

Introduction

The UN Security Council's Four Defining Fields of Tension

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How can the United Nations (UN) Security Council contribute to the maintenance of international peace and security in times of heightened tensions, global polarisation, and contestation about the principles underlying the international legal and political order? In this Trialogue, three experts rooted in diverse geographic, socio-legal, and ideational backgrounds present their perspectives on the Security Council's historic development, its present functions and deficits, and its defining tensions and future trajectories.

This introduction sets the scene for the authors' engagement by briefly reflecting on the Security Council's functions in the international peace and security architecture (section I). It then discusses the changing political environment (section II), and how states and other actors have responded to the Security Council's dysfunction in the past (section III). Based on this, four tensions are identified, in this introduction, that define the current role and work of the Security Council (section IV). Lastly, it introduces the authors of the Trialogue (section V).

I. THE UN SECURITY COUNCIL'S FUNCTIONS IN THE PEACE AND SECURITY ARCHITECTURE

The UN Security Council is the most crucial actor in terms of international peace and security. According to Article 24(1) UN Charter, UN members have conferred upon the Security Council the 'primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. The Security Council is the system's most powerful institutional actor. Its decisions are binding for UN members and it has the power, under Chapter VII of the UN Charter, to authorise enforcement actions.

The Council fulfils important functions for the maintenance of international peace and security. Its most general function is as an institutional arena for debate and exchange – especially for conflict and contestation with implications for international peace and security. As conflict studies underline, a forum for contestation is a crucial asset in avoiding radicalisation and escalation into military conflicts.¹ Accordingly, even when the Security Council fails to decide on substantive outcomes, its very existence is a significant factor – keeping opponents in touch with one another, and facilitating and structuring their exchanges – that can prove decisive in reaching substantive agreement in the future.

Beyond this, the Council has more concrete functions for the maintenance of peace. One of its classical functions has been the authorisation of peacekeeping missions. While the UN General Assembly mandated the first comprehensive peacekeeping mission – namely, the UN Emergency Force in the Suez (UNEF I), established after the 1956 Suez crisis – later peacekeeping operations were established by the Security Council. The Council initially relied on Chapter VI of the UN Charter, then later – and especially after the end of the Cold War – it established robust peacekeeping missions under Chapter VII. The binding measures set out in that chapter also provide for other, more generally important functions of the Security Council. Such functions – aimed at the maintenance or restoration of international peace and security – include: issuing directives and recommendations to conflicting parties; authorising economic sanctions; making referrals to the International Criminal Court; and – as a measure of last resort – authorising the use of military force as an enforcement action.

The Council has additionally become an important actor in law-making, although this function remains particularly disputed.² The Security Council has significant influence on the development of international law.³ It has

¹ Lisbeth Zimmermann, Nicole Deitelhoff, Max Lesch, Antonio Arcudi, and Anton Peez, *International Norm Disputes: The Link between Contestation and Norm Robustness* (Oxford: Oxford University Press, 2023), sect. 1.6.3.

² See Anne Peters, 'Article 24', in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus (eds), *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 4th edn, 2024 forthcoming), MN 70–84. See also, critically, Michael Wood and Eran Sthoeger, *The UN Security Council and International Law* (Cambridge: Cambridge University Press, 2022), 11–14.

³ Gregory H. Fox, Kristen Boon, and Isaac Jenkins, 'The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law', *American University Law Review* 67 (2018), 649–732; Gregory H. Fox, 'Invitations to Intervene after the Cold War: Towards a New Collective Model', in Dino Kritsiotis, Olivier Corten, and Gregory H. Fox, *Armed Intervention and Consent*, Max Planck Trialogues on the Law of Peace and War (Anne

issued various far-reaching and general resolutions, such as those on state obligations regarding terrorism, which can produce identifiable legislative effects, including requiring states to create certain domestic legal rules.⁴ Moreover, the Security Council offers a forum in which UN members can tackle and respond to new threats, such as COVID-19 or the climate crisis – even though it remains controversial among states whether and to what extent this is, in fact, part of its mandate.⁵

II. THE CHANGING POLITICAL ENVIRONMENT

The Security Council's ability to fulfil these functions has always been strongly affected by world politics. These effects are reflected, among other things, in the number of resolutions passed each year and the number of vetoes issued by the five permanent members (P5).

After an initial period of activity in the 1940s, during which the P5 issued a significant number of vetoes, the Council's activity declined significantly for much of the Cold War.⁶ The Council was barely operational at that time, as divisions between the oppositional parties translated into procedural blockages.

The end of the Cold War and the resulting new political constellation saw a period of reactivation. In the 1990s, the Security Council was able to adopt a cooperative approach that was unprecedented in the breadth and depth of its activities.⁷ This period was characterised by relative unity among the Security Council members – particularly among the P5 – with low rates of both vetoes

Peters and Christian Marxsen, series eds), vol. 4 (Cambridge: Cambridge University Press, 2023), 179–318 (262–8).

⁴ See, e.g., SC Res. 1373 of 28 September 2001, UN Doc. S/RES/1373(2001), on the financing of terrorism; SC Res. 2178 of 24 September 2014, UN Doc. S/RES/2178(2014), on foreign terrorist fighters; SC Res. 2396 of 21 December 2017, UN Doc. S/RES/2396(2017), on anti-terror cooperation – especially on foreign terrorist fighters and information and data-sharing.

⁵ Paolo Palchetti, 'Débattre des changements climatiques au Conseil de sécurité: pour quoi faire?', *Questions of International Law, Zoom-Out* 91 (2022), 39–50; Erin Pobjie, 'COVID-19 and the Scope of the UN Security Council's Mandate to Address Non-Traditional Threats to International Peace and Security', *Heidelberg Journal of International Law* 81 (2021), 117–46.

⁶ In the 1940s, the Council passed around 20 resolutions each year. Around ten resolutions were vetoed each year, almost exclusively by the Soviet Union – in most cases, blocking states from becoming members of the United Nations. The Cold War led to a stark decline in the Security Council's activity. Only 54 resolutions were passed between 1950 and 1959; during the same time, 36 resolutions were vetoed. From the 1960s on, activity increased, and an average of around 18 resolutions were passed each year between 1960 and 1989.

⁷ Peter Wallensteen and Patrik Johansson, 'Security Council Decisions in Perspective', in David M. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (Boulder, CO: Lynne Rienner, 2004), 17–33 (21).

and abstentions.⁸ An average of around 64 resolutions were concluded each year in the 1990s and that high level of activity lasted throughout the subsequent two decades.

Nevertheless, underlying tensions had developed and, in the 2010s, the Security Council entered a phase of renewed confrontation. Its members were unable to agree on common courses of action in response to major international crises. A recurring dynamic saw Western states pushing for interventions under Chapter VII of the UN Charter, while China and Russia were reluctant to authorise military action. When Security Council members could not agree on a response to severe human rights violations in Kosovo, Western states alone initiated the 1999 Kosovo War. In 2003, when no unity could be established regarding enforcement of Iraq's disarmament obligations, the United States and its 'coalition of the willing' attacked Iraq without Security Council authorisation or any other basis in international law. Notwithstanding Chinese and Russian opposition to these two interventions, both states ultimately supported – or, at least, neither vetoed – resolutions aiming to settle the post-conflict situations.⁹

The 2011 Libya intervention is a consequential case for the further workings of the Security Council that is analysed thoroughly in the three chapters of this book.¹⁰ This intervention was authorised by the Security Council, but Russia and China later complained that the Council had overstepped the boundaries of Resolution 1973 in doing so.¹¹ In light of that experience, Russia has since taken a much more uncompromising position during the ongoing civil war that first unfolded in Syria in 2011. Western states aimed to support the opposition against oppression by the Assad government, but Russia vetoed

⁸ See the figures cited in Joel Wuthnow, *Chinese Diplomacy and the UN Security Council: Beyond the Veto* (London: Routledge, 2013), 19, 21, and 29.

⁹ SC Res. 1244 of 10 June 1999, UN Doc. S/RES/1244(1999), established a UN-mandated interim administration in Kosovo. Russia supported the resolution, while China abstained. The political situation after the 2003 US invasion of Iraq was also addressed by the Security Council through several resolutions, which Russia and China supported, including: SC Res. 1483 of 22 May 2003, UN Doc. S/RES/1483(2003); SC Res. 1500 of 14 August 2003, UN Doc. S/RES/1500(2003); SC Res. 1511 of 16 October 2003, UN Doc. S/RES/1511(2003).

¹⁰ Congyan Cai, 'The UN Security Council: Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, section V.B (pp. 79–81); Larissa van den Herik, 'The UN Security Council: A Reflection on Institutional Strength', Chapter 2 in this volume, section IV.A (pp.123–131); Tiyanjana Maluwa, 'The UN Security Council: Between Centralism and Regionalism', Chapter 3 in this volume, section III.B (pp. 203–231).

¹¹ See the discussion of the Russian reaction and the context in Christian Marxsen, 'International Law in Crisis: Russia's Struggle for Recognition', *German Yearbook of International Law* 58 (2015), 11–48 (32–3). On the Chinese position, see Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, section V.B (p. 80).

many Security Council actions directed against that government – referencing the Libya intervention to argue that it would not accept any further action aimed at regime change.¹²

With the war in Ukraine, the situation has worsened still. It has been described – including by Congyan Cai, in this volume – as a ‘new Cold War’.¹³ In this context, it is apparent that the Security Council is incapable of fulfilling its mandate: it can neither take action nor make a recommendation in regard to the Russian aggression, because decisions have been and would continue to be vetoed by Russia itself.¹⁴ The Security Council thus remains paralysed with regard to the war in Ukraine.

Secondly, we are witnessing an ideological polarisation: competing visions for international law are developing, and the Western and US-led dominance that emerged during the 1990s is being challenged.¹⁵ Western states compete with Russia and China over the relevance and definition of concepts such as sovereignty, democracy, and the rule of law. Thus they struggle over the normative values underlying and implemented in the international legal system.

Indeed, Russia has openly declared its intention to strive for a ‘new world order’.¹⁶ The United Nations – and, in particular, the Security Council – is very much at the centre of this vision. In March 2023, Russia’s President Vladimir Putin announced, at a joint press conference with China’s President Xi Jinping: ‘We [will] jointly work to create a more just and democratic multipolar world order, which should be based on the central

¹² See the Russian statement to the UN Security Council at its 6627th meeting of 4 October 2011, UN Doc. S/PV.6627, 3–5 (4): ‘The situation in Syria cannot be considered in the Council separately from the Libyan experience. . . . For us, Members of the United Nations, including in terms of a precedent, it is very important to know how the resolution was implemented and how a Security Council resolution turned into its opposite.’

¹³ Cai, ‘Maintaining Peace during a Global Power Shift’, Chapter 1 in this volume, section VII (p. 108).

¹⁴ See Draft SC Res. S/2022/155, vetoed by Russia at the meeting of 25 February 2022, UN Doc. S/PV.8979, 6: voting result, yes – 11, no – 1 (Russia), abstained – 3 (China, India, United Arab Emirates); Draft SC Res. S/2022/720, vetoed by Russia at the meeting of 30 September 2022, UN Doc. S/PV.9143, 4: voting result, yes – 10, no – 1 (Russia), abstained – 4 (Brazil, China, Gabon, and India).

¹⁵ See Tanja A. Börzel and Michael Zürn, ‘Contestations of the Liberal International Order: From Liberal Multilateralism to Postnational Liberalism’, *International Organization* 75 (2021), 282–305 (283).

¹⁶ On 7 April 2023, at a press conference during a visit to Turkey, Russian Foreign Minister Sergei Lavrov declared that negotiations about the war in Ukraine would need to ‘be about the principles on which the new world order will be based’: quoted in *The Guardian*, ‘Kremlin’s Strategic Aim in Ukraine is “New World Order”’, 7 April 2023, available at www.theguardian.com/world/live/2023/apr/07/russia-ukraine-war-live-pentagon-investigating-leak-of-us-and-nato-files-report-macron-and-von-der-leyens-last-day-in-china.

role of the UN, its Security Council, international law, and the purposes and principles of the UN Charter.¹⁷ Russia's domestic authoritarianism and blatant violations of international law indicate that its approach to and use of that framework is cynical. At the same time, Putin's statement clearly indicates the type of ideological confrontation that is likely in the years to come, with effect too on confrontations within the Security Council.

There remain, however, some significant differences between the Security Council now and the Security Council in the Cold War context. It is, first of all, important to take account of the fact that the Security Council remains quite active – obstruction of action in relation to specific conflicts or measures notwithstanding. Even in the context of polarising conflicts such as that in Syria, in relation to which Russia has vetoed a significant number of resolutions, the count of adopted resolutions is still higher than that of resolutions that have been vetoed.¹⁸ The Security Council is far from being generally blocked: it passed 54 resolutions even in 2022 – the year in which Russia waged its war of aggression against Ukraine – which is only slightly below the average of the last 25 years.¹⁹

The situation also appears different in that the Cold War context was characterised by bipolarity; today's situation and dynamic is significantly more complex, and often labelled an emerging 'multipolar order'.²⁰ Much uncertainty exists: the main poles of the confrontation are still taking shape

¹⁷ Vladimir Putin, Press statements by President of Russia and President of China, 21 March 2023, available at www.en.kremlin.ru/events/president/transcripts/70750.

¹⁸ As of January 2023, Russia has vetoed 17 draft SC resolutions on Syria (S/2011/612, S/2012/77, S/2012/538, S/2014/348, S/2016/846, S/2016/1026, S/2017/172, S/2017/315, S/2017/884, S/2017/962, S/2017/970, S/2018/321, S/2019/756, S/2019/961, S/2020/654, S/2020/667, and S/2022/538) but has consented to 29 such resolutions (S/RES/2042, S/RES/2043, S/RES/2059, S/RES/2118, S/RES/2139, S/RES/2165, S/RES/2170, S/RES/2178, S/RES/2191, S/RES/2199, S/RES/2209, S/RES/2235, S/RES/2249, S/RES/2254, S/RES/2258, S/RES/2268, S/RES/2314, S/RES/2319, S/RES/2328, S/RES/2332, S/RES/2336, S/RES/2393, S/RES/2401, S/RES/2449, S/RES/2504, S/RES/2533, S/RES/2585, S/RES/2642, and S/RES/2672). Those resolutions that were adopted concerned, inter alia, the establishment of observer missions, the destruction of Syria's chemical weapons stockpiles, the use of chemical weapons in Syria, humanitarian access, the prevention of the recruitment of foreign fighters, and the political solution to the crisis in Syria. Russia vetoed, inter alia, resolutions that condemned Syria's use of force against its own population, referred the situation to the International Criminal Court, established, renewed, or extended investigative mechanisms, aimed at providing humanitarian access, and condemned specific uses of chemical weapons on Syrian territory.

¹⁹ On average, the Security Council passed around 64 resolutions a year in the 1990s, 62 in the 2000s, and 60 in the 2010s.

²⁰ The term has been used for some time in international relations discourse: see, e.g., Barry R. Posen, 'From Unipolarity to Multipolarity: Transition in Sight?', in G. John Ikenberry, Michael Mastanduno, and William C. Wohlforth (eds), *International Relations Theory and the Consequences of Unipolarity* (Cambridge: Cambridge University Press, 2011), 317–41.

and remain volatile. On one side of the equation, Western states – at the time of writing – appear to be in solidarity (particularly in their united reaction to the Russian aggression against Ukraine) and concerns about the ‘brain death’ of the North Atlantic Treaty Organization (NATO) have been muted.²¹ Nevertheless, sudden changes seem possible – especially as a consequence of domestic power shifts within the United States or elsewhere – and these could lead to a radical realignment of international politics.

On the other side of the equation is China. As the main challenger to Western dominance, China is assuming a more assertive position, but its stance towards Russia and the nature of future cooperation between the two states remains unclear. China and Russia have, on the one hand, announced that ‘friendship between the two States has no limits’ and that ‘there are no “forbidden” areas of cooperation’.²² On the other hand, China does not currently appear ready to be drawn into Russia’s war.

In the current situation, much also depends on how developing countries will position themselves. Western states are increasingly recognising their importance as crucial actors for creating majorities, such as in the case of Russia’s aggression against Ukraine. As a consequence, developing states have gained political weight because the main rivals are on the lookout for allies.

III. PAST RESPONSES

The Security Council has always had to fulfil its functions under difficult circumstances. During much of its existence, its effective operation was limited – particularly because of the veto power. Thus numerous strategies have been discussed and developed to keep it operational and to mitigate the consequences of any dysfunction.

A. *Formal Reform*

Critiques of the Security Council have always triggered debate about the possibility of formal reforms. Two main points stand out. First, the Security Council has – with its 15 members – a relatively small membership and thus

²¹ See the statement by French President Emmanuel Macron in *The Economist*, ‘Emmanuel Macron Warns Europe: NATO is Becoming Brain-Dead’, 7 November 2019, available at www.economist.com/europe/2019/11/07/emmanuel-macron-warns-europe-nato-is-becoming-brain-dead.

²² Joint Statement of the Russian Federation and the People’s Republic of China on the International Relations Entering a New Era and the Global Sustainable Development, 4 February 2022, available at www.en.kremlin.ru/supplement/5770.

the scope of its representation is limited. This is particularly problematic because it is supposed to act on behalf of all of its 193 UN members.²³

Secondly, the Security Council is essentially an institutionalisation of privilege that is at odds with the principle of sovereign equality.²⁴ The P5 are in a unique position to block Security Council action, even against a majority of other members. Accordingly, the legitimacy of such privileges – particularly the abuse of the veto – has been a focus of criticism for decades, inspiring initiatives for formal reform.

Deliberations about and plans for formal institutional reform of the UN Charter have been broad in scope, but very high hurdles block the path to their realisation. Under Article 108 UN Charter, permanent members have the power to veto any Charter amendments. Reform of the provisions on the Security Council has been successful only once, when the number of elected Council members was increased from six to ten in response to the significant increase in UN membership.²⁵ Several proposals have suggested that the number of permanent and elected members be increased.²⁶ However, all such suggestions have failed to garner sufficient support, and hence the 2005 World Summit Outcome included only an abstract expression of support for Security Council reform and no concrete proposals.²⁷ Since then, those debating formal reform of the Security Council have gone relatively quiet. One reason for this is undoubtedly that efforts at formal reform emerged against a backdrop of relative political unity among UN members. In the 1990s, a reform proposal supported by two-thirds of UN members, plus the P5, seemed possible; in the current context of polarised international affairs, the majority needed for formal reform no longer appears to be a realistic option.

²³ Art. 24(1) UN Charter.

²⁴ Nico Krisch, 'The Security Council and the Great Powers', in Vaughan Lowe, Adam Roberts, Jennifer Welsh, and Dominik Zaum (eds), *The United Nations Security Council and War* (Oxford: Oxford University Press, 2008), 133–53 (135).

²⁵ GA Res. 1991 of 17 December 1963, UN Doc. A/RES/1991(XVIII).

²⁶ Bardo Fassbender, *Key Documents on the Reform of the UN Security Council 1991–2019* (Leiden: Brill Nijhoff, 2020), 15–35. See the proposal of Ismail Razali, suggesting an increase to the Council's membership of five permanent and four non-permanent members: Report of the Open-Ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council, UN Doc. A/51/47, 8 August 1997, Annex II. See also the Italian counter-proposal: *ibid.*, Annex XIII. See also the different proposals and criteria formulated in *A More Secure World: Our Shared Responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, 2 December 2004, UN Doc. A/59/565, 8–99 (paras 249–60). See also the discussion by Maluwa, 'Between Centralism and Regionalism', Chapter 3 in this volume, section V.A (pp. 254–58).

²⁷ GA Res. of 16 September 2005 (World Summit Outcome), UN Doc. A/RES/60/1, para. 153.

B. Empowering Other UN Organs

During the Cold War and again today, much of the wrangling over the workings of the Security Council and potential amendments to its procedures has been carried out in less formal ways – particularly by interpreting the UN Charter.

In 1950, the Soviet Union stayed away from Security Council meetings to protest the Republic of China holding China's seat in the Security Council rather than the then newly formed People's Republic of China.²⁸ The Soviet Union held the legal view that its absence would block the Security Council from making any decisions²⁹ – a view based on Article 27(3) UN Charter, which then stated that Security Council decisions on matters other than procedural questions 'shall be made by an affirmative vote of seven [now nine] members including the concurring votes of the permanent members'. The Soviet Union's interpretation seemed a reasonable approach to the wording of Article 27(3). Nevertheless, the Security Council took action with regard to the war unfolding in Korea, issuing a recommendation that UN members render assistance to the Republic of Korea as necessary to repel North Korea's armed attack.³⁰ The members of the Security Council thus made it clear that they would not accept the Soviet Union's attempt to bind the Council's hands and it resorted to dynamic interpretation to this end.³¹ When the Soviet Union realised that it would not be able to block Council action merely by staying away, it returned to the meetings and participated: it blocked further actions and recommendations with regard to Korea by issuing a veto.³²

This is the background against which the UN General Assembly adopted the 'Uniting for Peace' Resolution, whereby it declared that:

[I]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.³³

²⁸ UN Doc. S/PV.461, 13 January 1950, 10.

²⁹ UN Doc. S/PV.480, 1 August 1950, 20.

³⁰ SC Res. 83 of 27 June 1950, UN Doc. S/RES/83(1950).

³¹ See, in detail on this question, Andreas Zimmermann, 'Article 27', in Simma et al. (eds), *The Charter of the United Nations* (n. 2), MN 184–89.

³² UN Doc. S/PV.496, 5 September 1950, 18 (vetoing Draft SC Res. S/1653 of 31 July 1950).

³³ GA Res. 377(V) of 3 November 1950, UN Doc. A/RES/377(V), OP 1.

The Resolution was advocated by the United States and was an attempt to change the institutional balance within the UN system, giving more weight to the General Assembly, whose resolutions could not be blocked by the Soviet Union and in which Western states had, at the time, a clear majority.³⁴ The Resolution was thus meant to overcome the institutional blockade and it aimed to alleviate the overall effects in the Security Council of the far-reaching veto right.

Supporters of the Soviet Union complained that the ‘Uniting for Peace’ Resolution was meant to ‘bypass the veto’ and to ‘establish within the United Nations the predominance of one group of Powers to the detriment of the rights and interests of other Powers and of the Organization as a whole’.³⁵ They argued that it was ‘illegal’³⁶ and ‘an ill-concealed attempt to alter the Charter’.³⁷ Nevertheless, the Resolution was supported by an overwhelming majority.³⁸

The International Court of Justice has also accepted this interpretation of the General Assembly’s competences as consistent with the UN Charter.³⁹

The ‘Uniting for Peace’ Resolution remains of great importance even today – as was evident in the General Assembly’s emergency special session convened in response to the war in Ukraine. In this General Assembly debate, Russia echoed its old critique concerning the competences of the UN organs, claiming that the ‘attempt to circumvent and disregard the position of the Russian Federation contradicts the very foundation of the Charter of the United Nations’.⁴⁰

Even more recently, the General Assembly has claimed a role in critically assessing the use of the veto.⁴¹ On the initiative of Liechtenstein – co-sponsored by 83 UN member states, including France, the United Kingdom, and the United States – the UN General Assembly has decided

³⁴ See, on the background, Thomas Franck, *Nation against Nation* (Oxford: Oxford University Press, 1985), 39–41.

³⁵ UN Doc. A/PV.300, 2 November 1950, para. 102 (Belarus).

³⁶ UN Doc. A/PV.299, 1 November 1950, para. 170 (Poland).

³⁷ *Ibid.*, para. 190 (Poland). See also UN Doc. A/PV.300, 2 November 1950, para. 51 (Czechoslovakia).

³⁸ The resolution was adopted with 52 votes for, 5 against and 2 abstentions: *ibid.*, para. 73.

³⁹ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, paras 27–8.

⁴⁰ UN Doc. A/ES-11/PV.1, 28 February 2022, 11.

⁴¹ See, on this point, Van den Herik, ‘A Reflection on Institutional Strength’, Chapter 2 in this volume, section III (p. 121). See also Raphael Schäfer, ‘The Echo of Quiet Voices: Liechtenstein’s Veto Initiative and the American Six Principles’, *EJIL:Talk!*, 10 October 2022, available at www.ejiltalk.org/the-echo-of-quiet-voices-liechtensteins-veto-initiative-and-the-american-six-principles/.

that it will hold a formal meeting each time a veto is cast by a permanent member of the Security Council.⁴² The General Assembly has also invited the Security Council to submit a special report each time a veto is cast. Thus the General Assembly has assumed a sort of oversight role in relation to the veto – even though it has no formal authority to hold the Security Council to account, other than by stirring public scrutiny and debate. The 2022 Resolution was adopted without recorded vote and despite opposition by Russia, which rejected it as ‘an attempt to create an instrument that exerts pressure on the permanent members of the Security Council’.⁴³

The blockade of the Security Council has thus been, and is likely to continue being, a potential trigger for power shifts within the UN system. When the Security Council is blocked, other UN bodies – particularly the UN General Assembly – will step in and claim (limited) institutional roles in matters of peace and security.

C. *Informal Mechanisms*

In addition, UN member states have established working mechanisms and proposals aimed at increasing the inclusiveness, transparency, and legitimacy of decision-making within the UN Security Council. ‘Arria formula’ meetings have been established as flexible consultations, allowing Security Council members to informally exchange their views and engage with representatives of states who are not members of the Security Council, with representatives of international organisations, and with non-governmental organisations. Arria formula meetings can also be used to initiate exchange when an agreement to hold formal Security Council meetings cannot be reached.⁴⁴ Groups of states have advocated for voluntary restraint in the use of the veto by calling for its suspension in cases of mass atrocities.⁴⁵ The Accountability, Coherence and Transparency (ACT) Group has, moreover, presented a code of conduct, whereby signatory states pledge not to vote against credible Security Council resolutions that aim to take action against the commission of genocide, crimes

⁴² GA Res. 76/262 of 26 April 2022, UN Doc. A/RES/76/262.

⁴³ UN Doc. A/76/PV.69, 15. Other states (Indonesia, India, Brazil) complained about the lack of debate and the lack of inclusiveness in drafting Resolution 76/262: see *ibid.*, 6 and 10.

⁴⁴ See Van den Herik, ‘A Reflection on Institutional Strength’, Chapter 2 in this volume, section III (p. 122).

⁴⁵ See the initiative led by France and Mexico: Global Centre for the Responsibility to Protect, ‘Political Declaration on Suspension of Veto Powers in Cases of Mass Atrocities’, 1 August 2015, available at www.globalr2p.org/resources/political-declaration-on-suspension-of-veto-powers-in-cases-of-mass-atrocities/.

against humanity or war crimes, or to prevent such crimes.⁴⁶ Larissa van den Herik analyses these mechanisms in detail in this volume.⁴⁷

D. Authority of External Actors

The lack of Security Council action in response to certain crises has also triggered actors – states, groups of states, and international organisations – to take actions outside of the UN framework. The centrality of the UN Security Council in peace and security matters has thus been called into question. This includes the question of whether regional organisations or individual states may initiate military interventions to prevent severe violations of human rights – a debate that raged after the 1999 Kosovo intervention in which NATO member states intervened without Security Council authorisation when the Council could not establish a consensus. It also includes the question of whether regional organisations can authorise military interventions to prevent such crimes, as foreseen in Article 4(h) of the Constitutive Act of the African Union (AU), and if so, under which conditions.⁴⁸

The AU provision acknowledges ‘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’.⁴⁹ Whether, and to what extent, this right may conflict with the central role of the UN Security Council is subject to dispute and Tiyanjana Maluwa discusses the question thoroughly in this volume.⁵⁰ It has recently been argued that it may be described as a form of ‘dormant contestation’⁵¹ – that is, a conflict about institutional competences that remains latent and has not become acute, which may nevertheless lead to conflicts in the future – but Maluwa argues that such conflicts are unlikely ever to happen.⁵²

⁴⁶ 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.

⁴⁷ See Van den Herik, ‘A Reflection on Institutional Strength’, Chapter 2 in this volume, section III (pp. 118–19).

⁴⁸ Maluwa, ‘Between Centralism and Regionalism’, Chapter 3 in this volume, section III.A (pp. 197–203).

⁴⁹ Article 4(h) AU Constitutive Act.

⁵⁰ Maluwa, ‘Between Centralism and Regionalism’, Chapter 3 in this volume, section III.A (pp. 197–203).

⁵¹ See John-Mark Iyi, ‘Of Norms and Ambiguity: The Contested Authority of UN Security and African Union in the Use of Force in Africa’, *Heidelberg Journal of International Law* 83 (2023), 91–118 (114).

⁵² See Maluwa, ‘The UN Security Council between Centralism and Regionalism’, Chapter 3 in this volume, section III.A (p. 200).

Another field in which states have resorted to actions outside of the Security Council is that of unilateral sanctions. It remains contested whether such unilateral sanctions are a challenge to the Security Council's responsibilities for maintaining peace and security or, alternatively, a necessary correction in constellations in which the Security Council remains inactive and dysfunctional.⁵³

Legally speaking, all this shows that the P5 dominate the Security Council and have the power to both steer and block its workings. Such barriers are a double-edged sword: other members, as well as outside actors, will not accept their action being blocked and will develop workarounds – be they progressive interpretations of the UN Charter or action outside of the Security Council framework – thereby creating precedents and new institutional procedures.

IV. TRAJECTORIES OF AND TENSIONS IN THE SECURITY COUNCIL'S OPERATION

This brief overview of its past dynamics illustrates a number of competing and overlapping trajectories in the Security Council's development that are thoroughly investigated throughout this volume.

The Security Council is currently defined by four fields of tension. First, the Security Council operates in tension between *law and power* as competing mechanisms. The UN Charter has legalised the privileges of a few powerful states so that the Council's operation is inherently tied to continuity in the (political) support of those states – namely, the P5. At the same time, however, the Council does not operate in a legal vacuum; legal limitations of the Security Council and its members can be established by interpreting the UN Charter.⁵⁴ Moreover, as elaborated earlier in this introduction, the political power of the P5 can be constrained and at least soft accountability mechanisms established through the Council's institutional embeddedness and the activities of its elected members. Advocating such limits and mechanisms may ultimately contribute to the taming of the Security Council's permanent members; alternatively, it may undermine the Council's position as political support for its legal framework diminishes. The authors of this Trialogue will engage deeply with this disputed question.

Secondly, the Security Council and visions for its future operation oscillate between *centralisation and institutional diversification*. The centralist

⁵³ The latter view is taken by Van den Herik, 'A Reflection on Institutional Strength', Chapter 2 in this volume, section V.A (p. 159).

⁵⁴ Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes* (Cambridge: Cambridge University Press, 2020); Anne Peters, 'Article 25', in Simma et al. (eds), *The Charter of the United Nations* (n. 2), MN 63–146.

approach highlights the importance of having a single unified actor in peace and security matters, as envisioned in the UN Charter. According to this perspective, a lack of unity indicates that necessary majorities for the adoption of (legal) measures have not (yet) been established and such a lack of unity among powerful states must therefore not be circumvented. The counter-position emphasises that other actors may fulfil important roles in overcoming an institutional blockade of the Security Council. The empowerment of other actors – particularly within the United Nations, as discussed with regard to the General Assembly earlier in this introduction – is then meant to overcome (or at least alleviate) the difficulties in Security Council decision-making, especially in view of the veto.

This ties in with a third contested field: the tension between *universality and regionalism*. The balance between universal and regional aspects of the international peace and security architecture was controversial during the drafting process of the UN Charter, as Maluwa explains in this volume.⁵⁵ It continues to be an issue in debates about the authority of regional organisations, for example in regard to the African Union, but also with a view to NATO and other regional organisations who might claim the authority to act when the Security Council is not able to operate effectively.

Lastly, the Security Council, as well as plans for its future operations, oscillate between *formalisation and informalisation*. On the one hand, the UN Charter's formal regulations about UN organs and their competences establish the relevant normative framework and (some) actors insist that any change must be made through formal amendment procedures. On the other hand, shifts in powers and competences are being introduced through informal mechanisms, as explored earlier in this introduction.

How can, and should, the Security Council go forward in a time of global polarisation and an apparent shrinking of the lowest common denominator in international peace and security matters? How can, and should, it navigate between the four defining tensions? This Trialogue provides a survey of past and present problems, explores these trajectories, and offers possible lines of development.

V. THREE VOICES IN A TRIALOGUE

The Max Planck Trialogues on the Law of Peace and War aim to generate a better and deeper understanding of questions of international law by

⁵⁵ Maluwa, 'Between Centralism and Regionalism', Chapter 3 in this volume, section II.A (pp. 191–92).

juxtaposing diverging perspectives. They productively employ what we call ‘multiperspectivism’,⁵⁶ to better understand where, on the one hand, international law is truly international⁵⁷ – that is, where rules and foundational principles are carried by a substantive international consensus – and where, on the other hand, such law is essentially contested and significantly depends on diverging preconceptions (*Vorverständnisse*), geographical origins, and political interests.

This Trialogue’s authors are:

- Congyan Cai, a professor at Fudan University School of Law, based in Shanghai, China;
- Larissa van den Herik, a professor at the Grotius Centre for International Legal Studies at Leiden University, The Netherlands; and
- Tiyanjana Maluwa, a professor at the School of Law at Pennsylvania State University, United States, who has previously served as legal counsel to the Organisation of African Unity (now the African Union) and then as legal adviser to the Office of the UN High Commissioner for Human Rights.

All three of these contributors approach the question of the Security Council’s role in the maintenance of peace from distinctive positions of various geographical and ideational rootedness and with related normative visions.

- Cai focuses on the role of power and law, and emphasises the role of China as an emerging actor aiming to shape the future international legal order and the working of the Security Council.
- Van den Herik takes the perspective of the less powerful states – particularly of the elected members of the Security Council – and explores their role in influencing international peace and security matters vis-à-vis its permanent members.
- Maluwa investigates the past, present, and future relationships between regional organisations and the Security Council and – using the example of the African Union – explores how the Security Council, as

⁵⁶ Anne Peters, ‘Introduction’, in Mary-Ellen O’Connell, Christian Tams, and Dire Tladi, *Self-Defence against Non-State Actors*, Max Planck Trialogues on the Law of Peace and War (Anne Peters and Christian Marxsen, series eds), vol. 1 (Cambridge: Cambridge University Press, 2019), xi–xxv.

⁵⁷ This approach has significant overlap with the research agenda of comparative international law: see Anthea Roberts, *Is International Law International?* (Oxford: Oxford University Press, 2017); Mireille Delmas-Marty, ‘Comparative Law and International Law: Methods for Ordering Pluralism’, *University of Tokyo Journal of Law and Politics* 3 (2006), 43–59; Martti Koskenniemi, ‘The Case for Comparative International Law’, *Finnish Yearbook of International Law* 20 (2009), 1–8; Boris N. Mamlyuk and Ugo Mattei, ‘Comparative International Law’, *Brooklyn Journal of International Law* 36 (2011), 385–452.

the central actor, can cooperate with regional organisations towards maintaining international peace and security.

Congyan Cai's starting point is an observation that the Security Council is 'deeply embedded in power politics [. . .], whether we like it or not'.⁵⁸ The great powers – the P5 – are crucial in giving the Security Council the political weight necessary to act effectively in peace and security matters. Any legal reform proposals, so Cai argues, need to take account of the political environment and political dynamics – particularly since politics usually prevail over legal constraints.⁵⁹ In his diagnosis, tensions have developed into what he describes as a 'new Cold War': lacking unity among the P5, the Security Council is at risk of being marginalised, as it was during the original Cold War.⁶⁰ A crucial factor for the Security Council's future operation, says Cai, will be the role of China, which is developing a much more 'aggressive' international agenda with the aim of shaping and setting international norms.⁶¹ China thus aims to reshape the established global power relations and – Cai's crucial point – will counter Western dominance by introducing and developing legal principles.

Larissa van den Herik's account of the Security Council places less emphasis on the powers and actions of individual states and focuses instead on the institutional embeddedness of all actors. From this perspective, she investigates how the less powerful states can develop mechanisms to effectively constrain the Security Council, including the P5, shifting the relationship between law and power in favour of the rule of law and institutional procedures. Van den Herik shows both how checks and balances can be established and that some are already operational at the Security Council. She espouses an 'institutionalist perspective' that is 'premised on the idea that, even in the setting of intense power politics in which the Security Council operates, the Council is not entirely unbounded; rather, it is governed by its own institutional and procedural framework'.⁶² Moreover, she argues that a 'new balance' is needed between the Security Council and other actors, such as the General Assembly, as well as international and regional organisations.⁶³ Where the Security Council is blocked, other actors will step in, and hence it is important, Van den Herik argues, to establish institutional procedures for these arrangements.

⁵⁸ Cai, 'Maintaining Peace during a Global Power Shift', Chapter 1 in this volume, section I (p. 22).

⁵⁹ *Ibid.*, section II.D (p. 33).

⁶⁰ *Ibid.*, section VII (p. 108).

⁶¹ *Ibid.*, section V.B (p. 81).

⁶² Van den Herik, 'A Reflection on Institutional Strength', Chapter 2 in this volume, section I (p. 112).

⁶³ *Ibid.*, section VIII (p. 184–85).

Tiyanjana Maluwa explores the role of regional actors by focusing on relationships and cooperation between the Security Council and the African Union. He diagnoses a ‘reconfiguration of regionalism’ – that is, the regional approach that was once contemplated during the United Nations’ formative phase and which has again come to the fore since the end of the Cold War, through partnership peacekeeping whereby regional organisations such as the African Union act as UN partners in safeguarding or enforcing peace and security. This reconfiguration has not, Maluwa argues, led to a challenge to the Security Council’s centrality in peace and security matters but rather focused a cooperative approach. Regional organisations do not aim to challenge the Security Council but to complement it by providing regional expertise and legitimacy.

The authors’ exchange highlights the political stakes and shows how situat- edness affects positions on law and policy. While no author directly represents a certain state or region, each nevertheless develops accounts and explanations that are, in effect, in favour of specific regional interests – interests that will be crucial to the future working of the Security Council. Cai’s approach aims to emphasise more clearly the role of political power within the legal discourse and in the centrality of the Security Council, with the *de facto* effect that Chinese interests have an unhampered influence on the Security Council. Van den Herik investigates the role of smaller states and how legal mechanisms and institutions can be used to counter the hegemony of the great powers. Maluwa is interested in understanding and establishing how the workings of the African Union and the Security Council can be conceptualised as synergistic and harmonious.

The authors partly converge and partly disagree on the working methods and procedures of the Security Council, Security Council competences in regard to new threats, Security Council reform, and past conflicts such as that surrounding the 2011 intervention in Libya. In doing so, they provide a nuanced assessment that is acutely relevant to the challenges that lie ahead. These conversations can be traced through numerous cross- references that highlight the intensive exchanges that have engaged the authors.

Anne Peters concludes the book by drawing these threads of the debate together and reflecting in particular on its effects on the war unfolding in Ukraine.