions relating to the maintenance of international peace and security.[243]

The voting positions of African states revealed an equal split between those who supported the Resolution and those who did not. Of the 54 African members, 27 voted in favour, 1 voted against, 17 abstained, and 9 were absent. Four possible explanations may be offered for the countries that did not support the Resolution by voting negatively, abstaining, or being absent. First, several of the opposing or abstaining countries – especially the southern African states (i.e., Angola, Mozambique, Namibia, South Africa, and Zimbabwe) – remain grateful for the former Soviet Union's support for their national liberation struggles. Thus, on the one hand, South Africa was unequivocal in its demand for Russia's withdrawal from Ukraine.[244] On the other hand, however, it also expressed sympathy for the argument, probably shared by many abstainers, that if NATO had taken greater account of Russia's security interests and given it the assurances that had been promised since the dissolution of the Warsaw Pact, the crisis might never have arisen.[245]

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

[242] GA Res. ES-11/1 of 2 March 2022, UN Doc. A/RES/ES-11/1.

[243] The 'Uniting for Peace Resolution' was adopted to circumvent further Security Council vetoes by the Soviet Union during the Korean War (1950–53): GA Res. 377(V) of 3 November 1950, UN Doc. A/RES/377(V).

[244] South African Department of International Relations and Cooperation, 'South African Government Calls for a Peaceful Resolution of the Escalating Conflict between the Russian Federation and Ukraine', 24 February 2022, available at www.dirco.gov.za/south-african-government-calls-for-a-peaceful-resolution-of-the-escalating-conflict-between-the-russian-federation-and-ukraine/.

[245] See op-ed article by Clayson Monyela, 'Ukraine Needs an Inclusive and Lasting Roadmap to Peace', *Daily Maverick*, 11 March 2022, available at www.dailymaverick.co.za/opinionista/2022-03-11-ukraine-needs-an-inclusive-and-lasting-roadmap-to-peace/. Clayson Monyela is head of public diplomacy at the South African Department of International Relations and Cooperation.

Secondly, there seemed to be a reluctance among many African states to be drawn into any resurrection of the Cold War in which some of them were used as proxies. This reluctance stems from the desire of African states to stick to the principles of non-alignment between East and West. Ironically, however, the differences in the positions adopted in the General Assembly may have exposed emerging 'new Cold War' divisions within the African continent.

The third factor is Russia's growing influence in Africa, which I discussed earlier. On this point, one may wonder whether the African states that did not support the Resolution were motivated solely by their wish to please Russia or, more probably, the desire not to offend China – the more significant partner for most of these states, given the latter's position on the invasion, which Cai has discussed in admirable detail.[246] Here, it is notable that China uses Russia's characterisation of its invasion of Ukraine as 'a special military operation', as does Cai, instead of describing it as 'a war', the term used by most UN member states and legal commentators. If the ramifications of the war in Ukraine escalate globally and a 'new Cold War' including China settles in, African countries will likely split into antagonistic blocs defined by their support for or opposition to Russia – an outcome that would negate the non-alignment that they traditionally proclaim.

A final factor that may have played a part in the motivations behind the voting was the perception of double standards on the part of some members of the Security Council – in particular, the P3. This can be viewed through two lenses: one, the perception that, even as one acknowledged the gravity of the situation caused by the unprovoked aggression of a nuclear-powered P5 member against a less powerful neighbour, one might recall that some past aggressions by other P5 members in other parts of the world were never seriously challenged or condemned by the Security Council; the other, the view that the attention given to the plight of victims of these past aggressions by Western powers was nowhere near that accorded to Ukrainians affected by the war.

This latter sentiment had been expressed by the representative of Kenya in his address to the Security Council during the 25 February 2022 session. In remarks that did not attract any comment at the time, he recalled the Council's 2011 authorisation of intervention in Libya and its consequences:

> Even as deserved condemnations ring out today about the breach of Ukraine's sovereignty, history's condemnations are allowed silence in this room. We cannot help but recall that Africa's Sahel region is in terrible

[246] Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, section III.B.

> turmoil due to the hasty and ill-considered intervention in Libya a decade ago.
>
> On that occasion, the African Union sought more time for diplomacy. Its Peace and Security Council was ignored and what resulted was not peace or the safety and security of the Libyan people. Instead, terror was unleashed on African peoples in the countries to the south of Libya. There have been yet other actions of similar magnitude that have brought us to this unfortunate pass.[247]

I agree with this sentiment up to a point, because it accords with some of the observations and criticism that I have advanced regarding the NATO intervention in Libya. I do not agree, however, with the implied suggestion of a moral equivalence between the Russian invasion of Ukraine, which undoubtedly violated the Charter and international law (a point accepted even by those who support or sympathise with Russia's rationalisation of its action), and the intervention in Libya. The latter, as I have argued, was justifiably authorised by the Security Council within its Chapter VII powers, even if the manner of its execution by NATO tainted its legality and legitimacy.

Despite the absence of an AU or African common position, there was subsequent engagement between both parties to the conflict and representatives of the African Union. On 3 June 2022, the AU chair and the chair of the AU Commission met with Russian President Vladimir Putin. President Sall of Senegal was reported to have pleaded Africa's cause, telling the Russian president that the continent was threatened by an unprecedented food crisis resulting from the blockading of Ukrainian ports and the Western sanctions on Russia, and to have asked Putin 'to be aware that [African] countries, even if they are far from the theatre [of action], are victims of the crisis at the economic level'.[248] Subsequently, on 20 June 2022, Ukrainian President Volodymyr Zelensky addressed the Bureau of the AU Assembly in a closed-door virtual meeting in which he reiterated that Ukraine was a victim of 'a brutal war – a war of invasion' by Russian troops – and acknowledged that Ukraine was aware of the economic difficulties and food crisis that some African countries were facing as a result.[249]

[247] UN Doc. S/PV.8979, 25 February 2022, 11.

[248] Christophe Châtelot, 'Vladimir Putin Promises to Facilitate Ukrainian Wheat Export to Africa', *Le Monde*, 5 June 2022, available at www.lemonde.fr/en/international/article/2022/06/05/vladimir-putin-promises-to-facilitate-ukrainian-wheat-export-to-africa_5985719_4.html.

[249] See Noé Hochet-Bodin, 'Volodymyr Zelensky Seeks Support from the African Union', *Le Monde*, 21 June 2022, available at www.lemonde.fr/en/le-monde-africa/article/2022/06/22/volodymyr-zelensky-seeks-african-union-support_5987621_124.html.

The impact of the war for many developing countries, especially in Africa, as measured in terms of rising food and fuel prices and the knock-on effects of the sanctions imposed on Russia, may be long-lasting. Consistent with their traditional opposition to unilateral sanctions, African countries did not support these sanctions. The AU chair underscored this when he addressed an EU summit on 31 May 2022, warning that Western sanctions had made it difficult for African countries to buy grain from Russia, and that this only compounded the difficulties and slowdown in economic growth that African countries already faced from the effects of the climate crisis and the COVID-19 pandemic.[250]

As regards the sanctions, it may also be noted that neither the African Union nor any individual African state publicly supported Russia's argument, echoed by China, that the sanctions were illegal and a breach of international law. This argument reprised the position that Russia took when the European Union and the United States imposed sanctions against it following its annexation of Crimea in 2014. The Russian position was premised on the argument that only the Security Council can decide on sanctions and that, if it has not done so, any sanctions adopted are, by definition, unilateral and illegal.[251] I do not share this view. The argument implies that sanctions could never be legally adopted against a permanent member of the Security Council, since it is inconceivable that any P5 state would forgo its veto and allow the Council to adopt a decision that would harm that state. To my mind, the non-UN sanctions imposed by the European Union and other Western countries were legal and legitimate countermeasures to the Russian invasion, which represented a violation of a peremptory norm of international law prohibiting the use of force.

One of the lessons from the Security Council's handling of the war in Ukraine is that it is unable to deal with threats to international peace and security in which the principal or sole offender is its permanent member. For Africa, the most immediate ramification of the war was the understandable decision by Ukraine to withdraw its 250-strong contingent and eight helicopters that made up a third of the UN fleet from the UN peacekeeping mission in

[250] Victoria Mallet and Andy Bounds, 'African Union Warns of "Collateral Impact" as EU's Russia Sanctions Hit Food Supplies', *Financial Times*, 31 May 2022, available at www.ft.com/content/e558de33-6064-4b10-a784-eb344cb17915.

[251] Russian Foreign Minister Sergey Lavrov reiterated this point on 1 April 2022 in relation to the new Western sanctions during a visit to India. See Patrick Wintour, 'Russia and India Will Find Ways to Trade Despite Sanctions, Says Lavrov', *The Guardian*, 1 April 2022, available at www.theguardian.com/world/2022/apr/01/russia-and-india-will-find-ways-to-trade-despite-sanctions-says-lavrov.

the Democratic Republic of Congo (MONUSCO).[252] Although MONUSCO was already expected to end its operations in 2024, Ukraine's withdrawal did not augur well for the DRC's deteriorating security situation. Ukraine also pulled out of the UN missions in Mali and South Sudan.

C. *The Problem of Security Council Inaction and Failure to Decide*

The failure of the Security Council to act to prevent or stop the Rwanda genocide was a painful reminder that, while the founders established it as the organ with the primary responsibility for the maintenance of international peace and security, when faced with a crisis within the scope of its mandate, it has no obligation to decide whether to act or not. Although it was a domestic genocide perpetrated by domestic actors, few would argue that the Rwanda crisis did not fall within the scope of Article 39 UN Charter. The Charter gives the Security Council legal authority to authorise binding measures necessary to restore peace and security, but it does not establish any obligation requiring it to decide on any measures in any situation. Yet failure by the Security Council to decide is itself a form of decision. Put differently, the Security Council 'speaks' both when it takes a decision and when it does not. 'Inaction' is a perverse form of 'action' – and it is a legally relevant omission.[253]

Most of the discussion on Security Council reform by UN member states and scholars has focused on substantive issues, such as its outdated membership structure and the use of the veto power; not as much attention has been given to exploring the possibility of procedural reforms. Such reforms could take the form of amendments to the Security Council's Rules of Procedure and Working Methods, without necessitating the more complex process of amending the Charter provided for under Articles 108 and 109. Anna Spain and Anne Peters are among the few scholars who have written on the issue of procedural reforms to improve the Security Council's decision-making.[254] Specifically, Spain proposes that the Security Council adopt three new procedural duties: the duty to decide; the duty to disclose; and the duty to consult to improve its decision-making processes. Peters proposes the duty to give reasons.[255]

[252] See Samba Cyuzuzo, 'Ukraine Troops Leave DR Congo Peacekeeping Mission Monusco', *BBC News*, 18 September 2022, available at www.bbc.com/news/world-africa-62945971.

[253] See generally Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes* (Cambridge: Cambridge University Press, 2020).

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

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

According to Spain, the duty to decide would require the Security Council to decide affirmatively whether it will take action to deal with crises falling within the scope of its authority. The duty to disclose would require it to explain publicly its reasons should it not do so. Finally, the duty to consult would obligate it to engage in broader dialogue with affected parties before taking serious action, aiming to understand the will of the people whom the Security Council's decisions may affect, so as to integrate their preferences into its decision-making.[256] Spain argues that: '[These] duties would serve as a commitment mechanism that would encourage the UNSC to make decisions or explain to the public its justifications for not doing so.'[257]

The proposal is cogent and viable. I think, however, that the third duty proposed, the duty to consult, may prove the most problematic, because it requires the Security Council to go beyond governments of the states concerned as interlocutors and engage directly with the people in those states 'to understand their will'. The politics and practicalities of achieving this engagement may prove to be a difficult – perhaps even an insurmountable – challenge. Leaving aside this quibble, in my reading, the idea of the Security Council adopting internal procedural reforms establishing procedural duties is consistent with some of the proposals advanced by member states, such as the S5 and ACT Group. The ACT Group's position is particularly apposite in this respect. As noted in the previous section, the core objective of the ACT Group initiative is to improve the working methods of the Security Council. An important aspect of this is to encourage more Arria formula meetings and improve the relationship between the Security Council and the broader UN membership. As Van den Herik has rightly argued, these meetings provide opportunities for other states to participate and to mobilise.[258]

African states and many others rightly faulted the United Nations generally for its inaction in Rwanda and the Security Council specifically for failing to adopt any decision as the genocide was unfolding. But the inaction was not the result of a P5 member using the veto to block a draft resolution on the issue; the Council did not even deliberate the need for such a resolution.

Regarding more recent situations involving allegations of genocide, for example in Syria and Myanmar, the use of the veto on multiple occasions by the P2 members has prevented the Security Council from authorising any

[256] Spain, 'Security Council's Duty to Decide' (n. 253), 326.

[257] *Ibid.*

[258] Accountability, Coherence and Transparency (ACT) Group, *Better Working Methods for Today's UN Security Council* [Factsheet], May 2019, available at https://centerforunreform.org/wp-content/uploads/2015/06/FACT-SHEET-ACT-June-2015.pdf, 1. See Van den Herik, 'A Reflection on Institutional Strength', Chapter 2 in this volume, section III (p. 122).

action. Since 2011, when the P5 united to adopt Resolution 1973 on Libya, Russia and China have used their veto power 13 and 7 times, respectively, to block resolutions addressing war crimes and crimes against humanity committed in Syria. These instances have increased the calls among UN member states for there to be a restraint on the use of the veto by the P5 in situations of mass atrocity. For example, at the 70th Session of the General Assembly in 2015, France and Mexico presented a proposal entitled 'Political Statement on the Suspension of the Veto in Case of Mass Atrocities' and invited UN member states to sign it.[259] At the same time, the ACT Group launched a draft code of conduct regarding Security Council action against genocide, crimes against humanity, or war crimes. The Code of Conduct, launched officially on 23 October 2015, calls upon *all* members of the Security Council, both permanent and non-permanent, not to vote against any credible draft resolution intended to prevent or stop mass atrocities.[260] Prior to the ACT Group's campaign, Anne Peters had argued for the Security Council's '*duty* to intervene', as a moral or even legal obligation, to protect populations against genocide or crimes against humanity. The existence of such a duty would preclude the use of the veto by the P5 in relevant situations.[261]

The ACT Code of Conduct is a legally non-binding instrument to which UN member states voluntarily commit themselves. On the one hand, until all of the P5 members make that pledge and abide by it, the veto power will remain a potential tool for some members of the Security Council to use against resolutions aimed at addressing future situations of genocides, crimes against humanity, and war crimes. On the other hand, if all of the P5 members were to embrace it (which is most unlikely), the Code of Conduct would in effect be a procedural reform of the working methods of the Security Council without formal Charter amendment. Such a development would have enormous political significance but little normative consequence for the law of peace and war and for the system of collective security. Statements made by states at the General Assembly pledging their support for the Code of Conduct, or signing it, are not resolutions of the General Assembly, still less

[259] See generally Jean-Baptiste Jeangène Vilmer, 'The Responsibility not to Veto: A Genealogy', *Global Governance* 24 (2018), 331–49. See also Ariela Blätter and Paul D. Williams, 'The Responsibility not to Veto', *Global Responsibility to Protect* 3 (2011), 301–22.

[260] Annex I to the letter dated 14 December 2015 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General, UN Doc. A/70/621–S/2015/978 ('Code of Conduct Regarding Security Council Action against Genocide, Crimes against Humanity or War Crimes').

[261] Anne Peters, 'Humanity as the A and Ω of Sovereignty', *European Journal of International Law* 20 (2009), 513–44 (538–40).

of the Security Council.[262] To date, only France and the United Kingdom, among the P5 members, have signed the ACT Code of Conduct.

From the perspective of the African states, the voluntary pledge requested of permanent and non-permanent members of the Security Council is of huge symbolic significance, even if it yields no immediate normative outcomes. Article 4(h) was incorporated into the AU Constitutive Act to address the crimes of genocide, crimes against humanity, and war crimes, which are widely regarded as violations of peremptory norms of general international law (i.e., ius cogens).[263] Given this fact, it is surprising that there are only 22 AU member states among the current 122 signatories to the Code of Conduct.[264] That list does not include Rwanda – the country whose painful experience in 1994 was arguably a critical factor behind the adoption of Article 4(h). This illustrates the double bind of voluntary pledges: some states sign such pledges precisely because of their non-binding nature and hence lack of normative consequences; others choose not to sign them because they see no point in committing to a pledge that has no binding legal effect and carries no enforceable obligations. Yet, in my view, the ACT Code of Conduct remains a valuable vehicle for garnering the necessary international consensus that may help, over time, to push both the General Assembly and Security Council in the right direction towards a norm-creating trajectory. To this extent, the Code will remain a relevant negotiating point in future deliberations on UN reform.

In an unrelated move, in April 2022, the General Assembly adopted by consensus a resolution co-sponsored by 83 countries mandating an automatic meeting in the event of any Security Council veto.[265] Under Resolution 76/262, the General Assembly decided to meet automatically within ten days if the veto is used in the Security Council by one or more of the P5, inviting the concerned P5 members to account to the meeting for the circumstances behind its use of the veto, so that all UN members might have an opportunity to scrutinise and comment on it. The General Assembly also decided to include in the provisional agenda of its 77th Session an item entitled 'Use of

[262] As of 8 June 2022, 122 UN member states and 2 observers had signed the Code of Conduct: see Global Centre for the Responsibility to Protect, 'List of Signatories to the ACT Code of Conduct', 8 June 2022, available at www.globalr2p.org/resources/list-of-signatories-to-the-act-code-of-conduct/.

[263] See *Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*)*, Report of the International Law Commission, UN Doc. A/74/10, Pt V, Annex. The Commission included these crimes in an illustrative list of norms that it considered 'candidates' for ius cogens.

[264] Global Centre for the Responsibility to Protect, 'List of Signatories' (n. 262).

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

the veto'.[266] Liechtenstein led this initiative, which it had embarked upon with a core group of states more than two years earlier out of growing concern that the Security Council had found it increasingly difficult to carry out its work in accordance with its mandate under the Charter.[267]

Two brief observations may be made about this Resolution. First, although not formally directed at Russia, its adoption came in the wake of Russia's use of the veto of the draft Security Council resolution on Ukraine. Since General Assembly Resolution 76/262 is non-binding, it is unlikely that any concerned P5 member will feel compelled to explain themselves in the General Assembly other than, perhaps, to reiterate their earlier justifications given in the Security Council. Yet by deciding to maintain, on the agenda of its future sessions, an item on the use of the veto, the General Assembly will ensure that the debate about the veto power of the P5 remains alive. This will be symbolically significant.

Secondly, Resolution 76/262 followed the General Assembly's adoption of Resolution ES-11/1 on 2 March 2022, in which it demanded that Russia cease its invasion of Ukraine and withdraw its troops immediately. There is thus an implied link between the two resolutions. Both highlight two critical issues that Van den Herik and I have raised and on which we agree: broadening the inclusion of other voices beyond the Security Council, and the Council's inevitable dysfunction when a permanent member is involved in the crisis.

D. *Unconventional Global Threats: The Climate Crisis and Climate Security*

The notion of unconventional threats to security is elastic and their identification depends on whether one adopts a narrow or expansive conception of security. A few candidates emerge in most accounts of such threats, including health pandemics, cyber tools, artificial intelligence, biotechnology, transnational organised crime, the climate crisis, and autonomous or unmanned systems, to mention only a few. By their nature, most of these new threats are transnational and potentially impact all regions of the world.

Climate – or the climate crisis – is one of the most transnational of these threats and is currently of particular concern to the African region. I regard this as a new threat that deserves serious attention from both the African Union and the United Nations going forward. This is not to suggest that the other

[266] *Ibid.*, para. 4.

[267] Security Council Report, 'Monthly Forecast (May 2022)', available at www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/2022_05_forecast.pdf, 2.

unconventional threats are of no consequence or matter less to Africa. Global pandemics and epidemics, such as malaria, tuberculosis, and HIV-AIDS, or more recently Ebola and COVID-19, are of equal concern to African states as threats to their security. However, there appears to be a consensus, which African countries share, that global health issues are for the World Health Organization (WHO) to deal with. The impacts of the climate crisis – desertification, land degradation, droughts, and so on – have affected communities across most of the African continent for decades and continue to do so. These impacts are more visible and observable, and more enduring, and thus make the climate–security nexus obvious and urgent. It is for this reason that I propose to devote the remainder of this section to this issue.

Van den Herik has given a succinct account of the first open debate in the Security Council, convened by the United Kingdom, on the relationship between energy, security, and climate in 2007, at which many delegations expressed concern and resistance against any suggestion of the Security Council expanding its remit to deal with these matters. She rightly points out that the concerns expressed by some members were twofold: fear of Security Council mission creep; and the potential weakening of the UN system that would result from letting the Security Council deal with matters falling under the mandates of other UN agencies.[268] Van den Herik quotes the representative of Sudan, who, speaking on behalf of the African Group, expressed the fear that the 'increasing and alarming encroachment by the Security Council on the mandates of other United Nations bodies [compromises] the principles and purposes of the United Nations Charter and is also undermining the relevant bodies'.[269] A decade later, subsequent open session debates and discussions on climate and security in the Security Council suggest a growing acceptance among states that this is a legitimate issue for the Security Council to take on.[270]

There is widespread agreement that, although it contributes least to global warming in comparison to other regions, Africa is disproportionately vulnerable to the impact of climate change. Moreover, some of the countries most

[268] Van den Herik, 'A Reflection on Institutional Strength', Chapter 2 in this volume, section VII (p. 176).

[269] UN Doc. S/PV.5663, 17 April 2007, 12.

[270] For recent Security Council discussions on climate and security, see Ministerial-Level Open Video Teleconference on Maintenance of International Peace and Security: Climate and Security, 24 July 2020, available at https://media.un.org/en/asset/k1z/k1z5jgc04h; High-Level Open Video Teleconference Debate on Climate and Security, 23 February 2021, available at www.youtube.com/watch?v=ToZV7vV6Mdc; 'Climate Change "Biggest Threat Modern Humans Have Ever Faced", World Renowned Naturalist Tells Security Council, Calls for Greater Global Cooperation', UN Doc. SC/14445, 23 February 2021.

affected by the climate crisis are also among the most politically fragile and prone to conflicts.[271] The African Union recognises that climate and ecological crises have led to forced displacement and migration, food and water insecurity, inter-communal conflicts between herders and farmers, and the scourge of violent extremism and terrorism.[272] The war in Darfur was an early example of a climate-related conflict. In a resolution on Darfur adopted some 15 years after the start of the conflict, the Security Council still recognised the 'adverse effects of climate change, ecological changes and natural disasters, among other factors, on the situation in Darfur, including through drought, desertification, land degradation and food insecurity'.[273]

Since 2015, the African Union has officially included the climate crisis as a security threat on its agenda. The APSA Roadmap 2016–20, adopted by the PSC, identifies the climate crisis as one of the cross-cutting issues in peace and security, and addresses 'the issues of continental coordination, collaboration and research to mitigate the impact of climate change as a threat to peace and security in Africa'.[274] Furthermore, the APSA Roadmap characterises the climate crisis as a 'threat multiplier that exacerbates security trends, tension and stability'.[275] Since 2016, the PSC has held open sessions on climate change. At these meetings, AU members have acknowledged, among other things, 'the inextricable link between climate change, peace and security in Africa', and 'stressed the importance of the AU Commission to mainstream climate change in all its activities, particularly in early warning and conflict prevention efforts'.[276] Members have also essentially described the climate crisis as an existential threat to all countries and regions in Africa, and to continental peace, security, and

[271] Hannah Ritchie, 'Global Inequities in CO_2 Emissions', *Our Word in Data*, 16 October 2016, available at https://ourworldindata.org/co2-by-income-region. It is estimated that 57 per cent of the countries facing the highest double burden of climate exposure and political instability are in sub-Saharan Africa. See generally United States Agency for International Development (USAID), *The Intersection of Global Fragility and Climate Risks* (Washington, DC: USAID, 2018).

[272] African Union, Declaration of the 9th African Union High-Level Retreat on 'Promotion of Peace, Security and Stability: "Strengthening African Union's Conflict Prevention and Peacemaking Efforts"', Accra, 25–26 October 2018.

[273] SC Res. 2429 of 13 July 2018, UN Doc. S/RES/2429(2018).

[274] African Union, *African Peace and Security Architecture: APSA Roadmap 2016–2020*, December 2015, available at https://au.int/sites/default/files/documents/38310-doc-9_2015-en-apsa-roadmap-final.pdf, 60.

[275] *Ibid.*, 20.

[276] African Union, 585th Meeting of the AU Peace and Security Council: An Open Session on the Theme: 'Climate Change: State Fragility, Peace and Security in Africa', 30 March 2016.

stability.[277] In 2018, the PSC proposed the appointment of an AU Special Envoy for Climate and Security to work with the Committee of African Heads of State and Government on Climate Change.[278]

The debates in the PSC compare with the open session debates on climate convened by the Security Council since the first meeting in 2007. It is notable that the 2019 Security Council debate introduced the notion of 'threat multiplier' to describe the impacts of the climate crisis on global security – a notion already incorporated into the APSA Roadmap in 2015. Apart from two other open session debates held in 2011 and 2018, the Security Council has convened special events on climate-related security risks.[279] The president of the Security Council has also issued statements addressing the climate–security nexus following meetings on country- or region-specific situations in Africa. An early example was the statement on West Africa and the Sahel, issued on 30 January 2018, in which the Security Council recognised the link between the climate crisis and violence in the regions.[280] This was reiterated most recently in another presidential statement issued on 3 February 2021, in which the Security Council recognised 'the adverse effects of climate change, ecological changes and natural hazards on the stability of West Africa and the Sahel region'.[281] More importantly, despite refraining from officially addressing the climate crisis, several Security Council resolutions and missions since 2017 have operated on the premise of the adverse effects and implications of climate change, natural disasters, and other ecological changes on stability and security in relation to specific countries or regions. In addition to the resolution on Darfur mentioned earlier,[282] these include resolutions on some of the conflict situations discussed in this chapter – namely, Mali[283] and Somalia[284] – and others, such as in the Lake Chad Basin Region,[285] the CAR,[286] and the DRC.[287]

[277] African Union, 774th Meeting of the AU Peace and Security Council: An Open Session on the Theme: 'The Link between Climate Change and Conflicts in Africa and Addressing the Security Implications', 21 May 2018.
[278] *Ibid.*
[279] See above, n. 269.
[280] Presidential Statement on West Africa and the Sahel, UN Doc. S/PRST/13189, 30 January 2018.
[281] Presidential Statement on West Africa and the Sahel, UN Doc. S/PRST/14428, 3 February 2021.
[282] SC Res. 2429 of 13 July 2018, UN Doc. S/RES/2429(2018).
[283] SC Res. 2423 of 28 June 2018, UN Doc. S/RES/2423(2018); SC Res. 2480 of 28 June 2019, UN Doc. S/RES/2480(2019).
[284] SC Res. 2408 of 27 March 2018, UN Doc. S/RES/2408(2018).
[285] SC Res. 2349 of 31 March 2017, UN Doc. S/RES/2349(2017).
[286] SC Res. 2499 of 15 November 2019, UN Doc. S/RES/2499(2019).
[287] SC Res. 2502 of 19 December 2019, UN Doc. S/RES/2502(2019).

Some African states have also taken the initiative both individually and as African members of the Security Council to advocate for the climate crisis as an issue of importance to not only their own national security but also that of all other countries. Thus, in April 2020, two recently elected African members of the Security Council, Niger and Tunisia, participated in a Security Council Arria formula meeting that they co-hosted with other Council members on climate security risks.[288] Building on the fact that the Security Council's Resolution 2349 on the Lake Chad Basin Region had already, in 2017, acknowledged the link between the climate crisis and violence,[289] the representative of Niger underlined the need to consider the climate crisis as a threat to peace and security, pointing towards the situation of 'climate driven conflicts' in the Sahel region.[290] Although Tunisia did not mention the climate crisis as one of its priority issues at its election as a member of the Security Council, focusing instead on conflict prevention and settlement, and terrorism, it advocated during the meeting for the inclusion of the topic within the Security Council's remit. It also acknowledged that the impacts of the climate crisis can 'exacerbate existing conflicts' and supported the appointment of a special envoy for climate security to improve coordination with the UN system,[291] separate from the current UN envoy on climate action and finance.[292]

South Africa rejoined the Security Council for its third term in 2019–20, during which it set out to position Africa as a strong, resilient, and influential global player by bolstering the African Union's relationship with the United

[288] On 22 April 2020, Belgium, the Dominican Republic, Estonia, France, Germany, Niger, Saint Vincent and the Grenadines, Tunisia, the United Kingdom, and Viet Nam hosted a virtual meeting of the Security Council in Arria formula to assess climate-related security risks and to exchange ideas on what the United Nations can do to prevent climate-related conflicts: see Permanent Mission of France to the United Nations in New York, 'Event on Climate and Security Risks', 29 December 2020, available at www.onu.delegfrance.org/Event-on-Climate-and-Security-risks. Because of their informal character, no record and no outcomes are usually made available for Arria formula meetings. The key points made in statements by participants at the meeting of 22 April 2020 are summarised in Judith Nora Hardt and Alina Viehoff, *A Climate for Change in the Security Council: Member States' Approaches to the Climate–Security Nexus*, Research Report No. 5, Institute for Peace Research and Security Policy, University of Hamburg, July 2020.

[289] SC Res. 2349 of 31 March 2017, UN Doc. S/RES/2349(2017), para. 26.

[290] Statement by Abdou Abarry, representative of Niger, during the Security Council virtual meeting on climate and security risks, 22 April 2020: see Hardt and Viehoff, *A Climate for Change* (n. 288), 61.

[291] Statement by Tarek Laded, representative of Tunisia, during the Security Council virtual meeting on climate and security risks, 22 April 2020: see Hardt and Viehoff, *A Climate for Change* (n. 288), 83.

[292] The Secretary-General appointed Mark Joseph Carney of Canada to serve in this capacity on 1 December 2019.

Nations.[293] During its previous tenures in the Security Council in 2007 and 2011, South Africa had questioned whether it was appropriate that the Council should deal with the climate crisis, arguing that such an issue went beyond its mandate and that other UN forums were better placed to address it. South Africa repeated these concerns in 2019, but it shifted its position in the April 2020 Arria formula meeting. The South African representative stated there that, 'while it is still important to question the exact role of the Security Council, it has become clear that climate change is a matter of security that acts as a "conflict multiplier" and is contributing to conflicts, for example in the Sahel, Lake Chad, and the Horn of Africa'.[294]

The African Union has declared its determination to factor this threat into its conflict prevention and management, and post-conflict peacebuilding strategies. The PSC has made clear recommendations on how to mainstream the climate crisis and address these impacts. Alongside its request for the appointment of an AU special envoy for climate and security, the PSC requested – in the context of the implementation of the APSA Roadmap – the AU Commission to undertake a study on the nexus between the climate crisis and peace and security in the continent.[295] Yet, to date, these recommendations have not been translated into actionable commitments. On its face, one could attribute this to lack of political commitment on the part of the political leaders at the levels of both the institution and member states. Another obstacle is the lack of dedicated funding within the AU Peace Fund, established under Article 22 Peace and Security Protocol, for climate-related security issues.[296] In addition, I would also argue that the delay in implementing the recommendations is partly because of the limited understanding of the full nature of climate-related risks and how they impact policy processes. Lack of funding and limited institutional capacity clearly impact the ability of the African Union and other regional organisations in the Global

[293] Acceptance Statement by President Cyril Ramaphosa on assuming the Chair of the African Union for 2020, 9 February 2020, available at www.thepresidency.gov.za/speeches/acceptance-statement-president-cyril-ramaphosa-assuming-chair-african-union-2020.

[294] Statement by Kgaugelo Mogashoa, representative of South Africa, during the Security Council virtual meeting on climate and security risks, 22 April 2020; see Hardt and Viehoff, *A Climate for Change* (n. 288), 78.

[295] See above, n. 277.

[296] The AU Peace Fund has struggled to secure the required contributions and, at its 33rd Ordinary Session on 9–10 February 2020, the AU Assembly decided to postpone its launch to 2023 to make up for the shortfall in funding: AU Doc. Assembly/AU/Dec.752 (XXXIII), para. 6. As of 28 February 2021, the AU Peace Fund had mobilised only US$208 million, which is just over 50 per cent of the target set by the organisation: Personal interview between the author and a senior official of AU Department of Political Affairs, Peace and Security, 28 February 2021.

South to operate effectively, especially with regards to managing threats to regional peace and security. Cai is right to note that I do not discuss whether and how the African Union might strengthen its institutional capability. I allude to it, but I believe a discussion of this question falls outside the scope of this chapter.[297]

In my view, the African Union's delay in implementing its own recommendations is an opportunity for it to engage more effectively with the Security Council to find common cause on an issue that both bodies have embraced more clearly in recent years than they did barely a decade ago. I echo Van den Herik's observation, made in connection with the Security Council's resolution on the Lake Chad Basin Region – namely, that the Security Council has shown that 'there is a willingness to consider the security implications of the climate crisis in concrete situations'.[298] This willingness should provide a basis for the African Union and the United Nations to address climate security issues concretely in peace operations in Africa in situations in which the impacts of the climate crisis are a factor. This would be another aspect of the realisation of the partnership between the centre and the periphery for the maintenance of international peace and security.

V. CONCLUSION

The cooperation between the United Nations and the African Union in various peacekeeping missions in Africa is predicated on the reconfiguration of regionalism and reaffirmation of the primacy of the Security Council. This reconfiguration allows space for the regional organisation that is better placed to understand the root causes of the conflicts that create the need for the peacekeeping operations to play a part in the management of those conflicts and peacebuilding processes. The relationship between the United Nations and the African Union in these partnership operations also focuses attention on the role of the A3 members of the Security Council, which alone has the power to authorise them. The question that arises, and which underlies the foregoing discussion, is: to what extent, if at all, do they bring the voices from the periphery to the centre of global decision-making that is the Security Council? A related question, addressed to some degree or another in all of the chapters in this volume, is whether, in the post-Cold-War era, the Security

[297] Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, section VI.B (p. 105). But see *ibid.*

[298] Van den Herik, 'A Reflection on Institutional Strength', Chapter 2 in this volume, section VII (p. 178).

Council remains the unrivalled centre of global decision-making. As Cai and Van den Herik also ask, have the new landscape of power politics, changing dynamics among the members, and its failure to stop the war in Ukraine significantly reduced the Security Council's relevance – perhaps even exposed its obsolescence?

The changes that led to the collapse of the ideological divisions symbolised by the Cold War and the Berlin Wall affected the global power structure and the political dynamics in the Security Council in various ways. The end of the Cold War and the fall of the Wall signalled in changes in the strategic interests of the United States and the Soviet Union that had a significant impact on international relations. One of the outcomes of these changes was the growing pressure on the United Nations to engage in relatively new situations of conflict prevention, management, and resolution, and in post-conflict peace-building. The United Nations was expected to fill the void resulting from the withdrawal of military or humanitarian assistance by the two superpowers in their spheres of influence, and to deal with the fissures and conflicts that began to emerge in these spaces, driven by new forms of ethno-political nationalism, from the Balkans to the Horn of Africa and elsewhere.

These post-Cold-War challenges for the United Nations motivated UN Secretary-General Boutros-Ghali's *Agenda for Peace*, one of the key aspects of which was the invitation to UN member states to rethink the traditional approach to peacekeeping and the relationship between the global body and regional organisations in the maintenance of international peace and security. In a sense, this was an invitation to the UN members to reaffirm the primacy of the Security Council, which still symbolised the centre of power politics in the post-Cold-War order, while reimagining the role of the periphery, represented by the regional organisations, in this new order.

In this chapter, I selected the African Union as an illustrative case study to test the consequences of the changes in the international political landscape over the past two decades for Security Council decision-making and their impact on its relationships with regional organisations. Regional organisations differ from each other in many ways and there is no suggestion that conclusions drawn from an analysis of the AU–UN partnership hold true for other regional bodies. The European Union, for example, is completely different from the African Union and its relationship with the United Nations has operated differently, even in the limited cases of collaborative peace missions. But in the realm of the maintenance of international peace and security, no regional organisation other than the African Union has collaborated more with the United Nations. The regional perspective that the African Union brings to the United Nations – through the participation of African non-permanent members of the Security Council and

the engagement by AU member states with the broader UN membership – is as critical to understanding the dynamics of the post-Cold-War political universe as are the perspectives of other rising powers and influential states that periodically get elected to sit on the Security Council. These rising powers include states that have also enhanced their engagements and cooperation with the African Union and African states individually within the Security Council, in the United Nations broadly, and in other global forums. Pre-eminent among these is China, which is itself widely acknowledged as a 'resurgent' global power whose behaviour is changing the inter-relationships and power dynamics within the Security Council. The discussion of China's relationship and interactions with the African Union, especially in the context of peacekeeping, was aimed at illustrating this.

The African Union's peacekeeping partnerships with the United Nations are only one aspect of the interactions between the global body and the regional body. Other issues that are intimately connected to the Security Council's primary role as custodian of the system of collective security include current threats to security, such as the fight against terrorism, and future threats, such as the climate crisis. The African Union is as deeply invested in confronting these challenges as is the rest of the UN membership. The Security Council's stewardship on these issues is critical to future institutional and normative developments in the United Nations, and to how its decisions and actions may contribute to the development of international law as it relates to collective security.

The Security Council is not a legislative organ and does not create general international law. Yet when members of the Security Council deliberate on issues and adopt decisions, they often claim to base their positions on the provisions of the UN Charter and principles of international law, thereby invoking international legal norms to justify their political choices. In their turn, the decisions and actions of the Security Council can shape normative developments in various ways. As a site for political discourse, the Security Council can also be the crucible for legal diplomacy and a vehicle for shaping future trajectories in the law of peace and war. Aside from the issue of peace operations, the African Union's engagement with the United Nations also plays out in the larger context of the Security Council's contribution to other developments. Some of the issues addressed in this chapter relate to normative questions, such as the R2P principle (in the context of the much-contested intervention in Libya by UN-authorised NATO forces), international terrorism (in relation to the peacekeeping missions in Mali and Somalia), and the climate crisis as an unconventional threat to security. Other questions relate to

Security Council reform, such as contestation over permanent seats, and the problem of Security Council inaction and failure to decide.

By participating in the decision-making processes of the Security Council through its A3 representatives and in other formal and informal debates, African states bring to bear their multilateralist perspectives on the international rule of law – sometimes forged as a common AU regional perspective – on a whole range of issues. But, in the final analysis, as I have argued, the relationship between the African Union and the United Nations, and the assertion by the African Union of its regional perspectives, do not challenge but rather complement and reaffirm the primacy of the Security Council in the maintenance of peace and security. The Security Council remains relevant and continues to hold the centre of the widening gyre of the somewhat decentralised collective security system in the post-Cold-War era – or, as some have suggested, the 'new Cold War' period that the world is already entering.