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A Keen Observer of the International Rule of Law? International Law in China's Voting Behaviour and Argumentation in the United Nations Security Council

PHIL C. W. CHAN*

Abstract

Given the centrality of law in the creation, decision-making, and impact of the United Nations Security Council, the deliberative discourses among Security Council Members, and the necessity for China to articulate its reasons publicly for its actions within the Security Council, the roles that China plays within the Security Council illuminate and clarify its approaches to the current international legal order. This article explains how law serves as a constitutional–normative framework within which the Security Council must function, followed by a discussion of how the Security Council in turn may serve as a locus of deliberative discourses that delineate, influence, and constrain its members' state behaviours. It challenges the view that law plays a limited role on matters of international security by exploring China's voting behaviour in the Security Council and the arguments that it has proffered. It also discusses how China may respond to a draft Security Council resolution aimed at its conduct other than simply by vetoing it, and how it has taken a proactive role in the maintenance of international peace and security through the Security Council.

Key words

China; United Nations Security Council; international peace and security; international law; deliberative discourse

1. Introduction

Since the Opium War, China has metamorphosed, from an insular imperial regime determined to have its traditions preserved, into a major international actor whose contributions to the legitimacy and development of international law ought to be understood. Given the centrality of law in the creation, decision-making processes and procedures, and impact of the United Nations Security Council and its decisions,

* LLB (HKU), LLM (Dunelm), PhD Candidate (NUS); Senior Research Fellow, Max Planck Institute for Comparative Public Law and International Law [philchan@dunelm.org.uk]. I am grateful to Simon Chesterman for insisting that I include the subject of this article as part of my doctoral thesis at the National University of Singapore, and for his comments and suggestions on my chapter drafts. This article was presented at the Institute for International Law, Ludwig-Maximilians-Universität München, and the Faculty of Law, Humboldt-Universität zu Berlin, in April 2013. I thank Christian Walter and Georg Nolte for their invitations and critical comments, and their students for the engaging thoughts and questions. Responsibility for any errors or omissions remains mine alone.

the deliberative discourses that Security Council member states engage in that in turn shape their behaviours, and the necessity for China to articulate its reasons publicly for its actions within the Security Council (which may consist in abstentions and vetoes as well as support), the roles that China plays within the Security Council illuminate and clarify its approaches to the current international legal order. China's actions within the Security Council also show how international law may or may not have evolved to encompass certain contentious interpretations of the United Nations Charter, notably the power of the United Nations to form or delegate peacekeeping operations, and the purported right or duty, of the international community or a particular state to use force against another state in the face of human rights violations or a humanitarian catastrophe.

This article first explains how international law serves as a constitutional–normative framework within which the Security Council must operate, followed by a discussion of how the Security Council in turn may serve as a locus of deliberative discourses that delineate, influence, and constrain its member states' behaviours. Then, it challenges the view commonly held by international relations scholars that international law plays a limited role on matters of international peace and security[1] by exploring China's voting behaviour in the Security Council and the arguments that it has proffered in justification. This article also discusses how China has made use of its Security Council permanent membership to explore possibilities for strengthening the United Nations in the maintenance of international peace and security. Finally, it addresses some scenarios in which China may resort to international legal norms and principles to respond to a draft Security Council resolution aimed at its conduct rather than simply veto it. An appreciation of how China deploys legal argumentation to buttress its positions helps advance 'our understanding of the law, and thus . . . the identity, objective, and principles of the community'.[2] This article shows the importance China, through its voting behaviour and argumentation within the Security Council, ascribes to international law as the perimeter within which the current international order ought to function.

2. The Security Council and international law

The United Nations was established to forestall international conflicts and the Security Council was envisaged as a forum where major states, together with especially affected states and a rotating sample of other states,[3] may meet to deliberate

1 R. Jervis, 'Security Regimes', in S. D. Krasner (ed.), *International Regimes* (1983), 173; K. Waltz, *Theory of International Politics* (1979), 126–30.

2 M. Koskenniemi, 'The Place of Law in Collective Security', (1995–6) 17 *Michigan Journal of International Law*, 455, at 480.

3 Under Article 23(1) of the United Nations Charter, it falls upon the United Nations General Assembly to elect ten members of the United Nations to be non-permanent members of the Security Council, 'due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution'. Article 23(2) states that a non-permanent member shall be elected for a term of two years, and may not be eligible for immediate re-election. Currently, three non-permanent members are elected from among African states and two from among Asian states (with the proviso that one of these

and determine the course of action to follow in a situation or dispute by reference to established international norms, principles, rules, and procedures, in order that international peace and security may be maintained or restored. The United Nations Charter vests the primary responsibility for the maintenance of international peace and security in the Security Council,[4] and specifically prescribes that the General Assembly shall not make any recommendation without a request of the Security Council regarding a situation or dispute of which the Security Council has been seized.[5] The legitimacy of Security Council decisions derives directly from the Charter, whereby, in discharging its responsibility in accordance with the Charter, the Security Council acts on behalf of all United Nations member states,[6] who agree to accept and implement its decisions.[7]

Notwithstanding the veto power of Security Council permanent members, the consequential structural inequalities within Security Council decision-making processes and procedures, and the political nature of Security Council determinations as to the existence of a threat to the peace,[8] Simon Chesterman argues that 'a distinction must be made between the exercise of discretion formally provided for in the constituent document of the organization and the arbitrary exercise of the powers that it grants'.[9] A Security Council member state must justify its conduct through 'principled, informed, collective deliberation'[10] by reference to international legal norms and principles lest it face moral and political censure. International law serves an essential contribution to the maintenance of international peace and security through the reliance that states place upon it in justifying their policies, practices, and actions. The Security Council itself must abide by such rules and principles of international law as are applicable to it, with its functions, competences, and powers defined and constrained by the Charter as its constituting treaty. The popular belief, reflected in much international relations scholarship, that the Security Council possesses unfettered powers concerning all matters of international (and

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five non-permanent members must be an Arab state alternately in Africa or Asia), two from among Latin American and Caribbean states, two from among Eastern European states, and two from Western European and other states (such as Australia and Canada).

4 Ibid., Art. 24(1). Although the responsibility conferred on the Security Council for the maintenance of international peace and security is primary (and thus not necessarily exclusive: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports* 2004, 136, 148–9), under Article 39 of the Charter it is the Security Council alone that has the competence and capacity to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression' and to 'make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'. Security Council determinations, recommendations, or measures are not justiciable. In his separate opinion in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Order of 13 September 1993, ICJ Reports* 1993, 325, 439, Judge ad hoc Lauterpacht stated that while there are legal constraints on the Security Council, 'there can be no less doubt that it does not embrace any right of the Court to substitute its discretion for that of the Security Council in determining the existence of a threat to the peace, a breach of the peace or an act of aggression, or the political steps to be taken following such a determination'.

5 United Nations Charter, Art. 12(1).

6 Ibid., Art. 24(1).

7 Ibid., Art. 25.

8 *The Prosecutor v. Dusko Tadić*, Appeal on Jurisdiction, IT-94–1-AR72, 35 ILM 32 (1996), para. 29.

9 S. Chesterman, 'An International Rule of Law?', (2008) 56 *American Journal of Comparative Law* 331, at 351.

10 A. Buchanan and R. O. Keohane, 'The Legitimacy of Global Governance Institutions', (2006) 20 *Ethics & International Affairs* 405, at 434.

even domestic) concern and may override international law or constitutes a 'world legislature'[11] is incorrect and cannot be supported without jeopardizing the integrity of the Security Council as a creature and institution of international law, and of the current international order underpinned by the primacy of the United Nations and its constituting Charter.[12]

While many international relations scholars often conflate legitimacy (real or perceived) with legality, legitimacy and legality are two distinct concepts. A perception of an illegitimate process tends to reflect 'subjective conclusions, perhaps based on unarticulated notions about what is fair and just, or perhaps on a conscious utilitarian assessment of what the process means for oneself'.[13] The legitimacy of a decision, of a process through which it is made, and of the organization that makes it, is important as it comprises 'factors that affect our willingness to voluntarily comply with commands'[14] and embodies 'a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process'.[15] Bardo Fassbender ascribes to legitimacy a legal character in cases where 'it affects the authority of a rule-making institution, defined as its ability to have its decisions implemented. In other words, legitimacy becomes a legal category in conjunction with the problem of compliance of someone subject to the law with a legal rule or decision'.[16] In the conduct of international relations, legality cannot be considered in isolation from politics, even in a forum such as the Security Council where law is supposed to possess primacy and constraining impact over discretionary political decision-making. In fact, very often it is law, including the principles of state sovereignty and of non-intervention and the prohibition of the use of force, that gives rise to conflicts and concerns calling for political reconfiguration. As Martti Koskenniemi discerns, '"[l]aw" and "discretion" did not exist in separate pigeon-holes in our minds. The legal debate did not "stop" at any point to leave room for a separate political choice; political choices were posed the moment the legal debate started.'[17] Its requisite objectivity notwithstanding, international law in its application to a situation or dispute is ultimately a political act subject to discretion.[18]

That policy plays a determining role in the interpretation and application of international law in a situation or dispute does not alter the fact that the Security Council remains bound by its constituting legal framework; that is, the United Nations Charter. As the International Court of Justice in its advisory opinion in

11 See S. Talmon, 'The Security Council as World Legislature', (2005) 99 *American Journal of International Law* 175.
12 United Nations Charter, Art. 103.
13 D. D. Caron, 'The Legitimacy of the Collective Authority of the Security Council', (1993) 87 *American Journal of International Law* 552, at 557.
14 T. M. Franck, *The Power of Legitimacy among Nations* (1990), 150.
15 Ibid., at 24.
16 B. Fassbender, 'Uncertain Steps into a Post-Cold War World: The Role and Functioning of the UN Security Council after a Decade of Measures against Iraq', (2002) 13 *European Journal of International Law* 273, at 293.
17 Koskenniemi, *supra* note 2, at 475.
18 Ibid., at 489.

Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)[19] stated:

> The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution.[20]

Hans Kelsen argues that the purpose of Security Council enforcement powers for which Article 39 of the Charter provides is the maintenance or restoration of international peace and security, and not necessarily the maintenance or restoration of international law.[21] However, the Security Council cannot decide on a course of action, however its members wish, without a proper legal basis or beyond its jurisdiction, without jeopardizing the legitimacy – and effectiveness – of *all* Security Council decisions that derive from Article 25 of the Charter. The general consent of United Nations member states, which Article 25 embodies, to submit to, and to agree to undertake, Security Council decisions does not absolve the Security Council from its legal obligation to act in accordance with the Charter, as the same provision indicates, and the fact that an issue concerns international peace and security does not entitle the Security Council to act as it wishes. As the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *The Prosecutor* v. *Dusko Tadić* stated:

> The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus [subject] to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).[22]

Reference is had also to the International Court of Justice's advisory opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*.[23] The Court referred to South Africa's continued presence in Namibia as 'a situation which the Court has found to have been *validly* declared illegal [by the Security Council]'.[24]

The competences and powers of the Security Council are thus confined to occasions where they are necessary for the maintenance of international peace and security, and not more. The requirement that the Security Council discharge its powers and responsibility only for the maintenance of international peace and security is further confirmed by Article 13(1)(a) of the Charter, whereby it is the General Assembly that is entrusted with the responsibilities, functions, and powers

19 *ICJ Reports* 1947–8, 57.
20 Ibid., at 64.
21 H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1964), 294.
22 *Tadić*, *supra* note 8, para. 28.
23 *ICJ Reports* 1971, 16.
24 Ibid., at para. 118 (emphasis in original).

to make recommendations for the development and codification of international law. To hold otherwise, treaty law-making processes will be stymied. In addition, Articles 40, 42, 43(1), and 51 of the Charter require that a Security Council action must be *necessary* for the maintenance of international peace and security:

> the Council's general powers do not provide it with a blank cheque to take measures which would violate fundamental principles and rules of international law, even if these are not specifically referred to in Chapter I or in other provisions of the Charter.[25]

The United Nations International Law Commission has stressed that states cannot violate norms of *jus cogens* by proxy through an international organization.[26] In his separate opinion in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judge ad hoc Lauterpacht stated:

> The relief which Article 103 may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *jus cogens*. Indeed, one only has to state the opposite proposition thus – that a Security Council resolution may even require participation in genocide – for its unacceptability to be apparent.[27]

It is noteworthy that China has voiced support for legal liability to be attached to member states of an international organization whose collective decision violates international law.[28]

When China joined the second phase of the Dumbarton Oaks negotiations between the United Kingdom, the United States, and the Soviet Union, it proposed that Article 1 of the United Nations Charter should include the provision that 'the settlement of international disputes should be on the basis of the principles of justice and international law'. China's proposal was adopted,[29] as a result of which one of the purposes of the United Nations, as stated in the Charter, is 'to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace'.[30] A corresponding addition was made to Article 2(3) of the Charter, that '[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not

25 T. D. Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers under Chapter VII of the Charter', (1995) 26 *Netherlands Yearbook of International Law* 33, at 71.

26 A. Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', (2005) 16 *European Journal of International Law* 59, at 68.

27 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 4, per Judge ad hoc Lauterpacht, 440 (sep. op.).

28 Statement of China in the Sixth Committee of the Sixtieth Session of the United Nations General Assembly, UN Doc. A/C/6/60/SR.11, 23 November 2005, para. 53. However, consensus is that no such liability exists under international law: see R. Higgins, *Report to Institut de droit international*, 66-I *Yearbook of Institut de droit international* (1995), 375; Resolution of Institut de droit international on the Legal Consequences for Member States of the Non-Fulfillment by International Organisations of their Obligations towards Third States, Session of Lisbon, 1 September 1995.

29 Y.-L. Liang, 'The Settlement of Disputes in the Security Council: The Yalta Voting Formula', 24 (1947) *British Year Book of International Law* 330, at 332–3.

30 United Nations Charter, Art. 1(1).

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endangered.'[31] That said, while the Security Council must make political decisions in accordance with international law, it is not its role to find legal answers to political problems.[32] Non-compliance with the Charter or with international law is not a basis for the Security Council to assert jurisdiction or competence so long as there is no threat to the peace,[33] and it is for the International Court of Justice to provide legal answers.[34]

Many speak of the Security Council's 'failure' to pass a draft resolution, or 'failure' of one or more permanent members to agree to one, in the face of a threat to international peace and security or a humanitarian catastrophe. The International Commission on Intervention and State Sovereignty (which, it ought to be noted, was set up under the auspices of the Canadian government and composed of 12 members, and not an international organization as its name tends to suggest) argued in its report in 2001 that

> if the Security Council expressly rejects a proposal for intervention where humanitarian or human rights issues are significantly at stake, or the Council fails to deal with such a proposal within a reasonable time, it is difficult to argue that alternative means of discharging the responsibility to protect can be entirely discounted.[35]

What is amiss is that it is precisely the design and process that the Charter embodies and requires that a Security Council decision has the support (or at least acquiescence[36]) of all permanent members in order for it to be effective and not become a source of military conflict among permanent members themselves, and their veto power is constitutionally built through the Charter into Security Council decision-making processes and procedures. At no times during the Kosovo crisis in 1999, the invasion of Iraq in 2003, or the internal conflict in Syria since 2011 was the Security Council unable or incapacitated to act as a result of disagreement among permanent members. The possibility of disagreement among permanent members and a permanent member's capacity to veto a draft Security Council resolution is a core structural part of the Security Council in order to constrain excessive or unilateral exercise of military or political power by one or more individual states and to ensure that any Security Council action has the agreement and co-operation of all major powers.[37]

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31 Ibid., Art. 2(3).

32 See R. Higgins, 'The Place of International Law in the Settlement of Disputes by the Security Council', (1970) 64 *American Journal of International Law* 1, at 16.

33 Ibid.

34 Ibid., at 3, citing Articles 33 and 36(3) of the United Nations Charter.

35 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001), 53.

36 Following debates within the Security Council, consensus has been reached that a Permanent Member's voluntary abstention or absence, as opposed to compulsory abstention required where the Permanent Member is a party to a dispute in question, does not constitute a veto: see Y.-L. Liang, 'Abstention and Absence of a Permanent Member in Relation to the Voting Procedure in the Security Council', 44 (1950) *American Journal of International Law* 694.

37 While France and the United Kingdom arguably have ceased to be major powers in their own right, they possess substantial influence within the European Union and may serve as the conduit through which the European Union *en bloc* asserts within the Security Council its economic and political power and its policies on matters such as human rights, democracy, self-determination, and the maintenance of international peace and security. France also continues to have significant influence in many African states through its relations

In the case of Kosovo, two permanent members (China and Russia) indicated that they would exercise their vetoes in relation to any United Nations-authorized or -led military action in Kosovo as they expressed their positions that any such action would be incompatible with the Charter and international law, and the Security Council decided collectively not to adopt a resolution authorizing military action. The refusal of China and Russia to automatically endorse British/French/United States preferences in fact illustrated that the Security Council 'acquired teeth',[38] and the Security Council's 'special responsibility' for the maintenance of international peace and security was thus met. Daniel Joyner argues that this fundamental facet of the United Nations system is

> wilfully misunderstood by critics of the Security Council's handling of humanitarian intervention cases, who apparently desire the legitimacy of representative authorization for their actions by the Council, but who are unwilling to abide by the denial of that authorization by the same body.[39]

The veto has helped maintain and stabilize Security Council decision-making processes and procedures by providing a check-and-balance exercise among permanent members. Without the veto, the Security Council would merely become another device for powerful states to act as they wish with a semblance of international legitimacy; the number of military missions, some of which may be for malevolent purposes, will significantly increase; and the chief purpose of the Security Council – the maintenance of international peace and security – will fail. The real issue is not so much the existence of the veto but '*how* the veto ought to be exercised under the Charter'.[40] Instead of enabling permanent members to advance their own national interests or agendas, the veto imposes a duty to 'constantly search for agreement'.[41] In order that the Security Council and its decisions possess the requisite legitimacy and effectiveness, the reasoning that underlies Security Council decisions must be articulated publicly and supported by international legal norms and principles that are shared and respected by all States, as I explain in the next section.

In the eyes of some, compliance of an international organization and its members with established norms, principles, rules, and procedures in making a decision does not by itself render the organization, the norms, the principles, the rules, the process, or the decision legitimate. Allen Buchanan and Robert Keohane argue that

> an institution should be presumed to be illegitimate if its practices or procedures predictably undermine the pursuit of the very goals in terms of which it justifies its existence. Thus, for example, if the fundamental character of the Security Council's decision-making process renders that institution incapable of successfully pursuing

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with its former colonies, as does the United Kingdom through its leadership role in the Commonwealth of Nations.

38 N. Krisch, 'Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo', 13 (2002) *European Journal of International Law* 323, at 334.

39 D. H. Joyner, 'The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm', (2002) 13 *European Journal of International Law* 597, at 608.

40 C. L. Lim, 'The Great Power Balance, the United Nations and What the Framers Intended: In Partial Response to Hans Köchler', (2007) 6 *Chinese Journal of International Law* 307, at 313 (emphasis in original).

41 N. J. Padelford, 'The Use of the Veto', (1948) 2 *International Organization* 227, at 228–9.

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> what it now acknowledges as one of its chief goals – stopping large-scale violations of basic human rights – this impugns its legitimacy.[42]

It is important to keep in mind that a Security Council resolution comes into being only after it is passed with the support or acquiescence of all permanent members, and legitimate and effective Security Council decision-making does not always have to result in a resolution. The legitimacy of a Security Council decision rests upon the fact that it is collectively made. A collective decision is not the same as a unanimous decision, much less a decision made in subservience to the wishes of powerful states. As Martha Finnemore has stated, multilateralism manifests more than in co-operation among a number of states, but in co-operation taking place in accordance with established norms, principles, rules, and procedures of a general nature.[43] A collective decision requires that all Security Council members be able to inform Security Council deliberations with their own perspectives with the objective of maintaining international peace and security. That a permanent member such as China would veto an otherwise widely supported draft Security Council resolution at the expense of its popularity within the Security Council and among governments around the world speaks volumes about the permanent member, the Security Council, and the current international order governed under the framework of the Charter and international law.

3. Security Council as a locus of deliberative discourses

With its structural flaws and lack of representativeness, the Security Council might not be taken as an exemplar of an institution for deliberative discourses and, in fact, has faced a great deal of criticism and calls for institutional reform. David Caron argues that a permanent member's capacity to dilute, stymie, or preclude a Security Council decision through its threat or use of veto illustrates that the Security Council from its inception has betrayed its express promise to be the guarantor of international peace and security,[44] while others are concerned that powerful states use the Security Council to impose 'hegemonic international law'.[45] The problem is exacerbated by the practice of permanent members to agree on a decision through informal discussions, from which non-permanent members are excluded, before the formal vote. Ian Hurd asserts that Security Council meetings are now reduced to pro forma affairs that merely put on record what has already been informally agreed upon by permanent members, that the president of the Security Council 'invariably notes in opening an official meeting that "the Security Council is

42 A. Buchanan and R. O. Keohane, 'The Legitimacy of Global Governance Institutions', in A. Buchanan, *Human Rights, Legitimacy, and the Use of Force* (2010), 105, at 119.

43 M. Finnemore, 'Fights about Rules: The Role of Efficacy and Power in Changing Multilateralism', (2005) 31 *Review of International Studies* 187, at 195.

44 Caron, *supra* note 13, 560.

45 D. F. Vagts, 'Hegemonic International Law', (2001) 95 *American Journal of International Law* 843; see also J. E. Alvarez, 'Hegemonic International Law Revisited', 97 *American Journal of International Law* (2003), 873.

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meeting in accordance with the understanding reached in its prior consultations"'.[46] Ngaire Woods notes that

> [a] further, deeper problem with informal processes is that they are unrecorded. This means that the *reasoning* for a decision is not open to scrutiny by other states, *nor is the position taken by each member*. In these ways, the Council is not accountable to states who are not party to the informal processes even if they are directly affected by the Council's decisions ... The experience of the Security Council also highlights that reliance on informal negotiations, which take place behind the scenes, magnifies the unequal resources available to members in order to work effectively to push their own preferences.[47]

Caron explains that the effectiveness of the Security Council may suffer due to perceptions that it is illegitimate, resulting in failure to pass a draft resolution, failure to pass a stronger draft resolution that is otherwise warranted, difficulty in summoning the necessary domestic and/or international support to implement a resolution, and the weakening of the Security Council generally.[48] Even when the Security Council manages to garner the necessary votes for a decision, its habitual tendency to label its actions as 'exceptional', 'without precedent', or 'extraordinary'[49] has reinforced the perception that it merely provides a 'law-laundering service' to legitimize and enforce the unilateral will of powerful states.[50] As Susan Marks discerns,

> [i]f all it would have taken to make the war in Iraq legal was a few more votes in the Security Council, then perhaps at least some of the energy that is going into affirming the illegality of the war should be turned to the question of whether there is something wrong with international law.[51]

Referring to the catastrophic United Nations peacekeeping operation in Somalia between 1993 and 1995, Richard Falk warns that a legal but illegitimate decision of the Security Council will be met with determined opposition from the people whom the decision aims to protect, and United Nations imprimatur does not necessarily translate into local acceptance.[52] Phillip Darby criticizes peacekeeping operations as imperialism in disguise, indeed worse than imperialism, for

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46 I. Hurd, 'Legitimacy, Power, and the Symbolic Life of the UN Security Council', (2002) 8 *Global Governance* 35, at 42–3. See also L. Feuerle, 'Informal Consultation: A Mechanism in Security Council Decision-Making', (1985) 18 *New York Journal of International Law and Politics* 267.

47 N. Woods, 'Good Governance in International Organizations', (1999) 5 *Global Governance* 39, at 50 (emphasis in original).

48 Caron, *supra* note 13, 558.

49 M. J. Aznar-Gómez, 'A Decade of Human Rights Protection by the Security Council: A Sketch of Deregulation?', (2002) 13 *European Journal of International Law* 223, at 226, citing the positions of Security Council Members when adopting Resolution 688 (1991) regarding Iraq (UN Doc. S/PV.2982, 5 April 1991), Resolutions 770 (1992) and 787 (1992) regarding Bosnia and Herzegovina (UN Doc. S/PV.3106, 13 August 1992; UN Doc. S/PV.3137, 16 November 1992), Resolution 794 (1992) regarding Somalia (UN Doc. S/PV.3145, 3 December 1992), and Resolution 917 (1994) regarding Haiti (UN Doc. S/PV.3376, 6 May 1994).

50 R. A. Falk, 'The United Nations and the Rule of Law', (1994) 4 *Transnational Law and Contemporary Problems* 611, at 628.

51 S. Marks, 'State-Centrism, International Law, and the Anxieties of Influence', (2006) 19 *Leiden Journal of International Law* 339, at 347.

52 Falk, *supra* note 50, 627.

> [b]ringing development and security together in a single fold opened the doors to attempts to re-engineer the state, to remake whole societies and to recast the identities of ordinary people, all in the interests of 'best practice' as laid down by external experts. This is interventionism on a scale beyond the imaginings of the former rulers of empire.[53]

Malcolm Shaw argues that 'the Western state's authoritative deployment of violence is now structurally reinforced by its increasing, if problematic, integration with the legitimate international world authority-structure of the United Nations'.[54] The *United Nations Peacekeeping Operations: Principles and Guidelines*[55] state that

> [t]he manner in which a United Nations peacekeeping operation conducts itself may have a profound impact on its perceived legitimacy on the ground. The firmness and fairness with which a United Nations peacekeeping operation exercises its mandate, the circumspection with which it uses force, the discipline it imposes upon its personnel, the respect it shows to local customs, institutions and laws, and the decency with which it treats the local people all have a direct effect upon perceptions of its legitimacy.[56]

Increased attention is now paid to local agency in peacekeeping and peacebuilding,[57] as peace must be 'contextualised more subtly, geographically, culturally, in terms of identity, and the evolution of the previous socio-economic polity'.[58]

The legitimacy (and appearance thereof) of a Security Council decision is thus as important as its legality. Ian Johnstone argues that instead of negotiations for expansion of membership of the Security Council (permanent membership or as a whole) or for revision of voting rules, 'improving the quality of deliberations would

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53 P. Darby, 'Rolling Back the Frontiers of Empire: Practising the Postcolonial', 16 (2009) *International Peacekeeping* 699, at 708.

54 M. Shaw, *Theory of the Global State: Globality as Unfinished Revolution* (2000), 200. Shaw, ibid., at 216, explains that '[i]t is clear that the UN depends for both its resources and its political direction on the West, and that the united West is mostly able to mobilize the UN system to its own purposes. Despite the deeply ambiguous relationship between the main component of the West (the USA) and the UN, it is difficult to conceive of either without the other. The mutual dependence of Western power and the UN system is fundamental. Major and minor exercises of Western military power have been legitimated through the UN; the UN has not authorized or undertaken any significant actions against Western interests'.

55 United Nations Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines* (2008).

56 Ibid., at 36.

57 See, e.g., N. Cooper, 'On the Crisis of the Liberal Peace', (2007) 7 *Conflict, Security and Development* 605; M. Pugh, 'Accountability and Credibility: Assessing Host Population Perceptions and Expectations', in C. de Coning, A. Stensland, and T. Tardy (eds.), *Beyond the New Horizon* (2010), 56.

58 O. P. Richmond, *Peace in International Relations* (2008), 17. As Shen Guofang, China's deputy permanent representative to the United Nations, stated: 'Poverty leads to social instability, which will in turn be a threat to peace and security at the national and even regional levels … In order to uproot the causes of conflicts, we must help developing countries, especially the least-developed countries, to seek economic development, eradicate poverty, curb diseases, improve the environment and the fight against social injustice … The early realization of the disarmament, demobilization and reintegration of ex-combatants and the promotion of the repatriation, resettlement and the economic recovery of refugees and displaced persons constitute the short-term objectives of peacebuilding. The long-term objectives, however, are the eradication of poverty, development of economy as well as a peaceful and rewarding life for people in the post-conflict countries and regions': Statement of Ambassador Shen Guofang, Deputy Permanent Representative of China to the United Nations at the Security Council on the Topic of 'Peace-Building: Towards a Comprehensive Approach', 5 February 2001, as quoted in Zhao Lei, 'Two Pillars of China's Global Peace Engagement Strategy: UN Peacekeeping and International Peacebuilding', (2011) 18 *International Peacekeeping* 344, at 353.

enhance the legitimacy and, therefore, effectiveness of Council decision making',[59] be more politically achievable,[60] and enable decisions to be more amenable to those in disagreement 'through the exchange of reasons *that are shared or can be shared* by all who are bound by the decisions taken'.[61] Thomas Risse emphasizes that the consensus that results from a deliberative discourse additionally has constitutive effects upon participants,[62] such that the internalizing impact that international law may bring to bear on states may materialize. International legal norms and principles and institutional processes and procedures agreed upon by states provide a normative framework for deliberative discourses and for the reasons that such deliberative discourses generate. Once international legal norms and principles are internalized in a state's foreign and domestic policies and practices, they become dependent on normative legitimacy and guide the state's future conduct, as the state endeavours to maintain a reputation as a trustworthy actor through norm-conforming behaviour.[63] Although equal access is a condition of a deliberative discourse for which the Security Council might not necessarily provide (due to its lack of representativeness, its differentiation between permanent and non-permanent members, and permanent members' veto power), a deliberative discourse may still succeed provided that the requirements, and the felt need, for a 'good argument' are shared among all Security Council members.[64] Sincerity is not essential for deliberative discourses to influence state behaviours, provided that international legal norms and principles inhere in the justifications proffered.[65] It has been found to be extremely difficult for participants in a deliberative discourse to make self-serving or self-interested claims without encountering criticism and resistance, and participants must rely on commonly accepted norms and principles even when advancing their own interests.[66] While consensus is a goal of a deliberative discourse, it is not a prerequisite to a deliberative discourse's success or integrity, and disagreements form part and parcel, and may indeed shape the course, of a deliberative discourse and the development of relevant norms, principles, rules, and values. Even after a decision has been made, new information may compel that the decision be revisited. A deliberative discourse is thus a dynamic, continuing process. A state is held accountable not only to other states but also to 'what may be called their *moral* constituents, all those individuals who are bound by the decisions they make, whether *de jure* or *de*

59 I. Johnstone, 'Legislation and Adjudication in the UN Security Council: Bringing down the Deliberative Deficit', (2008) 102 *American Journal of International Law* 275.

60 Ibid.

61 Ibid., at 278 (emphasis in original).

62 T. Risse, '"Let's Argue!": Communicative Action in World Politics', (2000) 54 *International Organization* 1, at 10. See also R. L. Jepperson, A. Wendt, and P. J. Katzenstein, 'Norms, Identity, and Culture in National Security', in P. J. Katzenstein (ed.), *The Culture of National Security* (1996), 33.

63 A. I. Johnston, 'Treating International Institutions as Social Environments', (2001) 45 *International Studies Quarterly* 487, at 490.

64 Risse, *supra* note 62, 18.

65 I. Johnstone, 'Security Council Deliberations: The Power of the Better Argument', 14 (2003) *European Journal of International Law* 437, at 453–5.

66 J. Elster, 'Introduction', in Jon Elster (ed.), *Deliberative Democracy* (1998), 1. See also S. Chaiken, W. Wood, and A. H. Eagly, 'Principles of Persuasion', in E. T. Higgins and A. W. Kruglanski (eds.), *Social Psychology: Handbook of Basic Principles* (1996), 702.

facto'[67] – that is, transnational corporations, the media, its citizens, citizens in other states, and an 'interpretive community' whose expertise, interests, and concerns extend beyond international law and who constitute an important arbiter of whether the requirements of a deliberative discourse are met.[68] In order to possess legitimacy, international law, and the obligations that it imposes, must be of a general and abstract character and must not be subject to the shifting political preferences or expediencies of powerful states. For these reasons, during the debate that preceded the invasion of Iraq in 2003, all permanent members and most non-permanent members of the Security Council invoked international legal norms and principles to advance their respective positions. When the United States failed to persuade the 'interpretive community' that its intention to invade Iraq was on the basis of its 'war on terrorism' and self-defence, it moved its case to one of enforcing Security Council resolutions regarding weapons of mass destruction in Iraq.[69]

As the next section shows, the forum for deliberative discourses that the Security Council provides enables China to appreciate, adapt, and assert the roles it may play in the maintenance of international peace and security and the development of international law, and allows other states and the 'interpretive community' to understand the rationales underlying China's voting behaviour and argumentation within the Security Council.

4. China's voting behaviour and argumentation in the Security Council

Samuel Kim has suggested that China's membership of the Security Council has the effect that

> symbolically, both the image and the prestige of the Security Council in the global community have been made more legitimate, more realistic, more colorful and more relevant. In practical terms, the Security Council's political effectiveness has also been enhanced to the extent that the presence of China has contributed to bridging the gap between authority claims and power capabilities of the Council.[70]

In addition to geopolitical and normative reasons that render China's participation in Security Council deliberations and decisions essential, having China in the fold, as has been borne out by the evolution of China's participation in the United Nations from fervent opposition to firm support, enables China and other Security Council members, and the international community as a whole, to understand and communicate with each other within a legal–institutional framework that binds all states. The social opprobrium that violations of international law elicit serves an instrumental role in bringing about treaty compliance,[71] particularly for states such

67 D. F. Thompson, 'Democratic Theory and Global Society', (1999) 7 *Journal of Political Philosophy* 111, at 120 (emphasis in original).
68 Johnstone, *supra* note 59, 278–81.
69 Johnstone, *supra* note 65, 477–8.
70 S. S. Kim, *China, the United Nations, and World Order* (1979), 237–8.
71 A. Chayes and A. H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1998); A. Moravcsik, 'Explaining International Human Rights Regimes: Liberal Theory and Western Europe', (1995)

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as China that seek to portray themselves as trustworthy international actors. Furthermore, information obtained through interactions with and within international organizations 'can reduce uncertainty about the credibility of others' commitments, and thus help actors' expectations converge around some cooperative outcome',[72] with the role that the Security Council serves in transmitting information arguably more important than its ability in resolving substantive issues.[73] Above all, participation in international organizations tends to lead states to redefine their national interests in order to meet their treaty obligations. Ann Kent suggests that the extent, and perhaps success, of China's socialization with international organizations should be measured by

> China's readiness to redefine its actual interests, including its implementation of international norms in domestic law and practice; China's preparedness to renegotiate its sovereignty in response to organizational and treaty pressures; and the degree to which China shows a readiness to shoulder the costs, as well as enjoy the benefits, of organizational participation.[74]

Since the end of the Cold War, the United States has appeared to hold unmatched influence and power within Security Council decision-making.[75] Barry O'Neill argues that in fact it is China that holds the most influence and power as a Security Council member – about twice the influence and power enjoyed by any of the other permanent members – on account of its veto power and the 'extreme' political positions it tends to hold, as the veto power of the three Western permanent members, or four if Russia is included, is often pooled whereas China may singlehandedly defeat a draft resolution notwithstanding Western pressure.[76] O'Neill suggests that the power disparity within the Security Council between China and the other permanent members would remain the same even if membership of the Security Council were to be enlarged.[77]

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1 *European Journal of International Relations* 157; O. R. Young, 'The Effectiveness of International Institutions: Hard Cases and Critical Variables', in J. N. Rosenau and E.-O. Czempiel (eds.), *Governance without Government: Order and Change in World Politics* (1992), 160.

72 Johnston, *supra* note 65, at 490.

73 A. Thompson, 'Coercion through IOs: The Security Council and the Logic of Information Transmission', (2006) 60 *International Organization* 1.

74 A. Kent, 'China's International Socialization: The Role of International Organizations', (2002) 8 *Global Governance* 343, at 349–50.

75 H. Köchler, 'The United Nations Organization and Global Power Politics: The Antagonism between Power and Law and the Future of World Order', (2006) 5 *Chinese Journal of International Law* 323. W. M. Reisman asserts that the United States' dominance within Security Council decision-making (in public and in private) is an open and unquestionable fact: 'The Constitutional Crisis in the United Nations', (1993) 87 *American Journal of International Law* 83, at 97.

76 B. O'Neill, 'Power and Satisfaction in the United Nations Security Council', (1996) 40 *Journal of Conflict Resolution* 219, 233. Ann Kent concurs with O'Neill's analysis, and argues that within the Security Council 'China is the most powerful state, precisely because it stands alone with a veto at an extreme policy position. Thus, "it is constantly using its veto or, rather, the threat to veto (actually or only implicitly), and so it is constantly making a difference"': *supra* note 74, 346, quoting B. O'Neill, 'Power and Satisfaction in the Security Council', in B. Russett (ed.), *The Once and Future Security Council* (1997), 70, 75.

77 O'Neill, *supra* note 76, 233–4. Pooling of vetoes may occasionally lead to free-riding – a permanent member might vote in favour of a draft resolution in the knowledge that its ally takes a contrary position and will veto the draft resolution, even though it privately wishes the draft resolution to be vetoed. The support of non-permanent members is also important as it instils a sense of legitimacy in a draft resolution; their disapproval of a draft resolution signifies that the draft resolution is not acceptable to states beyond permanent members.

The amount of influence and power that China holds within the Security Council is a major reason China has often been singled out for criticism by Western states, scholars, and media for impeding the passage of draft resolutions, obstructing the work of the Security Council, and stonewalling the development of international law. Such criticism is unfair, as China has rarely vetoed or threatened to veto a draft resolution. As at 30 August 2012, the veto was exercised 269 times. The Soviet Union/Russia vetoed draft Security Council resolutions 127 times, the United States 83 times, the United Kingdom 32 times, France 18 times, and China eight times (including once on 13 December 1955 when it was represented by the authorities on Taiwan, to block Mongolia's admission to United Nations membership on grounds that Mongolia was part of China[78]). China's rare use of its power to veto illustrates the sincerity of its belief that the veto is a means by which powerful states exercise hegemony.

Sally Morphet argues that China's voting behaviour within the Security Council since 1971, when the PRC government replaced the authorities on Taiwan as the representative government of China, may be characterized as having developed through four phases.[79] Between November 1971 and 1981, China was adjusting to its position, powers, and responsibilities within the Security Council. During this period, China vetoed proposed Security Council action twice. China vetoed Bangladesh's initial application for United Nations membership on 25 August 1972, when Bangladesh sought to secede from Pakistan, due to its concern over the legal status of Taiwan and its position that the parent state's consent was essential to a territory attaining independence and statehood. At the Security Council debate, China maintained that '[p]ending the true implementation of the relevant General Assembly and Security Council resolutions and a reasonable settlement of the issues between India and Pakistan and between Pakistan and "Bangladesh", the Security Council should not consider the application.'[80] China drew attention to 'acts of the Soviet social-imperialists' and 'their sinister designs to use others as counters or stakes to maintain and aggravate tension on the South Asian sub-continent'.[81] After Pakistan acknowledged Bangladesh's independence in 1974, China no longer blocked Bangladesh's application for United Nations membership and Bangladesh was admitted without vote. On 10 September 1972, China joined the Soviet Union to veto a draft amendment to a draft resolution that, vetoed by the United States, called for cessation of hostilities between Israel and Syria/Lebanon after the Munich massacre, arguing that '[t]he history of the Middle East since the Second World War is one of incessant aggression and expansion by Israeli Zionism and of the continuous fight of the Palestinian and other Arab peoples against aggression and expansion.'[82]

78 Mongolia was admitted to United Nations membership on 27 October 1961 when the Soviet Union agreed to not veto Mauritania's application for United Nations membership on condition that Mongolia be admitted, and the authorities on Taiwan representing China in the United Nations relented under pressure from African states.

79 S. Morphet, 'China as a Permanent Member of the Security Council: October 1971–December 1999', (2000) 31 *Security Dialogue* 151.

80 UN Doc. S/PV.1660, 25 August 1972, 15.

81 Ibid.

82 UN Doc. S/PV.1662, 10 September 1972, para. 193.

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Between 1982 and 1985, China managed its roles vis-à-vis both developing states and other permanent members with greater ease, and did not oppose any draft resolution. Between 1986 and July 1990 when the Soviet Union collapsed, China began to take a more conciliatory stance with other permanent members, and did not oppose any draft resolution.

From August 1990 to 2000, China navigated its roles and powers within the Security Council in the broader context of its relations with other permanent members in light of the United States' dominance and Western permanent members' increasing tendency to authorize the use of force on humanitarian grounds, and vetoed proposed Security Council action twice. China vetoed a draft resolution on 10 January 1997 on dispatching military observers to the United Nations Verification Mission in Guatemala and a draft resolution on 25 February 1999 on extending the mandate of the United Nations Preventive Deployment Force in Macedonia, for the reason that Guatemala and Macedonia recognized the authorities on Taiwan as the legitimate government of China (although China referred to Taiwan in its explanation of its veto in the case of Guatemala only,[83] and cited the United Nations' limited financial resources and improvements on the ground in its explanation of its veto in respect of Macedonia[84]).

Morphet's analysis corresponds to the level of China's adaptation to international law and its socialization with the United Nations as a forum through which it may use its influence and power to assert its positions, particularly in respect of the principle of state sovereignty and the importance it attaches to how other states interact with Taiwan.

On draft Security Council resolutions that it did not find correct or amenable, instead of vetoing, China has tended to abstain. By abstaining, a Security Council member withholds from the proposed action the legitimacy that an affirmative vote from it may provide. Given the increasing Western tendency to treat a Security Council resolution – which must be necessary for the maintenance of international peace and security in a situation or dispute – as 'international legislation' and a foundation upon which a norm of customary international law may rapidly crystallize and consolidate, one of the effects and rationales that stem from an abstention is its indication that the proposed action in the opinion of the abstaining state does not comport with certain legal or policy requirements. As at 12 May 2012, China abstained on 38 draft Chapter VII resolutions[85] and 18 draft non-Chapter VII resolutions[86] since 1990, as opposed to its lone abstention in 1982 during

83 UN Doc. S/PV.3730, 10 January 1997.
84 UN Doc. S/PV.3982, 25 February 1999.
85 UN SC Resolutions 678 (1990), 686 (1991), 748 (1992), 757 (1992), 770 (1992), 778 (1992), 787 (1992), 816 (1993), 820 (1993), 883 (1993), 929 (1994), 940 (1994), 942 (1994), 955 (1994), 988 (1995), 998 (1995), 1054 (1996), 1070 (1996), 1101 (1997), 1114 (1997), 1134 (1997), 1160 (1998), 1199 (1998), 1203 (1998), 1207 (1998), 1244 (1999), 1280 (1999), 1284 (1999), 1333 (2000), 1556 (2004), 1564 (2004), 1591 (2005), 1593 (2005), 1672 (2006), 1680 (2006), 1945 (2010), 1973 (2011), and 2023 (2011).
86 UN SC Resolutions 688 (1991), 776 (1992), 777 (1992), 781 (1992), 792 (1992), 821 (1993), 825 (1993), 855 (1993), 975 (1995), 1067 (1996), 1077 (1996), 1239 (1999), 1249 (1999), 1290 (2000), 1559 (2004), 1706 (2006), 1757 (2007), and 1907 (2009).

1971–89,[87] principally on matters that concerned impositions of non-military sanctions, use of force, establishments of international tribunals, and mandates and scopes of various humanitarian relief missions, on grounds that Security Council action would constitute interference in the relevant states' internal affairs and breach of their state sovereignty. Otherwise, China abstained in 1999 on a draft resolution on Nauru's application for United Nations membership due to Nauru's recognition of the authorities on Taiwan as the legitimate government of China,[88] and in 2000 on a draft resolution on Tuvalu's application for United Nations membership for the same reason,[89] even though it could have vetoed both draft resolutions as it did in 1972 in respect of Bangladesh and in 1955, when it was represented by the authorities on Taiwan, in respect of Mongolia.[90]

Meanwhile, China has taken a more co-operative role with other permanent members, even when it comes to its allies on whom other Security Council members wish to impose sanctions. China voted affirmatively on all three draft Security Council resolutions against nuclear development in North Korea[91] and all three draft Security Council resolutions against nuclear development in Iran[92] between 2006 and 2009. Of the 28 draft Security Council resolutions regarding genocide in Darfur

87 UN SC Res. 502 (1982); the draft resolution called for immediate cessation of hostilities between Argentina and the United Kingdom and complete withdrawal of Argentine forces from the Falkland Islands/Malvinas.

88 UN SC Res. 1249 (1999).

89 UN SC Res. 1290 (2000).

90 The Security Council in its press release (SC/6693, 25 June 1999) on its recommendation of Nauru's admission to United Nations membership stated that China explained before the formal vote that it 'attached great importance to the desire of the Republic of Nauru for admission to the United Nations and had seriously studied its application. However, the most essential thing in the admission process was that the purposes and principles of the United Nations Charter should be complied with. New Members should comply with General Assembly resolutions and fulfil their Charter obligations. China could not support the recommendation on admission of the Republic of Nauru to the United Nations … At the same time, considering the long-term interests of the peoples of China and the Republic of Nauru, China would not block the resolution. [China] hoped that when the Republic of Nauru joined the United Nations, it would comply with all the resolutions, including General Assembly resolution 2758 (1971)'. Similarly, the Security Council in its press release (SC/6807, 17 February 2000) on its recommendation of Tuvalu's admission to United Nations membership stated that before the formal vote 'the representative of China who, in the report of the Membership Committee (S/2000/70) indicated that China could not associate itself with the Committee's recommendation, said his delegation had attached great importance to the desire of Tuvalu to join the United Nations and had made a serious study of its application. A Member State of the United Nations should truly implement the obligations of the United Nations Charter and seriously abide by the resolutions of the General Assembly, which was an important basis on which to judge whether an applicant country had met the standard for membership. He reiterated that the most important thing was that the principles and purposes of the Charter should be implemented, as well as General Assembly resolution 2758. Flowing from that primary obligation, he could not support the recommendation to the Assembly for acceptance of Tuvalu's membership. At the same time, given his country's long-term shared interests with the people of Tuvalu and the strong wish of the Pacific States to admit that country, his delegation would not block the recommendation. Hopefully, he added, after joining the United Nations Tuvalu could strictly abide by the United Nations Charter and implement the relevant General Assembly resolution'. In 2002, Nauru shifted its recognition to the PRC government as the legitimate government of China, although it reversed its recognition in 2005, while Tuvalu continues to recognize the authorities on Taiwan as the legitimate government of China.

91 UN SC Resolutions 1695 (2006), 1718 (2006), and 1874 (2009).

92 UN SC Resolutions 1696 (2006), 1737 (2006), and 1747 (2007).

between 2004 and 2008, China voted affirmatively on 22[93] while abstaining on six.[94] China, together with Russia, vetoed draft Security Council resolutions regarding political repression in Burma/Myanmar on 12 January 2007,[95] political repression in Zimbabwe on 11 July 2008,[96] and the Syrian government's suppression of internal unrest on 4 October 2011[97] and on 4 February 2012,[98] on grounds that Security Council action would constitute interference in Burma/Myanmar's, Zimbabwe's, and Syria's internal affairs and breach of the three states' sovereignty. China did vote in unanimity with other Security Council Members on 14 April 2012 in favour of authorizing up to 30 unarmed military observers to be dispatched to Syria to monitor compliance with the ceasefire agreement between forces loyal and hostile to the Syrian government;[99] on 21 April 2012 in favour of establishing a United Nations Supervision Mission in Syria (with an authorized capacity of up to 300 unarmed military observers and necessary civilian personnel);[100] and on 20 July 2012 in favour of extending the mandate of the mission for a final period of 30 days.[101] The Security Council in its Resolution 2059 (2012) indicated that it would be willing to further extend the mandate of the mission

> only in the event that the Secretary-General reports and the Security Council [confirm] the cessation of the use of heavy weapons and a reduction in the level of violence by all sides sufficient to allow [the mission] to implement its mandate.[102]

The mandate of the mission ceased as of 19 August 2012 amid escalating violence in Syria.

4.1. China's evolving attitude to international peacekeeping

Despite its rare use of veto, China has received sustained criticism about its frequent abstentions. Nigel Thalakada has described China as pursuing a 'maxi–mini' strategy, maximizing its own security and economic benefits while minimizing its responsibilities,[103] while Thomas Christensen calls China 'the high church of realpolitik in the post-Cold War world'.[104] Erik Voeten notes that China abstained on draft Security Council Resolution 678 (1990), which concerned Iraq's refusal to comply with previous Security Council resolutions regarding Kuwait, in exchange for the United States' abstention in a World Bank vote on Chinese loans and for

93 UN SC Resolutions 1547 (2004), 1569 (2004), 1574 (2004), 1590 (2005), 1627 (2005), 1651 (2005), 1663 (2006), 1665 (2006), 1679 (2006), 1709 (2006), 1713 (2006), 1714 (2006), 1755 (2007), 1769 (2007), 1779 (2007), 1784 (2007), 1812 (2008), 1828 (2008), 1841 (2008), 1870 (2009), 1881 (2009), and 1891 (2009).
94 UN SC Resolutions 1556 (2004), 1564 (2004), 1591 (2005), 1593 (2005), 1672 (2006), and 1706 (2006).
95 UN Doc. S/PV.5619, 12 January 2007.
96 UN Doc. S/PV.5933, 11 July 2008.
97 UN Doc. S/PV.6627, 4 October 2011.
98 UN Doc. S/PV.6711, 4 February 2012.
99 UN SC Res. 2042 (2012).
100 UN SC Res. 2043 (2012).
101 UN SC Res. 2059 (2012).
102 Ibid., para. 3.
103 N. Thalakada, 'China's Voting Pattern in the Security Council, 1990–1995', in Russett, *supra* note 76, 83.
104 T. J. Christensen, 'Chinese Realpolitik', (September/October 1996) 75 *Foreign Affairs* 37. See also A. I. Johnston, 'Realism(s) and Chinese Security Policy in the Post-Cold War', in E. B. Kapstein and M. Manstanduno (eds.), *Unipolar Politics: Realism and State Strategies after the Cold War* (1999), 261; A. Nathan and R. S. Ross, *The Great Wall and the Empty Fortress: China's Search for Security* (1997); G. Segal, *Defending China* (1995).

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security guarantees relating to Taiwan and substantive changes in other draft Security Council resolutions.[105]

Since the humanitarian crises in Bosnia and Herzegovina, Rwanda, Kosovo, and Darfur, the concept of a 'responsibility to protect' has gained currency among Western governments and scholars. The International Commission on Intervention and State Sovereignty in its 2001 report developed

> *the idea* sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.[106]

Merely three years had elapsed before the matter was taken up as part of the debate about United Nations institutional reform, when the High-Level Panel on Threats, Challenges and Change stated in its 2004 report[107] that

> there is growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community – with it spanning a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies.[108]

The panel spoke of an 'emerging norm of a collective international responsibility to protect'[109] that encompassed not only 'the "right to intervene" of any State but the "responsibility to protect" of every State when it comes to people suffering from avoidable catastrophe'.[110] Anne-Marie Slaughter asserts that underlying a responsibility to protect is a responsibility to be protected, and refusal to receive protection should engage a right of the international community to compel receipt.[111] Firmly believing that her position is not 'a leap into wishing thinking', Louise Arbour argues that 'in existing law, in institutions and in lessons learned from practice' a state has a 'permanent' responsibility to protect individuals, not only within one's territory but also within the territory of another state, against abuse.[112] The only authorities that Arbour cites in support[113] are the 2005 *World Summit Outcome Document* (of which, it is noted, China voted in favour, and whose drafters included Qian Qichen, China's foreign minister at the time, as a member of the International Commission on

105 E. Voeten, 'Outside Options and the Logic of Security Council Action', 95 *American Political Science Review* (2001), 845, 846, fn. 8. See also D. Malone, *Decision-Making in the UN Security Council: The Case of Haiti, 1990–1997* (1998).

106 *The Responsibility to Protect*, *supra* note 35, VIII (emphasis added).

107 *A More Secure World: Our Shared Responsibility: Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change* (2004).

108 Ibid., at para. 201.

109 Ibid., at para. 202.

110 Ibid., at para. 201.

111 A.-M. Slaughter, 'Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform', (2005) 99 *American Journal of International Law* 619, at 625.

112 L. Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice', (2008) 34 *Review of International Studies* 445, at 447–8.

113 Ibid., at 449–52.

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Intervention and State Sovereignty),[114] Article I of the 1948 Genocide Convention,[115] and the International Court of Justice's judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* between Bosnia and Herzegovina and Serbia and Montenegro in 2007 that

> if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit.[116]

Arbour goes on to assert that Security Council permanent members, given their influence and power within and outside the Security Council, have a 'heavier responsibility than other States to ensure the protection of civilians everywhere',[117] and that in the event that a permanent member vetoes or threatens to veto 'action *that is deemed necessary by other members* to avert genocide, or crimes against humanity',[118] it may be held to have violated its obligations under the Genocide Convention.[119] At the Security Council debate on 24 March 1998 about the NATO intervention in Kosovo, Slovenia's permanent representative argued that NATO intervention was justified because 'not all permanent members were willing to act in accordance with their special responsibility for the maintenance of international peace and security'.[120]

The High-Level Panel on Threats, Challenges and Change associated the concept of responsibility to protect with the principle of collective security by the Security Council, stating that the Security Council 'can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a "threat to international peace and security"',[121] and that

> we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, *on a*

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114 Notwithstanding China's affirmative vote for, and Qian's participation in the drafting of, the *Document*, I argue that the *Document* does not embody, represent, evidence or contribute to state practice and, a fortiori, the emergence of any new norm of customary international law. My position is the same regarding the status of the High-Level Panel on Threats, Challenges and Change's report, *supra* note 107, as a matter of law (customary or otherwise). The fact that a group, however diverse, representative or eminent, of government officials and scholars meets, even under United Nations auspices, to discuss matters of international concern does not confer on any of its findings or conclusions the status of law or evince state practice, which must be proven by the existence of general, consistent and widespread practice of states accompanied by the requisite *opinio juris*.

115 Article I of the Convention on the Prevention and Punishment of the Crime of Genocide states that '[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.'

116 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, ICJ Reports* 2007, 43, 222. However, Arbour, *supra* note 112, omits to cite the Court's immediately subsequent statement that 'if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which … must occur for there to be a violation of the obligation to prevent': *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ibid.

117 Arbour, *supra* note 112, 453.

118 Ibid. (emphasis added).

119 Ibid., at 454.

120 UN Doc. S/PV.3988, 24 March 1999, 6–7.

121 *Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change*, *supra* note 107, para. 202.

> *case-by-case basis* and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[122]

The panel urged permanent members 'to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses'.[123]

It is important to note that the United Nations Charter does not provide for peacekeeping operations. International peacekeeping 'evolved as an alternative to the collective security that the UN was designed to provide but could not'.[124] Taylor Fravel notes that peacekeeping operations 'evolved in the early 1950s as a response to border disputes sparked by decolonization'.[125] China traditionally considered any peacekeeping operation to constitute interference in a state's internal affairs and breach of the state's sovereignty. China insisted that the consent of the host state, impartiality of the peacekeeping operation, and non-use of force except in self-defence were essential to any peacekeeping operation that the Security Council were to authorize. At a Security Council debate on 7 July 2010 about protection of civilians in armed conflict, China reiterated that

> [a]dhering to the three principles of the consent of the country concerned, impartiality and the non-use of force except in self-defence is the key to the success of peacekeeping operations. Any deviation from those basic principles will cause more conflicts and problems, even to the point of jeopardizing the success of the peacekeeping operation concerned, rather than help to protect civilians.[126]

China abstained on draft Security Council Resolutions 770 (1992), 776 (1992), 781 (1992), 836 (1993), 871 (1993), and 908 (1994) regarding Bosnia and Herzegovina on grounds of the prohibition of the use of force, and on Security Council Resolution 998 (1995) regarding changing the mandate of the United Nations peacekeeping operation in Bosnia and Herzegovina to enforcement action. However, China voted affirmatively on draft Security Council Resolutions 836 (1993), 871 (1993), 908 (1994), 1031 (1995), and 1088 (1996) on grounds that Bosnia and Herzegovina consented to (and later requested) United Nations peacekeeping and that the situation on the ground had become exceptional, although it reiterated its opposition to the use of force. China also voted in favour of draft Security Council Resolution 1037 (1996) regarding Croatia on grounds that Croatia requested United Nations peacekeeping, while reiterating its opposition to the use of force, and in favour of draft Security Council Resolution 794 (1992) regarding Somalia due to the exceptional nature of the situation on the ground.[127] China abstained on draft Security Council Resolution 975 (1995) regarding Haiti, although it eventually voted in favour of draft Security

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122 Ibid., at para. 139 (emphasis added).
123 Ibid., at para. 256.
124 W. J. Durch, 'Building on Sand: UN Peacekeeping in the Western Sahara', (1993) 17(4) *International Security* 151, at 151.
125 M. T. Fravel, 'China's Attitude toward U.N. Peacekeeping Operations since 1989', (1996) 36 *Asian Survey* 1102, at 1104.
126 UN Doc. S/PV.6354, 7 July 2010, 28.
127 See S. Stähle, 'China's Shifting Attitude towards United Nations Peacekeeping Operations', (2008) 195 *China Quarterly* 631, at 640.

Council Resolutions 1048 (1995) and 1063 (1996) after Haiti requested peacekeeping assistance. China's Ministry of Foreign Affairs explained that China abstained on draft Security Council Resolution 929 (1994) on establishing a temporary multinational humanitarian operation in Rwanda because

> [w]e have consistently argued that the indispensable condition for the UN peacekeeping operations to succeed is to gain consent from the parties concerned and to cooperate with the affected states and regional organizations. It is still hard to ensure that the Security Council's resolution that approves of taking action will gain consent and cooperation from the affected parties.[128]

China abstained on draft Security Council Resolution 955 (1994) on establishing an international tribunal for crimes committed in Rwanda out of concern that the principles of state sovereignty and of non-interference in other states' internal affairs would be undermined.

Concerning the humanitarian crisis and NATO intervention in Kosovo, China abstained on draft Security Council Resolutions 1160 (1998), 1199 (1998), 1203 (1998), 1239 (1999), and 1244 (1999), and in three of the five instances provided the only non-affirmative vote. Pang Zhongying argues that

> [c]entral to Chinese concerns is the changing nature and context of peace operations – with the potential for mission creep and the move to 'coalitions of the willing' – and the implications these would have for international involvement in China's key internal affairs relating, for example, to Taiwan, Tibet, and Xinjiang.[129]

China explained its abstention on draft Security Council Resolution 1160 (1998) on grounds that

> ethnic issues are extremely complicated and sensitive, especially in the Balkans. On the one hand, the legitimate rights and interests of all ethnic groups should be protected; on the other, secessionist activities by various extremist elements should be prevented ... If the Council is to get involved in a dispute without a request from the country concerned, it may set bad precedent and have wider negative implications.[130]

After NATO commenced bombing over the Federal Republic of Yugoslavia (Serbia and Montenegro) on 24 March 1999, at the Security Council meeting on 10 June 1999 aimed to confirm a ceasefire agreement through draft Security Council Resolution 1244 (1999), China abstained in the vote and stated thus:

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128 As quoted in C. Wu, 'Sovereignty, Human Rights, and Responsibility: Changes in China's Response to International Humanitarian Crises', (2010) 15 *Journal of Chinese Political Science* 71, at 74.

129 Z. Pang, 'China's Changing Attitude to UN Peacekeeping', (2005) 12 *International Peacekeeping* 87, at 88. Similarly, He Yin has stated that '[a]lthough China can be flexible in normative principles like state sovereignty and non-intervention ... [i]t is aware that its flexibility regarding these norms may be a "double-edged sword". On the one hand, when properly used, flexibility can provide Beijing with more diplomatic options for dealing with international affairs, prevent unnecessary conflicts with other powers, and yield a favourable environment for its development strategy. On the other hand, when overexploited, it [does] not only jeopardise China's strategic interests regarding state sovereignty (especially the Taiwan Question) but also damages its image as a peace-loving power, especially in the eyes of the developing world': *China's Changing Policy on UN Peacekeeping Operations* (2007), 57.

130 UN Doc. S/PV.3868, 31 March 1998, 11–12.

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NATO seriously violated the Charter of the United Nations and norms of international law, and undermined the authority of the Security Council, thus setting an extremely dangerous precedent in the history of international relations.

... Respect for sovereignty and non-interference in each other's internal affairs are basic principles of the United Nations Charter. Since the end of the Cold War, the international situation has undergone major changes, but those principles are by no means outdated. On the contrary, they have acquired even greater relevance. At the threshold of the new century, it is even more imperative for us to reaffirm those principles. In essence, the 'human rights over sovereignty' theory strives to infringe upon the sovereignty of other States and to promote hegemonism under the pretext of human rights. This totally runs counter to the purposes and principles of the United Nations Charter. The international community should maintain vigilance against it.

The draft resolution before us has failed to fully reflect China's principled stand and justified concerns. In particular, it makes no mention of the disaster caused by NATO bombing in the Federal Republic of Yugoslavia and it has failed to impose necessary restrictions on the invoking of Chapter VII of the United Nations Charter. Therefore, we have great difficulty with the draft resolution. However, in view of the fact that the Federal Republic of Yugoslavia has already accepted the peace plan, that NATO has suspended its bombing in the Federal Republic of Yugoslavia, and that the draft resolution has reaffirmed the purposes and principles of the United Nations Charter, the primary responsibility of the Security Council for the maintenance of international peace and security and the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, the Chinese delegation will not block the adoption of this draft resolution.[131]

131 UN Doc. S/PV.4011, 10 June 1999. Construing the NATO intervention as 'an international constitutional moment', Anne-Marie Slaughter and William Burke-White argue that Art. 2(4) of the United Nations Charter, which states that '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations', should now read: 'All states and individuals shall refrain from the deliberate targeting or killing of civilians in armed conflict of any kind, for any purpose', which 'articulates a principle of civilian inviolability' that permits and compels humanitarian intervention and has replaced the principle of state sovereignty as a new *Grundnorm* for the 'new' international order: 'An International Constitutional Moment', (2002) 43 *Harvard International Law Journal* 1, at 2. Such a fanciful analysis notwithstanding, it is generally agreed among scholars of international law that the NATO intervention was incompatible with both the Charter and customary international law as it contravened the prohibition of the use of force and the principles of state sovereignty, territorial integrity, and non-intervention: see, e.g., A. Cassese, '*Ex Iniuria Ius Oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', (1999) 10 *European Journal of International Law* 23; J. I. Charney, 'Anticipatory Humanitarian Intervention in Kosovo', (1999) 32 *Vanderbilt Journal of Transnational Law* 1231; V. Gowland-Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance', (2000) 11 *European Journal of International Law* 361; L. Henkin, 'Kosovo and the Law of "Humanitarian Intervention"', (1999) 93 *American Journal of International Law* 824; P. Hilpold, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?', (2001) 12 *European Journal of International Law* 437; A. Pellet, 'Brief Remarks on the Unilateral Use of Force', (2000) 11 *European Journal of International Law* 385; B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', (1999) 10 *European Journal of International Law* 1. The International Court of Justice in *Legality of Use of Force (Yugoslavia v. United States of America), Provisional Measures, Order of 2 June 1999, ICJ Reports* 1999, 916, 922, emphasized that it was 'profoundly concerned with the use of force in Yugoslavia' which 'under the present circumstances ... raises very serious issues of international law'. Even some of the states that participated in the NATO intervention, particularly Germany, cautioned against attributing precedential value to the NATO intervention: Simma, ibid., 12–13. The fact that the NATO intervention was 'collective' is immaterial as 'the Alliance has no greater freedom than its member states' under international law: ibid., 19; to ascribe binding force to a unilateral decision of a majority of Security Council permanent members when the Security Council collectively, and as the only international organization empowered by the Charter to authorize enforcement action for the maintenance of international peace and security, decided against adopting a resolution that would have authorized military intervention in Kosovo was 'tantamount to ignoring the very essence of the decision process within the

China's opposition to the notion of a right to humanitarian intervention is widely shared among developing states. The Group of 77 in 2000 categorically rejected the existence of such a purported right that 'has no legal basis in the United Nations Charter or in the general principles of international law'.[132]

Nonetheless, China has voted in favour of peacekeeping operations authorized under draft Security Council Resolutions 1264 (1999), 1272 (1999), 1410 (2002), and 1704 (2006) regarding East Timor (now Timor Leste); Security Council Resolutions 1270 (1999) and 1289 (2000) regarding Sierra Leone; Security Council Resolutions 1291 (2000) and 1671 (2006) regarding the Democratic Republic of the Congo; Security Council Resolution 1386 (2001) regarding Afghanistan; Security Council Resolutions 1464 (2003) and 1528 (2004) regarding Côte d'Ivoire; Security Council Resolutions 1497 (2003) and 1509 (2003) regarding Liberia; Security Council Resolutions 1529 (2004) and 1542 (2004) regarding Haiti; Security Council Resolution 1545 (2004) regarding Burundi; and Security Council Resolutions 1590 (2005) and 1769 (2007) regarding Sudan,[133] after previously abstaining on draft Security Council Resolutions 1556 (2004), 1564 (2004), 1593 (2005), 1679 (2006), and 1706 (2006)[134] on grounds that Sudan's consent had not been obtained and pressure on the Sudanese government would only worsen the situation, and out of 'national judicial sovereignty'.[135] Stefan Stähle argues that the turning point of China's

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Security Council': Hilpold, *supra*, 449. With the far-reaching consequences that a Security Council decision entails, Hilpold, *supra*, stresses that '[a]ny attempt to introduce a majority principle for the permanent members of the Council, too – if only indirectly or with weakened consequences – and thereby abolishing or at least softening their veto power, would not only run counter to the letter of Article 27 of the UN Charter but also to the spirit lying at the heart of the constitutional consensus which permitted the establishment of [the current international order].' Security Council Resolution 1244 (1999), on which China abstained, and which legitimated *ex post facto* the NATO intervention but reaffirmed the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, did not render the intervention compatible with the Charter or customary international law. On the contrary, the Security Council's *ex post facto* legitimation 'introduces in the international legal order a part of uncertainty which is deeply repugnant to the very function of law in any society and it is impossible to assume that it will not happen again in similar situations in the future': Pellet, *supra*, 389.

132 Declaration of the Group of 77 South Summit, Havana, 10–14 April 2000, para. 54.

133 See Stähle, *supra* note 127, 641–2.

134 Ibid., at 651; N. P. Contessi, 'Multilateralism, Intervention and Norm Contestation: China's Stance on Darfur in the UN Security Council', (2010) 41 *Security Dialogue* 323, at 331. At the Security Council meeting regarding draft Security Council Resolution 1679 (2006), China stated that '[w]e believe that, if the United Nations is to deploy a peacekeeping operation in Darfur, the agreement and cooperation of the Sudanese Government must be obtained. That is a basic principle and precondition for the deployment of all United Nations peacekeeping operations': UN Doc. S/PV.5439, 16 May 2006. At the Security Council meeting regarding draft Security Council Resolution 1706 (2006), China explained its abstention on grounds that 'having participated in all the consultation processes in a constructive manner, China agreed upon or accepted almost all the contents of the resolution. However, we have consistently urged the sponsors to clearly include "with the consent of the Government of National Unity" in the text of the resolution, which is a fixed and standardized phrase utilized by the Council when deploying United Nations missions': UN Doc. S/PV.5519, 31 August 2006.

135 UN SC Res. 1556 (2004), Preamble and paras. 1–2 and 7–8; UN SC Res. 1564 (2004), Preamble and para. 12; UN Doc. S/PV.5040, 18 September 2004; UN Doc. S/PV.5519, 31 August 2006. At the Security Council meeting regarding draft Security Council Resolution 1593 (2005), which called for the situation in Darfur to be referred to the International Criminal Court for investigation into human rights violations committed since July 2002, China abstained on grounds that 'out of national judicial sovereignty, we would prefer to see perpetrators of gross violations of human rights stand trial in the Sudanese judicial system. We have noted that the Sudanese judiciary has recently taken legal action against individuals involved. . . . We are not in favour of referring the question of Darfur to the International Criminal Court (ICC) without the consent of the Sudanese Government': UN Doc. S/PV.5158, 31 March 2005.

voting behaviour regarding United Nations peacekeeping was when it supported the Australian-led mission in 1999 to restore peace and security in East Timor and protect United Nations personnel on the ground.[136] Bates Gill and James Reilly assert that

> [g]eographic proximity; a desire to respond in some way to anti-Chinese violence in Indonesia; initial involvement with the voting process; and a desire to retain UN authority, and thus Chinese influence, over issues of intervention and the use of force were all likely factors in China's ultimate policy choices.[137]

China voted affirmatively on draft Security Council Resolution 1296 (2000), which stated that

> the deliberate targeting of civilian populations or other protected persons and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security.[138]

China has maintained that the success or otherwise of United Nations peacekeeping operations is heavily dependent on the 'democratization of international relations'. At the Security Council debate on 21 June 2001 about the United Nations Secretary-General's 2001 report on prevention of armed conflict,[139] China asserted thus:

> The United Nations should play an important role in the promotion of the democratisation of international relations. Armed conflicts in the Middle East, the Balkans, the Great Lakes region of Africa and other countries and regions could be stopped as early as possible and new conflicts could be prevented if all sides concerned could really follow the basic norms guiding state-to-state relations. Although the role and capacity of the United Nations has its own limitations, as the Secretary-General has pointed out in the report, preventing armed conflict represents an important orientation in the field of maintaining international peace and security as well as an important task of the United Nations. China is willing to make its own contribution, together with other Member States, to strengthening the capacity of the United Nations for the prevention of armed conflict.[140]

China's increased experience with peacekeeping operations has led it to depart from its previous unease. While China remained wary of blurring peacekeeping operations with peace-building activities, in 2001 it indicated its recognition that 'peacekeeping operations, conflict prevention and peace-building activities had become increasingly intertwined',[141] although it insisted that the host state should assume a 'dominant role' in resolving conflict.[142] In 2003, China indicated that, given the growing complexity of operations, traditional operations were no longer suited for certain types of conflict; the situations in the Democratic Republic of the Congo and in Liberia, for example, had highlighted the need for rapid, early and robust

136 Stähle, *supra* note 127, 648.
137 B. Gill and J. Reilly, 'Sovereignty, Intervention and Peacekeeping: The View from Beijing', (2000) 42(3) *Survival* 41, at 50.
138 UN SC Res. 1296 (2000), para.5.
139 *Prevention of Armed Conflict: Report of the Secretary-General*, UN Doc. A/55/985–2/2001/574, 7 June 2001.
140 Statement of Ambassador Wang Yingfan, as quoted in Pang, *supra* note 129, 94.
141 UN Doc. A/C.4/56/SR.20, 4 December 2001, para. 45.
142 UN Doc. A/C.4/55/SR.20, 5 April 2001, paras. 28–29.

intervention',[143] 'including the use of enforcement measures where necessary'.[144] In 2004, China stated that military force, 'where necessary',[145] constituted an essential part of peacekeeping operations:

> In conflict management, the roles of military action and that of the civilian elements are closely interrelated and predicated on one another. . . . Military success guarantees the presence of a civilian role, which is an essential and indispensable element in any post-conflict reconstruction.[146]

In 2005, President Hu Jintao stated that China was in support of a 'comprehensive strategy featuring prevention, peace restoration, peacekeeping, and post-conflict reconstruction'.[147] Zhang Yesui, China's ambassador to the United States, stated at the Munich Conference on Security Policy in 2007 that China's increasing contribution to United Nations peacekeeping operations 'reflected China's commitment to global security given the country's important role within the international system and the fact that its security and development are closely linked to that of the rest of the world'.[148] Major-General Zhang Qinsheng, deputy chief of the General Staff of the People's Liberation Army (PLA), at the PLA Peacekeeping Work Conference in Beijing in June 2007, stated that

> active participation in the UN peacekeeping operations is . . . an important measure to display China's image of being a peace-loving and responsible big country and likewise an important avenue to get adapted to the needs of the revolution in military affairs in the world and enhance the quality construction of the army.[149]

Chin-Hao Huang notes that

> [i]n May 2009, the PLA General Staff Department announced that it would strengthen the PLA's emergency response system and rapid deployment capacity to respond to the various MOOTW [military operations other than war], including peacekeeping activities. In June 2009 the Central Military Commission, the PLA and five of the seven military area commands met in Beijing to strengthen and improve the PLA's peacekeeping role, discussing ways to streamline the selection, organization, training and rotation of Chinese peacekeepers.[150]

On 26 April 2010, the PLA issued a special report commemorating China's contribution to international peacekeeping in the preceding two decades, which stated that

> [u]p to the end of March 2010, the PLA has contributed peacekeepers over 15,000 persons/times to 18 UN peacekeeping missions worldwide . . . The Chinese peacekeeping troops have built and maintained over 8,000 kilometres of road, constructed 230-odd

143 UN Doc. A/C.4/58/SR.11, 14 November 2003, para. 31.
144 Ibid., at para. 33.
145 Ibid.; see also UN Doc. A/C.4/59/SR.17, 31 December 2004, para. 24.
146 UN Doc. S/PV.5041, 22 September 2004.
147 UN Doc. S/PV.5261, 14 September 2005.
148 As quoted in C.-H. Huang, 'Principles and Praxis of China's Peacekeeping', (2011) 18 *International Peacekeeping* 257, at 260–1.
149 *PLA Daily*, 22 June 2007, as quoted in Z. Wu and I. Taylor, 'From Refusal to Engagement: Chinese Contributions to Peacekeeping in Africa', (2011) 29 *Journal of Contemporary African Studies* 137, at 150.
150 Huang, *supra* note 148, at 261, citing 'PLA Constructs MOOTW Arms Force System', *PLA Daily*, 14 May 2009, and 'PLA Peacekeeping Work Conference Held in Beijing', *PLA Daily*, 26 June 2009.

> bridges and given medical treatment to patients for 60,000 persons/times in the UN peacekeeping mission areas, playing a positive role in promoting the peaceful settlement of disputes, maintaining the regional safety and stability, and facilitating the economical and social development in some countries.[151]

According to United Nations data, China has increased its personnel contribution to peacekeeping operations twenty-fold and, with more than 2,100 peacekeepers abroad, has more troops under United Nations command than does any other Security Council permanent member.[152]

As president of the Security Council during January–June 2010, China took the initiative to convene a thematic debate on 13 January 2010 to explore possibilities for strengthening co-operation and collaboration between the United Nations and regional and sub-regional organizations in the maintenance of international peace and security. In its concept paper,[153] while emphasizing the pre-eminence of the Security Council,[154] China indicated its wish to explore the comparative advantages that the United Nations and regional organizations may respectively possess and those that they may share in the maintenance of international peace and security, including in particular in conflict prevention, management, and resolution,[155] and how their respective roles and responsibilities may be better defined and delineated in accordance with the United Nations Charter.[156] China considered a collaborative partnership between the United Nations and regional and sub-regional organizations to be crucial in preventing, managing, and resolving conflicts, including nascent disputes and emerging crises, effectively,[157] and in encouraging states to 'resolve differences and problems peacefully through dialogue, reconciliation, negotiation, good offices and mediation'.[158] Opportunities that such a thematic debate may generate aside, it marked the first time that China took the initiative as president of the Security Council to convene a thematic debate (and not due to previous Security Council decisions). According to Security Council Report, a not-for-profit organization affiliated with Columbia University, Security Council permanent members have largely been reluctant about holding thematic debates, which are generally initiated by non-permanent members during their Security Council presidencies.[159]

4.2. Will China veto a draft Security Council resolution aimed at its conduct?

Due to their veto power, permanent members are often taken to be immune to the enforcement powers of the Security Council and, consequently, the constraints of

151 'PLA Contributes a Lot to UN Peacekeeping Operations', *PLA Daily*, 26 April 2010, as quoted in Zhao, *supra* note 58, 346.
152 United Nations Department of Peacekeeping Operations, 'UN Missions Summary Detailed by Country', 1 October 2010.
153 Letter dated 4 January 2010 from the Permanent Representative of China to the United Nations addressed to the Secretary-General, UN Doc. S/2010/9, 7 January 2010.
154 Ibid., at para.1.
155 Ibid.
156 Ibid., at para.2(1).
157 Ibid., at para.2(3).
158 Ibid.
159 Security Council Report, Update Report: UN Cooperation with Regional and Subregional Organisations in the Maintenance of International Peace and Security, 8 January 2010, No. 2.

international law. The possibility that China may veto proposed Security Council action aimed at its conduct, such as its violations of human rights, its lack of democratic governance, its treatment of Tibet, or its recourse to military force against Taiwan, is one that many have in mind when criticizing the legitimacy and effectiveness of the Security Council. As Andrew Hurrell argues, '[l]egitimacy implies a willingness to comply with rules or to accept a political order even if this goes against specific interests at specific times.'[160]

During the 1970s China repeatedly criticized the United States' and the Soviet Union's capacity and tendency to veto draft Security Council resolutions in order to exercise hegemony. In 1973, Ling Ching stated that

> [t]he super-Powers were arguing very hard for their idea that it was only up to the Security Council to decide whether a specific act constituted an act of aggression. Obviously, what they had in mind was invariably their veto power in the Security Council. In the event of their aggression against other countries, they could remain unpunished by casting a single negative veto. Consequently it might well be asked whether the whole text of the definition of aggression would not become a mere scrap of paper.[161]

Pursuant to Article 27(3) of the United Nations Charter, a Security Council (permanent) member that is 'a party to a dispute' shall abstain in relevant decisions under Chapter VI or under Article 52(3) of the Charter.[162] Yuen-Li Liang, who was chairperson of the Committee of Experts of the Security Council that met during March–April 1946 to Study the Rules of Procedure of the Security Council, explained that by virtue of the fact that the term 'dispute' and not 'situation' is used in Article 27(3), the Security Council is not under any obligation to invite a non-member concerned in a 'situation' to participate in its proceedings without vote, unlike Article 32 in a case that constitutes a dispute, and it is for the Security Council alone to decide whether a matter constitutes a dispute.[163] The Article 27(3) abstention

160 A. Hurrell, 'Legitimacy and the Use of Force: Can the Circle Be Squared?', (2005) 31 *Review of International Studies* 15, at 16.

161 28 General Assembly Official Records, C.6 (1442nd meeting), para. 77 (1973), as quoted in S. S. Kim, 'The People's Republic of China and the Charter-Based International Legal Order', (1978) 72 *American Journal of International Law* 317, at 344. Similarly, in 1974, An Chih-yüan stated that '[a]s it stood, the definition would enable the super-Powers to take advantage of their position as permanent members of the Security Council to justify their acts of aggression and, by abusing their veto power, to prevent the Security Council from adopting any resolution condemning the aggressor and supporting the victim. … Since an aggressor could veto any draft resolution of the Security Council stating that it had committed an act of aggression, it was difficult to see how the definition could have the effect of deterring a potential aggressor, simplifying the implementation of measures to suppress acts of aggression and protecting the rights and interests of the victim, as provided in the preamble of the draft definition': 29 General Assembly Official Records, C.6 (1475th meeting), para. 16 (1974), as quoted in Kim, *supra*, 345–6.

162 United Nations Charter, Art.27(3).

163 Liang, *supra* note 29, 347–8. Liang, representing China, submitted a statement regarding the application of Article 27(3), as follows (at 349–51):

> The Yalta Formula provides that when a state is party to a dispute it shall abstain from voting in the non-procedural decisions of the Council under Chapter VI of the Charter concerning such dispute. This requirement for abstention, in the case of a permanent member being a party to a dispute, obviously does not affect the requirement that the remaining permanent members must concur in the decisions.
>
> It is also clear that the abstention requirement laid down in Article 27, paragraph 3, is not intended to apply to all matters arising under Article 35, paragraph 1. Thus when a state brings to the attention of

requirement does not apply to Chapter VII, with which enforcement powers, not recommendatory powers, of the Security Council lie. Reisman thus argues that

> since Article 39 permits the Council, when exercising chapter VII powers, to make either recommendations or decisions as it sees fit, the permanent members of the Council can evade Article 27(3) by operating under chapter VII or . . . by simply not

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the Security Council, by reason of the general interest of that state as a Member of the United Nations, a matter which it considers might endanger international peace and security, the requirement for abstention shall not apply to such Member in any of the decisions of the Council provided for in Article 34 and Article 36. In exercising such a general right, the position of the state bringing the matter to the attention of the Security Council is similar to that of the Secretary-General under Article 99.

With respect to the requirement for abstention, however, the distinction between disputes and situations should not extend to those cases in which one state complains that its specific rights have been infringed upon or their enjoyment directly endangered by the action of one or more other states, and alleges that a dispute, the continuance of which endangers international peace and security, has arisen. Should the other state or states directly involved make the allegation that a situation has arisen as distinct from a dispute, such an attempted distinction shall not affect the requirement for abstention laid down in Article 27, paragraph 3, of the Charter.

The specific function of the Security Council in connexion with the pacific settlement of disputes and situations endangering the maintenance of international peace and security is laid down in Article 36, which states that 'The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment'. The terms of this article indicate that the action contemplated is not based upon a prior determination whether a matter is a dispute or a situation, but upon whether the matter brought before the Council is of such a nature that its continuance is likely to endanger the maintenance of international peace and security. It is clear that Article 36 makes no distinction between disputes and situations in so far as the function of the Council in making recommendations is concerned.

At the time of the Yalta Conference the authors of the voting formula had before them only the text of the Dumbarton Oaks Proposals. An examination of these proposals reveals that the paragraph corresponding to Article 36(1) of the Charter, namely Chapter VIII, Section A, paragraph 5, refers only to disputes and not to situations. In embodying the abstention clause into the voting formula, therefore, it was clearly the intention of the authors to exclude from voting those states involved directly in a matter whose continuance might endanger international peace and security. However, as the term used to describe such matters was 'dispute' in the text of the Dumbarton Oaks Proposals, it was only logical that the term used in the Yalta Formula was 'parties to a dispute'. There is further evidence of the fact that the term 'parties to a dispute' was meant to include 'parties directly concerned in a situation' in cases where the Security Council has to make the determination provided for in Article 34 of the Charter. In a statement issued on 5 March 1945 Mr Stettinius, then Secretary of State said: 'This means that no nation, large or small, if a party to a dispute, would participate in the decisions of the Security Council on questions like the following: "(b) Whether the dispute or situation is of such a nature that its continuation is likely to threaten the peace."'

As stated above, the text of the Yalta Formula was drafted on the basis of the text of the Dumbarton Oaks Proposals in which the term 'situation' did not appear in connexion with the specific function of the Council relative to pacific settlement, as laid down in Chapter VIII, Section A, paragraph 5. At San Francisco this section of the Dumbarton Oaks Proposals was considerably revised while the text of the Yalta Formula remained untouched. Among the many modifications made in Section A of Chapter VIII was the insertion of the term 'or of a situation of like nature' in paragraph 5 of that section. The Summary Report of the Twelfth Meeting of Committee III/2 reveals that the words 'or of a situation of like nature' were intended to give effect to the Australian amendment which proposed that the Security Council should be permitted to deal with both a dispute or a situation the continuance of which was likely to endanger the peace. Thus it is clear that the insertion of the term 'or of a situation of like nature' in Article 36 with reference to the specific function of the Security Council as regards pacific settlement was never intended to be the basis of a differentiation between the duty of states to abstain from voting in a dispute to which they are parties and the absence of such a duty in the case of situations in which they are directly concerned.

> indicating whether the resolution in question is being adopted under chapter VI or chapter VII.[164]

As China always is able to rely on Article 2(7) of the Charter to shield itself from interference in its internal affairs, it will not need to veto a draft Security Council resolution intended to condemn it for its human rights violations, its lack of democratic governance, or its treatment of Tibet. The most likely scenario in which China might veto a draft Security Council resolution aimed at its conduct is if the draft resolution were to condemn its use of force against Taiwan and demand that it cease and desist, a draft resolution that undoubtedly would fall under Chapter VII. Article 27(3) will not apply if Taiwan applies for United Nations membership. China will be able to veto Taiwan's application given that admission to United Nations membership requires a decision of the General Assembly upon recommendation of the Security Council.[165] China will not be a party to a dispute or situation if a territorial entity, even Taiwan, applies for United Nations membership – as when China, represented by the authorities on Taiwan at the time, was able to veto Mongolia's application for United Nations membership in 1955 on grounds that Mongolia was part of China. Another scenario in which Article 27(3) might apply is a draft Security Council resolution calling for abolition of the veto that a United Nations member state might argue to be a cause of international peace and security continuing to be endangered, as it is arguable that as a permanent member China constitutes a party to the dispute (even though United Nations institutional reform should properly be construed as a situation). However, even if Article 27(3) were to apply, the other permanent members also would be required to abstain, and Article 27(3) requires nine affirmative votes for a decision to be made. Most fundamentally, abolition of the veto cannot take place without an amendment to the Charter, which requires ratifications of all permanent members.[166]

> The abstention clause in Article 27(3) of the Charter is an embodiment of the principle that, so far as the process of pacific settlement calls for the appreciation by the Council of a question presented to it, a state shall not at once be judge and party in its own cause. If a matter brought to the attention of the Council is sufficiently grave so that the Council considers that its continuance may endanger international peace and security, it may make such a decision exclusive of the votes of the states directly involved. If this decision is in the affirmative, the Security Council may recommend appropriate procedure or methods of adjustment by virtue of a decision which is again exclusive of the votes of the states directly involved. This requirement for abstention, however, does not flow from the fact that the states directly involved are parties to a dispute as distinct from being directly involved in a situation. Rather it is derived from the necessity for effective action on the part of the Council on the one hand, and the principle that no state shall be judge and party in its own cause on the other.
>
> If the interpretation is accepted that, with respect to the requirement for abstention, a distinction exists between parties to a dispute and parties directly concerned in a situation, then when a matter is brought to the attention of the Security Council involving a permanent member, that matter can never be considered a dispute within the meaning of the Charter, unless that permanent member chooses to have it so considered. Furthermore, to make the determination of whether a dispute or situation exists subject to the veto power of a permanent member is to defeat the clear intention of the Yalta Formula and to render meaningless the distinction made therein between voting procedures applicable to pacific settlement and voting procedures applicable to enforcement action.

164 Reisman, *supra* note 75, 93.
165 United Nations Charter, Art. 4(2).
166 Ibid., Art. 108.

5. Conclusion

Recent humanitarian crises in Libya and Syria have made the Security Council the focal point of renaissance and, simultaneously, criticism of the utility, effectiveness, and legitimacy of the United Nations and of international law. The Security Council managed to pass seven draft resolutions (six unanimously) imposing sanctions on the Libyan government for its use of violence against its citizens, authorizing a no-fly zone over Libya to protect Libya's civilian population, and establishing a United Nations Support Mission in Libya whose mandate was extended twice.[167] However, on account of China's joint vetoes with Russia on two occasions, the Security Council collectively, and as the only international organization empowered by the Charter to authorize enforcement action for the maintenance of international peace and security, decided against adopting resolutions that would have authorized military intervention in the internal conflict in Syria.

While many argue that China, through its vetoes in respect of Syria, has shown that it is unfit to be a responsible world power, as it has misused its role and power within the Security Council to continue to protect an ally from international intervention, China's capacity to veto a draft resolution – and its willingness to do so notwithstanding Western pressure and criticism within the Security Council and international media – is precisely why the veto is constitutionally built into the structure of the United Nations and the current international legal order. Criticism of China's vetoes as recalcitrant ignores the possibility that China may have real interest and intention in ensuring that the legitimacy of international law, the Security Council, its decision-making process and procedures, and its decisions is not jeopardized by any unilateral action that other states may wish to pursue. It ought not to be forgotten that China is the only permanent member that is non-Western and plausibly capable of claiming to represent developing states, many of which might rely on China's veto power to protect their own interests.

Interests aside, when China voted on draft Security Council resolutions, both recently and in the past, it referred to international legal norms and principles, which many Western states and scholars preferred not to mention when they were inconvenient, notably the principles of state sovereignty and of non-interference by the United Nations in the internal affairs of a member state, as well as the prohibition of the use of force. At the same time, China has shown readiness to be flexible in the application of international law through peacekeeping operations in order to protect civilians mired in internal conflicts. China now actively supports and participates in peacekeeping operations authorized by the Security Council, provided that the three principles of international peacekeeping – that the consent of the host state

167 UN SC Res. 1970 (2011; passed unanimously) imposing sanctions on the Libyan government; UN SC Res. 1973 (2011); China, Russia, Brazil, Germany, and India abstained) authorizing a no-fly zone over Libya for the protection of civilians; UN SC Res. 2009 (2011; passed unanimously) establishing a United Nations Support Mission in Libya; UN SC Res. 2016 (2011; passed unanimously) terminating military intervention in Libya on 27 October 2011; UN SC Res. 2017 (2011; passed unanimously) regarding portable surface-to-air missiles in Libya; UN SC Res. 2022 (2011; passed unanimously) extending the mandate of the United Nations Support Mission in Libya; and UN SC Res. 2040 (2012; passed unanimously) further extending the mandate of the Mission.

concerned has been obtained, that any peacekeeping operation must be impartial, and that force must not be used except in self-defence – are met. Furthermore, China has taken initiatives to explore possibilities for strengthening the United Nations in the maintenance of international peace and security.

If one were to speak of the international rule of law, China, through its voting behaviour and argumentation within the Security Council, has demonstrated the importance it ascribes international law as the perimeter within which the current international order ought to function. China certainly should not be criticized for impeding the progressive development of international law in instances where progressive development is merely a code for violations. At a Security Council meeting on 4 May 2011, China emphasized the importance of

> the complete and strict implementation of the relevant resolutions of the Security Council. The international community must respect the sovereignty, independence, unity and territorial integrity of Libya. The internal affairs and fate of Libya must be left up to the Libyan people to decide. We are not in favour of any arbitrary interpretation of the Council's resolutions or of any actions going beyond those mandated by the Council.[168]

At a subsequent Security Council meeting, China cautioned that

> the strengthening of the protection of civilians in armed conflict must strictly abide by the purposes and principles of the Charter of the United Nations. The responsibility to protect civilians lies first and foremost with the Government of the country concerned. The international community and external organizations can provide constructive assistance, but they must observe the principles of objectivity and neutrality and fully respect the independence, sovereignty, unity and territorial integrity of the country concerned. There must be no attempt at regime change or involvement in civil war by any party under the guise of protecting civilians.[169]

On 4 October 2011, China vetoed the first of two draft Security Council resolutions in respect of the internal conflict in Syria as it found that

> under the current circumstances, sanctions or the threat thereof does not help to resolve the question of Syria and, instead, may further complicate the situation. Regrettably and disappointingly, this major and legitimate concern did not receive due attention from the sponsors. As it now stands, the draft resolution focuses solely on exerting pressure on Syria, even threatening to impose sanctions. It does not help to facilitate the easing of the situation in Syria.[170]

China's vetoes (jointly with Russia) of two draft Security Council resolutions that sought to impose sanctions on Syria, after its support for action authorized by the Security Council and delegated to NATO against Libya, arguably manifested China's concern about civilian casualties caused by NATO in Libya and NATO's exceeding its mandate under Security Council Resolution 1973 (2011) by targeting the Gaddafi regime and providing arms to rebel groups.[171] In fact, China's position

168 UN Doc. S/PV.6528, 4 May 2011, 10.
169 UN Doc. S/PV.6531, 10 May 2011, 20.
170 UN Doc. S/PV.6627, 4 October 2011, 5.
171 See A. Garwood-Gowers, 'China and the "Responsibility to Protect": The Implications of the Libyan Intervention', (2012) 2 *Asian Journal of International Law* 375, at 387.

was taken further by a number of other Security Council members, notably Russia, Brazil, and India. Russia drew a direct link between NATO's action in Libya and its proposed action in Syria, and asserted that '[t]he international community is alarmed by statements that compliance with Security Council resolutions on Libya in the NATO interpretation is a model for the future actions of NATO in implementing the responsibility to protect.'[172] Brazil released a concept note that warned of 'a growing perception that the concept of the responsibility to protect might be misused for purposes other than protecting civilians, such as regime change. This perception may make it even more difficult to attain the protection objectives pursued by the international community',[173] while India concisely charged that 'Libya has given R2P a bad name'.[174] Thus, one should be cautious before criticizing the rationales underlying China's vetoes in respect of Syria, and should not take China's support for peacekeeping operations for granted or assume that China vetoes a draft Security Council resolution out of its own interests or intransigence or the interests of its allies. Instead, Western powers and the international community as a whole ought to reflect on whether their desire to push aggressively for recognition and enforcement of purported international legal norms, such as a right or duty of humanitarian intervention or a responsibility to protect (or a responsibility to be protected), may actually delay, if not preclude, the actual crystallization and consolidation of such purported norms; prevent the protection of civilians in internal conflicts; endanger peace within a state, within a region, and internationally; and above all undermine the integrity of international law and destroy the foundation upon which protection of civilians and peace depends.

172 UN Doc. S/PV.6627, *supra* note 170, at 4.

173 'Responsibility while Protecting: Elements for the Development and Promotion of a Concept', Annex to the Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the United Nations Secretary-General, UN Doc. A/66/551-S/2011/701, 11 November 2011, para. 10.

174 As quoted in Garwood-Gowers, *supra* note 171, at 391.

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