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Still agreeing to disagree: international security and constructive ambiguity[*]

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ABSTRACT
This article – which updates and builds on an earlier piece published in *Global Governance* in 2004 – concerns the deliberate use of redundancies, contradictions, imprecisions and other ambiguities in UN Security Council resolutions on the use of force, centrally including Resolution 1441 on Iraq, Resolution 1973 on Libya, and Resolution 2249 on Syria and Iraq. 'Constructive ambiguity', a term generally attributed to former US Secretary of State Henry Kissinger, is employed in many areas of international law. This article identifies five different forms of constructive ambiguity found in Security Council resolutions and suggests reasons for why this drafting strategy is used. It concludes by considering the implications of this research for our understanding of the role of international law in international peace and security. It finds that ambiguity, deployed deliberately and strategically, is not the 'design weakness' that some scholars consider it to be.

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1. Introduction

Muammar Gaddafi's response to the 'Arab Spring' was to use mercenaries and warplanes to suppress pro-democracy protests. On 16 March 2011, as his forces advanced on the rebel-held city of Benghazi, the Libyan dictator reportedly warned its residents: 'We are coming tonight, and there will be no mercy'.[1] The next day, the UN Security Council adopted Resolution 1973, which provides two distinct authorizations to use military force within the same document.[2] In the first, the Council '*Authorizes* Member States … to

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*All websites last accessed 20 March 2020.

[1]Ishaan Tharoor, 'Gaddafi Warns Benghazi Rebels: We Are Coming, and There'll Be No Mercy', *Time* (17 March 2011) https://world.time.com/2011/03/17/gaddafi-warns-benghazi-rebel-city-we-are-coming-and-therell-be-no-mercy/.

[2]UNSC Res 1973, UN Doc S/RES/1973 (17 March 2011).

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take all necessary measures … to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi'.[3] In the second, the Council establishes a no-fly zone over Libya 'in order to help protect civilians'[4] and '*Authorizes* Member States … acting nationally or through regional organizations or arrangements, to take all necessary measures to enforce compliance with the ban on flights'.[5]

For the purposes of this article, it is important to understand that the second authorisation is redundant – since any UN member state could decide, under the first authorisation, that 'all necessary measures … to protect civilians and civilian populated areas' include the enforcement of a no-fly zone. Indeed, the first authorisation is expressly limited only by the exclusion of 'a foreign occupation force of any form on any part of Libyan territory'.[6] As a result, any member state could decide that 'all necessary measures' include air strikes, which is exactly what North Atlantic Treaty Organization (NATO) states did.

The extension of the intervention to include air strikes was publicly condemned by the Russian Federation (Russia), which insisted that Resolution 1973 only authorised the enforcement of the no-fly zone. Yet it is unlikely that Russia overlooked the existence of the first authorisation or its significance when negotiating and abstaining on, rather than vetoing, the resolution. Three weeks of negotiations had preceded the adoption of the six-page document, which meant that every word had been carefully scrutinised by lawyers from each of the 15 Security Council member states. In other words, it is likely that Russia consciously allowed the first, broader authorisation to be granted, before pretending – when condemning NATO's actions – that it simply was not there.

This article – which updates and builds on an earlier piece published by the author in *Global Governance* in 2004[7] – concerns the deliberate use of redundancies, contradictions, imprecisions and other ambiguities in Security Council resolutions, including but extending beyond Resolution 1973 and the intervention in Libya. The first section establishes that 'constructive ambiguity', a term generally attributed to former US Secretary of State Henry Kissinger, is employed in many areas of international law. The second section identifies five different forms of constructive ambiguity found in Security Council resolutions concerning the use of military force. The third section suggests reasons why this drafting strategy is used. A fourth and final section considers the implications of this research for our understanding of the role of international law in

[3] *Ibid*, para 4.
[4] *Ibid*, para 6.
[5] *Ibid*, para 8.
[6] *Ibid*, para 4.
[7] Michael Byers, 'Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity' (2004) 10 *Global Governance* 165.

international peace and security. It finds that ambiguity, deployed deliberately and strategically, is not the 'design weakness' that some scholars consider it to be.

2. Constructive ambiguity in international law

International legal documents often contain unintended ambiguities as a result of negotiations involving complex issues, divergent interests, and tight time constraints. Ambiguities are also unavoidable when crafting general rules that will later be applied to specific situations, each with its own particular set of facts. All legal systems take this into account. In some domestic systems, the principle of 'reasonableness' is both ambiguous and controlling.[8] Internationally, the principles of 'proportionality' and 'equity' play similar roles, for instance, in the law governing the use of military force and the Law of the Sea, respectively.[9] The 'law of treaties' also provides assistance in applying general rules to later specific circumstances, for instance, by requiring that 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' be 'taken into account'.[10]

However, ambiguities are sometimes included in international legal documents even when, from a drafting perspective, more precise language could easily have been employed. As this article will demonstrate, the reasons for this lie not in the law but in the politics involved in the negotiations. G R Berridge, Alan James, and Lorna Lloyd define constructive ambiguity as 'the deliberate use of ambiguous language in a sensitive issue in order to advance some political purpose'.[11]

This article uses a slightly different definition: *Constructive ambiguity is the deliberate use of ambiguous language in order to achieve agreement during the negotiation of a legal text.*

Again, constructive ambiguity is intentional. It is also the result of good, rather than bad, drafting – precisely because it reflects the intent of the negotiators.

Constructive ambiguity is sometimes used to paper over irreconcilable differences so that at least some agreement between the negotiating parties can be achieved. As Richard Bilder explained: 'Often agreement on a particular matter will only be possible through the adoption of very broad language in the text, which in effect leaves the problem for later

[8]See, e.g. Lord Hutton, 'Reasonableness and the Common Law' (2004) 55(3) *Northern Ireland Legal Quarterly* 242.

[9]See, e.g. *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (2000) www.icty.org/x/file/Press/nato061300.pdf, paras 48–50; United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3, Art 74 and Art 83, www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm.

[10]See Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331, Art 31(3)(b).

[11]GR Berridge, Alan James and Lorna Lloyd, *Dictionary of Diplomacy* (Palgrave Macmillan, 3rd edn 2012) 73.

resolution'.[12] Article 2(2)(c) of the 1974 Charter on Economic Rights and Duties of States provides one example of this:

> Each state has the right … (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent.[13]

In short, a state is required to pay compensation for expropriation, but is free to determine the amount, which could conceivably be nothing.[14]

A second example of constructive ambiguity is found in Article 1 of the 1958 Geneva Convention on the Continental Shelf, which defines the continental shelf as

> the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.[15]

As Thomas Franck explained:

> [T]he parties simply covered their differences and uncertainties with a formula whose content remained in abeyance pending further work by negotiators, courts, and administrators and by the evolution of customary state practice. The vagueness of the rule did permit a flexible response to further advances in technology, a benefit inherent in indeterminacy.[16]

A third example of constructive ambiguity is found in Article 27(3)(b) of the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS):

> Members may exclude from patentability … plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.

[12]Richard Bilder, 'The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs' (1962) 56 *American Journal of International Law* 633, 654. For an extended discussion, see Guy de Lacharrière, *La politique juridique extérieure* (IFRI, 1983) 89–103.

[13]UNGA Res 29/3281, UN Doc A/RES/29/3281 (XXIX) (12 December 1974).

[14]As Jorge Castañeda explained at the time: 'La solution du problème de l'indemnisation consisterait peut-être en une formule qui préserverait la position que l'une et l'autre parties soutiennent depuis près d'un siècle, c'est-à-dire qui serait énoncée en des termes suffisamment généraux et suffisamment abstraits (je serais tenté de dire délibérément ambigus) pour englober les positions respectives sans rien y changer et sans rien trancher.' Fourteenth session of the Council on Trade and Development (20 August 1974) Doc TD/B (XIV)/Misc 8. My translation: 'The solution to the problem of compensation may consist in a formula which preserves the position which both parties have supported for almost a century, that is to say, which is expressed in sufficiently general and abstract terms (I am tempted to say deliberately ambiguous) to encompass the respective positions without changing anything there and without settling anything.'

[15]Convention on the Continental Shelf (1958), No. 7302 (1964) 499 UNTS 311.

[16]Thomas M Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1995) 31 (footnote omitted).

> However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.[17]

This obvious contradiction, which leaves it unclear as to whether states can exclude plants from patents and comparable intellectual property protections, suggests that it was intentional, as does the fact that the parties committed to further negotiations, not on the issue of plant patents as such, but on the *existing* terms of this particular sub-section.

An extreme example of constructive ambiguity occurred in 1975 when the UN General Assembly addressed the military stalemate on the Korean Peninsula by adopting, on the same day, two resolutions that directly contradict each other. The two documents carry the same number – 3390 (XXX) – and are identified as resolutions 'A' and 'B'. Resolution A states that 'the Armistice Agreement remains indispensable to the maintenance of peace and security in the area', while Resolution B states that 'a durable peace cannot be expected so long as the present state of armistice is kept as it is in Korea'.[18] Both versions were voted on separately, and both were adopted narrowly with the majority of states abstaining.[19]

Constructive ambiguity is thus employed across the international legal system, from international trade and investment, to the Law of the Sea, to international peace and security. However, the last example – regarding the Korean Peninsula – came from the UN General Assembly, which does not have the capacity to adopt binding resolutions or authorise the use of force against the political independence or territorial integrity of member states. Nor is the UN General Assembly the principal body responsible for international peace and security. That role, including the capacity to authorise the use of force, rests in the UN Security Council, which for this reason and the existence of the veto power held by each of the five permanent members is the most overtly political body in international law. Examining constructive ambiguity in UN Security Council resolutions thus offers an excellent opportunity to study, not only the legal dimensions of this technique, but also the interaction of law and politics in the international system.

3. Constructive ambiguity and Security Council resolutions

Academics in the disciplines of both international law and international relations have written a great deal about indeterminacy,[20] and a subset of

[17] Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, 1869 UNTS 299.
[18] UNGA Res 3390, UN Doc A/RES/3390 (XXX) (A & B) (18 November 1975).
[19] Miguel Marin-Bosch, *Votes in the UN General Assembly* (Martinus Nijhoff, 1998) 37–38.
[20] See, e.g. Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990) 50–90; Vaughn P Shannon, 'Norms Are What States Make of Them: The Political Psychology of Norm

that literature addresses how constructive ambiguity has a role in creating more space for politics in the interpretation and application of treaties, other rules, and norms. For example, Kenneth Abbott and Duncan Snidal explained how powerful states prefer to negotiate 'soft law' because it is often imprecise, limits interference by external organisations, and therefore affords greater flexibility and control, while weaker states prefer the greater certainty and precision that often comes with 'hard law'.[21] Surabhi Ranganathan revealed how ambiguities in the rules concerning conflicts between treaties, as set out in the Vienna Convention on the Law of Treaties, are exploited by states seeking to change existing multilateral instruments.[22] Yuval Shany examined the 'margin of appreciation' whereby international or domestic courts sometimes accept that ambiguous rules allow governments to choose between different forms of compliant behaviour.[23] Wayne Sandholtz explored how normative development can occur within situations of legal ambiguity, and how 'norm entrepreneurs' can take advantage of these opportunities.[24] The role of ambiguity and politics in the interpretation of treaties has also been a topic of academic inquiry, including work that links legal analysis to theoretical developments in other disciplines such as linguistics.[25]

Some scholarly attention has also been paid to the role of constructive ambiguity within one of the most prominent and contested spheres of international politics, namely the negotiation and adoption of UN Security Council resolutions.[26] However, most of these writings either focus on identifying where constructive ambiguity has been used as a drafting technique, or on justifying particular interpretations of specific ambiguities. Contributions

Violation' (2000) 44(2) *International Studies Quarterly* 293; Wesley W Widmaier and Luke Glanville, 'The Benefits of Norm Ambiguity: Constructing the Responsibility to Protect Across Rwanda, Iraq and Libya' (2015) 21(4) *Contemporary Politics* 367.

[21]Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization* 421.

[22]Surabhi Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (Cambridge University Press, 2014).

[23]Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16(5) *European Journal of International Law* 907.

[24]Wayne Sandholtz, *Prohibiting Plunder: How Norms Change* (Oxford University Press, 2007); Wayne Sandholtz, 'Expanding Rights: Norm Innovation in the European and Inter-American Courts', in Alison Brysk and Michael Stohl (eds), *Expanding Human Rights: 21st Century Norms and Governance* (Edward Elgar, 2017) 156.

[25]See, e.g. Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press, 2012).

[26]See, e.g. Jules Lobel and Michael Ratner, 'Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime' (1999) 93 *American Journal of International Law* 124; Ian Johnstone, 'When the Security Council is Divided: Imprecise Authorizations, Implied Mandates, and the "Unreasonable Veto"' in Marc Weller (ed), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 227; Dapo Akande and Marko Milanovic, 'The Constructive Ambiguity of the Security Council's ISIS Resolution', *EJIL:Talk!* (21 November 2015) www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/.

of the latter type often come from practitioners, writing about events in which they were directly involved.[27]

Venturing beyond this literature to explore why constructive ambiguity is used in international documents, and with what specific and general consequences, is no easy task. For instance, it is difficult to establish the intent of negotiators when dealing with documents that were developed behind closed doors before being adopted in open meetings.[28] Yet the difficulty of establishing intent does not prevent us from inferring intent – based upon the language of a resolution and the circumstances in which it was adopted. Despite the challenges, there is a need for an exploration of constructive ambiguity that goes beyond identification and justification to explore the interaction of international law and international politics involved.

The Security Council adopts resolutions on a wide range of topics, from human rights to terrorist financing to the use of military force. For the purposes of a focused analysis, this article confines itself to resolutions concerning the use of force, since these are often the most politically charged. Nevertheless, and as the following subsections demonstrate, the use of constructive ambiguity in Security Council resolutions is widespread and takes a number of different forms.

3.1. Different authorizations provided by the same resolution

The introduction to this article explained how Security Council Resolution 1973 contains two authorizations, the first of which is much broader than the second. In operative paragraph four, the Council:

> *Authorizes* Member States … to take all necessary measures … to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory … .[29]

This first authorisation allows for a great deal of military activity, because 'all necessary measures' is the language normally used by the Council to grant full powers to intervening countries.[30] Even the exclusion of a 'foreign occupation

[27]See, e.g. Michael Wood, 'The Interpretation of Security Council Resolutions' (1998) 2 *Max Planck Yearbook of United Nations Law* 73, 95, www.mpil.de/files/pdf2/mpunyb_wood_2.pdf. For an updated version, see Michael Wood, 'The Interpretation of Security Council Resolutions, Revisited' (2017) 20 *Max Planck Yearbook of United Nations Law Online* 1. Brian J Egan, 'International Law, Legal Diplomacy, and the Counter-ISIL Campaign', *Remarks to the American Society of International Law* (1 April 2016) https://2009-2017.state.gov/s/l/releases/remarks/255493.htm; Alain Dejammet, 'Ambiguities of UNSC 1441: Constructive and Not', in Jochen Abr. Frowein et al (eds), *Verhandeln für den Frieden. Negotiating for Peace* (Springer-Verlag, 2003) 19–23.

[28]The practice of pre-negotiating resolutions before official meetings was clearly demonstrated on 28 September 2001, when Resolution 1373 was adopted at a meeting that lasted just five minutes: UNSC Verbatim Record, UN Doc S/PV.4385 (28 September 2001).

[29]UNSC Res 1973, UN Doc S/RES/1973 (17 March 2011).

[30]All military actions remain subject to the rules of international humanitarian law, including those set out in the 1949 Geneva Conventions and the 1977 Additional Protocols.

force' does not preclude the use of some ground forces, since 'occupation' is a technical term of international humanitarian law defined in the 1907 Hague Regulations: 'Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised'.[31]

The second authorisation – to enforce the no-fly zone – is redundant because it concerns a measure that could easily fall within the scope of 'all necessary measures … to protect civilians and civilian populated areas'. It appears in operative paragraph six, where the Council '*Decides* to establish a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians', and in operative paragraph eight where the Council '*Authorizes* Member States … to take all necessary measures to enforce compliance with the ban on flights imposed by paragraph 6 above, as necessary'.[32]

Russia was likely aware of the two parallel authorizations, since it participated in the three weeks of negotiations that led to the adoption of the six-page resolution.[33] Yet later, in its public comments, it focused on the narrower of the two. As Russian Foreign Minister Sergei Lavrov stated, 'We consider that intervention by the coalition in what is essentially an internal civil war is not sanctioned by the UN security council resolution'.[34] NATO countries took the opposite view, with British Foreign Office Minister Alistair Burt stating: 'The UN resolution's point of ensuring that civilians could be protected allows the international coalition to take action against those who are threatening civilians'.[35]

Some experts believe that Russia was surprised when NATO states interpreted Resolution 1973 as authorising air strikes, and that this experience contributed to its decision to block Security Council resolutions on the crisis in Syria.[36] Indeed, Russia's permanent representative to the United Nations said as much in October 2011:

> The situation in Syria cannot be considered in the Security Council in isolation from the Libyan experience. The international community is wary of the statements being heard that the implementation of the Security Council resolutions in Libya as interpreted by NATO is a model for its future actions to exercise the

[31] Hague Regulations Concerning the Laws and Customs of War on Land, as annexed to the 1907 Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, https://ihl-databases.icrc.org/ihl/INTRO/195?OpenDocument, Art. 42.

[32] UN Doc S/RES/1973 (n 29).

[33] Resolution 1973 followed Resolution 1970, which was adopted on 26 February 2011 and referred the situation in Libya to the Prosecutor of the International Criminal Court, imposed an arms embargo, banned travel by senior members of the Gaddafi regime and froze their assets. The intervening two resolutions (1971 and 1972) dealt with the situations in Liberia and Somalia, respectively.

[34] Robert Booth, 'Libya: Coalition Bombing May Be in Breach of UN Resolution's Legal Limits', *The Guardian* (28 March 2011) www.theguardian.com/world/2011/mar/28/libya-bombing-un-resolution-law.

[35] *Ibid.*

[36] See, e.g. Andreas Kulick, 'From Problem to Opportunity?: An Analytical Framework for Vagueness and Ambiguity in International Law' (2016) 59 *German Yearbook of International Law* 257.

> 'responsibility to protect'. It's not hard to imagine that tomorrow 'united defenders' may begin to apply this 'exemplary model' in Syria as well.[37]

This assessment is called into question by the likelihood that Russia knew about the existence of the first, broader authorisation when it abstained during the vote and therefore allowed Resolution 1973 to be adopted. A more likely explanation is that Russia's interests were more directly engaged in Syria than they were in Libya, with Syria being closer to its borders and containing a strategically significant Russian naval base. Another parallel explanation could be that Arab countries, many of which supported UN-authorised action in Libya, have been far from unified in support of UN-authorised action in Syria. As a result, Russia likely did not feel the same political pressure to refrain from using its veto there.

3.2. Different content in different official language versions of the same resolution

A related form of constructive ambiguity involves saying substantively different things within different official language versions of the same Security Council resolution.

Security Council resolutions are adopted in the six official languages of the United Nations – Arabic, Chinese, English, French, Russian, and Spanish – with each 'official language version' being equally authoritative. Yet sometimes different official language versions will say different things, usually accidentally but perhaps sometimes intentionally. Security Council Resolution 242, adopted following the 1967 Six Day War, provides one example of this form of constructive ambiguity. The French version demands the 'retrait des forces armées israéliennes des territoires occupés' – which translates directly as the 'retreat of Israeli armed forces from the occupied territories'. The English version demands the retreat 'from territories occupied in the recent conflict' and thus – because of the missing 'the' – arguably does not apply to *all* the territory, that is, East Jerusalem, the Gaza Strip, Golan Heights, and West Bank.[38] According to Guy de Lacharrière, the inconsistency was intentional:

> C'est ainsi que certains délégués ont précisé qu'ils étaient prêts à accepter le texte seulement dans une des deux versions, la française pour les uns, l'anglaise pour les autres. Ainsi, l'ambiguïté est apparue comme une condition de l'adoption de la résolution, la divergence des vues ne pouvant être autrement

[37] Embassy of the Russian Federation to the United Kingdom of Great Britain and Northern Ireland, *Statement in Explanation of Vote by Vitaly Churkin, Permanent Representative of the Russian Federation to the UN, on the Draft Resolution on the Situation in Syria, New York, October 4, 2011*, www.rusemb.org.uk/press/248.

[38] See John McHugo, 'Resolution 242: A Legal Reappraisal of the Right-Wing Israeli Interpretation of the Withdrawal Phrase with Reference to the Conflict Between Israel and the Palestinians' (2002) 51 *International and Comparative Law Quarterly* 851; Shabtai Rosenne, 'On Multi-Lingual Interpretation' (1971) 6 *Israel Law Review* 360.

> surmontée. L'ambiguïté, introduite et maintenue sur la demande très pressante d'Israël, peut être considérée comme ayant été, pour cet Etat, un procédé de limitation de l'échec.[39]

In other words, the ambiguity papered over a serious divergence of views, enabled Israel to avoid a diplomatic defeat, and thus made it possible for the resolution to be adopted.

3.3. Different understandings of a factual situation accommodated in the same resolution

Another related form of constructive ambiguity involves the inclusion of two different understandings of a factual situation within a single Security Council resolution.

In 2014, Ukraine was descending into crisis as a result of the ouster of President Viktor Yanukovych, the annexation of Crimea by Russia, and fighting in the eastern provinces of Donetsk and Luhansk between Ukrainian government forces and pro-Russian rebels. The US, European Union, Norway and Canada responded to the annexation of Crimea by adopting wide-reaching sanctions against Russia. Military cooperation between NATO and Russia also ceased.

Diplomacy, however, continued – including in the Security Council. In Resolution 2202, adopted on 17 February 2015, the Council expressed 'grave concern at the tragic events and violence in eastern regions of Ukraine' and endorsed the Minsk Agreements – a package of measures, including a ceasefire, negotiated by the leaders of Russia, Ukraine, France and Germany earlier that month.[40]

Resolution 2202 is significant for present purposes because it begins with the Security Council reaffirming 'its full respect for the sovereignty, independence and territorial integrity of Ukraine'.[41] The document was adopted unanimously, with the five permanent members – including Russia, the US, UK, and France – all voting in favour. However, agreement on the text of the resolution was likely only possible because of a constructive ambiguity, namely, on the geographic extent of Ukraine. From Russia's perspective, the first line of Resolution 2202 affirms the 'sovereignty, independence and territorial integrity' of a Ukraine that does not include Crimea, since Crimea is now part of the Russian Federation. From the perspective of the

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[39] de Lacharrière (n 12) 92. (My translation: 'As it happens, certain delegations indicated that they were prepared to accept the text only in one of the two versions, the French version for some, the English for others. The ambiguity thus appeared as a condition for the adoption of the resolution, the divergence of views being otherwise insurmountable. The ambiguity, introduced and maintained at the strong insistence of Israel, can be considered as having been, for that state, a means for limiting its defeat.'). It should be noted that Rosenne (n 38), who was working for the Israeli government, maintained that any ambiguity was unintentional.

[40] UNSC Res 2202, UN Doc S/RES/2202 (17 February 2015).

[41] *Ibid*.

US, UK, and France, the Ukraine referred to in the resolution includes Crimea, since Crimea is illegally occupied by Russia.

These two different understandings were probably evident to all the diplomats involved. The geographic extent of Ukraine could be left ambiguous because the Security Council was focused on the fighting in Donetsk and Luhansk. Papering over the annexation of Crimea, at least temporarily, would have helped the member states to come to an agreement on the problem at hand.

3.4. Different interpretive approaches facilitated by the same resolution

Another form of constructive ambiguity involves the inclusion of language in a Security Council resolution that deliberately facilitates two or more different interpretive approaches, leading to differing interpretations as to what has been authorised, and what has not. The best example is Resolution 1441, adopted in November 2002, which I have analysed at greater length elsewhere.[42]

In Resolution 1441, a unanimous Security Council recalled its previous resolutions on Iraq, required the Iraqi government to account for all of its chemical, biological, and nuclear weapons, and insisted on full cooperation with UN and International Atomic Energy Agency weapons inspectors.[43] The Council also declared that Iraq was in 'material breach' of some of the previous resolutions, that any further failure to comply would constitute an additional material breach, that it would 'convene immediately' if the inspectors reported such a failure, and that continued violations of Iraq's obligations would result in 'serious consequences'.[44]

The Security Council's member states soon disagreed publicly as to whether they were permitted to use force to uphold Resolution 1441. The US and UK focused on the finding of 'material breach' and threat of 'serious consequences', while France and Russia focused on the statement that the Council would 'convene immediately' in the event of any report of non-compliance, and argued that a further resolution would be needed before force could be used.

Both positions had some basis in the text of the resolution, because language had been included that supported both sides. Support for the US and UK position can be found in the preamble of Resolution 1441, which expressly refers to Resolution 678 and thus (arguably) implies that it remained in force. Support can also be found in the use of the language of 'material breach' – in a situation where all the member states knew what the US and

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[42]Byers (n 7) 165.
[43]UNSC Res 1441, UN Doc S/RES/1441 (8 November 2002).
[44]*Ibid.*

UK understood that concept to imply, namely, that fundamental failures to comply with Resolutions 687 and 1441 would revive the authorisation provided in Resolution 678.[45]

Other aspects of Resolution 1441, however, favour the argument against authorisation. First, the reference to Resolution 678 is made in the context of 'recalling' previous resolutions and is not therefore easily understood as an assertion that the resolution remains in force. Second, Resolution 1441 conspicuously fails to specify the legal consequences, if any, of a finding of material breach, despite this concept not being an established part of UN law.[46] Third, Resolution 1441 does state that, in the event of a report of non-compliance from the weapons inspectors, the Security Council 'will convene immediately'.[47] Fourth, although the Security Council warns of 'serious consequences', it does not employ the words 'all necessary means' or 'all necessary measures'. Finally, the Security Council declares its intent 'to remain seized of the matter'.[48]

The ambiguities in Resolution 1441 were likely intentional: the document is five pages long and took eight weeks to negotiate. Moreover, the differences in the legal positions taken on Resolution 1441 were likely the result, not just of ambiguities in the text, but of the inclusion of those ambiguities with the knowledge that the two groups of states held different views on the appropriate method for interpreting Security Council resolutions.

The US and UK generally prefer a contingently purposive and less textually oriented approach. For example, Sir Michael Wood – the Foreign Office Legal Adviser in 2003 – had argued in 1998 that the interpretation of a resolution requires taking into account the full background of the Security Council's involvement with an issue so as to determine the purpose it was seeking to achieve.[49] According to Sir Michael, the approach set out in the 1969 Vienna Convention on the Law of Treaties, which does not allow recourse to preparatory documents unless the 'ordinary meaning' of the text of a treaty is unclear, is inappropriate for Security Council resolutions because they are of an 'essentially political nature'.[50] William H Taft IV – the State Department Legal Adviser in 2003 – likewise stressed

[45]For an early expression of the US understanding of the application of 'material breach' to Resolution 687, see Michael Matheson, 'Legal Authority for the Possible Use of Force Against Iraq' (1998) 92 *American Society of International Law Proceedings* 136, 141.

[46]The concept of material breach was borrowed from the law of treaties. See Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331, Art. 60.

[47]UN Doc S/RES/1441 (n 43).

[48]For a developed set of arguments against the existence of authorisation, see Sean D Murphy, 'Assessing the Legality of Invading Iraq' (2004) 92 *Georgetown Law Journal* 173.

[49]Wood (1998) (n 27); Wood (2017) (n 27).

[50]*Ibid*. The same approach was taken by Lord Goldsmith, the British Attorney General, in his advice to Prime Minister Blair in advance of the Iraq War: 'The previous practice of the Council and statements made by Council members during the negotiation of resolution 1441 demonstrate that the phrase "material breach" signifies a finding by the Council of a sufficiently serious breach of the cease-fire conditions to revive the authorisation in resolution 678 and that "serious consequences" is accepted as

> that a Council determination that Iraq had committed a material breach would authorize individual member states to use force to secure compliance with the Council's resolutions … was well understood in the negotiations leading to the adoption of Resolution 1441 on November 8, 2002 … .[51]

A purposive approach to interpretation leads relatively easily to a presumption in favour of an authorisation to use force when a resolution is adopted in a situation where: (1) the Security Council has previously identified a threat to international peace and security; (2) the Council has imposed strict conditions on the state posing the threat; and (3) that state has conspicuously failed to fulfil the entirety of those conditions. Although the presumption may be countered by clear evidence to the contrary, textual ambiguities are read, where possible, in a manner that is consistent with the view that the Council intends its demands to be complied with and, if necessary, enforced.

Other countries generally take a more restrictive approach to interpreting Security Council resolutions, one that – as Jochen Abr. Frowein explained – accords no relevance to the subjective intentions of Security Council members:

> The resolution is not based on the common will of all those concerned. It is based on the common will of the majority of the members of the Security Council, including the permanent members, at least by abstention. This means that States against whom the Security Council exercises its power under Chapter VII have not contributed to the formulation of the resolution. As far as they are concerned the resolution has the same sort of objective existence as laws or administrative acts in a specific legal system. Therefore, the objective view of the neutral observer as addressee must be the most important aspect for the interpretation. Subjective intentions of some members of the Security Council, particularly intentions covered by the formulation or hidden in specific wording can, at least in principle, not be seen as in any way decisive.[52]

This more restrictive approach to interpretation was evident in some of the statements made in the Security Council meeting at which Resolution 1441 was adopted. For example, Mexican ambassador Aguilar Zinser said: 'We

indicating the use of force.' Goldsmith memo, 7 March 2003, www.comw.org/warreport/fulltext/0303goldsmith.html.

[51]William H Taft IV and Todd F Buchwald, 'Preemption, Iraq, and International Law' (2003) 97 *American Journal of International Law* 557, 560.

[52]Jochen Abr. Frowein, 'Unilateral Interpretation of Security Council Resolutions – a Threat to Collective Security?' in Volkmar Götz, Peter Selmer and Rudiger Wolfrum (eds), *Liber amicorum Günther Jaenicke – Zum 85. Geburtstag* (Springer-Verlag, 1998) 97, 99 (footnote omitted). Frowein also pointed out that a Security Council resolution authorising force 'is the legal basis for the most severe encroachment upon the sovereignty of a member of the United Nations', which provides another reason for an interpretive presumption *against* the authorisation of military force (*Ibid*, 112). Dire Tladi makes the same point with regards to the interpretation of Article 51 of the UN Charter: 'Any interpretation of Article 51 must take into account that self-defense is an exception to a general rule, namely the prohibition on the use of force against the territorial integrity of another state. Its parameters should be strictly construed and should not have the effect of overwhelming the general rule, namely the prohibition on the use of force.' Dire Tladi, 'The Nonconsenting Innocent State' (2013) 107 *American Journal of International Law* (2013) 570, 574.

reiterate the belief reflected in the agreed text that the possibility of the use of force is valid only as a last resort, with prior explicit authorization required from the Security Council'.[53]

Again, the ambiguities in Resolution 1441 were likely deliberate, with the resulting differences in interpretations having been foreseen by the states involved in its negotiation. Stephen Mathias, the Assistant Legal Adviser for UN Affairs in the US State Department at the time, later wrote: 'The Security Council in Resolution 1441 (2002) knowingly adopted a resolution the language of which would permit both sides to claim victory'.[54]

3.4. Approval of the use of force without Chapter VII authorisation

A final form of constructive ambiguity involves the inclusion of language in a Security Council resolution that supports a right to military action based on customary international law, without adding to that right through the provision of Chapter VII authorisation. In 2014–2015, the jihadist militant group Islamic State of Iraq and the Levant (ISIL) seized control of large areas of Iraq and Syria. In addition to challenging the Iraqi government (which was supported by the US) and the Syrian government (which was supported by Russia), ISIL organised or motivated numerous terrorist attacks outside the region.

In November 2015, the Security Council voted unanimously to adopt Resolution 2249.[55] For present purposes, the most interesting part of the resolution is operative paragraph 5, in which the Council:

> *Calls upon* Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da'esh as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al-Qaida, and other terrorist groups, as designated by the United Nations Security Council, and as may further be agreed by the International Syria Support Group (ISSG) and endorsed by the UN Security Council, pursuant to the statement of the International Syria Support Group (ISSG) of 14 November, and to eradicate the safe haven they have established over significant parts of Iraq and Syria[.][56]

[53]UNSC Verbatim Record, UN Doc S/PV.4644 (8 November 2002). Another good example of the restrictive approach to the interpretation of Security Council resolutions is found in a legal opinion produced within the Russian Foreign Ministry in 2003 and later translated into English: The Legal Department of the Ministry of Foreign Affairs of the Russian Federation, 'Legal Assessment of the Use of Force Against Iraq' (2003) 52(4) *International and Comparative Law Quarterly* 1059, 1062.

[54]D Stephen Mathias, 'The United States and the Security Council' in Niels Blokker and Nico Schrijver (eds), *The Security Council and the Use of Force: Theory and Reality – a Need for Change?* (Martinus Nijhoff, 2005) 173, 176. See also Dejammet (n 27).

[55]UNSC Res 2249, UN Doc S/RES/2249 (20 November 2015).

[56]*Ibid*.

As one parses this paragraph, it becomes clear that Resolution 2249 does not provide any rights to use force that the member states did not already have. The resolution contains the words 'all necessary measures' but lacks other markings of a binding resolution. The Security Council does not state that it is *acting under Chapter VII*, nor does it *decide* or *authorize* anything. The words *Calls upon* are generally used in non-binding resolutions. Moreover, the words 'all necessary measures' are followed by the words 'in compliance with international law, in particular with the United Nations Charter'. Since Chapter VII is used to authorise force that would otherwise be a violation of Article 2(4) of the Charter, the reference to compliance with the Charter indicates that the envisaged measures would be consistent with it.[57]

Significantly, none of the states using force against ISIL in Syria and Iraq argued that Resolution 2249 provided Chapter VII authorisation; instead, they justified their actions on the basis of customary international law. Russia relied on the right of intervention by invitation, in this case by the widely-recognized government of Syria.[58] The US and its allies relied on the invitation of the widely-recognized government of Iraq for their actions in that country, [59] and on the right of collective self-defence in support of Iraq for their actions in Syria.[60] The US and the UK also relied on the right of individual self-defence, on the basis that they themselves had suffered 'armed attacks' at the hands of ISIL.[61]

Why would the Security Council adopt a resolution approving of, but not authorising the use of force? There are several possible, perhaps overlapping, explanations. First, Russia and the US were at an impasse over the situation in Syria. Resolution 2249 broke the impasse and, by so doing, could have opened the way toward more meaningful cooperation – such as an attempted ceasefire announced on 9 September 2016.[62] Second, Russia had an interest in acquiring greater legitimacy for its actions, after being widely criticised for targeting anti-Assad rebels not linked with ISIL, and civilian facilities such as hospitals.[63] Third, the reliance of the US and its allies on the right of self-defence in Syria was contentious, because their actions were taking place on the

[57] For a similar analysis, see Akande and Milanovic (n 26); Wood (2017) (n 27) 17–18.

[58] Matthew Bodner, 'Russia begins airstrikes in Syria', *Moscow Times* (30 September 2015) www.themoscowtimes.com/2015/09/30/russia-begins-air-strikes-in-syria-a49973.

[59] Egan (n 27).

[60] *Ibid*.

[61] *Ibid*. For the UK, see Prime Minister David Cameron, Hansard, 26 November 2015, Column 1491, https://publications.parliament.uk/pa/cm201516/cmhansrd/cm151126/debtext/151126-0001.htm.

[62] Karen DeYoung, 'U.S., Russia Reach Deal on Cease-Fire in Syria', *Washington Post* (9 September 2016) www.washingtonpost.com/world/russian-foreign-minister-lavrov-says-he-was-thinking-of-calling-it-a-day-on-syria-talks-with-the-united-states/2016/09/09/f37ca320-75ff-11e6-9781-49e591781754_story.html. US-Russia relations with regard to Syria have been in flux ever since, with periods of limited cooperation interspersed with breakdowns.

[63] See, e.g. Dominique Soguel, 'Are Russian Air Strikes Targeting Hospitals in Syria?', *Christian Science Monitor* (13 November 2015) www.csmonitor.com/World/Middle-East/2015/1113/Are-Russian-air-strikes-targeting-hospitals-in-Syria.

sovereign territory of a government which was not supportive of ISIL, and was actually fighting against it.[64] The situation was thus different from Afghanistan in 2001, where the Taliban government was willingly harbouring Al'Qaeda.[65] Although Resolution 2249 did not validate the self-defence claim of the US and its allies, it may have provided some legitimacy for their actions.[66]

The legitimising effects of Resolution 2249 may have been particularly important with regard to domestic audiences, who likely perceived it as providing Security Council support for military action. Indeed, the resolution was adopted shortly before British parliamentarians were due to vote on whether their country should participate in air strikes in Syria. British participation was seen as desirable not only by the British government but also by France and the US, both of which, like the UK, are permanent members with significant influence in the Security Council.[67] Transcripts of the debates within the House of Commons show that the existence and content of Resolution 2249 – which Prime Minister David Cameron admitted was not a Chapter VII resolution – were reassuring to many Members of Parliament in the lead up to the vote.[68]

From the US and Russian perspectives, the approval provided by Resolution 2249 was likely preferable to a Chapter VII authorisation because it did not limit their freedom to act under customary international law.[69] The US, again, was justifying its actions in Syria as self-defence, and Article 51 of the UN Charter makes clear that the 'inherent right of individual or collective self-defence' only exists 'until the Security Council has taken measures necessary to maintain international peace and security'.[70] Had the resolution been adopted under Chapter VII, and had it only authorised certain forceful

[64]See, e.g. 'Speakers in Security Council Urge Balance between UN Role in State Sovereignty, Human Rights Protection, But Differ over Interpretation of Charter Principles', 7621st Meeting, SC/12241, UN Meetings Coverage and Press Releases (15 February 2016) www.un.org/press/en/2016/sc12241.doc.htm; Laurie O'Connor, 'Legality of the Use of Force in Syria against Islamic State and the Khorasan Group' (2016) 3(1) *Journal on the Use of Force and International Law* 70; Douglas Cantwell, 'The ETF and the Legality of U.S. Intervention in Syria under International Law', *Lawfare* (28 March 2016) www.lawfareblog.com/etf-and-legality-us-intervention-syria-under-international-law.

[65]See Michael Byers, 'The Intervention in Afghanistan (2001-)' in Tom Ruys and Olivier Corten (eds), *International Law and the Use of Force: A Case-Based Approach* (Oxford University Press, 2018) 625.

[66]One could conduct a similar, albeit less convincing analysis of paragraph 27 of Resolution 2199, adopted on 12 February 2015, in which the Security Council, acting explicitly under Chapter VII, '*Calls upon* all States to consider appropriate measures to prevent the transfer of all arms and related materiel of all types, in particular man-portable surface-to-air missiles, if there is a reasonable suspicion that such arms and related materiel would be obtained by ISIL, the ANF or other individuals, groups, undertakings and entities associated with Al-Qaida.' Replete with ambiguities, this paragraph could be read as supporting – but in no way limiting – US-led maritime interdiction programs in the Mediterranean and Arabian Seas that have long been justified on the basis of self-defence against terrorism.

[67]On 2 December 2015, the House of Commons voted (397–223) in support of British airstrikes in Syria. For a similar analysis, see Ashley Deeks, 'Threading the Needle in Security Council Resolution 2249', *Lawfare* (23 November 2015) www.lawfareblog.com/threading-needle-security-council-resolution-2249.

[68]Hansard, 26 November 2015, Columns 1489–1537, https://publications.parliament.uk/pa/cm201516/cmhansrd/cm151126/debtext/151126-0001.htm.

[69]For a similar analysis, see Akande and Milanovic (n 26).

[70]UN Charter (1945), Art. 51.

actions but not others, the options available to the US would have been limited to those which had been authorised.

A Chapter VII resolution might also have interfered with an ongoing US effort to extend the right of self-defence to include action within the territory of a sovereign government that is 'unwilling or unable' to address a threat from non-state actors located there.[71] Previous efforts to develop the right of self-defence in this manner had received little support from other states. Elena Chachko and Ashley Deeks have usefully chronicled the relevant state practice, which before the Syrian intervention included just the US, Russia (in Georgia in 2002), Turkey and Israel.[72] In Syria, however, an additional seven states joined the US in making this claim, namely the UK, Germany, The Netherlands, the Czech Republic, Canada, Australia, and, implicitly, Belgium.[73] At the same time, however, Russia reversed its earlier position and opposed the claim being advanced by these countries.[74]

Russia, again, was justifying its own actions within Syria on the basis of an invitation from the widely-recognised government of that country. Although intervention by invitation is well-established in customary international law,[75] it too can be superseded by a Security Council resolution adopted under Chapter VII.[76] In the absence of such a resolution, Russia remained free to use force, not only against ISIL but also against other rebel groups. In sum, the appearance rather than the reality of Security Council authorisation – a constructive ambiguity – was beneficial to both the US and Russia, despite the two countries being opposed to each other's actions.

4. Reasons why the Security Council uses constructive ambiguity

Security Council resolutions are closely scrutinised through all stages of their negotiation, because every word can have implications for war and peace, the removal or survival of governing regimes, and the sovereign independence of

[71] Michael Byers, 'Terrorism, the Use of Force and International Law after 11 September' (2002) 51(2) *International & Comparative Law Quarterly* 401; Byers (n 65).

[72] Elena Chachko and Ashley Deeks, 'Who is on Board with "Unwilling or Unable"?', *Lawfare* (10 October 2016) www.lawfareblog.com/who-board-unwilling-or-unable.

[73] *Ibid*.

[74] *Ibid*.

[75] Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1986) 56(1) *British Yearbook of International Law* 189. For the definitive review of state practice and *opinio juris*, see Georg Nolte, *Eingreifen auf Einladung* (Springer-Verlag, 1999) (with English summary).

[76] For instance, a Chapter VII resolution prohibiting the provision of military assistance would prevail over an invitation to intervene. Article 103 of the UN Charter states: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

states. Ambiguity is therefore often the result of deliberation rather than negligence; a choice, not an accident. When the Security Council wishes to adopt watertight wording, it is quite capable of doing so. For example, Resolutions 1483 and 1511 on Iraq, adopted in May and October 2003, left no scope for arguments that they provided retrospective authorisation for the US-led invasion earlier that year.[77] All of which raises the question of why the Security Council resorts to constructive ambiguity.

Sometimes, constructive ambiguity might enable the Security Council to adopt resolutions that help to prevent or at least postpone an armed conflict. In 2002, the US was on course to invade Iraq without Council authorisation. The interests of other countries were threatened by this plan and the regional instability it might create.[78] As just one example, Russia and France held billions of dollars in debts and other contracts with Iraq that could have been placed at risk by regime change.[79] Agreeing to Resolution 1441 was consistent with these interests because it provided for the resumption of weapons inspections, delaying and possibly even preventing the outbreak of war. Russian Foreign Minister Sergey Lavrov was explicit about the importance of the delay, stating:

> The resolution's wording is not ideal – a fact that the sponsors themselves acknowledge – but that reflects the very complicated nature of the compromise that was reached. … What is most important is that the resolution deflects the direct threat of war and that it opens the road towards further work in the interests of a political diplomatic settlement.[80]

Sometimes, constructive ambiguity might enable states to paper over a dispute in order to achieve a mutually desirable goal. As discussed in Section 3.3, the mutually desirable goal behind Resolution 2202 was Security Council endorsement of the Minsk Agreements.[81] Achieving this result required overlooking a disagreement over the status of Crimea, which Russia, the US and the other members of the Council did by reaffirming their 'full respect for the sovereignty, independence and territorial integrity of Ukraine' – without specifying whether it included Crimea.

Sometimes, constructive ambiguity might help a Security Council member to conceal a negotiating loss from its citizens. When negotiating Resolution 1973 on Libya, the Russian government likely did not want the Russian public to see it conceding to the US and allowing a full-blown intervention by NATO states. Negotiating the inclusion of the second, more limited

[77]UNSC Res 1483, UN Doc S/RES/1483 (22 May 2003); UNSC Res 1511, UN Doc S/RES/1511 (16 October 2003).
[78]William Boston, 'Europe Shifts to Post-War Focus', *Christian Science Monitor* (20 March 2003) www.csmonitor.com/2003/0320/p03s02-woeu.html.
[79]*Ibid*.
[80]UNSC Verbatim Record, UN Doc S/PV.4644 (8 November 2002). For a similar analysis, see Johnstone (n 26) 243.
[81]UN Doc S/RES/2202 (n 40).

authorisation for a no-fly zone enabled the Russian government to publicly oppose the intervention on the basis of the resolution, by pointing to one authorisation while ignoring the other. The Russian government could even claim that it was supporting the UN and that NATO states were undermining it. The use of constructive ambiguity to mislead or otherwise satisfy domestic audiences is a well-established strategy in peace agreements also. As Christine Bell and Kathleen Cavanaugh pointed out in the context of Article 2(ii) of the 1998 Belfast Peace Agreement, '[e]ach side knows that it is a "fudge" but can live with it, and "sell" it to their own constituents as victory, or at least not a defeat'.[82]

Relatedly, constructive ambiguity can sometimes help a Security Council member to build domestic support for military action. In 2002, the British government was conscious of the scepticism of the British public with regard to the threat posed by Iraq and to Tony Blair's unwavering support for George W Bush.[83] A credible argument based on the 'material breach' language in Resolution 1441 helped to allay some of that scepticism. In December 2015, Resolution 2249 likely played a similar role, being adopted just days before British parliamentarians voted in favour of airstrikes in Syria.

On other occasions, constructive ambiguity might enable certain, less powerful permanent members of the Security Council to support resolutions that, by virtue of having been negotiated and adopted in the Council, help them to preserve a position of international influence. In 2002, Russia and France were likely concerned about the effects of an unauthorised intervention in Iraq on the existing international order – centred, as it is, on Chapter VII of the UN Charter and the veto power of the five permanent members.[84] This concern would have been heightened by President George W Bush's claim to an extended right of pre-emptive self-defence, which he first articulated in June 2002[85] and set out in further detail in September 2002.[86] The concern likely rose to an even higher level after Bush told the UN General Assembly that the international organisation would be rendered 'irrelevant' if no Security Council resolution was achieved.[87]

[82]Christine Bell and Kathleen Cavanaugh, '"Constructive Ambiguity" or Internal Self-Determination? Self-Determination, Group Accommodation and the Belfast Agreement' (1999) 22 *Fordham International Law Journal* 1345, 1356.

[83]Jean Eaglesham, 'Bush Impedes Backing for War', *Financial Times* (14 November 2002) 2.

[84]Francis Fukuyama, 'End of the Postwar Alliance Pact', *The Yomiuri Shimbun* (16 March 2003) www.freerepublic.com/focus/f-news/866026/posts.

[85]Remarks by President George W Bush at the 2002 graduation exercises of the US Military Academy, West Point, New York (1 June 2002) https://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020601-3.html.

[86]National Security Strategy of the United States (20 September 2002) http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/.

[87]President's remarks at the United Nations General Assembly (12 September 2002) https://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020912-1.html.

Any weakening of the UN Charter, or any diminishment of the role of the Security Council, would reduce the influence of Russia and France as veto-holding permanent members. And in 2002, both Russia and France were in relative decline in terms of economic and military power – as a result of demographic changes, the end of the Cold War, and the rise of major developing countries such as Brazil, India and South Africa. Both countries therefore had an incentive to cushion the impact of any intervention in Iraq on the existing rules and institutions governing the use of force, even if that meant providing the US and UK with a more credible legal justification. Similar calculations would likely have been made by China.[88] Resolution 1441 enabled these countries to placate a belligerent George W Bush without creating a potentially dangerous precedent or visibly giving in to his demands. The end result was that the constructive ambiguities of the resolution served the interests of all the permanent members of the Security Council, at least initially, by providing a plausible justification for the intervention while maintaining legal arguments in opposition.

In the face of the determination of NATO states to intervene in Libya in 2011, the same concern – protecting the influence of the permanent members by keeping decision-making within the Security Council – might have contributed to Russia's willingness to negotiate a constructive ambiguity and then abstain on Resolution 1973. Russia was likely also concerned about preserving its political influence in Africa and the Middle East, since many African and Arab states were supportive of action.[89] By resorting to constructive ambiguity rather than exercising its veto, Russia was able to align with them on this issue, preserve its influence in the region, and still position itself to publicly oppose any actions above and beyond the enforcement of a no-fly zone.

Finally, constructive ambiguity might sometimes be used to provide arguments based on Security Council resolutions that prevent the creation of precedents for rights to use force under customary international law. In the lead-up to the 2003 Iraq War, some states would have concerned about a possible precedent for an extended right of pre-emptive self-defence – as had already been claimed by George W Bush. In Libya, Russia was similarly concerned about a possible precedent for intervention based on the 'Responsibility to Protect' (R2P), a doctrine developed by an *ad hoc* commission the Canadian government had established after the 1999 intervention in Kosovo.[90] Negotiating a constructive ambiguity enabled Russia to allow the adoption of

[88]Chris Buckley, 'China Tiptoes Between Opposing the War and Not Angering U.S.', *International Herald Tribune* (25 March 2003) 4.

[89]See, e.g. 'Arab League Calls for UN to Impose No-Fly Zone Over Libya', *Deutsche Welle* (12 March 2011) www.dw.com/en/arab-league-calls-for-un-to-impose-no-fly-zone-over-libya/a-14907977.

[90]International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (December 2001) www.responsibilitytoprotect.org/ICISS%20Report.pdf.

Resolution 1973, which then provided NATO with a much stronger argument – i.e. Chapter VII authorisation – than R2P.[91]

5. Conclusion: constructive ambiguity and international peace and security

Chapter VII resolutions have always been intentionally ambiguous in one respect, in that they authorise the use of 'all necessary means' or 'all necessary measures' to accomplish their goals. These phrases accord considerable discretion to states exercising a Chapter VII mandate, but necessarily so – since Article 43 of the UN Charter, which foresees that states will make armed forces available to the Security Council for deployment under its command, has never been implemented.[92] Instead, the Security Council from time to time authorises member states to use force on its behalf, and, like all military interventions, the resulting operations require constant, ongoing alterations in strategies, tactics, and targets.[93] The kind of ambiguities examined in this article are of a different character: they are employed in response to disagreements among states negotiating Security Council resolutions, and deliberately enable subsequent disagreements over whether, and in what circumstances, the use of force has actually been authorised.

How do these insights into constructive ambiguity contribute to our understanding of the relationship between international law and international politics? Security Council decision-making on the use of force is 'high politics', that part of international relations involving the very survival of states and governing regimes. It always takes place in the shadow of a potential veto, with the ability to block a resolution serving as a safety valve – one that prevents the major risks that could result if a decision were imposed upon any of the permanent members. For this reason, a resolution will only be adopted if it avoids any existing or potential disputes involving the core interests of those five nuclear-armed states. Constructive ambiguity can thus enable states to get things done, even when they have the capacity to destroy each other.

'Realist' accounts of international relations can easily accommodate this last point, since they view states as self-interested actors operating within a structure, not of rules and institutions, but of power politics.[94] Some realists do accept that rules play a role, for example, by generating information and

[91] Although Resolution 1973 does mention R2P, the reference to it is confined to the preamble, concerns the responsibilities of the Libyan government, and cannot be read as supporting a new right to intervene. See UN Doc S/RES/1973 (n 29). See also Geir Ulfstein and Hege Føsund Christiansen, 'The Legality of the NATO Bombing in Libya' (2013) 62(1) *International and Comparative Law Quarterly* 159.

[92] Nico Krisch, 'Article 43', in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd edn 2012) 1351 et seq.

[93] Alex J Bellamy and Paul D Williams, 'The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect' (2011) 87(4) *International Affairs* 825, 847.

[94] Core texts of the realist canon include Hans Morgenthau, *Politics Among Nations* (Knopf, 1948) and Kenneth N Waltz, *Theory of International Politics* (Waveland, 1979).

increasing opportunities for issue-linkage,[95] but the rules remain somewhat epiphenomenal – dependent on power, subject to short-term alteration by power-applying states and therefore of little relevance to how states actually behave.[96] Realists focus on the ability of states to control or influence *directly* how other states behave, through factors such as wealth, military strength, size and population. They would have difficulty explaining why states spend weeks negotiating Chapter VII resolutions that provide them with at-least-tenable legal justifications for their actions.

'Constructivist' accounts of international relations might have greater difficulty explaining the deliberate use of ambiguity to steer around disputes involving the core interests of nuclear-armed antagonists. Constructivists see the international system, not as a given but as socially constructed.[97] And while power politics and the institution and procedures of the UN Security Council are all ultimately social constructs, there is relatively little in the way of shared identities among Russia, China, and the US (and its British and French NATO allies), apart from their being nuclear-armed states and permanent members of the Security Council. To the degree that these shared identities create shared interests, they will be in avoiding direct military conflicts, and in avoiding any diminishment of these states' status and rights as veto holders.

'Institutionalist' accounts of international relations argue that bodies such as the United Nations have, over time, acquired a degree of independence from their member states and a resilience to short term changes in power relations.[98] However, the Security Council is a highly unusual UN organ, since it involves 15 states making claims and negotiating among themselves – without the mediating force of a large and deeply entrenched bureaucracy. Moreover, while institutionalists recognise that institutions and even international law play significant roles in international politics, they ignore or at least downplay the importance of legal obligation. In their language, rules are 'dependent' rather than 'independent' variables.

Most international lawyers would hardly characterise the rules that both constrain and empower Security Council members as dependent variables. For instance, the prohibition on the threat or use of force that is set out in Article 2(4) of the UN Charter is widely regarded as a peremptory norm of *jus*

[95]Stephen D Krasner, 'Realist Views of International Law' (2002) 96 *Proceedings of the Annual Meeting of the American Society of International Law* 265.

[96]Waltz (n 94) 102–28.

[97]Core texts of the constructivist canon include Friedrich Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, 1991); Jeffrey T Checkel, 'The Constructive Turn in International Relations Theory' (1998) 50(2) *World Politics* 324; Alexander Wendt, *Social Theory of International Politics* (Cambridge University Press, 1999).

[98]Core texts of the institutionalist canon include Stephen D Krasner, *International Regimes* (Cornell University Press, 1983); Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press, 1984); Kenneth W Abbott et al, 'The Concept of Legalization' (2000) 54(3) *International Organization* 401.

cogens.[99] Although governments argue about the application of the rule to particular facts, and the existence and extent of exceptions, the rule itself is never explicitly contested. Even Sir Michael Wood, when describing Security Council resolutions as being of an 'essentially political nature', did so as part of an argument about which interpretive approach should be applied to them.[100] Constructive ambiguity creates more room for arguments, but all of those arguments are premised on the existence and validity of legally binding rules.

This is not to say that rules are everything. A no-less-distinguished figure than Sir Arthur Watts argued that the international legal system could be regarded as a place where politically-driven differences are re-cast into legal arguments but only loosely constrained by rules. Sir Arthur, a former British Foreign Office Legal Advisor, wrote the following passage several years before the Iraq War:

> There is room for the view that all that States need for the general purposes of conducting their international relations is to be able to advance a legal justification for their conduct which is not demonstrably rubbish. Thereafter, political factors can take over, and the international acceptability or otherwise of a State's conduct can be left to be determined by considerations of international policy rather than of international law.[101]

Sir Arthur was right that the Security Council is an inherently political body, as is reflected in the considerable discretionary power that it holds under Chapter VII, as well as the fact that its resolutions are unlikely to be subject to authoritative interpretation by any court or tribunal. But while the Council's authority clearly extends to adopting resolutions that are deliberately open to different interpretations, those different interpretations are not unlimited, unchallengeable, or immutable. They always have to pass the 'not demonstrably rubbish' test, which is applied by the international community of states – in what Ian Johnstone has described as a discursive process of give-and-take[102] – within a framework of pre-existing, universally-applicable rules. Constructive ambiguity can provide a 'margin of appreciation' within which states can act without fear of losing status or influence, but only as long as they do not exceed bounds that are defined, both by those existing rules, and by the ongoing responses and reactions of other states.

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[99] Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, 2006) 50–51.

[100] *Ibid*. The same approach was taken by Lord Goldsmith, the British Attorney General, in his advice to Prime Minister Blair in advance of the Iraq War: 'The previous practice of the Council and statements made by Council members during the negotiation of resolution 1441 demonstrate that the phrase "material breach" signifies a finding by the Council of a sufficiently serious breach of the cease-fire conditions to revive the authorisation in resolution 678 and that 'serious consequences' is accepted as indicating the use of force.' Goldsmith memo (n 50).

[101] Sir Arthur Watts, 'The Importance of International Law' in Michael Byers (ed), *The Role of Law in International Politics* (Oxford University Press, 2000) 5, 8.

[102] See, e.g. Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford University Press, 2011).

Last but not least, constructive ambiguity can protect the international legal system from being damaged during major crises. After the Security Council adopts an ambiguously worded resolution, states advancing different interpretations of it are still making legal arguments, rather than acting as they wish in open defiance of international law. In these instances, ambiguity is not a 'design weakness', as some international relations scholars consider it to be.[103] Ambiguity, deployed deliberately and strategically, keeps international law at the centre of the international system – by enabling the most powerful states to agree to disagree.

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[103]Susanne Therese Hansen, 'Taking Ambiguity Seriously: Explaining the Indeterminacy of the European Union Conventional Arms Export Control Regime' (2016) 22(1) *European Journal of International Relations* 192, 194.