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Tempering the Security Council's Expanded Perception of Threats to the Peace

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Abstract

The United Nations (UN) Security Council has expanded its understanding of threats to the peace with varying support from states. Some members of the Council have simultaneously sought to temper this development, both by providing caveats in the text of resolutions and by making statements when adopting the resolutions. This article examines how the Security Council and its members have justified their

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positions and actions in situations that may constitute threats to the peace. Existing scholarship has covered conceptual matters relating to Chapters VI and VII of the UN Charter, often illustrated with selected incidents. The contribution of this study is a systematic empirical analysis of how references to threats to the peace have evolved at and within the UN Security Council 1989–2019. The study combines broad quantitative analysis with qualitative case studies illustrating both the expansion of the Council's perception of threats and the attempts by some states to temper this expansion.

Keywords

threats to the peace – explanation of vote – human rights – violence against women – terrorism

1 Introduction

The UN Security Council (UNSC) has expanded its understanding of threats to the peace with varying support from states. Some council members, not least certain permanent members, may have had objections but still have allowed this expansion to occur. Reluctant states have sought to temper the expansion through different techniques, in addition to placing caveats in the resolution themselves they have also sought to restrict the mandate of resolutions by making statements when adopting the resolutions. More concretely, when the Security Council deals with a situation and adopts a resolution two main interpretative processes are triggered: what is a threat to the peace and what is the mandate of the resolution. This article focuses on how explanations of votes in the Security Council are used both to expand the perception of what is a threat to the peace and to limit the scope and mandate of a specific resolution.

The Security Council wields considerable powers under Chapter VII of the UN Charter. These powers are conditioned on the determination, pursuant to Article 39, of the existence of a threat to the peace, breach of the peace, or act of aggression.[1] These broad notions in Article 39 grant the Security Council wide discretion to make such a determination. The Security Council also has the choice on whether and how to act when such a determination has been made. This reflects the political character, rather than legal character, of the Security

1 This is not always explicit, see H. Freudenschuß, 'Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council', 46 *Austrian Journal of Public and International Law and Politics* (1993) p. 31.

Council, typically viewed as an explanation for the inaction or selectivity of the Council.[2] The Security Council's determination is ultimately dependent on the perceptions and actions of its individual members. Members of the Council may make statements in connection with their votes, and these are termed explanations of votes. These explanations may convey the justifications used by the council members.

The first aim of this study is to understand how and when members of the UN Security Council talk about threats to the peace, breaches of the peace, or acts of aggression in the Council. This is important as the expansion of the notion of threats to the peace may have an impact on several branches of international law, such as the law on state responsibility, UN law, human rights and international humanitarian law, the law of individual criminal responsibility, and the law of arms control.[3]

The second aim of this study is to examine how states use explanations of votes to restrict the mandate of resolutions, seeking to temper the Security Council's expanded perception of threats to the peace. These explanations are not merely policy statements, they are arguably also intended to be and should be used as tools of legally interpreting resolutions.

The study adopts a mixed methods design, combining legal analysis with quantitative empirical analysis. Quantitative methods are used to collect and code data, identify, analyse, and describe patterns on how members of the Council argue.

The bulk of the empirical material consists of the voting record of Security Council members and their statements in the Council. This study has analysed all the debates during the period 1989–2019 which meets the following criteria: 1) the debate dealt with a threat against international peace and security and/or 2) the Council has determined (or has been called to do so) that one or several actors have violated a norm, and 3) this has resulted in either an adoption of a Security Council resolution, a Presidential Statement, or a vote where a draft resolution failed to pass. This selection yields a manageable sample to evaluate

2 N. Krisch, 'Article 39' in B. Simma and others (eds), *The Charter of the United Nations – A Commentary* (Third Edition, Oxford University Press, Oxford, 2012) pp. 1273, 1275–1276; M. Lundgren and M. Klamberg, 'Selective attention: The United Nations Security Council and armed conflict', 53 *British Journal of Political Science*, pp. 958–979.

3 K. Wellens, 'The UN Security Council and New Threats to the Peace: Back to the Future', 8 *Journal of Conflict and Security Law* (2003) p. 15; L. E. Fielding, 'Taking a Closer Look at Threats to Peace: The Power of the Security Council to Address Humanitarian Crises', 73 *University of Detroit Mercy Law Review* (1996) p. 557. P. H. Kooijmans, 'The Enlargement Of The Concept "Threat To The Peace"' in R.-J. Dupuy (ed), *Peace-Keeping and Peace-Building, The Development of the Role of the Security Council* (Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1992) p. 111.

how Security Council members discuss and view different forms of force and whether the Security Council should act. Focusing on the period since 1989 is motivated because the end of the Cold War entailed a significant reduction in the opposing political pressures in the Security Council, making the Council more operational and changing its discourse.

To achieve the aim of this paper we set the legal frame in Part 2, first by examining the relationship between the terms 'situation' and 'dispute' in Chapter VI of the UN Charter, on the one hand and 'threat to the peace,' 'breach of the peace,' and 'act of aggression' in Chapter VII on the other. The subsequent section discusses whether the Council's discretion to determine the existence of a threat to the peace, breach of the peace, or act of aggression is bounded by law or is unlimited. Part 2 concludes by conceptualizing explanations of votes and how they can be used to define the scope and mandate of Security Council resolutions. The paper then turns to evaluating how references to threats to the peace have evolved at and within the UN Security Council. Part 3 deals with patterns at the macro level as it discusses what violations and threats members of the Security Council are making references to. Part 4 examines three categories of perceived threats in more detail, with case studies of violence against women, human rights violations, and terrorism, which have attracted large and growing number of references in Security Council debates.

2 Law as a Restraint or Enabler for the Security Council

The binding nature of Security Council resolutions is grounded in Article 25 of the UN Charter. Security Council resolutions are decisions and as such their adoption are subject to Article 27 of the UN Charter. The next four sections deals with 1) the different contexts when a resolution may adopted, either in the context of a situation, dispute and/or threat to the peace; 2) the discretion of the Security Council to classify an event or circumstance as a threat to the peace; 3) the phenomenon of explanations of votes that may accompany the adoption of a resolution; and 4) how the Security Council may seek to influence the interpretation of a resolution.

2.1 *Situations, Disputes and Threats to the Peace*

In relation to a specific event, circumstance or relationship between actors, the Security Council may become involved in different contexts: 1) a situation, 2) a dispute or 3) the existence of threat to the peace, breach of the peace, or act of aggression.

We need to further define these different phases and how they relate to each other (figure 1).

The UN Charter distinguishes in several places between 'disputes' and 'situations'.[4] Articles 1(1), 34–36 refer to both, while Articles 27(3) and 32, 33, 37–38 only refer to disputes. Article 34 of the UN Charter states that the Security Council may investigate any dispute or any situation. Here, situation refers to the entirety or sum of events, circumstances and relationships between actors.[5] A situation describes a set of conditions that are somewhat broader than a dispute.[6] Since Article 34 mentions both notions, situation designates by a negative definition for circumstances that are not (yet) a dispute. Meanwhile, a dispute in the context of Article 34 refers to international friction (controversies and tensions) between two or more states,[7] which in turn normally would involve an allegation that somebody has violated a norm. Article 36 provides that the Security Council may, at any stage of a dispute, recommend appropriate procedures or methods of adjustment. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36.[8]

There are some instances when the difference between situation and dispute has caused debate. For example, when the Security Council was considering urging India and Pakistan to enter into negotiations pursuant to Article 33 (which only mentions disputes), India was arguing the provision was not applicable since the case before the Council was not a dispute but a situation caused by Pakistan.[9] The draft resolution was vetoed, however when hostilities later broke out between the two states, the Council called on them to utilize all peaceful means, including those listed in Article 33 of the UN Charter, to settle their differences.[10] However, the Council has in other instances acted without labelling them as disputes.[11]

4 C. Tomuschat, 'Article 2(3)' in B. Simma and others (eds), *The Charter of the United Nations – A Commentary* (Third Edition, Oxford University Press, Oxford, 2012) p. 192, para. 27.

5 T. Schweisfurth, 'Article 34' in B. Simma and others (eds), *The Charter of the United Nations – A Commentary* (Third Edition, Oxford University Press, Oxford, 2012) p. 1097, para. 24.

6 L. M. Goodrich, E. Hambro and A. P. Simons, *The United Nations and the maintenance of international peace and security* (Third and Revised Edition, Columbia Univeristy Press, New York & London, 1969) pp. 42; 230, 244, 253, 265, 271, 277 and 286.

7 Schweisfurth, 2012, *supra* note 5, p. 1097, para. 24.

8 UN Charter, Article 37.

9 Security Council, Meeting record S/PV.1016, 22 June 1962, para. 40.

10 Resolution 211 (1965), UN Doc S/RES/211.

11 Goodrich, Hambro and Simons, 1969, *supra* note 6, p. 265.

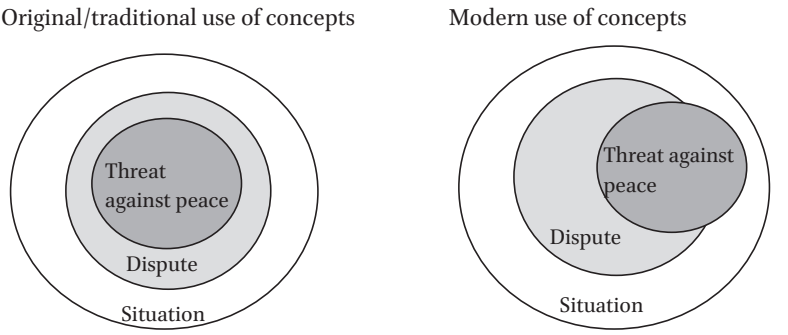

FIGURE 1 Phases of UNSC involvement

The UNSC can act in relation to situations and disputes under Chapter VI when situations are likely to 'endanger' international peace and security (Articles 33, 34 and 37) or might lead to international friction (Article 34). In contrast, Chapter VII requires the existence of 'a threat to the peace', 'breach of the peace', or 'act of aggression'. By explicitly invoking Chapter VII, the Security Council arguably presumes that there is at least a threat to the peace. However, in recent years other phrases have been used by the Council, for example the expression of 'grave concern' that a particular situation constitutes a threat.[12] Moreover, these concepts are increasingly difficult to distinguish as the Security Council refers to 'danger to peace' and 'threat to peace' without clear distinction.

Still, the concepts can be understood as semi-ordered, with 'threat' as more serious and representing a higher risk of conflict than 'danger'.[13] Among the concepts used in Article 39, 'threat to the peace' is almost always the only one used by the Security Council, which rarely determines breaches of the peace or acts of aggression.[14] The settled core of the concept 'threat to the peace' is an impending or already initiated armed conflict between states. The core definition has been expanded along three dimensions: 1) time, 2) subject-matter and 3) actors affected.[15] With the original core definition it would have been easy to establish a sequence or hierarchy, in which situation is the broadest concept encompassing the intermediary stage of dispute, which in turn would include the narrow concept of threat to peace. However, with expansion of the concept to also include the modern understanding of threat

12 Wellens, 2003, *supra* note 3, pp. 18–19.

13 Krisch, 2012, *supra* note 2, p. 1279.

14 An exception would be resolution 678 (1990) where the Security Council determined "that there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait".

15 Krisch, 2012, *supra* note 2, pp. 1278–1279, paras. 12–15.

against peace, such as refugee flows and environmental problems,[16] it follows that all threats against peace are arguably also situations but not necessarily disputes as illustrated by figure 1.

The genesis and operation of Chapters VI and VII are thus closely interlinked. Whatever restrictions the former chapter imposes on the Security Council can in most cases be overcome by proceeding to the latter chapter, if the situation is serious enough and if the required majority is obtained.[17] Usually the Security Council determines in the preamble of a resolution that a certain situation constitutes a threat to the peace without citing the UN Charter or any specific articles at all.[18] The expanded notion of threats and the practice of the Security Council to resort more frequently to pronouncements on threats to the peace without a formal determination under Article 39, makes it more difficult to distinguish the dividing lines between Chapter VI and VII compared to the original conception of the UN Charter.[19] The next section will explain how the Security Council has discretion to decide whether an event, circumstance or relationship should transition from being a situation or dispute to become a threat to the peace.

2.2 *The Discretion of the Security Council and the Expanded Security Agenda*

The Security Council has broad powers to do what it considers necessary to maintain or restore international peace and security with few or no codified limits to its freedom of action.[20] There is a debate on whether the Council's discretion to determine the existence of a threat to the peace, breach of the peace, or act of aggression is bounded by law[21] or unlimited.[22] The UN Charter

16 A. Hurrell, 'Collective Security and International Order Revisited', 11 *International Organization* (1992) p. 54; P. Wrange, 'Protecting which peace for whom against what? A conceptual analysis of collective security' in C. M. Bailliet (ed), *Research Handbook on International Law and Peace* (Edward Elgar, Cheltenham, 2019) p. 122.

17 T. Giegerich, 'Article 36' in B. Simma and others (eds), *The Charter of the United Nations – A Commentary* (Third Edition, Oxford University Press, Oxford, 2012) p. 1121, para. 5.

18 I. Österdahl, *Threat to the Peace* (Iustus Förlag, Uppsala, 1998) p. 89.

19 Wellens, 2003, *supra* note 3, p. 53

20 Österdahl, 1998, *supra* note 18, p. 93.

21 O. Corten, *The law against war: the prohibition on the use of force in contemporary international law* (Hart, Oxford, 2010) pp. 320–321; M. E. O'Connell, 'Continuing Limits on UN Intervention in Civil War', 67 *Indiana Law Journal* (1992) p. 911.

22 M. W. Reisman, 'The Constitutional Crisis in the United Nations', 87 *American Journal of International Law* (1993) pp. 93–94. Österdahl, 1998, *supra* note 18, pp. 85–99. See comment by Krisch, 2012, *supra* note 2, p. 1276, S. R. Ratner, 'The Security Council and International Law' in D. Malone (ed), *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner Publishers, London, 2004), pp. 592 and 604.

does not define threat to the peace, breach of the peace, or act of aggression. Even if one would conclude that political decisions regarding the existence of a threat to the peace are not constrained by legal considerations, it does not prevent the Council from taking legal considerations into account when reaching such decisions.[23] Despite the fact that the wording of Article 39 is vague, Security Council members regularly debate the limits of the scope of action under Article 39, which would indicate that the concepts relating to threats against peace and aggression are not completely indeterminate.[24] Pronouncements and determinations on threats to the peace are in almost all cases found in the penultimate preambular paragraph of Security Council resolutions.[25] Some would argue that there is a common understanding in the world community as to what constitutes a threat to peace, breach of peace, or act of aggression.[26] Pursuant to Article 24 of the UN Charter, the Security Council shall in its 'primary responsibility' to maintain international peace and security 'act in accordance with the Purposes and Principles of the United Nations.'[27] In a similar vein, the Appeals Chambers of the International Criminal Tribunal for the former Yugoslavia (ICTY) has stated that the Security Council's powers are not unlimited, arguing that they are 'subjected to certain constitutional limitations', and that the Council's powers "cannot, in any case, go beyond the limits of the jurisdiction of the [UN] at large".[28] If one accepts that there is a limit to what can be encapsulated within the notion of threat, any actions taken by the Council beyond such limits may be considered *ultra vires*.[29]

Several scholars have noted that non-military sources of instability have become 'threats to peace and security'.[30] The understanding of security has thus shifted from focusing on traditional inter-state military conflict to a much

23 Wellens, 2003, *supra* note 3, p. 30.
24 Goodrich, Hambro and Simons, 1969, *supra* note 6, p. 295; Corten, 2010, *supra* note 21, p. 321; Krisch, 2012, *supra* note 2, p. 1276.
25 Wellens, 2003, *supra* note 3, p. 20.
26 Fielding, 1996, *supra* note 3, p. 558. O'Connell, 1992, *supra* note 21, p, 911.
27 Goodrich, Hambro and Simons, 1969, *supra* note 6, p. 24; Fielding, 1996, *supra* note 3, p. 558.
28 *Prosecutor v. Dusko Tadić*, (Case No. IT-94-1), ICTY A. Ch., Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 28.
29 Wellens, 2003, *supra* note 3, p. 17.
30 Österdahl, 1998, *supra* note 18, p. 93; Krisch, 2012, *supra* note 2, pp. 1278–1291. See also part 3 Justifications when Dealing with Threats to the Peace – Patterns at the Macro Level.

broader concept, potentially encompassing all areas of human activity.[31] An important step was when the Security Council in 1992 stated that "[t]he absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security."[32] In the 1990s some commentators argued that the Security Council had pushed the interpretation of Article 39 to its broadest scope and a narrowing down in its interpretation was to be expected.[33] Nevertheless, the expansion appeared to be sustained during the early 2000s. The Security Council has confirmed this expanded security agenda in several thematic debates and in 2005 world leaders acknowledged "a whole range … multifaceted and interconnected challenges and threats".[34] But it is an open question exactly what those new boundaries are.

2.3 *Explanations of Votes*

Explanations of votes are not provided for in the Security Council Provisional Rules of Procedure. However, members of the Security Council may make statements in connection to their votes, called 'statements before the vote' or 'statements after the vote'.[35] In the Rules of Procedure of the General Assembly such statements are called 'explanation of vote'[36] and this term is used here for all statements made in connection to voting in the Security Council. The statements made in the general debate preceding or following a vote are often the only source of information regarding the reasons behind the adoption or non-adoption of a resolution.[37]

Sometimes states make legal arguments in their explanations of votes, which may serve at least two functions: first they can be used as a means for

31 G. Noll, 'Securitising sovereignty? States, refugees, and the regionalisation of international law' in E. v. S. Newman, J. (ed), *Refugees and forced displacement: international security, human vulnerability, and the state* (United Nations University Press, 2003) p. 280; Wellens, 2003, *supra* note 3, p. 16. Gill-Tiney argues that it started already in the 1970s, P. Gill-Tiney, 'A Liberal Peace?: The Growth of Liberal Norms and the Decline of Interstate Violence' *Journal of Conflict Resolution* (2021) p. 2.

32 Security Council, Meeting record S/PV.3046, 31 January 1992, p. 143.

33 Freudenschuβ, 1993, *supra* note 1, p. 39 as commented by Österdahl, 1998, *supra* note 18, p. 137; Wellens, 2003, *supra* note 3, p. 69.

34 UN General Assembly resolution 60/1, A/RES/60/1 (2005) 2005 World Summit Outcome, paras. 6 and 69. See also Wrange, 2019, *supra* note 16, pp. 121–122.

35 L. Sievers and S. Daws, *The procedure of the UN Security Council* (Fourth edition, Oxford University Press, Oxford, 2014) p. 357.

36 United Nations General Assembly Rules of Procedure (A/520/Rev.18).

37 D. Moeckli and R. N. Fasel, 'A Duty to Give Reasons in the Security Council: Making Voting Transparent', 14 *International Organizations Law Review* (2017) p. 17.

interpreting Security Council resolutions in relation to a specific situation or dispute; second they may contribute to the formation of customary international law.[38] As such they are both justifications for actions in a concrete situation and for state behavior in a more general sense.

Whether or not statements are made at adoption meetings is sometimes discussed in advance among the members of the Council. When a resolution has been adopted by consensus or as a 'presidential text', national statements by council members at the adoption meeting are unusual. When a consensus has been reached with great difficulty, there is usually an expectation from some members that national statements should be avoided in order to preserve the image of consensus. In other instances, council members may, to avoid polemic exchanges, agree beforehand to avoid making statements to discourage others from requesting to speak.[39] There are some exceptions where statements have been made after the adoption of resolutions by consensus or as a 'presidential text'.[40]

An explanation of vote can be used by a permanent member as an alternative to casting a veto in order to express dissatisfaction,[41] serving a rhetorical function.[42] While not obligatory, it has become customary in current practice for permanent members who exercise their veto power to subsequently provide an explanation for the rationale behind their veto vote.[43] It has also become more common for representatives invited to the Council, pursuant to rule 37 (which includes states whose interests are specially effected), to take the floor before or after the vote.[44] Statements made by such invited representatives are

38 M. Klamberg, 'Security Council Resolutions and the Double Function of Explanation of Votes' *Vanderbilt Journal of Transnational Law* (2022).

39 Sievers and Daws, 2014, *supra* note 35, pp. 357–358.

40 Security Council, Meeting record S/PV. 4344, 3 July 2001; Security Council, Meeting record S/PV.4399, 29 October 2001.

41 S. C. Hulton, 'Council Working Methods and Procedure' in D. M. Malone (ed), *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner Publishers, Boulder, 2004) p. 238; Sievers and Daws, 2014, *supra* note 35, 2014, p. 358. See for example the statement made by the U.S. representative in the debate on the Hebron Massacre, S/PV.3351, 18 March 1994.

42 S. Fish, *Doing what comes naturally: change, rhetoric and the practice of theory in literary and legal studies* (Clarendon, Oxford, 1989) p. 25; L. Henkin, *How Nations Behave* (Second Edition, Columbia University Press, New York, 1979) p. 45; R. R. Krebs and P. T. Jackson, 'Twisting Tongues and Twisting Arms: The Power of Political Rhetoric', 13 *European Journal of International Relations* (2007) p. 37.

43 Sievers and Daws, 2014, *supra* note 35, p. 358.

44 For example, the Sudanese representative was allowed to make a statement when adopting resolution 1593 (2005); The Somali representative was allowed to make a statement when adopting resolution 2073 (2012).

obviously not explanations of votes but may still be part of the deliberative process. Even if explanations of votes are perceived as mere rhetoric, this does not imply that they are irrelevant. Krebs and Jackson note that state leaders who renege on their public rhetorical commitments may bear substantial domestic and international costs.[45] In conclusion, explanations of votes are a way for members of the Council to record potential disagreements.[46]

2.4 *Defining the Scope and Mandate of a Security Council Resolution*

As indicated earlier, states may use explanations of votes to define the scope and mandate of a specific resolution, including to temper them. We need to consider methods of interpretation of legal texts such as the UN Charter and individual resolutions. The rules governing interpretation of Security Council resolutions are not regulated by treaty. In contrast to the extensive juridical pronouncements and doctrines concerning treaty interpretation, such guidance is largely lacking in relation to Security Council resolutions.[47] Although the Vienna Convention on the Law of Treaties (VCLT) is not applicable to Security Council Resolutions, its rules may serve as a foundational reference point.[48]

Several alternatives merit consideration. First, Security Council resolutions could be viewed as treaties. Alternatively, the rules of the VCLT could be applied *mutandis mutandis*.[49] The third option entails the adoption of a distinct analytical framework adapted for resolutions, incorporating established interpretive methods.[50] In the context of the present study it is argued that a separate analytical framework should be adopted for Security Council resolutions, encompassing generally accepted interpretive methods. This framework includes textual, contextual and teleological approaches, with teleological approaches deemed particularly fitting due to their potential to

45 Krebs and Jackson, 2007, *supra* note 42, p. 38.

46 Klamberg, 2022, *supra* note 38.

47 M. C. Wood, 'The Interpretation of Security Council Resolutions', 2 *Max Planck Yearbook of United Nations Law* (1998) p. 74.

48 J. A. Frowein, 'Unilateral Interpretation of Security Council Resolutions – A Threat to Collective Security?' in V. Götz, P. Selmer and R. Wolfrum (eds), *Liber Amicorum Gunther Jaenicke – Zum 85 Geburtstag* (Springer Verlag, Berlin, 1999) pp. 97–99; K. Svanberg, *FN:s säkerhetsråd i rättens tjänst* (Jure, Stockholm, 2014) p. 39.

49 Wood, 1998, *supra* note 47, p. 95.

50 E. Papastavridis, 'Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis', 56 *The International and Comparative Law Quarterly* (2007) pp. 87–88.

accommodate both the objectives set forth by the Security Council and the explanations of votes from individual council members.[51]

The ICJ's *Namibia* Advisory Opinion offers a guide to interpretation of Security Council Resolutions, where it stated that the discussion leading to the adoption of the Security Council resolution was relevant when determining the legal consequences of the resolution.[52] The Advisory Opinion omits any reference to the VCLT even though the treaty had been adopted two years earlier. This omission does not appear to be a lapse, as in other decisions, the ICJ has relied on VCLT rules as customary international law when interpreting treaties.[53] Similarly, the ICTY Appeals Chamber refrained from referencing the VCLT in the *Tadić* interlocutory appeal on jurisdiction. In its the decision the Appeals Chamber 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 interpretation of the statute.[54] When the European Court of Human Rights (ECtHR) had to interpret a Security Council resolution in *Al-Jedda*, it sought guidance from the ICJ statement in the *Namibia* Advisory Opinion.[55] However, in later opinions, the ICJ has referenced the VCLT when interpreting Security Council resolutions.[56]

An alternative perspective on explanations of votes is to categorise the practice as part of the preparatory works. Insofar as the VCLT is analogously relevant to Security Council resolutions, it is noteworthy 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".

In conclusion, records of debates in the form of explanations of votes may constitute relevant factors for interpretation. Whether introduced through teleological interpretation or under the umbrella of 'preparatory works', such records and statements are utilized to unveil the intent of the Security Council and its members, thereby elucidating the purpose of the resolution in question.[57]

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51 As previously argued in Klamberg, 2022, *supra* note 38, pp. 929–936.

52 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *notwithstanding Security Council Resolution 276*, ICJ, Advisory Opinion, 21 June 1971, para. 114.

53 *See* comment by Wood, 1998, *supra* note 47, p. 75.

54 *Tadić*, ICTY A. Ch., 2 October 1995, *supra* note 28, paras. 71–93, especially para. 75; Wood, 1998, *supra* note 47, p. 76; Papastavridis, 2007, *supra* note 50, pp. 92–93.

55 *Al-Jedda v. the United Kingdom*, ECtHR, 7 July 2011, paras. 49, 76 and 102.

56 *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, ICJ, Advisory Opinion, 22 July 2010, para. 94.

57 A similar argument is made by Klamberg, 2022, *supra* note 38.

3 Justifications when Dealing with Threats to the Peace – Patterns at the Macro Level

Security may be broadly understood as 'the pursuit of freedom from threat'.[58] In recent decades, if a particular type of activity is consistently described as a threat, it is likely that the choice of measures and the resources to counter that threat will become institutionalized.[59]

By drawing on resolutions and original data on explanations of votes, this article shows that the Council and its members have drawn on an expanded understanding of security to justify their positions. Existing scholarship has covered selected conceptual matters relating to Chapters VI and VII, often illustrated with unique incidents or cases, a technique familiar within the field of public international law.[60] This includes studies of the Responsibility to Protect (R2P),[61] gender mainstreaming and women, peace, and security,[62] humanitarian intervention,[63] and domestic regime change and the role of peacekeeping,[64] while analysis of a broader set of threats is rare.[65]

There are some previous studies on speech records. Schoenfeld et al have created a dataset containing 65,393 speeches held 1995–2017 in the public meetings of the UNSC. They observe three broad trends: the largest share of

58 O. Wæver, 'Societal Security: the Concept' in O. Wæver and others (eds), *Identity, Migration and the New Security Agenda in Europe* (Pinter Publishers, London, 1993) pp. 23–24.

59 B. Buzan, O. Wæver and J. d. Wilde, *Security: A New Framework for Analysis* (Lynne Rienner Publishers, Boulder and London, 1998) pp. 23–24; C. Enemark, 'Ebola, Disease-Control, and the Security Council: From Securitization to Securing Circulation', 2 *Journal of Global Security Studies* (2017) pp. 139 and 143.

60 Österdahl, 1998, *supra* note 18.

61 J. M. Welsh, 'Norm Robustness and the Responsibility to Protect', 4 *Journal of Global Security Studies* (2019).

62 A.-K. Kreft, 'The Gender Mainstreaming Gap: Security Council Resolution 1325 and UN Peacekeeping Mandates', 24 *International Peacekeeping* (2017); J. True and A. Wiener, 'Everyone Wants (a) Peace: The Dynamics of Rhetoric and Practice on 'Women, Peace and Security.'', 95 *International Affairs* (2019).

63 R. Hanania, 'The Humanitarian Turn at the UNSC: Explaining the Development of International Norms through Machine Learning Algorithms', 58 *Journal of Peace Research* (2021).

64 D. Curran and P. Holtom, 'Resonating, Rejecting, Reinterpreting: Mapping the Stabilization Discourse in the United Nations Security Council, 2000–14', 4 *Stability: International Journal of Security & Development* (2015); S. Wheatley, 'The Security Council, Democratic Legitimacy and Regime Change in Iraq', 17 *European Journal of International Law* (2006).

65 See notably C. C. True-Frost, 'The Security Council and Norm Consumption', 40 *New York University Journal of International Law and Politics* (2007).

speech contributions comes from non-permanent UNSC member states and invited speakers, UNSC meetings are becoming increasingly lengthy, and complex and the UN administration, i.e., the Secretary General with staff, was the sixth most frequent speaker in the UNSC during the surveyed period.[66] The same study uses these data to observe speaker position, topic introduction, and topic evolution. It includes a case study which shows that UN bureaucracy interventions can set the UNSC agenda on new topics, define the initial boundaries of a discussion, and have a substantive impact on a UNSC debate.[67] By means of statistical analysis of UNSC speeches 1995–2019, Voss et al argue that health emergencies lead the Council to pay more attention to this topic, displaying a narrow framing of health that follows a health security paradigm.[68] Contrasting rhetorical entrapment and rhetorical hollowing, Scherzinger finds that that while mentioning 'human rights' in UNSC debates is consistently associated with increased odds of authorization of force; the word 'terrorism' is associated with a decrease of odds for intervention.[69] Deepening this research tradition, Sakamoto uses concepts such as 'threat perception', 'securitisation' and 'interpretative communities'.[70] By using quantitative text analysis tools, Sakamoto finds that an increasing number of issues, entities and objects have become perceived as threats over the past decades.[71]

Researchers have also more explicitly sought to understand changes to what the UNSC considers threats against peace and security, typically focused

66 Schoenfeld, Mirco; Eckhard, Steffen; Patz, Ronny and van Meegdenburg, Hilde, 'The UN Security Council debates 1995–2017', 2019, dataset introduction paper available at: https://arxiv.org/abs/1906.10969.

67 Eckhard, Steffen; Patz, Ronny; Schönfeld, Mirco and van Meegdenburg, & Hilde, 'International bureaucrats in the UN Security Council debates: A speaker-topic network analysis', 30(2) *Journal of European Public Policy*, 2023, 214–233.

68 Voss, Maike; Kump, Isabell and Bochtler, & Paul, 'Unpacking the framing of health in the United Nations Security Council' 6(2) *Australian Journal of International Affairs*, 2022, 4–10.

69 Scherzinger, Johannes, ' "Acting under Chapter 7": rhetorical entrapment, rhetorical hollowing, and the authorization of force in the UN Security Council, 1995–2017', 37(1) *International Relations*
2023, 3–24.

70 Sakamoto, Takuto, 'Threat Conceptions in Global Security Discourse: Analyzing the Speech Records of the United Nations Security Council, 1990–2019', 67(3) International Studies Quarterly, 2023, 1–16 pp. 2–4.

71 *Ibid*, p. 14

on specific issues such as humanitarian crises,[72] climate change,[73] disease,[74] or sexual violence.[75] These studies have focused on positions expressed collectively by the Council, in resolutions or presidential statements, and sometimes by states during debates. Statements in connection with voting specifically have only been studied as illustrations for a single debate or by a specific state.[76] While there is a body of literature focused on the voting behavior of the UNSC, and of its members,[77] these statements, thus, have not been subject to such comparative study. In essence, our study observes via explanations of votes how the Council's understanding of security, and that of its individual members, has broadened over time.

The empirical material used for the original dataset consists of resolutions and member statements made in connection to council votes between 1989 and 2019. The dataset covers all meetings which resulted in 1) a vote on whether there is a threat to the peace, which in turn may have led to the adoption of a resolution or 2) a Presidential Statement. We have also examined all instances where the Security Council or its members entertain a charge against a state or other actors (for example armed non-state actors) for some kind of wrongdoing, either a norm violation or a threat against peace. This selection is done in order to focus on situations where there is either agreement or at least a debate on whether there is a threat to the peace. This excludes sessions of certain categories which are irrelevant for the study, for example the multiple occasions when the Secretary-General presents reports or when thematics resolutions are adopted, at many of these sessions there is neither a vote nor any council member arguing that there is a threat to peace. In total, after excluding meetings of lower relevance, the sample covers 1,381 meetings. Official minutes from these meetings were analysed and coded line by line by a team consisting of research assistants and project members to capture which norm violations

72 Fielding, 1996, *supra* note 3.

73 F. Sindico, 'Climate Change: A Security (Council) Issue', 1 *Carbon & Climate Law Review* (2007).

74 Enemark, 2017, *supra* note 59.

75 L. Anderson, 'Politics by Other Means: When Does Sexual Violence Threaten International Peace and Security?', 17 *International Peacekeeping* (2010); for a rare overview on general post-cold war changes see Wellens, 2003, *supra* note 3.

76 *e.g.* H. Freudenschuβ, 'Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council', 5 *European Journal of International Law* (1994).

77 *See, e.g.* C. Monteleone, 'Coalition Building in the UN Security Council', 29 *International Relations* (2015); E. Winter, 'Voting and Vetoing', 90 *American Political Science Review* (1996).

and threats that members of the Security Council identify and from whom they originate.[78] That allows us to understand how the Security Council and its members seek to justify action and their understanding of the concept 'threat against peace'. Altogether, the dataset includes 110 different permanent and non-permanent members.

Since states often use vague language when they discuss a situation or dispute in the Security Council, their justification for certain action by the Council may relate to both threats against peace and adjoining violations of norms. The latter refer to transgressions that are pertinent to the given situation and could potentially, though not necessarily, constitute threats against peace in and of themselves. Consider the scenario where the Security Council, during its deliberations on whether a civil war is a threat against peace, also mentions attacks against migrants. The attacks against migrants may not be considered a threat against peace in itself, but is used in justifying Security Council action. If we want to examine the full range of discourse in deliberations, we should study both direct references to threats against the peace and the adjoining references to norm violations. Figure 2 shows the annual counts of references to violations of norms and threats in Security Council resolutions during the period 1989–2019. These data provide an overview perspective on trends and patterns in the norm violations and threats that the Council, as a collective, refer to. Some norms and threats are mentioned with increasing frequency. For example, the Security Council is showing increasing attention to human rights violations and violence against women. In the 1990s, references to these two phenomena were rare and inconsistent; by the 2010s they rank among the most frequently referenced issues.[79] Since there is little reason to expect that conflict behaviour changed considerably between the 1990s and the 2010s, these changes likely reflect changes in the Council's collective perceptions. In contrast, some norm violations, such as ceasefire violations and insurgency or rebellion, show no clear over-time patterns, with marginal year-to-year variation around a fairly stable mean.

78 The coding team included Marie Karly Veloso, Martin Lundqvist and Sesen Mebrahtu, coordinated by Julia Dahlqvist under the supervision of the project members Mark Klamberg, Magnus Lundgren, Karin Sundström and Per Ahlin; the coders had initial training, regular meetings, were overseen by a coding coordinator and their coding was continuously tested by others in the team to assure intercoder reliability; we have merged our data with other datasets, including information on whether a meeting concerned the use of force from B. Frederking and C. Patane, 'Legitimacy and the UN Security Council Agenda', 50 *PS: Political Science & Politics* (2017).

79 These patterns are explored in greater depth in the case studies in part 5 of this article.

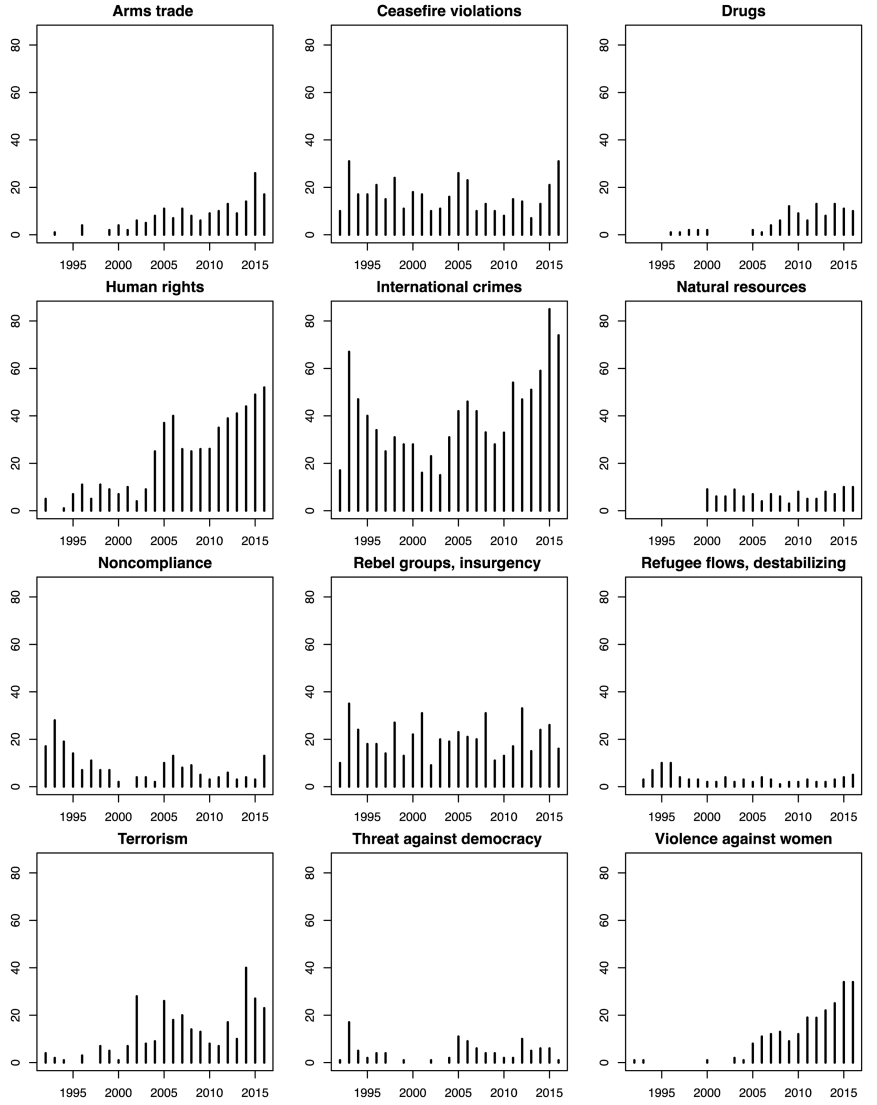

FIGURE 2 References to violations of norms in UNSC resolutions, 1989–2019, annual counts

Taking the example of violence against women, it is difficult to distinguish from analysing an explanation of vote whether a state speaking about such violence in the context of an armed conflict between two states claims that the violence against women in itself is a threat to the peace or whether it thinks that the attack of a state against another is a threat to the peace and the violence against women that is going on should also be condemned. Thus, the current study does not claim to provide a definitive assessment of which of

these norms and interests were determinative for individual members for the Security Council and the Council as a collective body. Instead, it measures and analyses to what extent various norms and threats are used as justifications. As such, it builds and expands on existing scholarship with more solid and comprehensive empirical data.

4 Tempering the Security Council

To better understand how the Security Council has expanded its perception of threats while some members have sought to temper resolution mandates, this section examines three categories of norm violations and threats in more detail: violence against women, human rights violations, and terrorism. These three categories have been selected mainly based on the large and growing number of references in Security Council resolutions (see Figure 2). As such, they are examples of how the Council has expanded the set of phenomena that it draws on to determine if there is a threat, constituting suitable cases for deeper study. In the following, we explore these cases to understand both the increase of references and attempts to temper them.

4.1 *Violence against Women*

A key area of concern from a feminist perspective is attacks or incidents involving sexual violence, where the majority of victims are women. An early example of publicly addressing the crime of rape during war occurred during and after World War I, following rapes committed by German soldiers against Belgian women. After World War II, the international prosecution of war criminals did not include prosecution for the crime of rape. There was little notable progress until the 1990s when the ICTY and the International Criminal Tribunal for Rwanda (ICTR) prosecuted wartime rape and sexual violence.[80]

Our data show an increase in references by UNSC members to violence against women since around 2004 (see Figure 3).

States were already talking about the issue before the thematic resolution 1820(2008) which condemned the use of sexual violence as a tool of war and the issue had, at that time, gained some traction in UNSC resolutions. A second, significant increase has taken place from 2010.

80 V. Nikolic-Ristanovic, 'Sexual Violence, International Law and Restorative Justice' in D. Buss and A. Manji (eds), *International Law: Modern Feminist Approaches* (Hart Publishing, Oxford, 2005) p. 273; M. Klamberg, *Power and Law in International Society: International relations as the Sociology of International Law* (Routledge, 2015) p. 115.

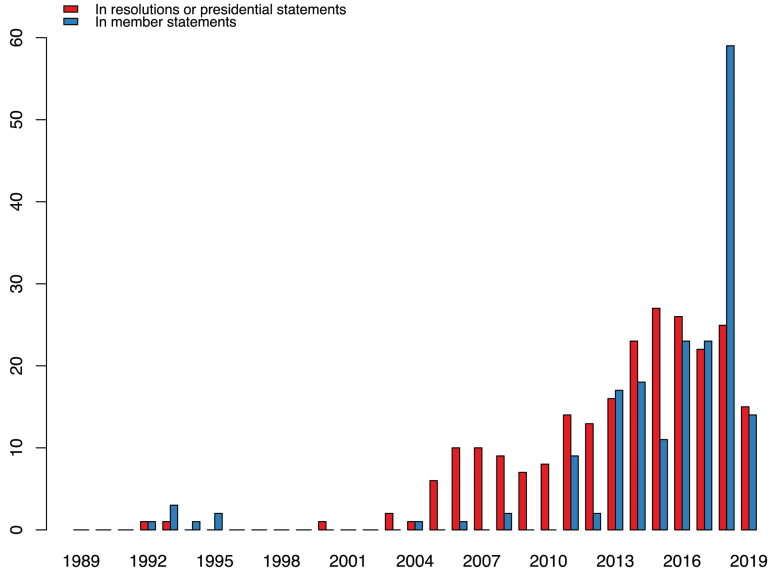

FIGURE 3 Count of annual references to violence against women in decisions and debates, 1989–2019

Does the Security Council consider contexts involving violence against women as merely situations or disputes or also as threats against peace? Figure 4

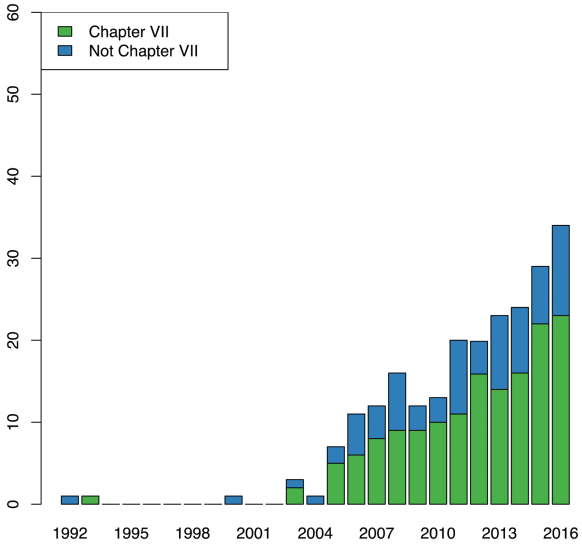

FIGURE 4 Count of annual references to violence against women in resolutions, 1989–2019

shows that when resolutions include references to violence against women, such resolutions are adopted under Chapter VII, indicating that it may be perceived as part of a threat against peace.

The above patterns correspond nicely to the broadened understanding of security, which increasingly include the experiences of women and the effects of structural gender inequalities. A key document in this context is Security Council Resolution 1325 (2000) on women, peace and security. This thematic resolution addresses enforcement measures under Article 41 of the UN Charter, where it is stated that the Security Council shall consider such measures' "potential impact on the civilian population, bearing in mind the special needs of women and girls, in order to consider appropriate humanitarian exemptions".[81]

The problems associated with the Security Council decision to establish the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISID (UNITAD) will be used to illustrate how some members have sought to temper its mandate. Resolution 2379 (2017) established UNITAD to support domestic efforts to hold ISIL accountable by collecting, preserving and storing evidence in Iraq of acts that might amount to war crimes, crimes against humanity and genocide committed in Iraq. The resolution focused particularly on violence against women and children and highlighted sexual crimes. The resolution called on all UN Member States to cooperate with UNITAD including through mutual arrangements on legal assistance. Two controversies concerned 1) the value of the evidence collected by UNITAD when its collection procedures were inconsistent with Iraqi criminal procedure law and 2) Iraq's use of the death penalty.[82] Operative paragraph 2 of Resolution 2379 appears to clarify the objective of the evidence collection: "to ensure the broadest possible use before national courts, and complementing investigations being carried out by the Iraqi authorities". Explanations of votes may provide further guidance. Several states emphasized the plight of women, the need to sanction rape and other sexual crimes. France and Sweden emphasized that evidence should only be used in procedures which are accordance with UN practices (which preclude the use of the death penalty), while all other states were silent on the matter which may be interpreted as acceptance of this requirement.[83] Thus, while the debate makes clear that UNITAD is to address violence against women it can also be used as a means of interpretation to limit the mandate

81 Resolution 1325 (2000), UN Doc S/RES/1325, operative para. 14.

82 A. Alfatlawi, 'Accountability of ISIS For Mass Violations Against Iraqi Women: Study In The Iraqi Criminal Framework', 1 *Akkad Journal of Law and Public Policy* (2021) pp. 163 and 165.

83 S/PV.8052, pp. 4 and 7.

of UNITAD to exclude investigations and trials where the death penalty is available.

To summarize, the Security Council has both in thematic and country-specific resolutions increasingly recognized sexual violence as a matter of international peace and security.

4.2 *Human Rights Violations*

There were instances when human rights violations were condemned by the Security Council during the pre-1990 period, but it is in the post-Cold War era in which the Security Council has increasingly recognized that the protection of human rights matters for the maintenance of peace and security. This despite it being the "one principal UN organ without express authority to deal with human rights".[84] Two early examples of the UNSC referencing human rights in discussions and resolutions can be seen in the debates over Southern Rhodesia (present day Zimbabwe) and South Africa. The case of Southern Rhodesia, in 1965, marked the first time that the Council made use of its Chapter VII powers to implement sanctions, over "the unilateral declaration of independence made by a racist minority in Southern Rhodesia", violating the rights of the black majority.[85] This corresponds to our quantitative findings, which show that UNSC members were already talking about human rights in the early 1990s, with a subsequent sharp increase in the 2010s (see Figure 5).

Throughout the period under study, human rights violations have been understood as (potentially) relevant for situations constituting threats against international peace and security. Over time, the references, in resolutions or presidential statements as well as in statements by members of the Council, have increased, as evidenced by the patterns in Figure 5. In 2010, almost half of the public debates in the Council included some mention of human rights.[86] Seen in a longer perspective, this increase began already from around 1990 and may, thus, be tied to other developments related to the end of the Cold War.[87]

If we examine the data even closer the following findings are noteworthy. When surveying the early debates during the 1990s, they relate to the conflicts

84 S. D. Bailey, *The UN Security Council and Human Rights* (St. Martin's Press, New York, 1994) p. 123; Fielding, 1996, *supra* note 3, p. 552; Wellens, 2003, *supra* note 3, p. 43.

85 Resolution 216 (1965), UN Doc S/RES/216.

86 J. Weschler, 'Human Rights Diplomacy of The United Nations Security Council' in M. O'Flaherty and others (eds), *Human Rights Diplomacy: Contemporary Perspectives* (Martinus Nijhoff Publishers, Leiden; Boston, 2011) p. 197.

87 Wellens, 2003, *supra* note 3; R. B. Lillich, 'The Role of the UN Security Council in Protecting Human Rights in Crisis Situtations: UN Humanitarian Intervention in the Post-Cold War World', 3 *Tulane Journal of International and Comparative Law* (1995).

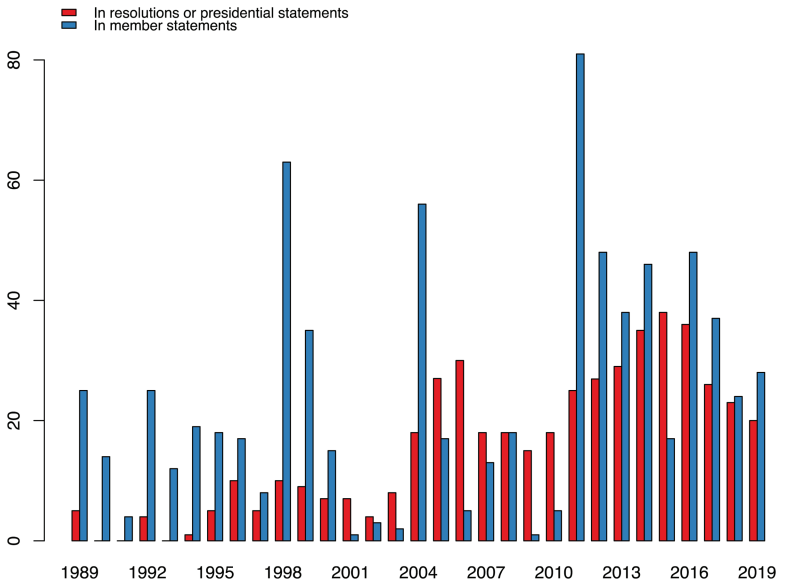

FIGURE 5 Count of annual references to violations of human rights in decisions and debates, 1989–2019

in Israel-Palestine,[88] Iraq-Kuwait[89] and Bosnia and Herzegovina.[90] These early debates on human rights all relate to armed conflict or occupation with high geopolitical significance. This is in line with findings in previous research that involvement in civil or international war is a major factor correlated with increase in human rights violations and state repression.[91] While it is generally accepted that human rights and peace and security are linked, a principal question is whether or not human rights violations in general can constitute

88 Meeting 2850(1989): five countries (USA using its veto power, France, Canada, Colombia and Nepal); meeting 2867(1989): five countries made charges of violations of human rights (Soviet Union, UK, France, Canada, Finland) while the USA used its veto power; meeting 2870(1989) one country (the USA abstaining when voting); meeting 2883(1989) one country (the USA abstaining when voting); meeting 2889(1989) eleven countries (USA using its veto power, Soviet Union, UK, France, China, Algeria, Brazil, Canada, Colombia, Ethiopia, Finland, Malaysia); Meeting 2949(1990): one country (Zaire).

89 Meeting 2937(1990): one country (USA); Meeting 2940(1990): one country (Colombia); Meeting 2951(1990): five countries (USA, UK, Colombia, Cuba, Finland); Meeting 2981(1991): one country (Austria); Meeting 3059(1992): nine countries (USA, Russia, UK, France, Belgium, Austria, Hungary, Ecuador, Venezuela)

90 Meeting 3082(1992): one country (Belgium);

91 For example, S. C. Poe and C. N. Tate, 'Repression of Human Rights to Personal Integrity in the 1980s: A Global Analysis', 88 *American Political Science Review* (1994).

a threat against international peace and security, or if they can be so only in a context of more general violence or conflict.[92] For example, human rights violations have often been linked to other cross-border issues, such as refugees, thus being seen as an indirect cause of a threat rather than the threat itself.[93] In other cases, such as Resolution 794 (1992) on Somalia, no clear links are made to such international issues, with focus being on an internal issue, albeit one of humanitarian disaster more than human rights violations.[94] While the increased involvement, including mentions in resolutions, statements, and debates, of the Council in human rights is linked to the end of the Cold War and related developments, it is also linked to the increasingly internal, rather than international, nature of war and conflict.[95]

Does the Security Council consider contexts involving violations of human rights as merely situations or disputes or also as threats against peace? Figure 6 shows that while the Security Council in the 1990s adopted resolutions making references to human rights, these resolutions were not adopted under Chapter VII. In comparison, in the 2000s and 2010s there were not only more resolutions

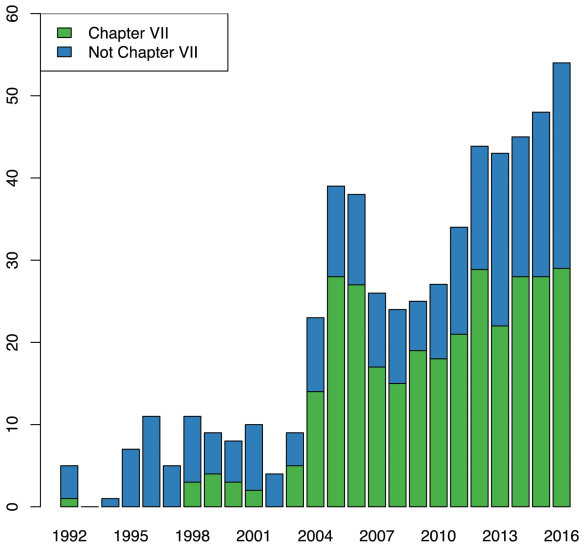

FIGURE 6 Count of annual references to human rights in resolutions, 1989–2019.

92 Krisch, 2012, *supra* note 2.

93 Wellens, 2003, *supra* note 3, pp. 43–44

94 Lillich, 1995, *supra* note 87.

95 Weschler, 2011, *supra* note 86, p. 191.

relating to human rights, these resolutions were also adopted under Chapter VII. Human rights violations are, thus, increasingly treated not only in relation to situations or disputes but also as threats against peace.

A key step in this development came with the presidential statement in 1992, mentioned earlier, in which the Council considered that non-military sources of instability could pose threats.[96] In addition, the statement said that human rights verification was an integral part of the Council's work, albeit without listing human rights violations as threats.[97] Further advances were made in 2000 with the declaratory Resolution 1314 (2000) on Children and armed conflict and in country-specific resolutions. The latter includes, for example, resolutions on Iraq and the Democratic Republic of Congo.[98] The failures of the Council to act in cases of widespread repression and violations, for example in Syria and in the genocide in Rwanda, shows the political nature of (in)activity.

Collective security has traditionally concerned the protection of states and it has often been understood that Chapter VII of the UN Charter serves the same purpose. However, practice shows that the Security Council increasingly places emphasis on the protection of individuals and their rights. This has been widely accepted in the context of armed conflicts, however there is an ongoing debate whether the Security Council can take enforcement action in relation to grave human rights violations and/or to defend democracy as such.[99]

The involvement by the Security Council in human rights matters has always been controversial as it challenges the traditional view of this being within the scope of internal affairs and, more generally, the traditional view of sovereignty.[100] While our data show that the Security Council increasingly includes human rights in its discussions of threats against peace, such references are often correlated with the existence of civil or international war. It is very difficult to find cases where the Security Council intervenes in situations of grave human rights violations but absence of war or conflict. Thus, it appears as the Security Council perceives that human rights violations

96 Security Council, S/PV.3046, 31 January 1992, *supra* note 32, p. 143.

97 *Ibid*., p. 142.

98 *See*, for example, Resolution 1484 (2003) (on Democratic Republic of Congo) and Resolution 1973 (2011) on Libya

99 Krisch, 2012, *supra* note 2, p. 1279.

100 D. P. Forsythe, 'The UN Security Council and Human Rights: State Sovereignty and Human Dignity' *Friedrich-Ebert-Stiftung: International Policy Analysis* (2012); C. J. T. Le Mon, Rachel S., 'Security Council Action in the Name of Human Rights: From Rhodesia to the Congo', 10 *UC Davis Journal of International Law & Policy* (2004)

have to be associated with an elevated level of violence for them to be used as justifications in resolutions or explanations of votes.

Turning to defining the scope and mandate of resolutions, one of the most notable Security Council decisions was its resolution 1973(2011) to authorize the use of force to protect civilians in Libya, ten votes in favor and five abstaining (Brazil, China, Germany, India, Russia). It was the first implementation of the principle of the responsibility to protect (R2P) in practice with a Security Council authorization. During and after the situation states, among them council members, expressed different views on the interpretation of the resolution. The key controversy was whether the use of force could also be utilized to overthrow the Libyan Government. The resolution and explanations of votes during the debate made it clear that the purpose was to protect civilians.[101] It was also clear that the Council ruled out foreign occupation,[102] states such as South Africa also added a caveat ruling out "unilateral military intervention under the pretext of protecting civilians".[103] One should also consider earlier and subsequent debates in the Council on the same conflict. When Resolution 1970(2011) was adopted the US representative stated that Libya's leader Qadhafi "has lost the legitimacy to rule and needs to do what is right for his country, by leaving now."[104] Two months after the approval of SC Resolution 1973 (2011), the question of whether it is possible to protect civilians without purposefully harming government forces became evident. France argued that the Security Council authorized the coalition forces "to protect civilians under bombardment ordered by their leaders. By striking colonel Qadhafi's forces before they entered Benghazi, France and its partners helped to prevent a massacre there."[105] The argument was that in order to implement the Security Council mandate to protect civilians, government forces had to be defeated.[106] In contrast Russia argued that "The noble goal of protecting civilians should not be compromised by attempts to resolve in parallel any unrelated issue."[107] South Africa expressed similarly "that the implementation of these resolutions [went] beyond their letter and spirit" and that the states in the coalition should "refrain from advancing political agendas that go beyond

101 Preambular paragraph 10 and S/PV.6498.
102 Resolution 1973(2011) operative paragraph 4 and statements by Lebanon, United Kingdom, Colombia, Nigeria and South Africa, S/PV.6498, pp. 3, 4, 7, 9 and 10
103 *Ibid.*, p. 10.
104 S/PV.6491, p. 3.
105 S/PV.6531, p. 23.
106 P. Ahlin, 'From Libya to Syria – Did the Nato forces in Libya really exceed the mandate given in SC Resolution 1973 (2011)?', 3 *Juridisk Tidskrift* (2019) p. 491.
107 S/PV.6531, p. 9

the protection of civilians mandate, including regime change."[108] The debate on Libya shows how the inclusion of human rights violations as a threat to the peace and authorization of the use of force triggers uncertainty on the mandate. It illustrates how states that want to preserve traditional understanding of threat to the peace may not use their vote to prevent authorizations altogether but instead use their voice to make a more restrictive interpretation.

This conjecture is supported in our quantitative data. All else equal, states that abstain from voting on given resolution are more likely to make statements questioning whether a particular norm violation can constitute a legitimate ground for authorization of military force.[109] This pattern is consistent with the interpretation that states seek to temper the interpretation of the Charter via their explanations of votes.

4.3 *Terrorism*

At the UN, before 2001, terrorism was mainly dealt with by the General Assembly.[110] The Security Council was hesitant to determine that terrorist acts constituted threats to peace and security. This is explained by Cold War politics rather than an absence of terrorist threats or acts. Obvious terrorist acts, such as the attack on Israeli Olympic team members at the 1972 Summer Games in Munich or the 1976 hijacking of Air France Flight 139 did not result in any action by the Council.[111]

Our study covers the period when terrorism stayed on the Security Council agenda. The general findings may be summarized as follows: Security Council members were already in the early 1990s talking about terrorism, the issue remained on the agenda following the 9/11-attacks receding somewhat in the second half of the 2000s to increase significantly in the 2010s (see figure 7).

The Security Council had already invoked Chapter VII in relation to terrorism in the early 1990s, as illustrated in figure 8. Does the Security Council consider contexts involving violence against terrorism as merely situations or disputes or also as threats against peace? Figure 8 shows that there is a trend with increasing references to terrorism in Security Council resolutions.

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108 *Ibid*. p. 18.

109 We examined all meetings in our data where states made statements concerning the legality of the use of force in relation to considered norm violations. If a state abstained from voting on a tabled resolution, it was about 3 times more likely to use its explanation of vote to communicate a restrictive interpretation of the Charter, compared with states voting in support. This difference is statistically significant at the $p<0.01$ level.

110 B. Saul, 'Definition of "Terrorism" in the UN Security Council: 1985 – 2004', 4 *Chinese Journal of International Law* (2005) p. 141.

111 *Ibid*, p. 143.

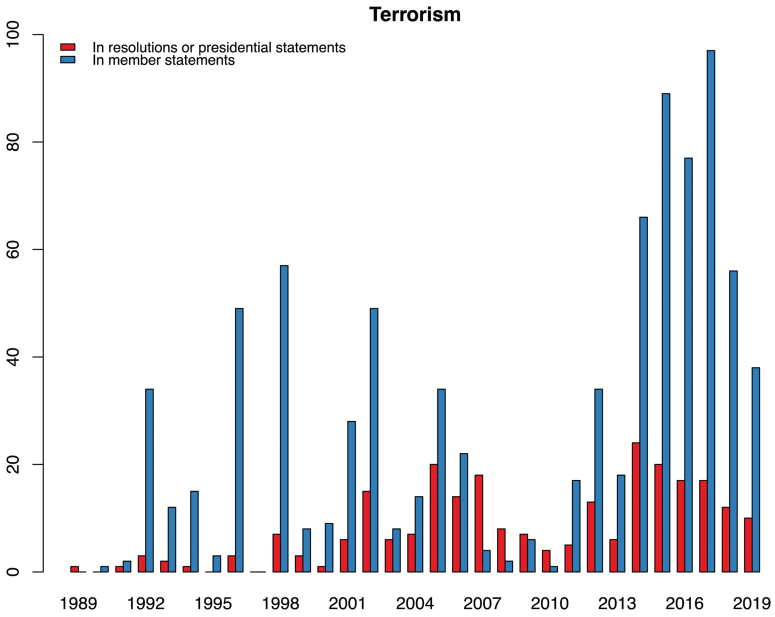

FIGURE 7 Count of annual references to terrorism as a threat against international peace and security, decisions and debates, 1989–2019

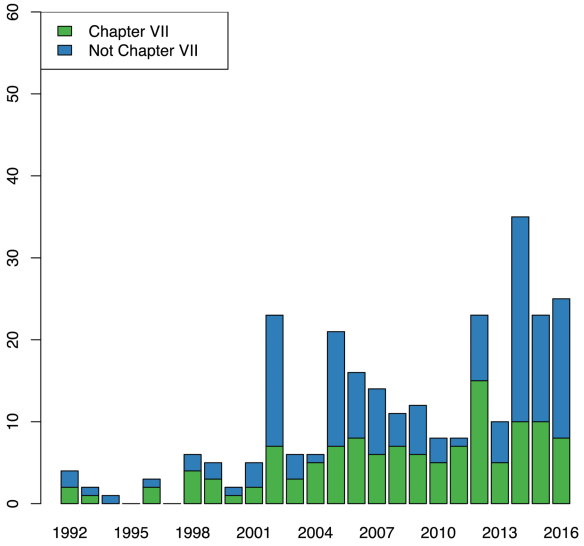

FIGURE 8 Count of annual references to terrorism in resolutions, 1989–2019.

The threat of terrorism is associated with at least two discussions related to Chapter VII of the UN Charter. The first concerns the permissibility to use force vis-a-vis a non-state actor as self-defence against large-scale terrorist acts. The second concerns the power of the Security Council to use enforcement action in cases of terrorism.

Commencing with the first discussion, 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. An early example would be resolution 748(1992) when the Security Council, in relation to the destruction of Pan Am Flight 103, stated that "the suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is essential for the maintenance of international peace and security".[112] The 9/11 attacks are often described as a decisive juncture in the approach under international law towards large-scale terrorism. The shared assumption, at least prior to the 9/11 attacks was that self-defence concerned inter-state use of force, with the United States (and some other countries outside the Council) challenging 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".[113] The United States moved gradually in the 1980s towards the same view claiming a right to use force against armed attacks by terrorists, including by the use of force against foreign countries that 'support, train, or harbour [them]'.[114] Thus, the United States had within the Council a somewhat diverging view. At the time, the problem of who was the aggressor was normally not addressed directly, rather an inter-state context in which some state nexus was sufficient.[115]

In relation to the 9/11 attack, the preambular text of resolution 1368 (2001) uses key phrases such as 'threat to international peace and security' and

112 *See* comment by Fielding, 1996, *supra* note 3, pp. 566–567.

113 T. Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press, Cambridge, 2010) p. 401.

114 C. J. Tams, 'Self-Defence against Non-State Actors: Making Sense of the 'Armed Attack' Requirement' in M. E. O'Connell, C. J. Tams and D. Tladi (eds), *Self-Defence against Non-State Actors*, vol 1 (Cambridge University Press, 2019) p. 138.

115 *Ibid*, p. 138.

'[r]ecognizing the inherent right of individual or collective self-defence' which indicates that the Security Council acknowledged that the requirements of Article 51 were met.[116] The widespread acceptance of other states towards US actions could have reflected a change in customary international law meaning that international law now accepts the use of force against a non-state actor as a response to large-scale terrorist acts.[117] The Security Council was, in a sense, writing or adjusting the law (i.e. customary international law). On the other hand, it is questionable whether this right to self-defence may be extended over time and without geographic limitations.[118] A second, less radical, approach also supported by US statements is that the *de facto* government of Afghanistan at the time of the September 11 attacks were complicit and responsible for the attacks. This would mean that the traditional interpretation of Article 51 to a large extent is intact.

The second discussion relates to the expanding practice of the Security Council to use enforcement action in relation to terrorism. There are several examples where the Security Council has stated that 'acts of international terrorism' constitute threats to the peace or to the maintenance of international peace and security.[119] The focus has changed from states as sponsors of terrorism to non-state groups as threats in and of themselves. While there are diverging views on the appropriate measures, there is increasing agreement that the Council has the power to invoke Chapter VII in relation to terrorism.[120]

At the same time, Security Council action shows how reluctant states have accepted resolutions while seeking to temper them. This is illustrated by 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). Russia and

116 Security Council Resolution 1368 (2001).

117 H. H. Koh, 'The Obama Administration and International Law speech at the Annual Meeting of the American Society of International Law Washington, DC' *US Department of State* (2010); M. Klamberg, 'International Law in the Age of Asymmetrical Warfare, Virtual Cockpits and Autonomous Robots' in J. Ebbesson and others (eds), *International Law and Changing Perceptions of Security* (Brill Nijhoff, Leiden and Boston, 2014) pp. 155–156.

118 M. E. O'Connell, 'Combatants and the Combat Zone', 43 *University of Richmond Law Review* (2009) p. 853.

119 Resolution 1189 (1998), UN Doc S/RES/1189; Resolution 1269 (1999), UN Doc S/RES/1269; Resolution 1373 (2001), UN Doc S/RES/1373; Resolution 1566 (2004), UN Doc S/RES/1566; Resolution 1989 (2011), UN Doc S/RES/1566.

120 Krisch, 2012, *supra* note 2, 1281–1282.

China had previously used their veto power to block Chapter VII resolutions on Syria.[121] Resolution 2249 was adopted unanimously. The resolution reaffirmed that terrorism constitutes one of the most serious threats to international peace and security.[122] Compared to other earlier resolutions authorizing 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 authorizes binding action or otherwise acts. Instead, it 'calls upon' states to 'take all necessary measures.'[123] This creates ambiguity to what extent the resolutions authorizes the use of force. The explanations of votes reveal 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 by stating "in our view, the French resolution is a political appeal, rather than a change to the legal principles underlying the fight against terrorism."[124] In other words, Russia and similarly minded states sought to temper its interpretation, to clarify that the resolution does not provide a new general legal ground for the use of force against terrorism.[125]

5 Conclusions

While it is widely agreed that the concept of security has broadened and that this is also reflected in the practice of the Security Council, the exact process and driving forces have been less studied.

Patterns at the macro level show that council members, individually and as a collective, are pushing the outer boundaries of what is considered a threat in an incremental manner, as illustrated by the Council's engagement with violence against women, human rights violations, and terrorism.

Our study of the institutional practice of the Security Council and debates among states confirms that non-military sources of instability have increasingly

121 *See e.g.* United Nations Security Council, Draft Resolution 612, 4 October 2011, S/2011/612; United Nations Security Council, Draft Resolution 538, 19 July 2012, S/2012/538; United Nations Security Council, Draft Resolution 348, 22 May 2014, S/2014/348; commented by J. Dahlqvist, *Defining a Security Council Mandate in Relation to Counter-Terrorism Actions – The Function and Legal Status of Explanations of Vote* (Stockholm University, 2018) p. 2.

122 Resolution 2249 (2015), preambular paragraph 4.

123 Resolution 2249 (2015), operative paragraph 5.

124 S/PV.7565, p. 5.

125 Dahlqvist, 2018, *supra* note 121, p. 39.

been referenced when discussing possible 'threats to peace and security'. The present study and the surveyed debates help us understand how and when members of UN Security Council talk about threats to the peace, breaches of the peace, or acts of aggression in the Council. However, to the extent that UN Security Council resolutions and explanations of votes contribute to the interpretation of specific provisions of the UN Charter and/or customary international law,[126] adequate attention has to be afforded not only to states belonging to the same strata of the world community but also a wider group of states over time. Otherwise, the perception of what is law – and thus also what is applied as law – might be skewed to what is topical at the moment.

In recent decades, commentators have discussed whether the UN Security Council already passed its zenith in the interpretation and implementation of Article 39[127] and whether it would apply a more narrow interpretation of what constitutes a threat against peace.[128] Such development has been looming by attempts of some council members to temper this development, both by providing caveats in the text of resolutions and by making statements when adopting resolutions.

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126 Klamberg, 2022, *supra* note 38.
127 Freudenschuβ, 1993, *supra* note 1, p. 39.
128 Österdahl, 1998, *supra* note 18, p. 137; Wellens, 2003, *supra* note 3, p. 69.