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Security Council Resolutions and the Double Function of Explanation of Votes

Mark Klamberg
Stockholm University

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Security Council Resolutions and the Double Function of Explanation of Votes

Mark Klamberg*

ABSTRACT

UN Security Council resolutions are not always clear: they sometimes need to be interpreted. Members of the Security Council may make statements in connection with their votes, termed explanation of votes. Explanation of votes may have at least two functions. First, they may contribute to the formation of customary international law. Secondly, they can be used as a means for interpreting Security Council resolutions in relation to a specific situation or dispute. The present Article examines different traject-ories of conversations to show how Security Council resolutions and explanation of votes may protect the status quo in some instances and act as agents of change in others.

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* Mark Klamberg is Professor of Public International Law, Stockholm University. He earned his law degree at Lund University, master in laws at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, LL.D. at Stockholm University and pursued a postdoctoral fellowship at the University of Oxford where he was member of the Senior Common Room at Christ Church. He has been an Associate Professor at Uppsala University and regularly contributes as a guest lecturer at the University of Edinburgh. I would like to thank Per Ahlin, Martin Dawidowicz, Magnus Lundgren, Efthymios Papastavridis, and Karin Sundström for suggestions and views on the draft, and the editorial board of Vanderbilt Journal of Transnational Law for their comments and revisions during the editorial process.

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I. INTRODUCTION

The UN Security Council has within the UN system the "primary responsibility for the maintenance of international peace and security."[1] The Council adopts resolutions, which are the decisions with the greatest potential consequences. Security Council resolutions are not always clear and need to be interpreted. Members of the Council may make statements in connection with their votes, and these are termed explanation of votes. This Article addresses the double function that explanation of votes may have: they may be used as means for interpreting Security Council resolutions in relation to a specific situation or dispute or as contributions to the formation of customary international law. As a result, states may face the tension between the common enterprise of developing the meaning of the resolution at hand and the individual enterprise of contributing to (or most probably, impeding) a change of a rule of customary international law.[2] When debating a particular resolution, a state may be torn between these functions. Explanation of votes may provide a means to resolve this dilemma.

A related way of phrasing this dilemma is to describe the Security Council as engaged in a conversation about the meaning of a resolution and the content of a rule of custom (i.e., whether it should be changed or remain intact). Thus, this Article offers an account of three ongoing

1. U.N. Charter art. 24, ¶ 1.

2. One may imagine additional functions, for example: even if legal arguments are never the sole or even the decisive factor in Security Council deliberations, they may shape the debates, and, by being available to the public, affect positions taken, at least indirectly. *See* Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 EUR. J. INT'L L. 437, 439, 462 (2003); *see also* Rosalyn Higgins, *The Development of International Law by the Political Organs of the United Nations*, 59 PROCEEDINGS AM. SOC'Y INT'L L. ITS ANN. MEETING 116 (1965), *reprinted in*, 1 ROSALYN HIGGINS, THEMES AND THEORIES: SELECTED ESSAYS, SPEECHES, AND WRITINGS IN INTERNATIONAL LAW 153, 157–60 (2009); Sufyan Droubi, *The Role of the United Nations in the Formation of Customary International Law in the Field of Human Rights*, 19 INT'L CMTY. L. REV. 68, 87–90 (2017).

conversations in the Security Council, representing when the Council supports change or preservation of status quo. The three conversations will show that there is often little disagreement in the explanation of votes on how to interpret the resolution in relation to a specific situation, but considerable disagreement on the broader impact on the development of international law. Conversation refers to the intersubjective enterprise that the Security Council is engaged in: adopting, interpreting resolutions, and possibly also creating general norms.[3]

The Article examines explanation of votes both with traditional approaches to sources and interpretation within the discourse of public international law, as well as with an external perspective to understand explanation of votes as a social phenomenon. Part II places explanation of votes within the legal framework of the UN Charter and Security Council Provisional Rules of Procedure. Part III explains how the Security Council engages in the legal discourse (i.e., how to understand and interpret a norm). Considering that the Security Council in its engagement with the legal discourse not only deals with specific situations or disputes, Part IV explores how the Security Council may also contribute to change and development of general norms. Part V describes three different modes of conversation in the Council in order to elucidate how explanation of votes perform their double function of interpreting resolutions and contributing to the development of public international law. Part VI concludes my findings with how norms are socially constructed and subjected to change.

II. EXPLANATION OF VOTES WITHIN THE LEGAL FRAMEWORK OF THE UN CHARTER

A. *Conceptualizing Security Council Resolutions*

The Security Council may adopt resolutions that are binding.[4] Article 25 of the UN Charter provides that UN members shall carry out the decisions of the Security Council. As noted by Michael C. Wood, Security Council resolutions "are not legislation, nor are they judgments or 'quasi-judgments', nor are they treaties."[5] States may

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3. *See* STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 14 (1980); Efthymios Papastavridis, *Interpretation of Security Council Resolutions Under Chapter VII in the Aftermath of the Iraqi Crisis*, 56 INT'L & COMPAR. L.Q. 83, 96–100 (2007).

4. While the Security Council can, under Chapters VI and VII, adopt resolutions that are binding, this does not mean that all resolutions are binding. *See* Anne Peters, *The Security Council, Functions and Powers, Article 25*, *in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 792–94 (Bruno Simma et al. eds., 3d ed. 2012).

5. Michael C. Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK Y.B. U.N. L. 73, 79 (1998); *see also* Papastavridis, *supra* note 3, at 87–88, 102–03; Gregory H. Fox, Kristen E. Boon & Isaac Jenkins, *The Contributions of United*

adopt resolutions for different reasons, including the negotiation of shared expectations of mutuality.[6]

Resolutions that constitute decisions and involve authorisation may represent the will of the states that negotiated the resolution, but differ from treaties in the sense that, pursuant to Article 25 of the UN Charter, they entail obligations for all UN members.[7] A Security Council resolution may be considered an agreement among its members at the same time as it is a legislative or executive act directed against other states. This should be compared with Article 34 of the Vienna Convention on the Law of Treaties (VCLT), which provides that "[a] treaty does not create either obligations or rights for a third State without its consent."[8] Moreover, while a state can choose whether to become a party to a treaty, make reservations, or withdraw, this does not apply to a resolution. However, the analogy to a legislature would also be misleading since the Council is not adopting generally binding norms. When acting under Chapter VII, the Security Council makes recommendations and takes decisions relating to particular situations or disputes. It may impose obligations, reaffirm existing rules, apply existing rules, or depart from or override existing rules in particular cases, but it cannot establish new rules of general application.[9] Thus, any analogies to the process of legislation in a domestic system should be made with caution.

B. *Explanation of Votes*

Members of the Security Council may make statements in connection with their vote on a particular resolution, either before the vote or after.[10] The term "explanation of votes" is not explicitly used in the Security Council Provisional Rules of Procedure—the document refers to "discussion" and that there should be a "record of the discussion."[11] However, as members of the Security Council use the

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Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law, 67 AM. U. L. REV. 649, 726–29 (2018).

6. *See* Rossana Deplano, *Assessing the Role of Resolutions in the ILC Draft Conclusions on Identification of Customary International Law: Substantive and Methodological Issues*, 14 INT'L ORGS. L. REV. 227, 242 (2017).

7. *See* Papastavridis, *supra* note 3, at 87.

8. Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331.

9. *See* Wood, *supra* note 5, at 78; Michael Byers, *Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity*, 10 GLOB. GOVERNANCE 165, 176, 180–81 (2004); Per Ahlin, *From Libya to Syria – Did the Nato Forces in Libya Really Exceed the Mandate Given in SC Resolution 1973 (2011)?*, 30 JURIDISK TIDSKRIFT [JT] 479, 481–82 (2019) (Swed.).

10. *See* LORAINE SIEVERS & SAM DAWS, THE PROCEDURE OF THE UN SECURITY COUNCIL 357–58 (4th ed. 2014).

11. *Compare* Provisional Rules of Proc. of the Sec. Council, Rules 38, 60, U.N. Doc. S/96/Rev.7 (1983), *with* Rules of Proc. of the Gen. Assembly, Rule 128, annex III ¶ (g)(iii), annex IV ¶¶ 74–76, U.N. Doc. A/520/Rev.19 (2021).

term "explanation of votes" in relation to these statements,[12] and the term is used in scholarship,[13] it is also in the present Article. Statements made in the general debate preceding or following a vote are often the only source of reasons why a resolution has (or has not) been adopted.[14]

Members of the Council sometimes discuss in advance whether or not statements will be made at adoption meetings. They seldom make statements when a resolution has been adopted by consensus or when the president makes a statement on behalf of the council (a "presidential text").[15] When a consensus has been reached with great difficulty, some members usually expect that national statements should be avoided in order to preserve the image of consensus. In other instances, Council members may seek to avoid polemic exchanges by agreeing beforehand to skip the opportunity to make statements as a way to discourage other members from requesting to speak.[16] There are some exceptions where statements have been made after the adoption of resolutions by consensus or as a "presidential text."[17]

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12. *See Explanation of Vote on a UN Security Council Resolution Renewing Yemen Sanctions*, U.S. MISSION TO THE U.N. (Feb. 25, 2021), https://usun.usmission.gov/explanation-of-vote-on-a-un-security-council-resolution-renewing-yemen-sanctions/ [https://perma.cc/J35M-KTUG] (archived July 16, 2022) (using the term "explanation of vote" in relation to a statement released by the U.S. regarding a vote on a Security Council resolution focused on sanctions for Yemen); Ministry of Foreign Affs., *Explanation of Vote by Sweden at the UN Security Council Consideration of Draft Resolution S/2017/1060*, GOV. OFFS. OF SWED. (Dec. 18, 2017), https://www.government.se/statements/2017/12/explanation-of-vote-by-sweden-at-the-unsc-consideration-of-resoloution-S20171060/ [https://perma.cc/5CFR-ZJWN] (archived July 16, 2022) (using the term "explanation of vote" in relation to a statement released by Sweden regarding a vote on a Security Council resolution that addressed that status of Jerusalem); *Explanation of Vote on Draft Resolution on Women, Peace and Security*, PERMANENT MISSION OF EST. TO THE U.N. (Oct. 30 2020), https://un.mfa.ee/explanation-of-vote-on-draft-resolution-on-women-peace-and-security/ [https://perma.cc/66E7-VSUV] (archived July 16, 2022) (using the term "explanation of vote" in relation to a statement released by Estonia on a vote on a Security Council resolution regarding women's rights and security).

13. *See, e.g.*, Papastavridis, *supra* note 3, at 106.

14. *See* Daniel Moeckli & Raffael N. Fasel, *A Duty to Give Reasons in the Security Council: Making Voting Transparent*, 14 INT'L ORGS. L. REV. 13, 17 (2017).

15. *See* SIEVERS & DAWS, *supra* note 10, at 357–58.

16. *See id.*

17. *Contra* SIEVERS & DAWS, *supra* note 10, at 358 (explaining that statements by members are uncommon when resolutions are "adopted by consensus" or are presidential texts "co-sponsored by all fifteen Council members"); *see* U.N. SCOR, 56th Sess., 4344th mtg. at 2–4, U.N. Doc. S/PV.4344 (July 3, 2001) (showing that statements were made by representatives of the U.K., the U.S., and Tunisia when resolution 1360 was adopted unanimously with fifteen votes in favor); U.N. SCOR, 56th Sess., 4399th mtg. at 2, U.N. Doc. S/PV.4399 (Oct. 29, 2001) (showing that a statement was made by the U.K. representative when resolution 1375 was adopted unanimously with fifteen votes in favor).

An explanation of vote can be used by a permanent member as an alternative to casting a veto in order to express dissatisfaction,[18] thus serving a rhetorical function.[19] It is not an obligation, but under current practice it is usual that permanent members who cast a veto vote afterwards explain the rationale behind their veto.[20] In recent practice, it has become more common that representatives invited to the Council pursuant to Rule 37 (which includes states whose interests are specially affected) take the floor before or after the vote.[21] Even if explanation of votes is perceived as mere rhetoric this does not mean it is irrelevant—Ronald R. Krebs and Patrick Thaddeus Jackson note that state leaders who renege on their public rhetorical commitments may bear a substantial domestic and international cost.[22]

During the 1990s and early 2000s, unity among the members of the Security Council increased and almost all resolutions were adopted by unanimity.[23] It is not always that easy to reach unity. One example of the major powers diverging is Resolution 1441 (2002) concerning Iraq, where "the governments of China, France, and the Russian Federation took the unusual step of issuing a joint written statement on the interpretation . . . following its unanimous adoption and their individual explanations of vote."[24] Here, the three powers sought to

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18. *See* SIEVERS & DAWS, *supra* note 10, at 358; *see, e.g.*, U.N. SCOR, 49th Sess., 3351st mtg. at 11–12, U.N. Doc. S/PV.3351 (Mar. 18, 1994) (providing a statement by the U.S. representative expressing "great reluctance" in passing the resolution regarding the Hebron Massacre due to "objectionable" language in the resolution, which is an example of the use of a statement to express a member's dissatisfaction in lieu of exercising its veto power).

19. *See* STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 25 (4th prtg. 1999) (describing the use of rhetorical comments to explain an individual's intentions and position on an issue without anticipating surrounding circumstances to change as a result); LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 45 (2d ed. 1979); Ronald R. Krebs & Patrick Thaddeus Jackson, *Twisting Tongues and Twisting Arms: The Power of Political Rhetoric*, 13 EUR. J. INT'L RELS. 35, 37 (2007).

20. *See* SIEVERS & DAWS, *supra* note 10, at 358.

21. *See* U.N. SCOR, 60th Sess., 5158th mtg. at 12–13, U.N. Doc. S/PV.5158 (Mar. 31, 2005) (stating that the Sudanese representative was allowed to make a statement when resolution 1593 was adopted by consensus); U.N. SCOR, 67th Sess., 6854th mtg. at 5, U.N. Doc. S/PV.6854 (Nov. 7, 2012) (stating that the Somali representative was allowed to make a statement when resolution 2073 was adopted unanimously with fifteen votes in favor).

22. *See* Krebs & Jackson, *supra* note 19, at 38.

23. *See* Susan C. Hulton, *Council Working Methods and Procedure, in* THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY 237, 237–38 (David M. Malone ed., 2004).

24. *See* Deputy Permanent Rep. of China, Permanent Rep. of France & Permanent Rep. of the Russian Federation, Letter dated Nov. 8, 2002 from the representatives of China, France and the Russian Federation to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2002/1236 (Nov. 8, 2002) [hereinafter Joint Statement by China, France and Russia]; Hulton, *supra* note 23, at 237–38 (commenting on the "unusual step" of the Joint Statement issued by the governments of China, France, and the Russian Federation regarding the interpretation and explanation of votes relating to the unanimously adopted resolution 1441).

prevent the United States from using force without further Security Council authorisation, trying to keep the situation under Council control. Resolution 1441 (2002) shows that council members sometimes "[agree] to disagree."[25] While the US representative stated that "in the event of further Iraqi violations, this resolution does not constrain any Member State from . . . enforc[ing] relevant United Nations resolutions,"[26] China, France, and the Russian Federation stated jointly that "[i]n case of failure by Iraq to comply with its obligations . . . [i]t will be . . . for the Council to take a position."[27] They could still all agree on the text of the resolution; the disagreement was displayed openly elsewhere, in the explanation of votes.

Explanation of votes is a way for members of the Council to record potential disagreements which may become gradually more prevalent due to increasing disagreement between the major powers.[28]

III. CONSTRUCTING THE MEANING OF SECURITY COUNCIL RESOLUTIONS

A. *The Engagement of the Security Council in the Legal Discourse*

As argued above, Security Council resolutions cannot mechanically be classified as legislation, judgements, "quasi-judgments," or treaties. A key reason for this discussion is that the international legal regime is horizontal and decentralised in the sense that there is no "world government" and the key enforcers of international law are the states themselves. It could be argued that "[r]ules may still have relevance in a decentralized system if [the rules] represent *a common understanding* of states of what is acceptable behavior" and that "[e]ven if one perceives the law on the use of force as merely rhetoric, international law serves to limit the range of legal and political arguments politicians, diplomats, and legal experts use."[29] One could also use the similar phrase *shared understandings*.[30]

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25. *See* Byers, *supra* note 9, at 165–66 ("The members of the Security Council agreed to the ambiguities of Resolution 1441 with their eyes open, knowing that they were neither resolving nor papering over their differences. Instead, they were simply agreeing to disagree.").

26. U.N. SCOR, 57th Sess., 4644th mtg. at 3, U.N. Doc. S/PV.4644 (Nov. 8, 2002).

27. Joint Statement by China, France and Russia, *supra* note 24, at 2.

28. *See* U.N. SCOR, 66th Sess., 6498th mtg. at 3–10, U.N. Doc. S/PV. 6498 (Mar. 17, 2011) (providing an example of when council members record potential disagreements in the explanation of votes).

29. MARK KLAMBERG, POWER AND LAW IN INTERNATIONAL SOCIETY: INTERNATIONAL RELATIONS AS THE SOCIOLOGY OF INTERNATIONAL LAW 153–55 (2015) (emphasis added); *see* Kyle Rapp, *Law and Contestation in International Negotiations*, 46 REV. INT'L STUD. 672, 673 (2020).

30. *See* Papastavridis, *supra* note 3, at 97–98.

Even when a matter is contested, international law can "frame" arguments.[31]

The Security Council is arguably involved in a process of reading norms and, to the extent it influences norms, also in a process of writing norms. This could also be described as a norm negotiation process.[32] From this follows that we need to uncover Security Council members' common understandings in varying areas of international law. There are disagreements among the members, and there is also room for changes in the understanding of a certain norm and contestation. Explanation of votes is an essential part of how the Security Council engages with the legal discourse. Explanation of votes may help us not only to understand members' shared assumptions, practices, and conventions, but also issues of contestation and moments of change. The formation of international law, treaty law, as well as customary international law, is a "process of the struggle and cooperation of states."[33]

Assuming that the Security Council is engaged in a legal discourse, we need to further consider the actors and their relative power. Should one distinguish between the Council's permanent members and its rotating, non-permanent members?

The Security Council may appear as an unlikely place for legal discourse since it is designed to be as heterogeneous as possible, dominated by five countries with few commonalities, except that they were victorious in World War II and were briefly the only states with nuclear weapons.[34] However, Ian Johnstone argues "[a]ll that is necessary is that the members believe that they are in an ongoing relationship, and that they share a general understanding of the purpose of the enterprise in which they are collectively engaged."[35] Permanent members have learned from each other in working together and have developed shared understandings. Even though by definition the rotating non-permanent members are varied and heterogeneous, they still enter into an enterprise with fixed terms and conditions.[36]

A related matter is to distinguish between strategic argumentation used to justify already adopted positions on the one hand from true reasoning on the other, where actors seek to reach consensus based on shared understandings. This distinction is arguably unnecessary since states still need to legally justify their

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31. *See* Rapp, *supra* note 29, at 674–77.

32. *See* Antonio Arcudi, *The Absence of Norm Modification and the Intensification of Norm Contestation: Africa and the Responsibility to Prosecute*, 11 GLOB. RESP. TO PROTECT 172, 179 (2019).

33. GRIGORI I. TUNKIN, THEORY OF INTERNATIONAL LAW 114 (William E. Butler trans., 1974).

34. *See* Ian Johnstone, *The Power of Interpretative Communities*, *in* POWER IN GLOBAL GOVERNANCE 185, 193–94 (Michael Barnett & Raymond Duvall eds., 2005).

35. *Id.* at 194.

36. *See* Papastavridis, *supra* note 3, at 97–98.

behaviour.[37] This may lead to "argumentative self-entrapment," where states, by engaging in the discussion, become entrapped by the norms.[38] A state must use plausible legal arguments that would allow rational discourse. However, this assumes that the concerned actors are engaged in a truth-seeking discourse where they are prepared to change their own views of the world, their interests, and sometimes even their identities.[39]

Even though power is unevenly distributed between the five permanent members compared to the ten non-permanent members, all members are subject to public scrutiny where explanation of votes may serve an important function. Debates among the members are non-hierarchical in the sense that the arguments of each are entitled to equal consideration. All members are equal in the sense that they all have one vote; the presidency rotates among all members and the Security Council acts on behalf of all UN members.[40] It is always possible to make self-serving arguments, however they are not likely to be persuasive in a public setting, at least not if they are purely self-serving.[41] In other words, the engagement of the Security Council in the legal discourse does not eliminate disparities in material power among its members but arguably mitigates them by generating pressure on members to justify their positions.

B. *The Applicability of the Vienna Convention on the Law of Treaties (VCLT) to Security Council Resolutions*

Interpretation of legal texts includes textual, contextual, and teleological approaches.[42] Rules on interpreting Security Council resolutions are not codified. If there are any rules, they are even more uncertain than the rules of treaty interpretation prior to the VCLT. The wealth of judicial pronouncements and doctrine on treaty interpretation is absent in relation to Security Council resolutions.[43]

This subpart examines whether and how far the VCLT is applicable to Security Council resolutions. Several scholars argue that, even though the VCLT is not applicable to Security Council

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37. *See* Johnstone, *supra* note 2, at 453–54; *see also* Rapp, *supra* note 29, at 676.

38. *See* Thomas Risse, *"Let's Argue!": Communicative Action in World Politics*, 54 INT'L ORG. 1, 23 (2000); Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, *in* THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 1, 25–28 (Thomas Risse et al. eds., 7th prtg. 2007); Thomas Risse & Stephen C. Ropp, *International Human Rights Norms and Domestic Change: Conclusions*, *in* THE POWER OF HUMAN RIGHTS, at 234, 255–56; KLAMBERG, *supra* note 29, at 159–60.

39. *See* Risse, *supra* note 38, at 2.

40. *See* U.N. Charter arts. 24, 27; Johnstone, *supra* note 2, at 459, 461; Johnstone *supra* note 34, at 196.

41. *See* Risse, *supra* note 38, at 17; *see also* Rapp, *supra* note 29, at 673.

42. *See* Vienna Convention on the Law of Treaties, *supra* note 8, art. 31(1).

43. *See* Wood, *supra* note 5, at 74.

resolutions, its rules may serve as a starting point.[44] Special consideration may also be warranted when interpreting certain categories of treaties, such as founding documents of international organisations.[45]

To elaborate, one could consider the following options: first, Security Council resolutions could be treated as treaties.[46] A second option would be to apply the rules of the VCLT *mutatis mutandis*.[47] The third option would be based on a separate analytical framework adapted for resolutions that would use well-established interpretive methods.[48] The VCLT may provide a counter-paradigm against which the relevant principles and presumptions will be assessed.[49] For the purpose of this Article, it is argued that a separate analytical framework should be adapted for Security Council resolutions, taking into account generally accepted interpretive methods.

One should arguably consider the "subjective purpose," the collective intent of Security Council members, as well as the "objective purpose," which "reflects the fundamental purpose of the Council in the framework of Chapter VII, i.e. the maintenance of international peace and security."[50] The European Court of Human Rights (ECtHR) also noted the object of maintaining international peace and security, as set out in the first sub-paragraph of Article 1 of the UN Charter when interpreting Resolution 1546 (2004) in the *Al-Jedda* case.[51]

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44. *See* Jochen A. Frowein, *Unilateral Interpretation of Security Council Resolutions – A Threat to Collective Security?*, *in* LIBER AMICORUM GÜNTHER JAENICKE – ZUM 85. GEBURTSTAG 97–99 (Volkmar Götz et al. eds., 1998); KATINKA SVANBERG, *FN:S SÄKERHETSRÅD I RÄTTENS TJÄNST* [*The UN Security Council Serving in a Legal Capacity*] 39 (2014).

45. Michael Wood, *The Interpretation of Security Council Resolutions, Revisited*, 20 MAX PLANCK Y.B. U.N. L. 8 (2016).

46. *See* Papastavridis, *supra* note 3, at 87–88.

47. *See id.* at 88; *see also* Wood, *supra* note 5, at 95.

48. *See* Papastavridis, *supra* note 3, at 88.

49. *See id.* at 100; Wood, *supra* note 5, at 85–86; *see also* Fox, Boon & Jenkins, *supra* note 5, at 660–61; Stefan Kadelbach, *Interpretation of the Charter*, *in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 96 (Bruno Simma et al. eds., 3d ed. 2012); Peters, *supra* note 4, at 798; Hugo Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989: Part Seven*, 66 BRIT. Y.B. INT'L L. 1, 24–29 (1995); Maarten Bos, *The Interpretation of Decisions of International Organisations*, 28 NETH. INT'L L. REV. 1, 5, 11–13 (1981).

50. Papastavridis, *supra* note 3, at 99.

51. *See* Al-Jedda v. United Kingdom, 2011-IV Eur. Ct. H.R. 305, 374–75; Al-Dulimi v. Switzerland, App. No. 5809/08, ¶ 139 (June 21, 2016), https://hudoc.echr.coe.int/eng?i=001-164515 [https://perma.cc/TF9D-EF7Y] (archived Aug. 20, 2022); *see also* Wood, *supra* note 45, at 22–24; Ahlin, *supra* note 9, at 482, 486 ("[The Security Council] has, for example, an unlimited right to decide what actions amounts to a threat to the peace or a breach of the peace in accordance with article 39 to the Charter."). *See generally* RALPH ZACKLIN, THE UNITED NATIONS SECRETARIAT AND THE USE OF FORCE IN A UNIPOLAR WORLD: POWER V. PRINCIPLE (2010) (describing the history of the United Nations Secretariat and the "central role" of the Security Council and the United Nations "in the maintenance of international peace and security").

The International Court of Justice (ICJ)'s *Namibia* Advisory Opinion provides a foundation for interpretation of Security Council resolutions.[52] Notably, there is no reference to the VCLT in the Advisory Opinion, even though the treaty was adopted two years earlier. This does not appear to be a lapse since in other decisions the ICJ did rely on VCLT rules on interpretation as rules of customary international law when considering treaties. The Court's remarks appear to tend more towards the policy-oriented approach than that of the VCLT.[53] Similarly, the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber did not refer to the VCLT in the *Tadić* interlocutory appeal on jurisdiction in relation to the question of whether the ICTY statute refers only to international armed conflicts.[54] Finally, when the ECtHR in *Al-Jedda* had to interpret a Security Council resolution, it relied for guidance on the ICJ statement in the *Namibia* Advisory Opinion.[55] However, the ICJ has, in later opinions, referred to the VCLT when interpreting Security Council resolutions. In the advisory opinion on the unilateral declaration of independence in respect of Kosovo, the ICJ states that "the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance" in the interpretation of Security Council resolutions.[56] However, the "differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account."[57]

What relevance should one afford to the statements by international courts on this matter? Only the Security Council can give authentic interpretations of its resolutions.[58] In this regard, we may consider the statement by the Permanent Court of International Justice (PCIJ) from 1923: "'it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely

52. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, ¶ 114 (June 21).

53. *See* Wood, *supra* note 5, at 75.

54. *See* Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 71–93 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Wood, *supra* note 5, at 76; Papastavridis, *supra* note 3, at 92–93.

55. *Al-Jedda*, 2011-IV Eur. Ct. H.R. at 348, 361, 373–74.

56. *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 ¶ 94 (July 22).

57. *Id.*

58. *See* Wood, *supra* note 5, at 82–84, 91–92; SVANBERG, *supra* note 44, at 40; *see also* Moeckli & Fasel, *supra* note 14, at 29 ("There is not one central, superior judicial institution that would be charged with supervising the Security Council and that could *quash* its decisions. Nevertheless, there are manifold ways in which the legality of Security Council action may be (and indeed is) *reviewed* by various courts and quasi-judicial bodies." (emphasis in original)).

to the person or body who has power to modify or suppress it."[59] However, Anne Peters notes that "authentic" does not mean "authoritative" in the sense that the other actors would not be allowed to interpret the rule differently.[60] Although the "authentic" interpretation of the Council itself does not strictly bind other actors, it has more legal and political weight than interpretations given by other international or domestic actors—in other words it may have persuasive authority. Peters describes how the ICJ has frequently interpreted Council decisions, taking into account the "authentic" Council decision, without accepting to be bound by it.[61] Moreover, even if the ICJ may not revise a Security Council decision, it may still be entitled to determine the legal consequences of a Council resolution,[62] as illustrated by the *Namibia (South West Africa)* advisory opinion.[63]

In conclusion, the ICJ appears to apply a separate analytical framework for Security Council resolutions. Even though different weight may be given to different factors in comparison with the VCLT, the main building-blocks in all legal interpretation remain: text, context, and purpose. Views differ on how much weight one should give to these factors. Ian Johnstone argues that a strict textualist approach to interpretation is difficult to uphold in general, given the ambiguous nature of words and their imperfection as modes of communicating meaning; it is even more difficult in an international context.[64] Thus, one has to consider other methods of interpretation.

There are some similarities between treaties and Security Council resolutions when it comes to contextual interpretation. For instance, both contain a preamble.[65] Wood is somewhat cautious when he argues that "[g]iven the way that Security Council resolutions are drafted, less reliance can be placed upon the preambular language of resolutions as a tool for the interpretation of the operative part."[66] Security Council resolutions may also refer to and incorporate other documents—for example, reports of the Secretary-General. A difference compared to treaties is that the preamble to a resolution does not only state the aims: it also includes guidance. The preamble also mentions previous resolutions that form part of the context. As such, resolutions are often part of a series that is a prerequisite for understanding them.[67] Thus,

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59. Question of Jaworzina (Polish-Czechoslovakian Frontier), Advisory Opinion, 1923 P.C.I.J. (ser. B), No. 8, at 37 (Dec. 6); *see* Papastavridis, *supra* note 3, at 91.

60. *See* Peters, *supra* note 4, at 798;

61. *See id.*; Johnstone, *supra* note 2, at 457.

62. *See* Bos, *supra* note 49, at 7; Moeckli & Fasel, *supra* note 14, at 29–34.

63. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, ¶ 89 (June 21).

64. *See* Ian Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities*, 12 MICH. J. INT'L L. 371, 373–75 (1991).

65. *See* Papastavridis, *supra* note 3, at 101.

66. Wood, *supra* note 45, at 34.

67. *See* Wood, *supra* note 5, at 87; SVANBERG, *supra* note 44, at 39.

the context of a Security Council resolution may include "the aggregate of all the prior or subsequent Resolutions."[68] In the *Kosovo* Advisory Opinion, the ICJ relied on previous resolutions and the preamble in order to determine the purpose of the legal regime established by the resolution at hand.[69] To conclude this Part, the preamble and previous resolutions are relevant for contextual interpretation of Security Council resolutions.

As suggested above, teleological reasoning is suitable when interpreting Security Council resolutions. This also follows from the ICJ's statement in *Kosovo*: teleological interpretation should have a more prominent position when interpreting Security Council resolutions than it does in the interpretation of treaties.[70]
Scholars' views also diverge on where to find the object and purpose. The preamble is not relevant only for contextual interpretation; it may also give guidance on the object and purpose of a resolution.[71] However, caution is warranted since the preamble is often used as a dumping ground for proposals that were deemed inacceptable in the operative paragraphs.[72] As already indicated, we may use explanation of votes and background documents, such as reports of the UN Secretary-General and previous resolutions, to uncover the object and purpose of a resolution.[73]

To establish the collective intent of the Security Council, explanation of votes may provide relevant data. Wood argues that in the case of Council resolutions:

> given their essentially political nature and the way they are drafted, the circumstance of the adoption of the resolution and such preparatory work as exists may often be of greater significance than in the case of treaties. The Vienna distinction between the general rule and the supplementary means has even less significance than in the case of treaties.[74]

The Appeals Chamber in *Tadić* found the object and purpose in the terms of the Security Council resolution adopting the statute, but also in the statements of Security Council members regarding their

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68. Papastavridis, *supra* note 3, at 101.

69. *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 98 (July 22).

70. *See id.* ¶¶ 94, 98.

71. The ICJ had a similar reasoning in relation to a Memorandum of Understanding. *See* Maritime Delimitation in the Indian Ocean (Som. v. Kenya), Judgment, 2017 I.C.J. 3, ¶¶ 70, 75 (Feb. 2); *Kosovo*, 2010 I.C.J. ¶ 95.

72. *See* Wood, *supra* note 5, at 86–87, 90; Wood, *supra* note 45, at 34.

73. *See* Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 75 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Wood, *supra* note 5, at 90–91; SVANBERG, *supra* note 44, at 40.

74. Wood, *supra* note 5, at 93, 95; SVANBERG, *supra* note 44, at 42–43.

interpretation of the statute.[75] When the ICJ was asked to interpret an expression in a General Assembly resolution, it stated that the meaning was to be in the "object and purpose" of the resolution.[76] The Court thereafter sought the object and purpose based on its reading of the records of the proceedings of the General Assembly.[77] The ICJ appears to have adopted the same approach when interpreting Security Council resolutions. It emphasised in the *Namibia* Advisory Opinion, *inter alia*, that the discussion leading to the adoption of the Security Council resolution was relevant when determining the legal consequences of the resolution:

> The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been, in fact, exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked, and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.[78]

As noted above, there are no references to the VCLT in the *Namibia* Advisory Opinion or in the *Tadić* interlocutory appeal on jurisdiction,[79] while the Court did mention the VCLT in the *Kosovo* advisory opinion. In its advisory opinion on the unilateral declaration of independence in respect of Kosovo, the ICJ described the Security Council as a "single, collective body."[80] It mentioned relevant factors for interpretation and explained that "[t]he interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption."[81] Thus, explanation of votes is one factor in the interpretative process. The ICJ description of the Security Council as a "single, collective body" and the distinct process of adopting

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75. *See* Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 75 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (with reference to statements by representatives of France, the United States, and the United Kingdom); U.N. SCOR, 48th Sess., 3217th mtg. at 11–19, U.N. Doc S/PV.3217 (May 25, 1993).

76. Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶ 84 (Oct. 16).

77. *See id.* ¶ 85.

78. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, ¶ 114 (June 21). This statement was repeated by the Court in a later advisory opinion. *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 117 (July 22).

79. *See* Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 71–93 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Wood, *supra* note 5, at 75–76; Papastavridis, *supra* note 3, at 92–93.

80. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 94 (July 22).

81. *Id.*

resolutions go well with the argument that the Security Council is engaged in a legal discourse.

A resolution may be understood either as a "meeting of wills" or as the Security Council's collective view of a situation.[82] There are many instances when Council members have conflicting interests and fail to reach a consensus. As a result, the Council may pass a neutral and inconsequential resolution. What is the will, intent, and the purpose of a resolution in these situations? Such resolutions arguably reflect only the common will of the majority of the members of the Council and not its entirety.

A different and additional way of understanding explanation of votes is to categorize the practice as part of the preparatory works. To the extent the VCLT is analogously relevant to Security Council resolutions one may note that Article 32 provides that "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion."[83]

The preparatory works of Security Council resolutions include draft resolutions, letters to the Security Council, and "the verbatim record of the debate at the meeting, including statements made before or after the vote [explanations of vote]".[84] Votes in favour may be relevant to determine "the circumstances of its conclusion," which is a part of Article 32 of the VCLT. As indicated above, these records may also be part of teleological interpretation.[85] The preparatory works may be perceived as the elucidation of the collective intent of the Security Council.[86] Efthymios Papastavridis notes the following:

> The role of the *travaux préparatoires* in the elucidation of the collective intent of the Council attains the same status correspondingly. . . . Of particular importance in this regard are the statements of the Representatives of the Member States who were the drafters of the Resolution to be adopted. According to the common practices and the shared understandings of the community in place, these statements and subsequently the interpretations that the above States ascribe to the draft Resolution influence the other States, who they might base their concurring vote on them, and thus they have an advanced normative value in the relevant interpretive process.[87]

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82. *See* Papastavridis, *supra* note 3, at 87 ("In one sense, they do represent, like a treaty does, a meeting of wills, a coming together of the (possibly opposing) aspirations of the States whose representatives have negotiated their drafting. In another sense, however, they provide for obligations, which are incumbent upon the Member States of the Organization independently of their consent by virtue of Article 25 of the Charter and in stark contrast with the principle *pacta tertiis nec nocent nec prosunt* of the law of treaties.").

83. Vienna Convention on the Law of Treaties, *supra* note 8, art. 32.

84. Wood, *supra* note 5, at 93.

85. *See* SVANBERG, *supra* note 44, at 39.

86. *See* Papastavridis, *supra* note 3, at 105–06; *see also* Wood, *supra* note 5, at 93–94.

87. Papastavridis, *supra* note 3, at 105–06.

When the ICTY Appeals Chamber considered Security Council Resolution 827, which established the ICTY, it derived the object and purpose not only in the terms of the resolution adopting the ICTY Statute. The Tribunal also took account of the statements and resolutions leading up to the establishment of the Tribunal as well as the Report of the Secretary-General containing the statute and the statements of Security Council members regarding their interpretation of the ICTY Statute.[88]

To summarize, records of the debate in the form of explanation of votes may be relevant for interpretation. Regardless of whether they are brought in through teleological interpretation or under the heading of "preparatory works," such records and statements are used to uncover the intent of the Security Council and its members and thus also the purpose of the resolution at hand.

IV. CONTESTATION AND CHANGE

Describing the Security Council as engaged in a legal discourse ties well into constructivist literature in international and comparative politics. A key question for constructivists is "how and why new norms emerge and why actors might obey norms despite contrary material pressures."[89] The question is considered below.

It was argued above that explanation of votes may help to understand not only what the shared assumptions, practices, and conventions of the Security Council as a collective are, but also issues of contestation and moments of change. First, change may be understood as a social phenomenon. We need to consider how far actors are constrained by the environment (i.e., structure), and how far they change the structure. Change as a social phenomenon is often based on the tacit assumption that the world is getting better, but that is not necessarily always the case. A second and more internal perspective is how does our understanding of customary international law as a source of law incorporate explanation of votes and change?

A. *The Evolution of Norms as a Social Phenomenon*

If change is a process that involves structure as well as actors, we need to examine how far actors either support the existing structure or challenge it. Antje Wiener distinguishes between "*reactive contestation*, or the practice of objecting to norms, on the one hand, and *proactive contestation*, or the practice of critically engaging with norms,

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88. *See* Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 75 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Papastavridis, *supra* note 3, at 93, 105–06.

89. *See* Krebs & Jackson, *supra* note 19, at 39.

on the other."[90] Transposed to the Security Council, we need to consider which members protect the status quo and which seek to revise it. This relates to questions of power and hegemony.

For an emerging norm to reach the threshold and become accepted as law, "it must become institutionalized in specific sets of international rules and organizations."[91] Whether a certain norm reaches this threshold, or tipping point, depends on the how many states adopt the norm and which states: some states may be more critical towards a norm being adopted than others.[92] This relates to the discussion on "specially-affected states": should we, in assessing whether a norm is "accepted," emphasise the views of the powerful states or those of the states that are subjected to the exercise of power?[93]

Ideas of structure and agency are arguably central to any notion of power. Structure may impose constraints both overtly through compulsory and institutional power or covertly to the extent it entails social powers, values, and interpretations.[94] Ann E. Towns argues that:

> norms do not simply standardize state behaviors . . . ; norms also draw on and set up hierarchical social orders among states. . . . norms do not simply generate a more homogeneous society of like units—they simultaneously help differentiate and hierarchically order actors. Homogenizing and stratifying tendencies are mutually implicated in norms.[95]

Wayne Sandholtz argues that:

> a single great power cannot dictate norms, but agreement among the major states is usually a prerequisite for norm change. . . . Great powers can seize territory, cut off trade, and win wars. In that sense, they can force specific outcomes. Great powers can (like the rich and powerful in any society) frequently 'get away' with violating rules. But the power to break rules is not the same as the power to make rules. . . . Norms require assent, which means that even great powers cannot escape the process of argument and persuasion. Naturally, with

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90. ANTJE WIENER, CONTESTATION AND CONSTITUTION OF NORMS IN GLOBAL INTERNATIONAL RELATIONS 2 (2018) (emphasis added); *see also* Elin Jakobsson, Norm Acceptance in the International Community: A Study of Disaster Risk Reduction and Climate-Induced Migration) 44, 63–66 (Oct. 19, 2018) (Ph.D. dissertation, Stockholm University).

91. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 897, 900 (1998).

92. *See id.* at 900–01.

93. *See generally* Kevin Jon Heller, *Specially-Affected States and the Formation of Custom*, 112 AM. J. INT'L L. 191 (2018). Wiener uses the term "affected stakeholder" when describing "those who are morally entitled to contest the norms that govern them." WIENER, *supra* note 90, at 9.

94. *See* Immanuel Wallerstein, *The Inter-State Structure of the Modern World-System*, *in* INTERNATIONAL THEORY: POSITIVISM AND BEYOND 87, 100–01 (Steve Smith et al. eds., 1996); Michael Barnett & Raymond Duvall, *Power in International Politics*, 59 INT'L ORG. 39, 54 (2005).

95. Ann E. Towns, *Norms and Social Hierarchies: Understanding International Policy Diffusion "From Below"*, 66 INT'L ORG. 179, 179, 189.

respect to smaller states, the powers have resources, both 'carrots' and 'sticks,' with which to persuade. With respect to other major powers, however, the carrots and sticks are more costly and, therefore, less useable.[96]

The structure/agency dichotomy may be applied in different ways when analysing the UN Security Council. For the present purpose, the structure is understood as the international system and laws within which the actors operate. International law is not necessarily "good" in the sense that it may also reinforce asymmetries of power. As David Kennedy puts it: "[L]aw consolidates winnings, translating victory into right."[97] The states will, in this model, have a dual role. As members of the international community, they act as lawmakers and provide resources that create the structure. Structures and discourses are not possessed or controlled by any single state.[98] Individual states may also be perceived as actors, as illustrated by situations where they are instructed by the Security Council to act in a certain way. Thus, when categorizing a certain observation, it will not always be obvious whether it belongs to structure or agency.

B. *Contribution to the Formation of Customary International Law*

Explanation of votes may contribute to the formation of customary international law. A Security Council resolution may not only confirm the validity of international norms but also contribute to "the formation of customary norms by providing the elements of state practice or legal conviction that are essential in the process of custom-generation."[99] This can be done "by resolutions by which the Council either purports to impact, qualify or modify the existing legal position under international law."[100] The potential for the Council through an act of sanction to contribute to the emergence or consolidation of the customary status of a rule of international is arguably greater when the status of that rule is contested.[101] José E. Alvarez notes that "[t]here is no authority granted to any organ of the UN to enact or otherwise influence the making of customary law or the process for

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96. WAYNE SANDHOLTZ, PROHIBITING PLUNDER: HOW NORMS CHANGE 264, 266 (2007); *see also* discussion *infra* Part IV.B. Contribution to the Formation of Customary International Law.

97. DAVID KENNEDY, A WORLD OF STRUGGLE 10–11, 257 (2016); *see also* David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT'L L. 9, 39–40, 42 (1999).

98. *See* Barnett & Duvall, *supra* note 94, at 44.

99. Alexander Orakhelashvili, *The Acts of the Security Council: Meaning and Standards of Review*, 11 MAX PLANCK Y.B. U.N. L. 143, 145 (2007).

100. *Id.*; *see* SVANBERG, *supra* note 44, at 753.

101. *See* Maruša T. Veber, *The Making of Custom Through Sanctions of International Organisations*, *in* INTERNATIONAL ORGANISATIONS, NON-STATE ACTORS, AND THE FORMATION OF CUSTOMARY INTERNATIONAL LAW 284, 285 (Sufyan Droubi & Jean d'Aspremont eds., 2020).

deriving general principles of law,"[102] but this author still admits when discussing Resolutions 1373 (2001) and 1540 (2004) that the Security Council "is likely to have a potential impact on the underlying customary law that the Charter affirms."[103] Even though the Council may impose binding obligations that deviate from accepted international obligations, it could be argued that since the Council acts on behalf of all member states and over time has imposed consistent obligations, this has an effect on customary international law. The Council is an agent for the UN member states. Considering that it specified in eleven resolutions on Somali piracy that the authorisations provided in the resolutions "shall not be considered as establishing customary international law," it is suggested that in the absence of such a disclaimer, resolutions could have such an effect.[104] To assess under what circumstances this may happen, and its significance, we need to discuss the nature of customary international law and its nature as a source of law.

In 2012 the International Law Commission (ILC) began examining how norms of customary international law are to be identified. In its report from 2018,[105] the ILC addressed and acknowledged the role of international organisations in generating custom in draft conclusions 4(2) and 12.

There are consequences of states delegating authority to the Security Council. Should these consequences be attributed to the member states of the Council? If members cannot claim ownership, and evidence of custom cannot be attributed to international organisations, the acts would disappear into a legal black hole. A common criticism "of viewing international organization resolutions as evidence of custom is that they are statements divorced from action."[106] However, binding Security Council resolutions are not mere nonsense; they are

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102. JOSÉ E. ALVAREZ, THE IMPACT OF INTERNATIONAL ORGANIZATIONS ON INTERNATIONAL LAW 61, 63 (2017).

103. *Id.* at 119–20; *see* Fox, Boon & Jenkins, *supra* note 5, at 656 (stating that the Security Council is aware that customary international law may be affected by its resolutions, as indicated by the Security Council at times, including in certain resolutions, "disclaimer[s]" that the resolutions "shall not be considered as establishing customary international law").

104. Fox, Boon & Jenkins, *supra* note 5, at 656, 705–12, 729 (quoting S.C. Res. 2184, ¶ 14 (Nov. 12, 2014); S.C. Res. 2182, ¶ 21 (Oct. 24, 2014); S.C. Res. 2125, ¶ 13 (Nov. 18, 2013); S.C. Res. 2077, ¶ 13 (Nov. 21, 2012); S.C. Res. 2020, ¶ 10 (Nov. 22, 2011); S.C. Res. 1950, ¶ 8 (Nov. 23, 2010); S.C. Res. 1897, ¶ 8 (Nov. 30, 2009); S.C. Res. 1851, ¶ 10 (Dec. 16, 2008); S.C. Res. 1846, ¶ 11 (Dec. 2, 2008); S.C. Res. 1838, ¶ 8 (Oct. 7, 2008); S.C. Res. 1816, ¶ 9 (June 2, 2008)).

105. Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10 (2018) [hereinafter Rep. of the Int'l Law Comm'n].

106. Fox, Boon, & Jenkins, *supra* note 5, at 719.

themselves actions that create new legal obligations and may impose punitive measures for non-compliance.[107]

In relation to Security Council resolutions, Alexander Orakhelashvili argues that "if there is to be an impact on the state of applicable international law, or if the legal change is to be initiated, it is critically necessary to know what the precise intention of the Council is."[108] As previously argued, explanation of votes may be part of the evidence of customary international law and as such either support the status quo or be part of a change of the norm at hand. The role of international organisations in the formation of customary international law will be reviewed below.

The ICJ has, in a number of cases, utilised General Assembly resolutions to confirm the existence of the *opinion juris*, taking into account the resolutions' conditions for adoption.[109] In *Legality of the Threat or Use of Nuclear Weapons* the ICJ stated that "[t]o establish whether [a General Assembly resolution provides evidence important for establishing the existence of a rule or the emergence of an *opinio juris*] it is necessary to look at its content and the conditions of its adoption."[110] Among other factors, the ICJ took note of the number of negative votes and abstentions in the adoption of a resolution.[111] In the *Nicaragua* case, the ICJ stated "that the attitude [of States towards certain General Assembly resolutions] expresses an *opinio juris*."[112] In the same case, references were made to what states had argued in the Security Council; however, the statements noted by the ICJ appear to concern facts rather than legal norms.[113]

Passive conduct, restraint in acting, omission, or silence may constitute tacit acceptance if a state has not expressed dissatisfaction with an emerging norm over a longer period, provided that the state is aware of the practice of other states and the process of an emerging norm.[114] The ILC has stated that "[p]ractice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain

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107. *Id.* at 712, 719; *see* Gregory Fox, *Security Council Resolutions as Evidence of Customary International Law*, EJIL: TALK! (Mar. 1, 2018), https://www.ejiltalk.org/security-council-resolutions-as-evidence-of-customary-international-law/ [https://perma.cc/X5HY-98HC] (archived Aug. 1, 2022).

108. Orakhelashvili, *supra* note 99, at 156.

109. *See* Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶ 52 (Oct. 16); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 86–88 (July 9); MALCOLM N. SHAW, INTERNATIONAL LAW 66 (8th ed., Cambridge Univ. Press 2017).

110. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 70 (July 8).

111. *See id.* ¶¶ 70–71.

112. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 188 (June 27); *see also id.* ¶¶ 189–91, 201–02.

113. *See id.* ¶¶ 88–89, 91, 129, 231, 233–34.

114. *See* ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 88–89 (1971); DIANA AMNÉUS, RESPONSIBILITY TO PROTECT BY MILITARY MEANS – EMERGING NORMS ON HUMANITARIAN INTERVENTION? 110 (2008).

circumstances, *include inaction*."[115] However, the ILC cautions with the words "under certain circumstances," so that only deliberate abstention from acting may count as practice.[116] Moreover, the ILC has in a draft conclusion stated that forms of evidence of acceptance as law (*opinio juris*) include "[f]ailure to react over time to a practice . . . , provided that States were in a position to react and the circumstances called for some reaction."[117] Silence may indicate tacit consent as well as indifference to the particular matter.[118] This is relevant for the present Article since Security Council members may choose to remain silent during a debate.

The traditional perception of customary international law as a source of law is that it is based on the practice of states. The argument made above is that states, through their actions and statements in the Security Council, can contribute to the formation of customary international law. An alternative or possibly complementary approach would be that the Security Council as an organisation may contribute to the formation of customary international law. A key question is thus whether UN Security Council "resolutions are capable of reflecting general—rather than mere UN—customary law."[119] Rosalyn Higgins argues that resolutions adopted by the political organs of the UN may develop international law.[120] Her assumption is that the political organs of the UN provide a setting where one may identify their practice, either as a totality of their individual acts or as collective acts.[121] This is congruent with the ILC approach as illustrated by the statement that "[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law."[122] The ILC explains that the requirement of a general practice means "it is primarily the practice of States" that contributes to the practice.[123] The ILC added that the

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115. Rep. of the Int'l Law Comm'n, *supra* note 105, at 120 (emphasis added); *see also* TUNKIN, *supra* note 33, at 117 (arguing that inaction by states in certain situations can create a customary practice of international law).

116. Rep. of the Int'l Law Comm'n, *supra* note 105, at 133.

117. *Id.* at 140; *see also id.* at 141–42.

118. *See* TUNKIN, *supra* note 33, at 129 (quoting IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 7 (2d ed. 1973)); *see also* Grigorij I. Tunkin, *Remarks on the Juridical Nature of Customary Norms of International Law*, 49 CALIF. L. REV. 419, 423 ("Recognition or acceptance by a state of this or that customary rule as a norm of law is, in its juridical sense, an expression of the will of the state of its agreement to regard this or that customary rule as a norm of international law."). *See generally* DUSTIN A. LEWIS, NAZ K. MODIRZADEH & GABRIELLA BLUM, HARV. L. SCH. PROGRAM ON INT'L. L. & ARMED CONFLICT, QUANTUM OF SILENCE: INACTION AND JUS AD BELLUM (2019), https://pilac.law.harvard.edu/quantum-of-silence (last visited Aug. 1, 2022) [https://perma.cc/7WJG-64U6] (archived Aug. 1, 2022).

119. Droubi, *supra* note 2, at 87.

120. *See* HIGGINS, *supra* note 2, at 157–60; Droubi, *supra* note 2, at 87.

121. HIGGINS, *supra* note 2, at 153.

122. Rep. of the Int'l Law Comm'n, *supra* note 105, at 119.

123. *Id.* at 130.

practice of international organisations also contributes to the formation and expression of rules of customary international law, "most clearly where Member States have transferred exclusive competences to the international organization."[124] The proposal to include the practice of international organisations among the relevant sources of customary international law was controversial.[125] In an argument relevant to Security Council resolutions, Hugo Thirlway states that "[i]n one sense, a resolution represents, like a treaty, a meeting of wills . . . . In another sense, it is a unilateral act, an assertion of the will of the organ adopting it, or statement of its collective view of a situation."[126]

Jonathan Charney challenges the traditional view of customary international law and argues that "[r]ather than state practice and *opinio juris*, multilateral forums often play a central role in the creation and shaping of contemporary international law."[127] However, Charney cautions this approach by adding that "[s]ome may question the authority [of multilateral institutions] to legislate universally."[128] Wood builds upon Charney's argument that multilateral activities may generate state practice and evidence of *opinio juris*, thus "play[ing] a significant role in creating (and expressing) rules of [customary international] law."[129] Wood argues that in addition to the process whereby one takes into account the acts taken by states in connection with the activities of international organisations and the *opinio juris* that may be deduced, "the practice and *opinio juris* of international organizations themselves, as subjects of international law," may contribute to the formation of rules of customary international law.[130]

Evidence of *opinio juris* of states may also be found in connection with their acts, including verbal acts, within international organisations. Reactions by an international organisation to a breach of obligation which is not directed towards the organisation may indicate that the organisation believes that the norm has the status of a rule of customary international law.[131] "Indeed, statements or votes within international organizations are frequently cited, especially by writers, also as evidence of *opinio juris*." [132]

There are arguably two competing approaches to whether Security Council silence in relation to *jus ad bellum* matters. On the

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124. *See id.* at 131.

125. *See* Deplano, *supra* note 6, at 234–35.

126. Hugo Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989: Part Eight*, 67 BRIT. Y.B. IN'TL L. 1, 29 (1996).

127. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 543 (1993); *see* Michael C. Wood, *International Organizations and Customary International Law*, 48 VAND. J. TRANSNAT'L L. 609, 610 (2015).

128. Charney, *supra* note 127, at 551; *see* Wood, *supra* note 127, at 610.

129. Wood, *supra* note 127, at 611.

130. *Id.* at 614–15.

131. *See* Veber, *supra* note 101, at 303.

132. Wood, *supra* note 127, at 615.

one hand, one can argue that since the Security Council has a responsibility to maintain international peace and security; silence indicates that the use of force was lawful. On the other hand, one must consider the decision-making procedure in the Council where the veto power makes it difficult to read too much into inaction. Dustin A. Lewis, Naz K. Modirzadeh, and Gabriella Blum argue that, as with States, the silence of the Security Council can, in principle, "speak."[133]

How can we transpose this discussion to Security Council resolutions and explanation of votes? The Security Council appears to be aware of the possibility that a specific provision in the text of a resolution may contribute to the development of customary international law,[134] an observation to be revisited in Part V.B.2. It is arguably possible to discern Security Council practice but more difficult to establish the Council's *opinio juris*, especially when Council members may have voted differently and given different reasons for their votes even if they have voted the same way. Thus, to the extent the Security Council may contribute to customary international law as a collective, it is in the form of *usus*, and it is more difficult to establish a collective Security Council *opinio juris*. The statements of Security Council members are, instead, the *opinio juris* of individual states.

To conclude, the Security Council may, through the adoption of resolutions and by debating, affect international law. Security Council resolutions and explanation of votes may be used to protect the status quo as well as serve as agents of change. Part V will examine both possibilities in relation to a selection of conversations in the Security Council.

V. TRAJECTORIES OF CONVERSATIONS IN THE SECURITY COUNCIL

The fact that explanation of votes may serve as a means for interpreting Security Council resolutions in relation to a specific dispute as well as contribute to the formation of customary international law may create tensions.

A Security Council member may in a particular dispute want to argue that a norm exists and is applicable to the situation, or at least that there is no legal norm prohibiting certain action. However, the same Security Council member may fear, and want to prevent, the same norm being invoked by other states in a different dispute where alliances and interests may differ. There are different techniques to accomplish this. One is to argue that the norm has limited scope; a second is to assert that the dispute at hand is of extraordinary nature and thus the proposed action cannot create a precedent. Explanation of votes may serve as the vehicle for Security Council members to make these arguments. In other words, one may create interpretative data

133. LEWIS, MODIRZADEH & BLUM, *supra* note 118, at 41.
134. *See* S.C. Res. 2146, ¶ 9 (Mar. 19, 2014); Deplano, *supra* note 6, at 239–40.

that supports a narrow reading of a norm and/or deny that certain action follows from legal conviction, arguing rather that it is a matter of policy choice.

To understand the double function of Security Council resolutions and explanation of votes, this Part will examine three conversations and related Security Council debates. The primary purpose of these accounts is not to finally determine the legal issues debated, but rather to describe different modes of conversation within the Council. The portrayal of the Security Council engaged in a legal discourse entails its being in an ongoing and continuous relationship. Thus, we cannot reduce a conversation to one resolution at a given time. Instead, the following account seeks to examine how the debate about, and the positions of Council members on, a particular matter may evolve or remain the same over time. When reaching conclusions on the function that the Security Council performs in these three conversations we consider different features of the debates: (i) shared Council assumptions, practices and conventions prior to the debate, (ii) matters and issues of contestation within the Council, (iii) contributions to the building the meaning of the resolutions in relation to the specific disputes at hand, (iv) the potential contribution to the formation of customary international law, and (v) Council members' willingness to change their views of the world, their interests and their identities.

A. *Conversation Where States Seek Change*

The first conversation concerns the permissibility to use force against a non-state actor as a response to large-scale terrorist acts. While Article 51 provides that self-defence can only be triggered by an armed attack on a state, it does not specify the origin of the attack: does it have to be a state or can it be a non-state actor? This is arguably a matter regulated in customary international law, where the debate in the Security Council is relevant.

The shared assumption, at least prior to 9/11, was that self-defence concerned inter-state use of force, however the United States (and some other countries outside the Council) challenged that view. From the 1970s, Israel increasingly adopted a wider understanding of the "harbouring" rationale according to which self-defence could be exercised against a host State that "was either unwilling *or unable* to prevent cross-border attacks from taking place."[135] In the 1980s the United States moved gradually towards the same view with the "Shultz doctrine," claiming a right to use force against armed attacks

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135. *See* TOM RUYS, 'ARMED ATTACK' AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 401 (2010); *see also* Christian J. Tams, *Self-Defence Against Non-State Actors: Making Sense of the 'Armed Attack' Requirement, in* 1 SELF-DEFENCE AGAINST NON-STATE ACTORS 90, 138 (Mary Ellen O'Connell et al. eds., 2019).

by terrorists, including "force against foreign countries that 'support, train, or harbour [them].'"[136] Thus, the United States had within the Council a somewhat diverging view. At the time, the problem of who the aggressor was normally was not addressed directly, rather in an inter-State context where some State nexus was enough.[137]

Resolution 1368 (2001) was adopted as a response to the 9/11 attacks, prompting questions about its interpretation and contribution to customary international law. Its preamble uses key phrases such as "threats to international peace and security" and "*[r]ecognizing* the inherent right of individual or collective self-defence."[138] This indicates that the Security Council acknowledged that the requirements of Article 51 were met. As interpreters, what can we deduce from the Security Council debate at the time the resolution was adopted (i.e., September 12, 2001)? It is striking—and maybe even surprising—that no Security Council member, not even the United States, used phrases such as "armed attack" or "self-defence" in the debate.[139] During the debate the Russian representative was the member that used the most apparent language and phrases that one associates with Chapter VII and Article 51: he used the phrase "act of aggression."[140] The US representative certainly used harsh language such as "[w]e will make no distinction between the terrorists who committed these acts and those who harbour them" but also language that could pass with the law enforcement paradigm and not necessarily with the self-defence paradigm: "We will bring those responsible to account."[141] This is notable since the North Atlantic Trade Organization (NATO) the same day invoked Article 5 of the North Atlantic Treaty which presupposes that an armed attack has occurred, and text of Resolution 1368 uses the phrase "self-defence."[142] Why were the states not using these phrases in the Security Council debate?

One plausible explanation is that Council members at the time wanted to support the United States to use force in that particular situation but did not necessarily wish to change international law in general. An additional explanation relates to the persons involved. The US ambassador at the time of the adoption of the resolution was James B. Cunningham who had been appointed by the previous president, Bill Clinton, not the current incumbent, George W. Bush. Bush

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136. Tams, *supra* note 135, at 138.
137. *See id.*
138. S.C. Res. 1368, pmbl. (Sept. 12, 2001).
139. *See* U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/PV.4370 (Sept. 12, 2001).
140. *Id.* at 5.
141. *Id.* at 7–8.
142. *See* Suzanne Daley, *After the Attacks: The Alliance; For First Time, NATO Invokes Joint Defense Pact with U.S.*, N.Y. TIMES (Sept. 13, 2001), https://www.nytimes.com/2001/09/13/us/after-attacks-alliance-for-first-time-nato-invokes-joint-defense-pact-with-us.html [https://perma.cc/9BYC-WWKK] (archived Aug. 1, 2022); S.C. Res. 1368, *supra* note 138.

appointed John Negroponte to be US ambassador to the United Nations in February 2001, but after substantial opposition from Senate Democrats the nomination was not ratified by the Senate until September 15, 2001, four days after the September 11, 2001 attacks.[143] According to the account of Swedish ambassador Pierre Schori, Resolution 1368 (2001) was drafted by the French ambassador Jean-David Levitte and the UK Ambassador Jeremy Greenstock without consultation with their respective capitals. Levitte and Greenstock had asked Cunningham if the resolution would be a blanket proposal to attack Afghanistan and Cunningham had responded no.[144] The idea was that the United States would first try to have Usama Bin Laden extradited from Afghanistan.[145] Thus, it appears that the representatives in the Security Council, due to the speed of events, were temporarily acting in a legal discourse somewhat independently from their respective capitals. This may partly explain the difference in tone and message during September 2001 when what was said in the capitals, in the Council, and by NATO is compared.

Did Resolution 1368 (2001) and the ensuing actions taken by states change the law on the use of force? Even though the US representative used cautious language when Resolution 1368 (2001) was adopted, the tone changed four weeks later when the United States used force against and in Afghanistan. Writing to the president of the Security Council on October 7, 2001, the US representative stated that the country "has initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001,"[146] which are phrases and requirements present in Article 51 of the UN Charter.[147]

The widespread acceptance by other states of the US action could have "reflected a change in customary international law, meaning that international law [would accept] the use of force against a non-state actor as a response to large-scale terrorist acts."[148] The Security

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143. Dan Collins, *Bush Taps Negroponte for Iraq Post*, CBS NEWS, (Apr. 13, 2004), https://www.cbsnews.com/news/bush-taps-negroponte-for-iraq-post/ [https://perma.cc/3BVP-2R8V] (archived Aug. 1, 2022).

144. *See* PIERRE SCHORI, DRAKSÅDDENS ÅR: 11 SEPTEMBER, IRAKKRIGET OCH VÄRLDEN EFTER BUSH [*The Year of the Dragon's Teeth: September 11, The Iraq War and the Post-Bush World*] 53 (2008).

145. *See* Major Garrett & Tom Mintier, *No Negotiations, U.S. Tells Taliban*, CNN (Oct. 1, 2001), http://edition.cnn.com/2001/WORLD/asiapcf/central/10/01/ret.us.taliban/index.html [https://perma.cc/VD8B-2X24] (archived Aug. 1, 2022).

146. Permanent Rep. of the U.S. to the U.N., Letter dated Oct. 7, 2001 from the Permanent Rep. of the U.S. to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001).

147. U.N. Charter, art. 51.

148. Mark Klamberg, *International Law in the Age of Asymmetrical Warfare, Virtual Cockpits and Autonomous Robots*, *in* INTERNATIONAL LAW AND CHANGING PERCEPTIONS OF SECURITY 152, 155–56 (Jonas Ebbesson et al. eds., 2014); *see The*

Council was in a sense writing or adjusting customary international law. On the other hand, it is questionable whether this right to self-defence may be extended for years without geographical limitations.[149] A second, less radical, approach supported by US statements is that the *de facto* government of Afghanistan at the time of the September 11 attacks was complicit and responsible for the attacks. This would mean that the traditional interpretation of Article 51 is largely intact. At the same time, such an interpretation would arguably exclude the use of force outside the territory of Afghanistan under the parole of "war against terrorism."[150] Taking this second approach would suggest that the Security Council was only reading law, and the preambular paragraph of the resolution is an example of authoritative treaty interpretation. There is also a third position, namely that the United States should have sought prior authorisation for the use of force by the Security Council and, lacking such authorisation, US action against Afghanistan does not meet the requirement of self-defence.[151]

To determine whether a change in customary international law has happened, we arguably need to examine subsequent state practice and statements. Even US antagonist Russia has expressed some support for the US position,[152] driven by their own security concerns. The matter remains subject to ongoing debate, outside and within the Security Council, including the Council's response to the 2015 IS/DAESH attacks in Sousse, Ankara, Beirut, over Sinaï, in Beirut, and in Paris when it adopted Resolution 2249 (2015). The resolution was adopted in formal unanimity. Compared to other, earlier

Obama Administration and International Law, U.S. DEP'T OF STATE (Mar. 25, 2010), https://2009-2017.state.gov/s/l/releases/remarks/139119.htm [https://perma.cc/9STG-J3B5] (archived Aug. 1, 2022).

149. *See* Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 858 (2009) ("In addition to exchange, intensity, and duration, armed conflicts have a spatial dimension.").

150. *See* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 746–47 (9th ed. 2019); OVE BRING, MARK KLAMBERG, SAID MAHMOUDI & PÅL WRANGE, SVERIGE OCH FOLKRÄTTEN [*Sweden and International Law*] 197–99 (6th ed. 2020); MARKUS GUNNEFLO, THE LIFE AND TIMES OF TARGETED KILLING 197–98 (2014).

151. *See* Said Mahmoudi, *International Use of Force: Quo Vadis?*, 15 JURIDISK TIDSKRIFT [JD] 341, 348–49 (2003) (Swed.); Said Mahmoudi, *Self-Defence and International Terrorism*, 48 SCANDINAVIAN STUD. L. 203, 206 (2005).

152. *See Statement by Vassily Nebenzia, Permanent Representative of Russia to the United Nations at the UN SC Members Arria Formula Meeting "Upholding the Collective Security of the UN Charter: The Use of Force in International Law, Non-State Actors and Legitimate Self-Defense"*, PERMANENT MISSION OF THE RUSSIAN FEDERATION TO THE UNITED NATIONS (Feb. 24, 2021), https://russiaun.ru/en/news/selfdefense24022021 [https://perma.cc/4NKJ-B5F7] (archived Aug. 1, 2022) ("The issue of the use of article 51 against non-state actors is a difficult one, because this article was not intended for this purpose . . . It was drafted in order to describe the right of self-defense against armed attacks of States. However the language of this article allows for a broader interpretation. This broader interpretation became practical after 9/11, which demonstrated that an attack of terrorists may rise to the level of an armed attack of a State. It was confirmed in SC resolution 1368 (2001).").

resolutions authorising the use of force, the resolution contains the phrase "all necessary measures," while words such as "decides" and "authorizes" are absent. Further, the resolution does not use the "acting under Chapter VII" phrase which is normally used when the Council authorises binding action or does something. Instead, it "calls upon" states to "take all necessary measures."[153] The resolution creates a constructive ambiguity as it can be used to provide political support for military action without endorsing any particular legal explanation on which such action can be based or providing legal authority from the Council itself.[154] The explanation of votes reveals that while France and the United Kingdom invoked the right of self-defence in accordance with Article 51 of the UN Charter,[155] the United States referred to the contested "unwilling or unable" doctrine by stating that "the Al-Assad regime in Syria has shown that it cannot and will not suppress that threat, even as it undertakes actions that benefit recruitment by extremists."[156] In contrast, the Russian representative stated "in our view, the French resolution is a political appeal, rather than a change to the legal principles underlying the fight against terrorism."[157] The explanation of votes reveals that Western powers were arguing for a more expansive understanding of the right to self-defence while Russia was trying to reduce any potential change in this regard. Compared to the period before 9/11, it appears that more states now have changed their views of the world, interests, and identities as part of the "war on terror." While some states may previously have perceived themselves as neutral bystanders, now they increasingly perceive that they may be at the receiving end of terrorist acts, and as such, parties to the "war on terror." Even though we may identify different positions among the states, there appears to be a clear shift in opinion with a greater and more explicit acceptance of the use of force against non-state actors in response to large-scale terrorist acts.

There is not full agreement among the members of the Council on the permissibility of force against a non-state actor, yet the shared assumptions of the Council appear to have adjusted over time, contributing to a potential change in how to counter large-scale terrorist acts. As such, explanation of votes may be an agent of change.

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153. S.C. Res. 2249, ¶ 5 (Nov. 20, 2015).

154. Dapo Akande & Marko Milanović, *The Constructive Ambiguity of the Security Council's ISIS Resolution*, EJIL: TALK! (Nov. 21 2015), https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/ [https://perma.cc/6ABY-HWMK] (archived Aug. 1, 2022); *see* S.C. Res. 2249 (Nov. 20, 2015).

155. U.N. SCOR., 70th Sess., 7565th mtg. at 2, 9, U.N. Doc. S/PV.7565 (Nov. 20, 2015).

156. *Id.* at 4.

157. *Id.* at 5.

B. *Conversation with Concurring Positions Rejecting Change*

The second conversation concerns the use of coercive powers on the seas. This use is illustrated by the efforts to counter Somali piracy in Resolution 1816 (2008) and to prevent the illicit export of crude oil from Libya in Resolution 2146 (2014).[158] These resolutions and debates were chosen since they illustrate how the Security Council is aware that its resolutions may potentially influence the formation of customary international law.

Concerning the exercise of power and jurisdiction on the seas, there are several shared assumptions, practices, and conventions, as codified in the United Nations Convention on the Law of the Sea (UNCLOS). However, this does not imply conformity in the interests of states: coastal states guard the right and sovereignty of coastal states in the territorial sea more than do states that may project naval power to other parts of the world.

Consider first the interpretation of Resolution 1816 (2008) and Resolution 2146 (2014). The Security Council invoked Chapter VII when it decided in the former that states cooperating with the Transitional Federal Government of Somalia might enter the territorial waters of Somalia and use "all necessary means to repress acts of piracy and armed robbery."[159] It is clear from the text of the resolution and is emphasised in the statements of the representatives of Indonesia, Libya, and China that the resolution only concerns the specific situation of piracy and armed robbery off the coast of Somalia.[160] This would create an exception in relation to the sovereignty of the coastal state (i.e., Somalia) over its territorial sea.[161] Similarly, the Security Council acted under Chapter VII when in Resolution 2146 (2014) it authorized:

> Member States to inspect on the high seas vessels designated by the [Sanctions Committee previously established by the Council] . . . and authorize[d] Member States to use all measures commensurate to the specific circumstances, in full compliance with international humanitarian law and international human

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158. *See* S.C. Res. 1816, *supra* note 104; S.C. Res. 2146, *supra* note 134. Similar resolutions and debates may be found in relation to the other ten resolutions on Somali piracy. *See* S.C. Res. 1838, *supra* note 104, ¶ 8; S.C. Res. 1846, *supra* note 104, ¶ 11; S.C. Res. 1851, *supra* note 104, ¶ 10.; S.C. Res. 1897, *supra* note 104, ¶ 8; S.C. Res. 1950, *supra* note 104, ¶ 8; S.C. Res. 2020, *supra* note 104, ¶ 10; S.C. Res. 2077, *supra* note 104, ¶ 13; S.C. Res. 2125, *supra* note 104, ¶ 13; S.C. Res. 2182, *supra* note 104, ¶ 21; S.C. Res. 2184, *supra* note 104, ¶ 14; *see also* Anna Petrig, *Piracy*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 843, 854–55 (Donald Rothwell et al. eds., 2015); Fox, Boon & Jenkins, *supra* note 5, at 656.

159. *See* S.C. Res. 1816, *supra* note 104, ¶ 7(b).

160. *See* U.N. SCOR, 63rd Sess., 5902d mtg. at 2–5, U.N. Doc S/PV.5902 (June 2, 2008).

161. *See* U.N. Convention on the Law of the Sea art. 2, Dec. 10, 1982, 1833 U.N.T.S. 397.

rights law, as may be applicable, to carry out such inspections and direct the vessel to take appropriate actions to return the crude oil.[162]

This part of the resolution appears to override Article 92 of UNCLOS, which provides that ships are under the exclusive jurisdiction of the state under whose flag they sail.[163] The representative of Argentina emphasised that the resolution only covers vessels illegally transporting oil and designated by the Sanctions Committee, no other situation.[164] The Chinese member underlined that, pursuant to the resolution, states acting under the resolution should first seek the consent of the vessel's flag State.[165]

We will now turn to the potential impact of the resolutions on customary international law. If put forward with no caveat, these Security Council resolutions could contribute to an erosion under customary international law of the exclusive jurisdiction of the flag state on the high seas and exclusive rights of coastal states in their territorial waters. The Security Council appears to be aware of this risk. When discussing piracy off the coast of Somalia, the representatives of Indonesia, Vietnam, and China made it clear that the resolution applies only to this situation and does not change the general rules under customary international law and/or UNCLOS in this regard.[166] Resolution 1816 (2008) provides that the resolution "shall not be considered as establishing customary international law."[167]

Similarly, during the debate on smuggling from Libya, the representatives of Argentina, Russia, and China raised their concerns.[168] Resolution 2146 (2014) also provides that the "resolution applies only with respect to vessels that are the subject of a designation made by the [Sanctions] Committee" and "underscores in particular that this resolution shall not be considered as establishing customary international law."[169]

Nations such as the United States, the United Kingdom, and France with the ability, and in some cases an interest, to project naval power to other parts of the world are silent on this matter. Thus, we can see a tension between coastal states on one hand (that are also members of or associated with the Non-Aligned Movement) and maritime (Western) powers on the other. As opposed to the

162. S.C. Res. 2146, *supra* note 134, ¶ 5.
163. *See* U.N. Convention on the Law of the Sea, *supra* note 161, art. 92(1).
164. *See* U.N. SCOR, 69th Sess., 7142d mtg. at 2, U.N. Doc.S/PV.7142 (Mar. 19, 2014).
165. *See id.* at 2–3.
166. *See* U.N. SCOR, 63d Sess., 5902d mtg. at 2–5, U.N. Doc. S/PV.5902 (June 2, 2008).
167. S.C. Res. 1816, *supra* note 104, ¶ 9.
168. *See* U.N. SCOR, 69th Sess., 7142d mtg. at 2–3, U.N. Doc.S/PV.7142 (Mar. 19, 2014).
169. S.C. Res. 2146, *supra* note 134, ¶ 9.

conversation on terrorism, there is less pressure on the states to change their views of the world, interests, or identities.

By reading Resolution 1816 (2008), Resolution 2146 (2014), and the debates on the resolutions, the reasonable conclusion is that states believe that Security Council resolutions may influence the formation of customary international law. If they want to prevent such developments, they will need to make this clear both during the debate and, if possible, in the text of the resolution. In these instances, Council members explicitly stated that authorisations under the resolutions concerned only the situations at hand and there was no support for change in general. As such, the explanation of votes contributed to preserving the status quo.

C. *Conversation Oscillating between Conflicting Positions and Convergence*

The final conversation concerns the legality of intervening with military means to protect human security within a state against international crimes such as genocide, crimes against humanity, and war crimes, often referred to as "humanitarian intervention" or couched within the concept "responsibility to protect." This subpart examines three debates in the Security Council where the resolutions directly or indirectly dealt with "humanitarian intervention" or "responsibility to protect." Two of the debates concerned Kosovo and the third, Libya.

The first debate concerned the Kosovo war and is of particular interest for this Article: the NATO bombing campaign that lasted from 24 March to 11 June 1999.[170] NATO abstained from tabling a resolution prior to the bombing as Russia and China threatened to veto such a resolution.[171] When the bombing started, the Russian Federation tabled draft resolution S/1999/328. This was rejected by the Security Council on 26 March 1999 (three members in favour, twelve against whereof three with veto power).[172] Opposition to the concept of humanitarian intervention was voiced by the G77.[173] Council members' statements somewhat clarify the nature of the conflicting positions. The US representative described the NATO intervention as "justified" and "necessary to stop the violence and to prevent a further

170. MICHAEL J. BOYLE, VIOLENCE AFTER WAR: EXPLAINING INSTABILITY IN POST-CONFLICT STATES 175 (Johns Hopkins Univ. Press 2014).

171. *See* Ove Bring, *Should NATO Take the Lead in Formulating a Doctrine on Humanitarian Intervention?*, NATO REV., Autumn 1999, at 24, 25–26.

172. U.N. SCOR., 54th Sess., 3989th mtg. at 6, U.N. Doc. S/PV.3989 (Mar. 26, 1999).

173. *See* Group of 77 at the U.N., *Declaration on the Occasion of the Twenty-Third Annual Ministerial Meeting of the Group of 77*, ¶ 69 (Sept. 24, 1999).

deterioration of peace and stability in the region."[174] The UK representative stated that "[i]n the current circumstances, military intervention is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe."[175] The representative of Argentina argued that there is an "obligation to protect and ensure respect" for international humanitarian law and human rights,[176] language similar to what was used later in 2001 by the International Commission on Intervention and State Sovereignty (ICISS).[177] Referring to the previous Council resolution, the representative of the Netherlands rejected the contention that the NATO bombings constituted unilateral use of force.[178] Russia described the NATO intervention as a "circumvention of the Security Council[,] . . . a real threat to international peace and security and a gross violation of the United Nations Charter and other basic norms of international law."[179] Similarly, the Chinese representative argued that the NATO action constituted a blatant violation of the UN Charter and challenged the authority of the Security Council.[180] This debate and other statements made outside the Council show fundamental disagreement in the situation at hand but not necessarily a will of the states taking part in or supporting the NATO bombings to change international law. The use by the UK representative of the word "exceptional" could be an attempt to reconcile the tension between interpreting the UN Charter, bringing this specific situation outside of the core area of prohibited conduct, while at the same time not seeking to change customary international law. None of the states supporting the NATO bombings appear to have made an attempt to that effect.

However, conversation in the Council continued in subsequent debates. When the Security Council, with Resolution 1244 (1999), established the United Nations Interim Administration Mission in Kosovo several states emphasised the Council's role and involve-

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174. U.N. SCOR, 54th Sess., 3989th mtg. at 5, U.N. Doc. S/PV.3989 (Mar. 26, 1999).

175. *Id.* at 7.

176. *See id.*

177. *Compare id., with* INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBITITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY viii, xii–xiii, 11–12 (2001) [hereinafter THE RESPONSIBILITY TO PROTECT REPORT]. For a general overview of the Responsibility to Protect, the ICISS Report contains a synopsis that states: "The foundations of the responsibility to protect, as a guiding principle for the international community of states, lie in: . . . specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law." THE RESPONSIBILITY TO PROTECT REPORT xi.

178. *See* U.N. SCOR, 54th Sess., 3989th mtg. at 4, U.N. Doc. S/PV.3989 (Mar. 26, 1999).

179. *Id.* at 5.

180. *See id.* at 9.

ment.[181] The resolution set out a political process for establishing self-governing institutions in Kosovo, while it still appeared to presume that Kosovo would remain a part of the Federal Republic of Yugoslavia. NATO states such as Canada and the Netherlands together with like-minded states such as Slovenia expressed the view that the resolution was part of a development in international law with greater weight for the respect for human rights in relation to sovereignty. The Netherlands representative stated that "[o]ne day, when the Kosovo crisis will be a thing of the past, we hope that the Security Council will devote a debate to the balance between respect for national sovereignty and territorial integrity on the one hand and respect for human rights and fundamental freedoms on the other hand, as well as to the shift [in that balance]."[182] However, these statements arguably relate rather to and constitute an attempt to *ex post facto* legitimize the intervention in 1999; they are less about the future status of Kosovo.[183] Reading the debate on Resolution 1244 (1999) one will not find a common position among Security Council members on the controversial issue of humanitarian intervention. However, we will find that states were engaged in the double function of Security Council resolutions and explanation of votes by making arguments that relate both to the future interpretation and application of the resolution, as well as to matters that pertain to the application and interpretation of international law beyond the situation at hand. In other words, the statements by states such as Canada, the Netherlands, and Slovenia may be perceived as attempts to influence the formation of customary international law in relation to humanitarian intervention.

The debates reveal that Council members appear to believe that they are in an ongoing relationship and conversation, and although there are real conflicts of interest, they still share a general understanding of the purpose of the enterprise in which they are collectively engaged (i.e., to promote peace in former Yugoslavia).[184] Debates in the Council relate to potential future developments where some states appear more willing to allow humanitarian intervention without Security Council authorisation. This discussion was rephrased in the 2001 ICISS Report, which introduced the concept "Responsibility to Protect" (R2P) which kept the door open for humanitarian intervention without Security Council authorisation.[185] However, the states rejected such development in the outcome document of the UN 2005 World Summit, which stresses that collective action should be taken through the Security Council in accordance with the UN

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181. The specific states were Russia, Slovenia, France, and the United States. *See* U.N. SCOR, 54th Sess., 4011th mtg. at 7–12, 14–15, U.N. Doc. S/PV.4011 (June 10, 1999).

182. *Id.* at 12.

183. SVANBERG, *supra* note 44, at 595.

184. *See supra* Part III.A; Johnstone, *supra* note 34, at 194.

185. *See generally* THE RESPONSIBITITY TO PROTECT REPORT, *supra* note 177.

Charter.[186] This approach was tested when military action was authorized by the Security Council in relation to Libya with the use of R2P terminology in Resolution 1973 (2011).[187] Several aspects of the resolution became matters of dispute and are in need of interpretation, for example, whether the resolution's prohibition against "a foreign occupation force" excludes all foreign ground forces and whether the resolution's aim to protect civilians may entail regime change.[188] Per Ahlin had scrutinized the statements made by the Council members when he concluded that the resolution's mandate was not exceeded.[189] Although the resolution caused a substantial divergence of views on how it should be interpreted, all Council members appeared to agree that the use of force to protect civilians requires prior authorisation by the Security Council.[190] Several Council members had at the time of the Kosovo intervention clearly conflicting interests and views on the appropriateness of the use of force to protect civilians without Council authorisation. The matter was much debated within and outside the Council. It appears that Council members had a convergence of views regarding whether Council authorisation is required (i.e., rejecting change in customary international law). This also entails a change in how the Council members perceive the world, interests, and their identities.

VI. CONCLUSIONS

This Article has argued that explanation of votes may have a double function: to be used as a means for interpreting Security Council resolutions in relation to a specific matter and to contribute to the formation of customary international law. The Council may issue authoritative and binding decisions in relation to situations and disputes at hand at the same time as its action (or inaction) may relate to the development of international law. The Council and its members are part of the process of constructing norms.

The three conversations show that explanation of votes is an essential part of the work of the Security Council when engaging in legal discourse. The conversations illustrate different trajectories of discourse in the Council. The resolutions surveyed above all authorized or supported states to act in the specific situations concerned. At the time of the adoption of the resolutions there appears to have been little disagreement in the explanation of votes on how to interpret the resolution in relation to the specific situation at hand but considerable disagreement over the broader impact on the development of

186. *See* G.A. Res. 60/1, ¶¶ 138–39 (Sept. 16, 2005).
187. *See* S.C. Res. 1973, at 1–3 (Mar. 17, 2011).
188. *Id.* ¶ 4.
189. *See* Ahlin, *supra* note 9, at 494–95.
190. *See* S.C. Res. 1973, *supra* note 187, ¶ 4.

international law. The disagreement—especially in relation to Resolutions 1244 (1999) and 1973 (2011)—becomes more apparent at a later stage. Security Council members make significant efforts to explain their position on a particular matter as it may have an impact on customary international law.

The present Article has set out to challenge some traditional assumptions on the role of the Security Council and how to interpret and understand its resolutions. The Council's potential engagement in law-making creates ambiguity: when adopting resolutions, is it acting on a case-by-case basis, or is it and its members intending to proclaim new general rules on the use of force? Such ambiguity may be useful to a hegemony that, at the time of the adoption of a resolution, may be unsure about whether it needs these rules or whether such will prove more trouble than they are worth, particularly if used by other states in ways not consistent with its hegemonic sensibilities.[191]

What are the practical implications? The three conversations discussed above show how Security Council resolutions and explanation of votes may protect the status quo in some instances and act as agents of change in others. The Security Council "does not operate in a legal vacuum";[192] its decisions have legal consequences in specific situations and may also contribute to the formation of customary international law. It is therefore important that states and other actors, including the ICJ, may identify the reasons for the acts of the Security Council, especially when the Council assumes functions normally performed by courts or administrative bodies.[193] In the interest of improving the quality of decision-making, legal certainty, and accountability, it is therefore in their own interest and of great value that Security Council members give their reasons for voting in a particular manner.

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191. JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 213 (2005).

192. Moeckli & Fasel, *supra* note 14, at 46.

193. *See id.* at 46–57.

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