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The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law

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LEAD ARTICLE

THE CONTRIBUTIONS OF UNITED NATIONS SECURITY COUNCIL RESOLUTIONS TO THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: NEW EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

GREGORY H. FOX,* KRISTEN E. BOON,** AND ISAAC JENKINS***

Since the end of the Cold War, the U.N. Security Council has become the preeminent international actor in the resolution of armed conflicts. This is

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especially true of non-international armed conflicts (“NIACs”), such as civil wars, which are now far more common than inter-state armed conflicts. Few, if any, scholars have asked whether obligations the Council has imposed on NIAC parties should contribute to norms of customary international law regulating various aspects of those conflicts. This Article is the first attempt to fill this gap. The analysis is based on a newly compiled data set of all Council resolutions passed on the most consequential NIACs from 1990 to 2013. The data show that the U.N. Security Council has regularly obligated NIAC parties to act in ways that diverge from otherwise-applicable international law in at least four significant areas. The Article argues that patterns of obligation found in Council resolutions on NIACs should serve as important evidence of customary international law. Moreover, failure to account for the Council’s centrality in resolving NIACs—substantially exceeding national interventions in scope and frequency—would consign this critical international practice to a legal black hole.

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INTRODUCTION

Since the end of the Cold War, the U.N. Security Council (“Council”) has become the preeminent international actor in the resolution of armed conflicts. This is especially true of non-international armed conflicts (“NIACs”), now far more common than inter-state armed conflicts (“IACs”).¹ The Council has developed a

1. SCOTT GATES ET AL., *TRENDS IN ARMED CONFLICT, 1946–2014*, at 2 (2016) (explaining how the dominant form of conflict has shifted from inter-state to internal); Therése Pettersson & Peter Wallensteen, *Armed Conflicts, 1946–2014*, 52 J. PEACE RES. 536, 537 (2015) (“What stands out in the [twenty-first] century is the lack of large-scale interstate conflict. Only one was active in 2014, the conflict between India and Pakistan, which led to fewer than [fifty] fatalities. The remaining [thirty-nine] conflicts were fought within states.”). The legal definition of an IAC is rooted in Article 2 of the Geneva Conventions: the rules of IACs apply to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. By contrast, a NIAC is defined in the negative: “armed conflict not of an international character.” *Id.* art. 3. The question of how to classify particular conflicts in international law is contested. See generally Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 32, 32 (Elizabeth Wilmshurst ed., 2012) (examining the distinction and arguments on classification of conflicts as international or non-international). In classifying conflicts included in our data set, we relied upon definitions from the Uppsala Conflict Data Program, from which we drew our overall list of conflicts. We designated conflicts in the following two Uppsala categories as NIACs: (1) “Internal Armed Conflict,” which “occurs between the government of a state and one or more internal opposition group(s) without intervention from other states,” and (2) “Internationalized Internal Armed Conflict,” which “occurs between the government of a state and one or more internal opposition group(s) with intervention from other states (secondary parties) on one or both sides.” See UPPSALA CONFLICT DATA PROGRAM, UCDP/PRIO ARMED CONFLICT DATASET CODEBOOK 9, http://www.pcr.uu.se/digitalAssets/124/c_124920-1-1-k_codebook_ucdp-prio-armed-conflict-dataset-v4_2012.pdf.

substantial track record of quelling hostilities in NIACs, assisting in negotiating peace agreements, supervising transitions from war to peace, and designing new political and legal institutions for the post-conflict societies.² No single state or group of states has come close to matching the Council's rate of intervention.³ It is the rare NIAC that is not subject to one or more of these Council actions.⁴

While the Council's omnipresence in NIACs is now unremarkable, the legal consequences of its actions have hardly been examined. Few have asked whether Council actions can contribute to customary international law, let alone whether the specific obligations the Council imposes on NIAC parties should contribute to customary norms regulating those conflicts.⁵ Traditional customary law consisted

2. See JAMES COCKAYNE ET AL., *THE UNITED NATIONS SECURITY COUNCIL AND CIVIL WAR: FIRST INSIGHTS FROM A NEW DATASET 4* (2010) ("Since 1989, the Council has deployed U.N. peace operations to twenty-four different countries affected by civil war, imposed sanctions on dozens of civil-war parties, and established several transitional administrations and international criminal tribunals to address civil wars and their consequences."); ADAM ROBERTS & DOMINIK ZAUM, *SELECTIVE SECURITY: WAR AND THE UNITED NATIONS SECURITY COUNCIL SINCE 1945*, at 31 (2008) (discussing the impact the Council has had on international war); Antonios Tzanakopoulos, *L'Intervention du Conseil de Sécurité dans les Conflits Internes*, in *LE RECOURS À LA FORCE AUTORISÉ PAR LE CONSEIL DE SÉCURITÉ: DROIT ET RESPONSABILITÉ* 67, 67–76 (Karine Bannelier & Cyrille Pison eds., 2014); Peter Wallensteen & Patrick Johansson, *The United Nations Security Council in State-Based Armed Conflicts, 2003–12*, in *SIPRI YEARBOOK 2014: ARMAMENTS, DISARMAMENT AND INTERNATIONAL SECURITY* 56, 56 (2014) (studying how the Council uses its powers to address conflicts).

3. As demonstrated below, the Council passed at least one resolution on 76% of all NIACs in the data set we created. By contrast, interventions by states—either individually or in groups—occurred in only 31% of the same conflicts. See *infra* notes 63–68 and accompanying text.

4. Of the NIACs in our data set, only three starting after 1990 were not the subject of Council resolutions: Nigeria, the Republic of the Congo, and Algeria. See *infra* notes 59–63 and accompanying text. Once the Council did address a NIAC, it passed a median of fourteen resolutions per conflict and an average of 27.6. See *infra* note 122 and accompanying text.

5. The Council receives virtually no attention in leading scholarship on the nature of customary law. See REEXAMINING CUSTOMARY INTERNATIONAL LAW vii–viii (Brian D. Lepard ed., 2017); CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 278 (Curtis Bradley ed., 2016); HUGH THIRLWAY, *THE SOURCES OF INTERNATIONAL LAW* 53–83 (2014); see also NOORA ARAJÄRVI, *THE CHANGING NATURE OF CUSTOMARY INTERNATIONAL LAW: METHODS OF INTERPRETING THE CONCEPT OF CUSTOM IN INTERNATIONAL CRIMINAL TRIBUNALS* 56–57 (2014); BIRGIT SCHLÜTTER, *DEVELOPMENTS IN CUSTOMARY INTERNATIONAL LAW* 60 (2010). The most recent and comprehensive examination of customary international law is the International Law Commission's (ILC) Draft Conclusions on the Identification of Customary International Law. Neither the sixteen draft "conclusions" produced by the Commission in June 2016 nor the preparatory reports of the Special Rapporteur

of acts by individual states taken out of a sense of legal obligation.⁶ But, if states have repeatedly turned to the Council as their chosen agent to address NIACs, a continued focus on state action would elide decades of important Council practice across a wide range of conflicts. The result could be—and arguably is—an emerging body of customary norms that is increasingly disconnected from how the international community actually addresses NIACs.

Many customary law questions concerning NIACs are the subject of fierce debate, and taking account of Council actions could easily determine their outcomes. For example, a debate on whether peace agreements that end NIACs are legally binding has been indeterminate, but the Council has been clear in its view that parties must follow such agreements.⁷ Similarly, scholars are divided on whether non-state rebel groups are bound by human rights obligations, but the Council has been consistent and unequivocal in applying human rights standards to such groups.⁸ Another contested issue is whether states should hold elections in the immediate aftermath of peace settlements in NIACs. Some scholars argue there is no more important time to adhere to international standards of democratic politics.⁹ Others argue that immediate post-conflict elections are frequently destabilizing and may actually end up

discusses the role of the Security Council in the creation of customary norms. *See generally* Int'l Law Comm'n, Rep. on the Work of Its Sixty-Eighth Session, U.N. Doc. A/71/10, at 76–79 (2016) [hereinafter ILC Draft Conclusions on Custom]; Michael Wood (Special Rapporteur), *Third Rep. on Identification of Customary International Law*, U.N. Doc. A/CN.4/682 (Mar. 27, 2015) [hereinafter Wood, *Third Report*]. The same is true of the International Law Association's lengthy report published in 2000. INT'L LAW ASS'N LONDON CONFERENCE, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 5–6 (2000).

6. *See* *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, 1985 I.C.J. 13, ¶ 27 (June 3) (“It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States.”). Custom is one of the two primary sources of international law, the other being treaties. *See* Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 59 Stat. 1055, TS No. 993.

7. *See infra* 14–198 and accompanying text.

8. *See infra* notes 139–63 and accompanying text.

9. Gregory H. Fox, *International Law and the Entitlement to Democracy After War*, 9 GLOBAL GOVERNANCE 179, 183 (2003).

undermining democratic transitions.¹⁰ The Council has consistently sided with the former view.¹¹

This Article is the first attempt to take account of Council practice in addressing these questions. Our analysis is based on a newly-compiled data set of all Council resolutions passed on the most consequential NIACs from 1990 to 2013.¹² Despite deep cleavages over Syria, Ukraine, and a few other conflicts, the Security Council has imposed a broad and consistent range of obligations on NIAC parties.¹³ The Council's most ambitious undertakings in response to NIACs, which are post-conflict peacekeeping and reconstruction missions, have remained active and relatively uncontroversial.¹⁴ While the weight accorded to the Council's resolutions varies with each norm in question, we argue that, in all cases, this practice should be considered relevant evidence of law in the substantive areas we discuss.¹⁵ Though many scholars have examined the Council's so-called "legislative resolutions"—binding, treaty-like documents obviously intended to

10. See Benjamin Reilly, *Timing and Sequencing of Post-Conflict Elections*, in BUILDING SUSTAINABLE PEACE: TIMING AND SEQUENCING OF POST-CONFLICT RECONSTRUCTION AND PEACEBUILDING 72, 73 (Arnim Langer & Graham K. Brown eds., 2016) (examining the consequences of holding post-conflict elections too soon after the end of a conflict, such as nationalist or ethnic parties instead of policy-driven parties, inclusion instead of competitiveness).

11. See *infra* discussion accompanying notes 232–34.

12. All data and coding documents can be found at Kristen E. Boon, Gregory H. Fox & Isaac Jenkins, *Project on the UN Security Council and Non-International Armed Conflicts*, WAYNE ST. U., <https://law.wayne.edu/international/securitycouncil-fox> (last visited Feb. 7, 2018) [hereinafter Project Website]. As described in more detail in Part I, we examined only resolutions on conflicts experiencing at least 1000 battle-related deaths in at least one conflict year. See *infra* note 32 and accompanying text.

13. Kristen E. Boon, Gregory H. Fox & Isaac Jenkins, *UN Security Council Data*, WAYNE ST. U., https://law.wayne.edu/pdfs/unscl_data_for_publication_12-17-17.csv (last visited Feb. 7, 2018) [hereinafter *UN Security Council Data Set*].

14. LOUISE RIIS ANDERSEN & PETER EMIL ENGEDAL, *BLUE HELMETS AND GREY ZONES: DO UN MULTIDIMENSIONAL PEACE OPERATIONS WORK?* 59 (2013) (stating that U.N.-led peace operations are less controversial to the Council than similar U.S. or NATO-led missions).

15. "Evidence of law" refers to the definition employed by the ILC in its Draft Conclusions on Customary International Law, which includes all materials that may be relevant to determining the basis of identifying a custom as a source of law. ILC Draft Conclusions on Custom, *supra* note 5, at 84 n.263 ("The term 'evidence' is used here as a broad concept relating to all the materials that may be considered as a basis for the identification of customary international law, not in any technical sense as used by particular courts or in particular legal systems.").

affect international law—our data is the first to assess normative patterns across conflict-specific resolutions.¹⁶

The data also allow us to respond to the most common critique of using Council practice as evidence of customary law: that Council resolutions address only discrete aspects of specific conflicts and do not establish broad, prospective rules of general application.¹⁷ The dense patterns of obligation we identify are quite similar to the repetitive practices of states in traditional customary law. Our data reveal two important conclusions that support giving a prominent role to Council practice in any legal analysis of internal conflicts: first, the Council is heavily involved in contemporary NIACs,¹⁸ and second, the Council has regularly imposed similar binding obligations in these conflicts that deviate in critical respects from accepted international

16. The “legislative” or “law-making” resolutions often address issues relating to terrorism and are treaty-like in that they set out broad, prospective rules of behavior potentially applicable to all member states. One of the most prominent examples is Resolution 1373, which requires all states to interrupt the financing of terrorist operations and criminalize the willful provision of such funding. S.C. Res. 1373, ¶ 1 (Sept. 28, 2001). Another example is Resolution 1540, which requires states to take measures to prevent the proliferation of nuclear, chemical, and biological weapons. S.C. Res. 1540, ¶ 2 (Apr. 28, 2004). A third is Resolution 2178 on foreign terrorist fighters, in which the Council “decided” that all states shall “prevent and suppress the recruiting, organizing, transporting[,] or equipping of individuals who travel to a State other than their States of residence or nationality” for the purpose of terrorist acts. S.C. Res. 2178, ¶ 5 (Sept. 24, 2014). Unlike most Council actions, these resolutions consciously transcend particular conflicts, including the conflict that may have triggered Council involvement, by seeking to compel action deemed essential to diminishing conflict in general. See José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT’L L. 873, 874 (2003). In Professor Stefan Talmon’s words, these resolutions “are phrased in neutral language, apply to an indefinite number of cases, and are not usually limited in time.” Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT’L L. 175, 176 (2005). Despite the small number of these resolutions, the literature they spawned is now vast. See, e.g., Mónica Lourdes de la Serna Galván, *Interpretation of Article 39 of the UN Charter (Threat to the Peace) by the Security Council: Is the Security Council a Legislator for the Entire International Community?*, 11 ANUARIO MEXICANO DE DRECHO INTERNACIONAL 147, 148–49 (2011) (analyzing the new ways that the Council attempts to determine threats to peace); Nicholas Tsagourias, *Security Council Legislation, Article 2(7) of the UN Charter, and the Principle of Subsidiarity*, 24 LEIDEN J. INT’L L. 539, 541 (2011) (filtering the assertion of U.N. legislative power through the lens of subsidiarity).

17. See, e.g., ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 114 (2007) (criticizing Council for its “essentially ad hoc and unsystematic approach to law-making[,] which results from Council action on specific issues”).

18. Our data show that the Council passed at least one resolution in 76% all NIACs from 1990 to 2013 that we coded, increasing to 80% for NIACs that began after 1990. See *infra* Section VII.A; see also *UN Security Council Data Set*, *supra* note 13.

law.¹⁹ Given that the Charter of the United Nations (“U.N. Charter”) designates the Council as acting on behalf of all member states on issues of peace and security,²⁰ this combination of the Council’s fixture in contemporary NIACs and its consistent imposition of similar obligations over time make its normative preferences highly significant.²¹ Council resolutions cannot be dismissed as inherently political, negotiated compromises or as one-off responses to particular crises when we know the Council has imposed the same obligations across a wide variety of conflicts over time.²²

We are hardly the first to identify the normative consequences of Council practice. The Council itself is aware that its resolutions may affect customary international law; for instance, the Council specified in no fewer than eleven resolutions on Somali piracy that the authorizations provided in the resolutions “shall not be considered as establishing customary international law,” suggesting that absent such a disclaimer, the resolutions could in fact have such an effect.²³ Of

19. See *infra* Section VII.A.1. While important early scholarship explored the impact of Council practice on the interpretation of the U.N. Charter, we examine exclusively non-Charter norms. See ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 2–3 (1963) (discussing the significance of the Council in the development of international law).

20. U.N. Charter art. 24, ¶ 1 (“In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”).

21. An additional source of law resulting from Council resolutions, though not from the substance of those resolutions, is the jurisprudence of the Yugoslav and Rwanda tribunals, which the Council created in Resolutions 808 and 955. S.C. Res. 955, ¶ 1 (Nov. 8, 1994); S.C. Res. 808, ¶ 1 (Feb. 22, 1993). Doctrine developed by the ad hoc tribunals now permeates international criminal and humanitarian law. See Darryl Robinson & Gillian MacNeil, *The Tribunals and the Renaissance of International Criminal Law: Three Themes*, 110 AM. J. INT’L L. 191, 192 (2016) (finding that answers provided by ad hoc tribunals to questions of international criminal law “have become generally accepted and absorbed as the starting point for any subsequent debate”).

22. *UN Security Council Data Set*, *supra* note 13.

23. S.C. Res. 2184, ¶ 14 (Nov. 12, 2014); S.C. Res. 2182, ¶ 21 (Oct. 24, 2014); S.C. Res. 2125, ¶ 13 (Nov. 18, 2013); S.C. Res. 2077, ¶ 13 (Nov. 21, 2012); S.C. Res. 2020, ¶ 10 (Nov. 22, 2011); S.C. Res. 1950, ¶ 8 (Nov. 23, 2010); S.C. Res. 1897, ¶ 8 (Nov. 30, 2009); S.C. Res. 1851, ¶ 10 (Dec. 16, 2008); S.C. Res. 1846, ¶ 11 (Dec. 2, 2008); S.C. Res. 1838, ¶ 8 (Oct. 7, 2008); S.C. Res. 1816, ¶ 9 (June 2, 2008); see also Stephen Mathias, *The Work of the International Law Commission on Identification of Customary International Law: A View from the Perspective of the Office of Legal Affairs*, 15 CHINESE J. INT’L L. 17, 27 (2016) (discussing the language of Resolution 1816). The Council also included identical language in a resolution on Libya. See S.C. Res. 2146, ¶ 9 (Mar. 19, 2014).

equal importance, many international actors have cited Council resolutions as evidence of customary law. These include the International Court of Justice (ICJ),²⁴ the International Committee of the Red Cross,²⁵ the International Criminal Tribunal for the Former Yugoslavia (ICTY),²⁶ the Inter-American Court of Human Rights (IACHR),²⁷ and the International Law Commission (ILC) in its commentary on the Draft Articles on State Responsibility.²⁸ But these are citations to at most a handful of discrete resolutions. The question is thus not *whether* individual Council actions can serve as evidence of custom but *how*, much in the manner of consistent state practice, patterns of Council-imposed obligations may affect customary law. We are unaware of any prior study of aggregated Council action intended to discover patterns of obligation.

Part I explains the methodology governing our selection and coding of Council resolutions on NIACs. Part II details our findings from the data, describes the general extent of Council action, and explains its

24. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 404, ¶ 81 (July 22) (finding that a series of Council resolutions do not reveal general condemnation of unilateral declarations of independence, which suggests that a different practice might lead to the ICJ ascribing normative value to Council practice); see also Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT'L L. 879, 879–80 (2005).

25. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 39 n.19, 94 n.97, 100 n.139, 107 nn.14 & 17, 109 n.24, 111 n.40, 113 nn.6–8, 137 n.60, 147 n.25, 184 n.79, 188 n.22, 195–96 nn.70–73, 198 n.87, 199 n.98, 201 nn.105–07 (2009) (noting instances where Council resolutions contribute to customary law).

26. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 133 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (“Of great relevance to the formation of *opinio juris* . . . are certain resolutions unanimously adopted by the Security Council. Thus, for instance, in two resolutions on Somalia, where a civil strife was under way, the Security Council unanimously condemned breaches of humanitarian law and stated that the authors of such breaches or those who had ordered their commission would be held ‘individually responsible’ for them.”).

27. Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 107 (Sept. 26, 2006) (discussing Resolutions 827 and 955, which created ICTY and the International Criminal Tribunal for Rwanda, in support of norm prohibiting domestic amnesties for crimes against humanity).

28. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 121, 175, 217, 227–28, 288–91, 334 (2001) [hereinafter ILC, Rep. 53d Sess.] (referring to Security Council resolutions in: comment (5) of article 11; comment (5) of article 20; comment (4) of article 30; comment (10) of article 31; comments (7), (8), and (12) of article 41; and comment (5) of article 50).

most common normative strategy of invoking and calling for adherence to well-established international law. Part III describes three areas in which Council practice may resolve debates over the state of customary law: (1) the human rights obligations of non-state actors in NIACs; (2) whether peace agreements ending NIACs are legally binding; and (3) the sequencing of democratic transitions in post-conflict states. In Part IV, we explore the potentially radical consequence of repeated Council prohibitions on the use of force in NIACs: a nascent *jus ad bellum* for internal conflicts. In Part V, we assess the significance of this aggregated practice for customary international law. Part VI provides conclusions and recommendations for further research.

There are two areas where this Article does not venture. First, it does not analyze the propriety or legality of Council actions in any depth. A robust literature already explores potential limits on Council jurisdiction under Chapter VII, including mechanisms such as judicial review designed to police those limits.²⁹ And because our data exhibit that the Council has regularly altered law applicable to NIACs for almost twenty-five years, it appears that if those limits do exist, they have little impact on Council practice. Second, this Article does not seek to measure whether the Council actions identified by the data set successfully changed the behavior of actors addressed by its norms. Our focus is not on the efficacy of Council practice on NIACs but rather on understanding the new legal environment it creates.

I. METHODOLOGY

We sought to assess whether the Security Council has responded to NIACs by imposing a similar set of legal obligations over time. Through this analysis we can seek to determine whether Council practice is consistent and uniform in the manner generally required of state practice qualifying as evidence of customary international law.³⁰

Because there was no existing compilation of Council resolutions related to NIACs, however, we created an original data set comprised of all Council resolutions on armed conflicts from 1990 to 2013,

29. See, e.g., Devon Whittle, *The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action*, 26 EUR. J. INT'L L. 671, 673 (exploring extra-legal measures through which to conduct oversight of the Council, including judicial review by the ICJ or municipal courts).

30. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 186 (June 27) (consistency); *North Sea Continental Shelf (Ger./Den.; Ger./Neth.)*, Judgment, 1969 I.C.J. 3, ¶ 74 (Feb. 20) (uniformity).

including those that were ongoing as of 1990.³¹ We define an “armed conflict” as one involving at least 1000 battle-related deaths occurring in at least one year of the conflict.³² Because we are interested in the Council’s role in promulgating binding legal obligations, for our hypothesis, a clear distinction exists between binding and non-binding Council statements.³³ In coding the resolutions, we therefore

31. We take 1990 to be an important transition point in world history, which ended U.S. and Soviet proxy wars in developing countries and ushered in a new focus on human rights in the international community. Relevant scholarship has shown that the Council became more willing to address conflicts with assertive resolutions as the sweeping effects of the end of the Cold War triggered civil wars around the world. See Lisa Hultman, *UN Peace Operations and Protection of Civilians: Cheap Talk or Norm Implementation?*, 50 J. PEACE RES. 59, 60 (2013); Peter Viggo Jakobsen, *National Interest, Humanitarianism or CNN: What Triggers UN Peace Enforcement After the Cold War?*, 33 J. PEACE RES. 205, 205 (1996) (observing that the U.N. shift toward peace enforcement after the Cold War was considered a very controversial change in U.N. behavior).

32. See Lotta Harbom & Peter Wallensteen, *Armed Conflicts, 1946–2009*, 47 J. PEACE RES. 501, 501 (2010). While the 1000 battle-related deaths threshold is not uncontested in the literature, we selected this threshold because these severe conflicts are most likely to merit inclusion in the Council’s limited agenda time. For an argument for a lower threshold, see Nicholas Sambanis, *What Is Civil War?: Conceptual and Empirical Complexities of an Operational Definition*, 48 J. CONFLICT RESOL. 814, 818–19 (2004), which argues for a threshold of twenty-five deaths. Our definitional threshold reflects two additional choices. First, there is the question of whether the threshold number, whatever it is, should count battlefield deaths or battle-related deaths. Maryann Cusimano Love, *God and Global Governance: Resurgent Religion in World Politics*, in *BEYOND SOVEREIGNTY: ISSUES FOR A GLOBAL AGENDA* 170, 178 (Maryann Cusimano Love ed., 4th ed. 2011). Because the Security Council has evinced a particular concern over conflicts with high civilian casualty rates, we have chosen to use battle-related deaths in order to take those concerns into account. Second, some conflict data sets include those with 1000 deaths in at least one conflict year while others include those with 1000 deaths over the lifetime of the conflict. See Charles H. Anderton & John R. Carter, *Conflict Datasets: A Primer for Academics, Policymakers, and Practitioners*, 22 DEF. & PEACE ECON. 21, 35 (2011). We have chosen the former because it correlates with the Security Council’s tendency to focus only on the most destructive conflicts. See VIRGINIA PAGE FORTNA, *DOES PEACEKEEPING WORK?: SHAPING BELLIGERENTS’ CHOICES AFTER CIVIL WAR* 19 (2008) (discussing how the Council decides where to send peacekeepers); Scott Sigmund Gartner & Jacob Bercovitch, *Overcoming Obstacles to Peace: The Contribution of Mediation to Short-Lived Conflict Settlements*, 50 INT’L STUD. Q. 819, 819 (2006) (arguing that mediations correlate to the success of an agreement); Michael J. Gilligan & Ernest J. Sergenti, *Do UN Interventions Cause Peace?: Using Matching to Improve Causal Inference*, 3 Q.J. POL. SCI. 89, 89 (2005) (analyzing the effectiveness of U.N. interventions during and after civil war); Mark J. Mullenbach, *Deciding to Keep Peace: An Analysis of International Influences on the Establishment of Third-Party Peacekeeping Missions*, 49 INT’L STUD. Q. 529, 529 (2005) (examining how third party actors decide to partake in peacekeeping missions).

33. We recognize that in some circumstances binding obligations may be contained in preambular paragraphs to resolutions and in Presidential Statements

established a three-point scale: (1) clearly non-binding statements; (2) statements that may be binding; and (3) statements that are clearly binding.³⁴ Whenever possible, we note the percentage of resolutions with Chapter VII obligations, the clearest form of binding Council obligation, and thus coded as Category 3.³⁵ In order to take account of uncertainty in distinguishing binding from non-binding obligations, when we describe the percentage of NIACs in which the Council imposes a particular obligation, that figure includes all binding or potentially binding obligations.³⁶

The question of how to distinguish binding from non-binding Council obligations is not easily answered. For coding purposes, we employed several clear markers to help identify binding obligations: citations to Articles 25 or 48 of the U.N. Charter, a Chapter VII authorization, or use of verbs at the outset of operative paragraphs widely recognized by experts as signaling binding obligations.³⁷ Although the ICJ has given general guidance on how Security Council resolutions are to be interpreted, considerable disagreement persists with regard to whether the Vienna Convention on the Law of Treaties and other approaches to interpretation are applicable to Council

issued by the Council. Because these are rare, however, they are not statistically significant, and our study encompasses only the body of Security Council resolutions.

34. See *infra* Appendix I. In the Israeli Wall case, the ICJ held that Israel had “contravened” a number of Security Council resolutions not passed under Chapter VII. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 134 (July 9); see also Öberg, *supra* note 24, at 885 n.40 (“Only obligations, of course, can be contravened.”).

35. See *infra* Appendix I; see also LORAINIE SIEVERS & SAM DAWES, THE PROCEDURE OF THE UN SECURITY COUNCIL 389 (4th ed. 2014) (“[W]hen Council members have wanted to signal that a resolution is to be understood as being mandatory, the Council has *almost always* either specifically cited Chapter VII or included wording which clearly implies reliance on that chapter.” (emphasis added)). Judge Koroma appears to have adopted this view in his dissenting opinion in the Kosovo case. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 402, ¶ 10 (July 22) (Koroma, J., dissenting) (stating that resolution 1244, a resolution adopted pursuant to Chapter VII, is binding).

36. Importantly, using this metric allows us to address the critique that some verbs on our list may not always signal binding obligations, or that in some cases it may be impossible to determine the Council’s intentions. Such uncertainty would not exist if an obligation was imposed under Chapter VII, if the obligation was denominated as a “decision,” or if the Council invoked Articles 25 or 48 of the Charter.

37. We used the following verbs to signal binding obligations (category one in our coding): Decides, Authorizes, Demands, Determines, Resolves, Condemns, and Endorses (if followed by a threat). See *infra* Appendix I.

resolutions.³⁸ Similarly, states, including the Council's five permanent members ("P5"), disagree on which verbs signal binding obligations in resolutions. Apart from the term "decisions," no authoritative source draws clear categorical distinctions between binding and non-binding language.³⁹ Moreover, states have now made public their views on which verbs signal binding obligations in Council resolutions, with surprising results: some P5 states view only the verb "decides" as signaling a binding obligation, while others declare they are more flexible, noting that a reference to Chapter VII would be sufficient.⁴⁰

Nonetheless, this uncertainty does not mean that the most restrictive views of Council language should cast doubt on the utility of our longer list of "binding" verbs.⁴¹ International actors citing the Council for evidence of custom have invoked resolutions with a broad range of verbs, suggesting that the most restrictive views of Council member states are not shared by other international actors.⁴² The ICJ has cited resolutions that use "calls upon," "deplores," and "strongly reaffirms."⁴³

38. See Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 114 (June 21) (articulating that the language of a Security Council resolution must be carefully analyzed when evaluating its binding effect and that determining whether the powers under Article 25 have been exercised requires "regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council"); Michael C. Wood, *The Interpretation of Security Council Resolutions, Revisited*, in 20 MAX PLANCK Y.B. UNITED NATIONS L. ONLINE 1, 2 (2017); Michael C. Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK Y.B. UNITED NATIONS L. 73, 74 (1998) (offering views on Council resolutions based on practical experience); Michael Wood, *The Law of Treaties and UN Security Council Resolutions: Some Reflections*, in THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 244, 255 (Enzo Cannizzaro ed., 2011) (outlining the Council's impact on the law of treaties).

39. *South West Africa*, 1971 I.C.J. ¶ 113 (obliging states to adhere to "the decisions of the Security Council" made with reference to the U.N. Charter). Article 25 of the U.N. Charter requires member states to carry out "decisions" of the Council. U.N. Charter art. 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.").

40. The differences of views among member states became clear during the authors' discussions with legal advisors to several national missions to the United Nations.

41. *Infra* Appendix I.

42. *UN Security Council Data Set*, *supra* note 13.

43. See, e.g., Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 402, ¶ 81 (July 22) (citing S.C. Res. 787, ¶ 3 (Nov. 16, 1992) (using "strongly reaffirms"); S.C. Res. 541, ¶ 1 (Nov. 18, 1983) (using "deplores"); S.C. Res. 217, ¶¶ 4-10 (Nov. 20, 1965) (using "calls upon")).

The ICTY has invoked resolutions with “condemns” and “demands.”⁴⁴ The Special Court for Sierra Leone has cited resolutions using “demands,” “condemns,” “express its concern,” and “emphasizes.”⁴⁵ The IACHR has relied on “calls upon,” preambular paragraphs, and resolutions as a whole without citing to particular paragraphs.⁴⁶ And the ILC in commentary on the Draft Articles on State Responsibility cites resolutions using “reaffirms,” “calls upon,” “requests,” “urges,” and “deplores.”⁴⁷ Together, these verbs comprise a *broader* set of binding terms than the data set employed.⁴⁸ Absent an authoritative list, our category of binding indicators is more consistent and perhaps more rigorous than current international practice.

In order to understand whether Council practice provides evidence of changing norms in international law, it is necessary to examine how the Council intervenes in conflicts. We perform a descriptive analysis of the data, focusing on key variables of interest, to understand how, where, and when the Council has made binding decisions.⁴⁹ We do not impose parametric assumptions or provide theoretical predictors as covariates.⁵⁰ Instead, we use the three-point scale for each variable

44. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 133 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (citing S.C. Res. 794, ¶ 5 (Dec. 3, 1992) (using “condemns”); S.C. Res. 814, ¶ 8 (Mar. 26, 1993) (using “demands”)).

45. Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgment, ¶ 216 (Mar. 2, 2009), <http://www.rscsl.org/Documents/Decisions/RUF/1234/SCSL-04-15-T-1234-searchable.pdf> (citing S.C. Res. 1828 using “demands,” S.C. Res. 1633 using “condemns,” S.C. Res. 78, using “emphasizes,” and S.C. Res. 954 using “emphasizes”); Prosecutor v. Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), ¶¶ 28–29 (May 31, 2004) [http://www.rscsl.org/Documents/Decisions/CDF/Appeal/131/SCSL-04-14-AR72\(E\)-131.pdf](http://www.rscsl.org/Documents/Decisions/CDF/Appeal/131/SCSL-04-14-AR72(E)-131.pdf) (citing S.C. Res. 1071 using “condemns”).

46. Coard v. United States, Case 10.951, Inter-Am. Comm’n H.R., Report No. 109/99, OEA/Ser.L./V/II.106, doc. 6 rev. ¶ 39 (1999) (citing S.C. Res. 237 using “calls upon”).

47. ILC, Rep. 53d Sess., *supra* note 28, at 287 (citing S.C. Res. 687 using “reaffirms”); *id.* at 288 (citing S.C. Res. 662 using “calls upon”); *id.* at 291 (citing S.C. Res. 218 using “requests”); *id.* (citing S.C. Res. 569 using “urges”); *id.* at 334 (citing S.C. Res. 171 using “deplores”); *id.* (citing S.C. Res. 332 using “calls upon”).

48. For a list of binding terms employed by the data set, see *infra* Appendix I.

49. *UN Security Council Data Set*, *supra* note 13.

50. Predicting even when the Council passes resolutions, let alone when it imposes individual obligations, requires a multi-stage theory of the Council process. We do not attempt to provide such a theory, which would have to account for target conflict dynamics, the political influence of the Council membership, and the deterministic influence of the P5. For more on these dynamics, see Bruce Bueno de Mesquita & Alastair Smith, *The Pernicious Consequences of UN Security Council Membership*, 54 J. CONFLICT RESOL. 667, 668 (2010), which presents information to support the claim that there are few ways to predict which nations are elected to the Council, and Barry

of interest to calculate relative frequencies of binding decisions in each category and for each conflict.⁵¹ Generating the relative frequencies involves taking a simple proportion of observations that meet a designated threshold over a relevant number of observations drawn from the population.

II. GENERAL FINDINGS

This Part first provides a general description of the findings and then analyzes four specific areas where Council-imposed obligations should be considered as providing evidence of customary law: (1) human rights obligations of non-state actors in NIACs; (2) the status of peace agreements following NIACs; (3) elections in post-NIAC states; and (4) a nascent *jus ad bellum* for NIACs.

A. Overview

Our analysis of 1057 resolutions between 1990 and 2013, representing 56 NIACs, shows that the Council is widely involved in NIACs and, moreover, that there are patterns to the Council's application of obligations.⁵² The data show that the Council passed resolutions for the majority of NIACs (76%),⁵³ and confirms that it became slightly more involved in conflicts that began after 1990 (80%),⁵⁴ though it remained very active for both new and legacy conflicts.⁵⁵ The range in the number of resolutions passed on individual NIACs is large, from zero resolutions to ninety-seven.⁵⁶ When the Council chooses to pass a resolution, it does not involve itself lightly; for conflicts contained within our period of study, the average duration was 9.8 years, with a median of fourteen resolutions per conflict and an average of 27.6.⁵⁷ Geographically, the Council has been

O'Neill, *Power and Satisfaction in the United Nations Security Council*, 40 J. CONFLICT RES. 219, 219 (1996), which discusses the power associated with voting ability on the Council.

51. *UN Security Council Data Set*, *supra* note 13.

52. A more detailed description of our coding methodology and additional descriptive statistics are contained in Appendix II, available at https://law.wayne.edu/pdfs/fox_boon_jenkins_appendix_ii_1-17-18.pdf.

53. *UN Security Council Data Set*, *supra* note 13.

54. *Id.*

55. *Id.*

56. The Council did not pass resolutions during this time period on NIACs in Algeria, Republic of the Congo, Ethiopia, India, Myanmar, Nigeria, Peru, Philippines, Sri Lanka, or Turkey.

57. *UN Security Council Data Set*, *supra* note 13.

most heavily involved relative to the number of conflicts in the former Yugoslavia and in Africa.⁵⁸

The Council has invoked Chapter VII authorities in 48% of conflicts⁵⁹ and usage of Chapter VII corresponds to the conflicts with the highest number of resolutions (such as Bosnia),⁶⁰ confirming that the Council becomes most heavily involved in cases in which not all parties to conflict are cooperative. The top conflict list indicates that the Council became most intensely involved in a diverse set of conflicts, including some in the former Soviet sphere in the early 1990s and some of the most violent African NIACs.⁶¹ The top conflicts in terms of resolutions per year also include a diverse set: some are among the shortest conflicts—Croatia/Yugoslavia, Iraq/Kuwait⁶²—while others among the longest—Democratic Republic of the Congo (“DR Congo”).⁶³

The Council pursued an array of remedies in response to NIACs. It created twenty-six peacekeeping missions for the conflicts we coded,⁶⁴ leading to involvement by peacekeepers in 57% of all these NIACs.⁶⁵ During the same period, the Council created a total of fifty-three missions—or 76% of all missions ever—to be involved in conflicts, post-conflict situations, and states with border disputes, though not all such conflicts met the threshold for inclusion in the data.⁶⁶ As expected, this represents a substantial increase in involvement after the Cold War.⁶⁷ Further, the Council gave missions Chapter VII mandates in 48% of conflicts and applied sanctions in a further 35%, which

58. See Andrew S. Cottey, *United Nations*, in 1 MODERN GENOCIDE: THE DEFINITIVE RESOURCE AND DOCUMENT COLLECTION 381, 381 (Paul R. Bartrop & Steven Leonard Jacobs eds., 2015) (reflecting on the ways in which the United Nations was heavily engaged in the Yugoslav conflict, specifically to discuss international actions in the conflict and manage international operations); Gift Phiri, *African Nations Push for Permanent UNSC Seat*, AL JAZEERA (Sept. 26, 2013), <http://www.aljazeera.com/indepth/features/2013/09/african-nations-push-for-permanent-uns-2013924133231925482.html> (emphasizing African calls for an permanent African seat on the Council since the Council’s recent agenda has been heavily Afrocentric).

59. *UN Security Council Data Set*, *supra* note 13.

60. *Id.*

61. A list of conflicts coded with a corresponding number of resolutions is available at Project Website, *supra* note 12.

62. *UN Security Council Data Set*, *supra* note 13.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. See Sebastian von Einsiedel et al., *Introduction*, in THE UN SECURITY COUNCIL IN THE 21ST CENTURY 5–8 (Sebastian von Einsiedel et al. eds., 2016) (acknowledging the increase of Council actions after the end of the Cold War due, in part, to the cooperation of the permanent Council members).

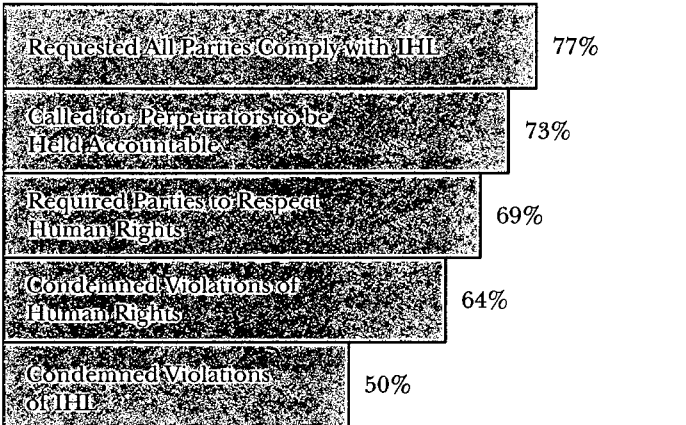
represents 73% of instances where it invoked Chapter VII.⁶⁸ Thus, the Council has robustly applied its most aggressive tools to arrest active conflicts during this period.

B. Enforcement of Existing Norms or Confirmation of Evolved Practice

A clear pattern emerging from the data is that the Council frequently reaffirms existing norms. In the areas of human rights, international humanitarian law (IHL), and individual criminal responsibility in particular, the data show that the Council’s normative practice reaffirms existing and agreed-upon practices.⁶⁹ In other words, an important role of the Council is to act as an institutional enforcer for settled norms and practices in the context of NIACs.⁷⁰

Table 1: Council Reaffirmation of Existing International Law Norms

For NIACs in which Ch VII was invoked, the Council:



68. UN Security Council Data Set, *supra* note 13.

69. See *infra* Table 1.

70. Kristen E. Boon, *UN Sanctions as Regulation*, 15 CHINESE J. INT’L L. 543, 560–61 (2016) (explaining the Council’s role as an institutional enforcer to act against and target non-state actors).

With regard to human rights, in 69% of NIACs that started before 1990 and included at least one Chapter VII resolution, the Council required parties to respect human rights obligations.⁷¹ This number decreased by 10% of similar conflicts that commenced after 1990.⁷² Nonetheless, references to human rights violations increased from 63% to 67% in the same period.⁷³ In Darfur and Somalia, for example, the Council consistently condemned human rights violations by government actors.⁷⁴

All of these resolutions use as their point of departure existing human rights obligations in major multilateral treaties. A similar pattern is apparent with regard to IHL.⁷⁵ In 75% of NIACs with at least one Chapter VII resolution, the Council made a general request to comply with IHL obligations, increasing to 83% in post-1990 conflicts.⁷⁶ The same is true for individual criminal responsibility. In 50% of NIACS, the Council condemned violations of international criminal law.⁷⁷ And in 69% of pre-1990 Chapter VII conflicts, rising to 83% of post-1990 conflicts, the Council called for perpetrators to be held responsible or to be brought to justice.⁷⁸ There are also numerous

71. *UN Security Council Data Set*, *supra* note 13.

72. *Id.*

73. *See, e.g.*, S.C. Res. 2139, ¶ 1 (Feb. 22, 2014) (recording that the Council both “[s]trongly condemn[ed] the widespread violations of human rights and [IHL] by the Syrian authorities, as well as the human rights abuses and violations of [IHL] by armed groups, including all forms of sexual and gender-based violence”).

74. *See* S.C. Res. 2158, ¶¶ 12–14 (May 29, 2014) (condemning grave violations against children and calling on the federal government in Somalia to actively promote respect for and protect human rights); S.C. Res. 2003, ¶ 16 (July 29, 2011) (condemning “human rights violations in, and relating to, Darfur, including arbitrary arrests and detentions,” by expressing “deep concern about the situation of all those so detained, including civil society members and IDPs” . . . and calling “on the Government of Sudan fully to respect its obligations, including by fulfilling its commitment to lift the state of emergency in Darfur, releasing all political prisoners, allowing free expression[,] and undertaking effective efforts to ensure accountability for serious violations of international human rights and humanitarian law”).

75. Related is the issue of refugees and their rights. The Council has been prolific on the need to adhere to the Refugee Convention and Protocol. *See* CHRISTIANE AHLBORN, *THE DEVELOPMENT OF INTERNATIONAL REFUGEE PROTECTION THROUGH THE PRACTICE OF THE UN SECURITY COUNCIL* 36–37 (2011) (highlighting the need for parties to armed conflicts to fully abide by international law, specifically laws and provisions relating to women and children).

76. *See, e.g.*, S.C. Res. 2093, ¶¶ 1, 12 (Mar. 6, 2013); S.C. Res. 1019 ¶¶ 3, 9 (Nov. 9, 1995); S.C. Res. 820, ¶¶ 7–8 (Apr. 17, 1993); S.C. Res. 771, ¶ 1 (Aug. 13, 1992).

77. Resolutions on Bosnia Herzegovina are illustrative. *See, e.g.*, S.C. Res. 1882, ¶ 1 (Aug. 4, 2009); S.C. Res. 1502, ¶ 1 (Aug. 26, 2003); S.C. Res. 1034, ¶¶ 1, 2 (Dec. 21, 1995); S.C. Res. 819, ¶¶ 6, 7 (Apr. 16, 1993).

78. *See, e.g.*, S.C. Res. 1355 ¶ 15 (June 15, 2001); S.C. Res. 1231, ¶ 3 (Mar. 11, 1999).

instances in which the Council ordered states to cooperate with international criminal tribunals.⁷⁹ In these subject matter areas, Security Council resolutions do not change the law so much as enforce it.

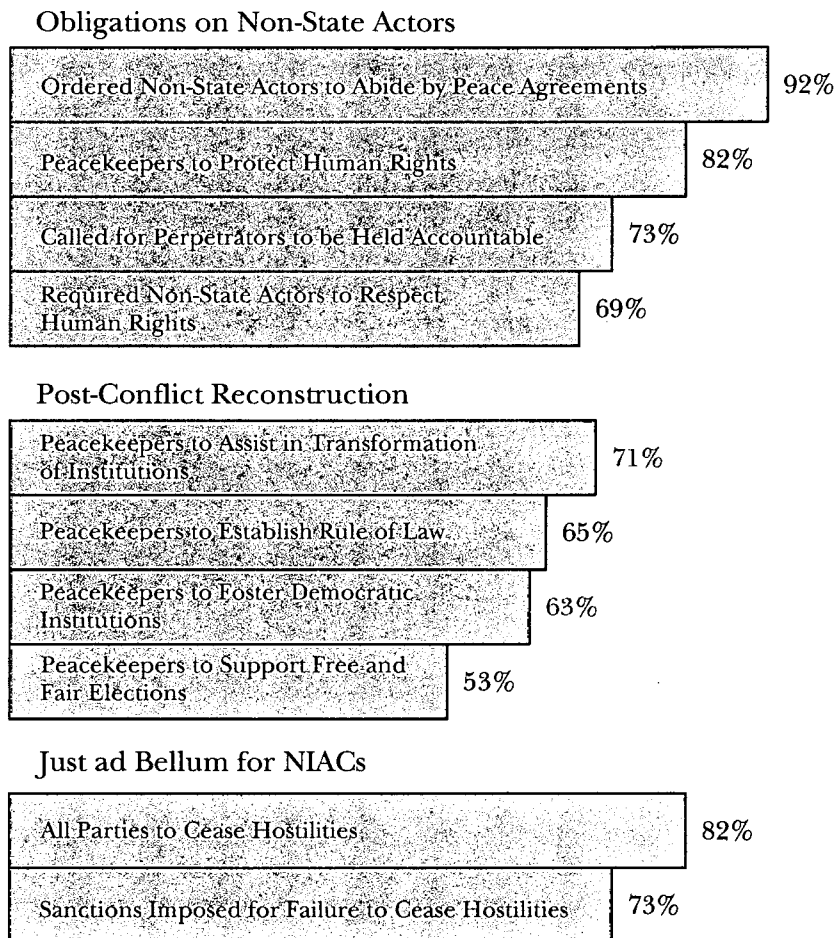
III. CONTRIBUTIONS TO DEBATES OVER EXISTING LAW

Our second and more significant finding is that Council practice is relevant to unresolved debates over customary norms and to the emergence of new norms related to NIACs. The four substantive issues we discuss represent a spectrum of norm crystallization.⁸⁰ In the first two, involving non-state actors, the Council has contributed to long-standing legal debates. In the third, involving post-conflict elections, the Council has affirmed controversial norms of democratic governance in circumstances where many argue the norms may be counter-productive. In the fourth, the Council has suggested a radical departure from existing law by outlining a nascent *jus ad bellum* for NIACs. The varying nature of these debates suggests that the addition of Council practice will have different consequences for different norms. In close cases, such as those involving non-state actors, Council practice may well come close to resolving the debates. In those situations where well-established doctrines would need to be revisited—like a *jus ad bellum* for NIACs—Council views may simply serve to widen debates about major shifts in custom still in their early stages.

79. See, e.g., S.C. Res. 1970, ¶ 5 (Feb. 26, 2011); S.C. Res. 1649, ¶ 19 (Dec. 21, 2005); S.C. Res. 1244, ¶ 14 (June 10, 1999); S.C. Res. 827, ¶ 4 (May 25, 1993).

80. See *infra* Table 2.

Table 2: Council-Imposed Obligations in Three Areas of Disputed Customary International Law



A. Human Rights Obligations of Non-State Actors

A non-state actor is by definition a party to every NIAC.⁸¹ The traditional gap between robust regulation of IACs and the relatively minimal regulation of NIACs is largely attributable to states' desire for maximum discretion in confronting non-state groups as well as a desire to avoid legitimizing the groups through their acquisition of legal rights

81. See *Non-international Armed Conflict*, INT'L COMM. RED CROSS, <https://casebook.icrc.org/glossary/non-international-armed-conflict> (last visited Feb. 7, 2018) (defining NIACs as "armed conflicts in which one or more non-State armed groups are involved").

and obligations.⁸² The traditional and still dominant view is that “most non-state actors, even the most influential of them are neither proper law-makers nor subjects of international law.”⁸³ But this statist paradigm has been forcefully challenged by functionalist arguments that assert a need to recognize greater legal parity among parties to NIACS where rebels control substantial territory and in other ways act like states.⁸⁴

1. *State of the law*

Human rights principles famously helped break the state’s near-monopoly on legal capacity to acquire rights under international law.⁸⁵ But human rights instruments have not expanded *obligations* beyond the state, and the traditional view has been that rebel groups lack the

82. See generally P.H. Kooijmans, *The Security Council and Non-State Entities as Parties to Armed Conflicts*, in INTERNATIONAL LAW: THEORY AND PRACTICE 333, 333 (Karl Wellens ed., 1998) (discussing the legal implications of Council resolutions that focus on non-state entities); Anja Mihr, *Non-State Actors in Conflict*, in HUMAN RIGHTS AND CONFLICT 305, 310 (Ineke Boerefijn et al. eds., 2012) (distinguishing between different types of non-state actors by highlighting that some use their position to reach alternative goals); Dan Miodownik & Oren Barak, *Introduction*, in NON-STATE ACTORS IN INTRASTATE CONFLICTS 1 (Dan Miodownik & Oren Barak eds., 2014) (discussing the role of external non-state actors in intrastate conflict); Anton O. Petrov, *Non-State Actors and the Law of Armed Conflict Revisited: Enforcing International Law Through Domestic Engagement*, 19 J. CONFLICT & SECURITY L. 279, 279 (2014) (explaining the drawbacks of giving non-state actors international law-making powers and offering a similar, or better, alternative); Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT’L L. 107, 108 (2012) (arguing that non-state actors play a limited role in making international law).

83. Jean d’Aspremont, *Non-State Actors from the Perspective of Legal Positivism: The Communitarian Semantics for the Secondary Rules of International Law*, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 23, 25 (Jean d’Aspremont ed., 2011) [hereinafter PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM].

84. See William Thomas Worster, *Relative International Legal Personality of Non-State Actors*, 42 BROOK. J. INT’L L. 207, 229–40, nn.78–131 (2015) (referring to many sources that argue for and against giving non-state actors more authority and power); see also Andrew Clapham, *Human Rights Obligation for Non-State Actors: Where Are We Now?*, in DOING PEACE THE RIGHTS WAY: ESSAYS IN INTERNATIONAL LAW AND RELATIONS IN HONOUR OF LOUISE ARBOUR (Fannie Lafontaine & François Larocqu, eds., forthcoming 2018) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2641390 (arguing that non-state actors already have obligations in the realm of international human rights).

85. Gregory Fox, *Navigating the Unilateral/Multilateral Divide*, in JUS POST BELLUM: MAPPING THE NORMATIVE FOUNDATIONS 229, 237 (Carsten Stahn, Jennifer S. Easterday & Jens Iverson, eds. 2014).

legal personality to acquire such obligations under treaty⁸⁶ or customary law.⁸⁷ Many scholars have rejected this view as rigidly formalist and oblivious to the reality of human rights violations in NIACs.⁸⁸ They point out that U.N. human rights bodies now routinely investigate and criticize rebel groups.⁸⁹ Moreover, scholars argue that when such groups and

86. Virtually all human rights treaties are limited to ratification by states. *See, e.g.*, African Charter on Human and Peoples' Rights art. 63, ¶ 1, June 27, 1981, 1520 U.N.T.S. 217 ("The present Charter shall be open to signature, ratification[,] or adherence of the Member States of the Organisation of African Unity."); International Covenant on Civil and Political Rights art. 48, ¶ 1, Dec. 19, 1966, 999 U.N.T.S. 171 ("The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant."). The one exception appears to be the Optional Protocol to the Rights of the Child Convention, which provides in Article 4(1): "Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of [eighteen] years." Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict art. 4, ¶ 1, Feb. 12, 2002, T.I.A.S. No. 13,094, 2173 U.N.T.S. 222. But Cedric Ryngaert points out that the Protocol has attributes of international humanitarian law, which undoubtedly applies to armed groups in certain circumstances, in addition to highlighting the use of "should" in Article 4(1) rather than "shall" indicates the article is "suggestive rather than binding." Cedric Ryngaert, *Human Rights Obligations of Armed Groups*, 41 BELGIAN REV. INT'L L. 355, 364 (2008).

87. CEDRIC RYNGAERT & JEAN D'ASPROMONT, INT'L LAW ASS'N, NON STATE ACTORS 10 (2014) [hereinafter NON STATE ACTORS] (reporting that direct responsibility of armed opposition groups "remains hypothetical in the present state of international law"); Ryngaert, *supra* note 86, at 362 (stating that human rights supervisory bodies have never given non-state actors human rights responsibilities as a matter of law); *see also* Robert McCorquodale, *Overlegalizing Silences: Human Rights and Nonstate Actors*, 96 AM. SOC'Y INT'L L. PROC. 384, 384 (2002) ("The international human rights law system is a state-based system, a system in which the law operates in only one area: state action. It ignores actions by nonstate actors . . . Nonstate actors are treated as if their actions could not violate human rights, or it is pretended that states can and do control all their activities.").

88. *See* NON STATE ACTORS, *supra* note 87, at 6 n.20 (referencing scholars who argue non-state actors can be bound to comply with international humanitarian law). Some cite Security Council resolutions in support of this claim. *See, e.g.*, Dapo Akande & Emanuela-Chiara Gillard, *Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict*, 92 INT'L L. STUD. 483, 487 n.15 (2016) (discussing Council resolutions to argue that "[i]n recent years there has been a shift towards imputing obligations to comply with human rights on non-State armed groups in situations where they exercise effective control over territory and populations and discharge a degree of public and administrative functions").

89. There is disagreement about whether the recommendations issued by these bodies address states or the groups themselves. *Compare* Clapham, *supra* note 84, at 6 (discussing how "nearly all speeches and statements at the [United Nations] refer to human rights violations being committed by armed groups," sometimes clearly condemning human rights violations committed by those groups), *with* Jean-Marie

not the government control significant portions of national territory, holding the groups accountable is the only means of securing the rights of local inhabitants.⁹⁰ Many states respond that holding rebel groups accountable would implicitly acknowledge their *capacity* to govern, which in turn would accord them an unwarranted legitimacy.⁹¹

The uncertainty surrounding this debate is amplified by disagreements among proponents over the precise content of rebel groups' human rights obligations.⁹² Views range from the full complement of rights set out in the Universal Declaration,⁹³ to a short list of peremptory norms,⁹⁴ to 'a more flexible approach that would apply human rights "to the extent appropriate to the context."⁹⁵

2. Security Council practice

The Council ordered non-state actors to respect human rights in 35% of all NIACs in the data set.⁹⁶ It imposed those obligations in 68% of NIACs in which it had invoked Chapter VII and in 83% of such conflicts that commenced after 1990.⁹⁷ Relatedly, the Council called for state and non-state perpetrators of human rights violations to be held accountable in 73% of NIACs in which it had invoked Chapter VII.⁹⁸ And in 82% of NIACs in which it invoked Chapter VII, the

Henckaerts & Cornelius Wiesener, *Human Rights Obligations of Non-State Armed Groups: A Possible Contribution from Customary International Law?*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW 146, 148 (Robert Kolb & Gloria Gaggioli eds., 2013) (stating that monitoring bodies have not addressed the responsibility of armed groups themselves).

90. See NON STATE ACTORS, *supra* note 87, at 6.

91. *Id.* at 7.

92. See Andrew Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations*, 88 INT'L REV. RED CROSS 491, 511 (2006) [hereinafter Clapham, *Human Rights Obligations*] (examining demands by international organizations for rebels to comply with human rights obligations outside the boundaries of humanitarian law).

93. *Id.* at 505–06 (quoting U.N. Special Rapporteur Philip Alston as saying that non-state actors must still comply with the requirements of the international community as expressed in the Universal Declaration of Human Rights).

94. See *id.* at 506 (listing rights to freedom of association, peaceful assembly, expression, family life, and democratic participation as human rights norms that non-state actors must still respect).

95. *Id.* at 502 (arguing that the basis for human rights obligations that non-state actors must respect should simply be the extent to which resources are available within the economic and social situation of the conflict).

96. UN Security Council Data Set, *supra* note 13.

97. *Id.*

98. *Id.*

Council mandated a peacekeeping mission to protect human rights, regardless of the identity of the violator.⁹⁹

The Council has called on rebel groups by name to cease activities that violate human rights, including the right to security of the person.¹⁰⁰ In the DR Congo, for example, it condemned

sexual violence against women and girls as a tool of warfare and atrocities perpetrated in the Ituri area by the Mouvement de Libération du Congo (MLC) and the Rassemblement Congolais pour la Démocratie/National (RCD/N) troops, as well as the acts of violence recently perpetrated by the Union des Patriotes Congolais (UPC) forces.¹⁰¹

More frequently, the Council has demanded that “all parties” or “all factions and forces” or “armed groups” cease such acts.¹⁰² An example is the conflict in Mali, where, in early 2012, Taureg rebels along with Ansar Dine and other Islamist groups took control of much of the northern part of the country.¹⁰³ After issuing a Presidential Statement condemning acts by the rebels,¹⁰⁴ the Council invoked Chapter VII and called on “all parties in the North of Mali to cease all abuses of human rights and violations of international humanitarian law.”¹⁰⁵ It repeated the same demand three months later, again invoking Chapter VII.¹⁰⁶ While a transitional government soon took control in Mali and a French-led intervention reversed rebel gains, in December the Council remained concerned that the “entrenchment of terrorist groups and criminal networks in the north of Mali continue[d] to pose a serious

99. *Id.*

100. *See, e.g.*, S.C. Res. 2127, ¶ 17 (Dec. 5, 2013) (condemning acts of violence and violations of international humanitarian law by non-state actors in Central African Republic); S.C. Res. 2067, ¶ 18 (Sept. 18, 2012) (condemning violent actions and attacks by terrorist groups and their affiliates in Somalia); S.C. Res. 1663, ¶ 7 (Mar. 24, 2006) (condemning armed attacks against civilians in Sudan).

101. S.C. Res. 1468, ¶ 2 (Mar. 20, 2003).

102. *See, e.g.*, S.C. Res. 2139, ¶ 1 (Feb. 22, 2014) (Syria); S.C. Res. 2046, ¶ 7 (May 2, 2012) (South Sudan); S.C. Res. 1935, ¶ 9 (July 30, 2010) (Sudan/Darfur); S.C. Res. 1814, ¶ 16 (May 15, 2008) (Somalia); S.C. Res. 1341, ¶ 9 (Feb. 22, 2001) (DR Congo); S.C. Res. 1181, ¶ 12 (July 13, 1998) (Sierra Leone); S.C. Res. 876, ¶ 4 (Oct. 19, 1993) (Georgia/Abkhazia).

103. Uppsala Conflict Data Program, *Government of Mali*, UPPSALA UNIVERSITET, <http://ucdp.uu.se/additionalinfo?id=72&entityType=0> (last visited Feb. 7, 2018).

104. S.C. Pres. Statement 2012/9 (Apr. 4, 2012).

105. S.C. Res. 2056, ¶ 13 (July 5, 2012).

106. S.C. Res. 2071, ¶ 5 (Oct. 12, 2012) (demanding that “all groups in the north of Mali cease all abuses of human rights and violations of international humanitarian law, including targeted attacks against the civilian population, sexual violence, recruitments of child soldiers and forced displacements”).

and urgent threat to the population throughout Mali.”¹⁰⁷ Again invoking Chapter VII, it authorized an African-led peacekeeping mission, which was tasked in part to “support the Malian authorities in recovering the areas in the north of its territory under the control of terrorist, extremist[,] and armed groups and in reducing the threat posed by terrorist organizations.”¹⁰⁸

When rebel groups fail to heed Council directives they are increasingly targeted with sanctions.¹⁰⁹ Only four of the sixteen Council sanctions regimes in place in 2017 targeted state actors exclusively; the rest targeted non-state actors exclusively or both state and non-state actors.¹¹⁰

3. Conclusions

The Security Council has consistently supported application of human rights obligations to non-state parties in NIACs. It has done so by condemning such groups by name and by including them in demands that all parties cease human rights abuses and respect human rights.¹¹¹ Moreover, the Council has empowered peacekeeping missions to secure rights against violation by non-state groups.¹¹² The Council has thus weighed in on the anti-statist side of a debate when

107. S.C. Res. 2085, at 1 (Dec. 20, 2012).

108. *Id.* ¶ 9(b). In a November report outlining a proposed United Nations presence in Mali, the Secretary-General recommended that “a strong United Nations human rights component should be envisaged as part of a multidimensional United Nations presence to monitor, report publicly and respond to violations of international humanitarian and human rights law by all parties.” U.N. Secretary-General, *Report of the Secretary-General on the Situation in Mali*, ¶ 74, U.N. Doc. S/2012/894 (Nov. 28, 2012) (emphasis added).

109. See Nigel D. White, *Sanctions Against Non-State Actors*, in COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW 127, 148–49 (Natalino Ronzitti ed., 2016) (examining the Council’s actions in progressively increasing sanctions in cases of non-compliance in the context of the National Union for the Total Independence of Angola (UNITA) rebel group in Angola).

110. The Stockholm Process on the Implementation of Targeted Sanctions (SPITS), *SPITS Sanctions List 2017*, UPPSALA UNIVERSITET, http://pcr.uu.se/digitalAssets/165/c_1655341_1-k_spits-sanctions-list-2017.pdf (listing all current and terminated sanctions with four “government only” targets—Eritrea, Guinea-Bissau, Iran, North Korea—and either “non-state actors” or a combination of the two as the remaining targets).

111. See, e.g., S.C. Res. 2216, at 2, ¶ 8 (Apr. 14, 2015) (condemning the military escalation by the Houthis and calling on all parties to respect human rights obligations).

112. See, e.g., S.C. Res. 1925, ¶ 12 (May 28, 2010) (allowing the peacekeeping mission in DR Congo to use the force necessary to protect civilians from violence initiated by any party in the conflict).

confronted with the question of whether the traditional human rights regime applies beyond state actors. The value of Council practice as evidence for customary law is enhanced by the breadth of its condemnations, which run from “human rights” abuses generally¹¹³ to specific obligations, such as those regarding child soldiers¹¹⁴ and sexual violence.¹¹⁵ Using Council practice as evidence of customary law is also enhanced by its efforts to achieve compliance through sanctions regimes and the dispatch of peacekeeping missions.

B. *Status of Peace Agreements Ending NIACs*

NIACs increasingly terminate through peace agreements, which are often detailed documents covering not only the end of hostilities but also a complex set of steps designed to achieve reconciliation and return the post-conflict state to its full functioning status.¹¹⁶ Are these agreements legally binding? This question is of interest to international lawyers for two principal reasons. First, binding agreements may more successfully accomplish their objectives than non-binding agreements. In the realm of inter-state agreements, evidence suggests that the reputational capital that states invest in binding as opposed to non-binding instruments may lead to greater levels of compliance.¹¹⁷ The same may be true of NIAC parties.

113. See, e.g., S.C. Res. 2014, ¶ 2 (Oct. 21, 2011) (condemning both human rights violations and human rights abuses by the Yemeni government and other actors).

114. See, e.g., S.C. Res. 1493, ¶ 13 (July 28, 2003) (condemning the use of child soldiers in the hostilities in the DR Congo).

115. See, e.g., S.C. Res. 2349, ¶ 1 (Mar. 31, 2017) (condemning sexual and gender-based violence perpetrated by Boko Haram and Islamic State of Iraq and the Levant (ISIL)).

116. See CHRISTINE BELL, *ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE LEX PACIFICATORIA* 28 (2008) (discussing the rise of peace agreements as a method to end civil conflicts following the end of the Cold War); Joakim Kreutz, *How Civil Wars End (and Recur)*, in *ROUTLEDGE HANDBOOK OF CIVIL WARS* 349, 356 (Edward Newman & Karl DeRouen, Jr. eds., 2014) (exploring the impact on the duration of a civil war when it is ended with a peace agreement); see also Christine Bell & Catherine O'Rourke, *Peace Agreements or 'Pieces of Paper'? The Impact of UNSC Resolution 1325 on Peace Processes and Their Agreements*, 59 *INT'L & COMP. L.Q.* 941, 943–44 (2010) (describing the Security Council's inclusion of roles for women in its efforts to end armed conflicts through peace agreements); Roberts & Sivakumaran, *supra* note 82, at 144–46 (describing the substance of recently implemented peace agreements).

117. For a variety of perspectives on signaling, reputation, and expectations, see Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *INT'L ORG.* 421, 427–28 (2010), which examines the difference between attempting to enforce binding agreements on one hand and utilizing norms and reputational pressures on the other to support compliance in post-conflict settlements with non-state actors; Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 *INT'L ORG.* 175, 176, 193 (1993), which explains how the international community seeks to raise

Second, some NIAC peace agreements contain full or partial amnesties, the enforcement of which may turn on whether the agreement as a whole is legally binding.¹¹⁸ The question of whether NIAC peace agreements are binding under international law is thus an important one.

1. *State of the law*

The Vienna Convention on the Law of Treaties' (VCLT) iconic definition of a treaty is limited to agreements between states.¹¹⁹ However, a savings clause in VCLT Article 3 provides that the definition does not affect the legal status of agreements "between States and other subjects of international law."¹²⁰ The question for peace agreements ending NIACs, then, is whether the non-state rebel parties may be considered "subjects of international law."¹²¹

Three major views are evident in international practice and scholarship.¹²² The first, exemplified by the decision of the Special Court for Sierra Leone in the case of *Prosecutor v. Kallon*,¹²³ asserts that rebel groups lack the requisite legal personality to enter into binding agreements.¹²⁴ The second argues that peace agreements may be

compliance levels by using reputational pressures; and Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POLIT. SCI. REV. 819, 819–20 (2000), which links post-conflict settlements to financial incentives in order to support compliance.

118. Francesca Lessa et al., *Persistent or Eroding Impunity? The Divergent Effects of Legal Challenges to Amnesty Laws for Past Human Rights Violations*, 47 ISR. L. REV. 105, 112, 130–31 (2014) (indexing 161 domestic and international judicial challenges to sixty-three different amnesties where only some of the challenged amnesties originated in peace agreements).

119. See Vienna Convention on the Law of Treaties art. 2, ¶ 1(a), art. 46, May 23, 1969, 1155 U.N.T.S. 331.

120. *Id.* art. 3.

121. *Id.*; see Clapham, *Human Rights Obligations*, *supra* note 92, at 492.

122. Discussion of this issue can often become circular. See Jan K. Kleffner, *Peace Treaties*, in 8 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 110 (Rüdiger Wolfrum eds., 2012) ("It is commonly held that an international legal person is an entity that possesses rights and obligations under international law, while the determination of whether such rights and obligations exist draws on whether the addressee of those rights and obligations possesses international legal personality." (citation omitted)).

123. Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Mar. 13, 2004), http://www.worldcourts.com/scsl/eng/decisions/2004.03.13_Prosecutor_v_Kallon_Norman_Kamara.pdf.

124. *Id.* ¶ 1. This case concerned the Lomé Agreement of July 7, 1999, which ended the civil war between the government and the Revolutionary United Front of Sierra Leone (RUF). See Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Sierra Leone-RUF, art. I, July 7, 1999, http://peacemaker.un.org/sites/peacemaker.un.org/files/SL_990707_LomePeaceA

binding under certain circumstances.¹²⁵ These circumstances include the scope and duration of a NIAC¹²⁶ and the intent of the state and international organization subject to the agreement.¹²⁷ The third view is that efforts to fit NIAC agreements into existing legal categories face fundamental limitations.¹²⁸

2. *Security Council practice*

Council practice on this fraught question has been consistent and clear: non-state parties are obligated to comply with NIAC peace agreements they have signed.¹²⁹ The negotiation and implementation of most such agreements now involves the Council *ex ante*, *ex post*, or both.¹³⁰ Fifty percent (23/46) of the NIACs in our data set have peace

greement.pdf [hereinafter Lomé Peace Agreement]. The Lomé Agreement contained a broad amnesty provision that the defendants argued precluded the Court from exercising jurisdiction. *Id.* art. IX. The prosecution responded that the Lomé Agreement was not a “treaty,” and thus, the amnesty provision could not be opposed against Sierra Leone. *Kallon*, SCSL-2004-15-AR72(E), ¶¶ 2, 32. The Appeals Chamber sided with the prosecution, conceding that while the RUF might possess the legal capacity for purposes of Common Article 3 of the Geneva Conventions, “[i]nternational law does not seem to have vested them with such [treaty-making] capacity.” *Id.* ¶ 48. While the Court did not discuss the VCLT definition, and its reasoning on the treaty issue is frustratingly elliptical, it appeared to fix on the RUF’s inability to function as a state as a decisive factor. *Id.* ¶ 41.

125. See Antonio Cassese, *The Special Court and International Law: The Decision Concerning the Lomé Agreement Amnesty*, 2 J. INT’L CRIM. JUST. 1130, 1134 (2004).

126. *Id.* (explaining the ways in which non-state actors can obtain standing to enter into agreements through objective demonstrations of legitimacy such as long term control over territories).

127. *Id.* at 1135 (determining the binding quality of the agreements by examining the intent of the parties). Others taking this more positive viewpoint to generally accept that rebel groups are bound by international humanitarian law as well as state practice of concluding agreements with other non-state groups include indigenous peoples and national liberation movements. See Tom Grant, *Who Can Make Treaties: Other Subjects of International Law*, in THE OXFORD GUIDE TO TREATIES 125, 133–34 (Duncan Hollis ed., 2012) (indigenous peoples); Daragh Murray, *How International Humanitarian Law Treaties Bind Non-State Armed Groups*, 20 J. CONFLICT & SECURITY L. 101, 101–02 (2015) (humanitarian law); Kirsten Schmalenbach, *Article 3: International Agreements Not Within the Scope of the Present Convention*, in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 49, 69 (Oliver Dörr & Kirsten Schmalenbach eds., 2012) (national liberation movements).

128. Bell & O’Rourke, *supra* note 116, at 949.

129. See White, *supra* note 109, at 148–49.

130. See, e.g., S.C. Res. 918, ¶¶ 1, 6 (May 17, 1994) (expressing both reaffirmation of the United Nations commitment to the peacekeeping efforts (*ex ante*) in Rwanda, and “stressing the importance” of the implementation of the Arusha Peace Agreement (*ex post*)).

agreements.¹³¹ The Council ordered non-state parties to abide by peace agreements in 83% of those conflicts and in 92% of Chapter VII conflicts.¹³² Perhaps the strongest indication of the Council's determination to treat NIAC peace agreements as binding is the sanctions regimes it has created to punish violation of the agreements. It did so in Liberia,¹³³ Rwanda,¹³⁴ Sierra Leone,¹³⁵ Côte d'Ivoire,¹³⁶ and the DR Congo.¹³⁷

In Côte d'Ivoire, for example, the Council strongly backed the January 2003 Linas-Marcoussis Accord to end a conflict that had started the previous year.¹³⁸ In May 2003, finding the situation in Côte d'Ivoire to constitute a "threat to international peace," the Council established a peacekeeping mission "with a mandate to facilitate the implementation by the Ivorian parties of the Linas-Marcoussis Agreement."¹³⁹ The peace process had effectively collapsed by November of that year, however, as rebel forces that refused to disarm resumed fighting.¹⁴⁰ In early 2004, the Council invoked Chapter VII to call on the parties "to carry out expeditiously their responsibilities under the Linas-Marcoussis Agreement."¹⁴¹ On November 15, with hostilities unabated, the Council invoked Chapter VII again to emphasize "that there can be no military solution to the crisis and that the full implementation of the Linas-Marcoussis and Accra III Agreements remains the only way to resolve the crisis persisting in the country."¹⁴² It imposed an arms embargo on the entire country and a

131. *UN Security Council Data Set*, *supra* note 13.

132. *Id.*

133. S.C. Res. 1521, ¶ 2(a) (Dec. 22, 2003); S.C. Res. 1343, ¶ 14(b) (Mar. 7, 2001); S.C. Res. 788, ¶ 8 (Nov. 19, 1992).

134. S.C. Res. 918, ¶¶ 5, 14(b)–(c) (May 17, 1994) (seeking to punish violations of earlier peace agreements in Rwanda by increasing the presence of troops, as well as by implementing an embargo against the importation of specific goods related to war making).

135. S.C. Res. 1132, ¶ 6 (Oct. 8, 1997) (admonishing violations of peace treaties in Sierra Leone by imposing an embargo on material for war making as well as petroleum).

136. S.C. Res. 1572, ¶¶ 6–7 (Nov. 15, 2004) (punishing violations of earlier peace agreements in Côte D'Ivoire by strengthening the U.N. peacekeeping mission in the area and imposing an embargo on war making material).

137. S.C. Res. 1596, ¶ 1 (May 3, 2005); S.C. Res. 1493, ¶¶ 6, 18, 20 (July 28, 2003).

138. S.C. Res. 1464, 1, ¶ 1 (Feb. 4, 2003) (endorsing the agreement and calling on "all Ivorian political forces to implement it fully and without delay").

139. S.C. Res. 1479, ¶ 2 (May 13, 2003).

140. *See* S.C. Pres. Statement 2004/42 (Nov. 6, 2004) (demanding cessation of all military activities without success).

141. S.C. Res. 1527, ¶ 4 (Feb. 4, 2004).

142. S.C. Res. 1572, ¶ 3 (Nov. 15, 2004).

travel ban and asset freeze “in particular [on] those who block the implementation of the Linas-Marcoussis and Accra III Agreements.”¹⁴³

3. *Conclusions*

Council practice evidences scant willingness to excuse or ignore non-state actors' violation of NIAC peace agreements.¹⁴⁴ The Council consistently asserts that compliance is essential and punishes the most egregious violations with sanctions.¹⁴⁵ While the Council has not explicitly described the agreements as binding under international law, the logic of the Council's post-conflict strategy would be difficult to understand if it regarded the agreements as optional. The agreements contain all the obligations of the parties later approved and elaborated upon in resolutions: demobilization of combatants, promotion of human rights and democratic institutions, constitutional reforms, and a host of other conflict-abatement devices.¹⁴⁶ An option to back out of these commitments would undo all subsequent Council actions. The Council's contribution to an uncertain question of treaty law thus clearly supports that the agreements are binding and as such is evidence of customary international law.

As with the human rights obligations of non-state actors, questions follow about how one would conceptualize non-state actors' responsibility for breaching NIAC peace agreements.¹⁴⁷ While this Article does not explore that complex question, a more straightforward consequence of viewing the agreements as binding is that amnesty provisions—such as the Lomé Agreement—might be successfully invoked in national or international courts. Another is that breach of a binding agreement by a non-state party might more

143. *Id.* ¶ 9.

144. *UN Security Council Data Set*, *supra* note 13.

145. One could certainly go farther and argue that Council resolutions make the agreements binding. See Olivier Corten & Pierre Klein, *Are Agreements between States and Non-State Entities Rooted in the International Legal Order?*, in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION*, *supra* note 38, at 1, 18 (arguing that the Council extends legitimacy to peace agreements between states and non-state actors by endorsing those peace agreements and granting them a place in the “international order”).

146. *E.g.*, Linas-Marcoussis Agreement, art. 7, ¶ 4, January 23, 2003, https://peacemaker.un.org/sites/peacemaker.un.org/files/CI_030123_Linas_MarcoussisAgreement.pdf; accord S.C. Res. 1464, ¶¶ 1, 9 (Feb. 4, 2003) (endorsing and expanding upon the Linas-Marcoussis Agreement to end fighting in the Côte D'Ivoire).

147. See Claudia Hofmann & Ulrich Schneckener, *Engaging Non-State Armed Actors in State- and Peace-Building: Options and Strategies*, 98 *INT'L REV. RED CROSS* 603, 618 (2011) (exploring NGO practices on convincing non-state actors to comply with international norms).

clearly relieve third party guarantors—such as the United Nations or a regional organization—of obligations under the agreement. Yet a third is that breach by a state party could lead to state responsibility.

C. *Post-Conflict Reconstruction*

The reconstruction of states emerging from NIACs presents an extraordinary challenge. The NIACs in our data set are among the longest and most deadly of the post-Cold War era.¹⁴⁸ In addition, they have frequently cleaved states along ethnic, religious, or political lines, calling into question the states' capacity to function as cohesive political units even after conflict has abated.¹⁴⁹ To return the states' governing institutions to full function—or to create fully functional institutions if they did not exist prior to the conflict—requires building trust across deep lines of social division.¹⁵⁰ Popular acceptance of a new national politics normalizes negotiated peace, allows for stability, and lessens the possibility that violence will relapse.¹⁵¹ Factions whose members have internalized the mutual antagonism of sub-state identities are often incapable of building national institutions that benefit both themselves and their opponents,¹⁵² hence the need for external assistance.¹⁵³

Building a functional state requires addressing a broad range of issues, which complicates isolating the normative aspects of post-conflict reconstruction. Some aspects of reconstruction cannot be easily connected to a defined norm or set of norms in international law; the demobilization of combatants, the rebuilding of infrastructure, and the resumption of normal economic activity, for

148. See Paul Collier et al., *On the Duration of Civil War*, 41 J. PEACE RES. 253, 259 (2004) (examining, through an econometric method, how long civil wars last and the reasons why some last longer than others); see also *UN Security Council Data Set*, *supra* note 13.

149. See STATHIS N. KALYVAS, *THE LOGIC OF VIOLENCE IN CIVIL WAR* 14, 390 (2006) (providing an overview of cleavages in civil war).

150. *C.f.* Caroline Hartzell & Matthew Hoddie, *Institutionalizing Peace: Power-Sharing and Post-Civil War Conflict Management*, 47 AM. J. POL. SCI. 318, 322 (2003) (examining the severity of deficits in trust following civil wars, specifically noting salient causal factors such as death tolls).

151. MICHAEL W. DOYLE & NICHOLAS SAMBANIS, *MAKING WAR AND BUILDING PEACE: UNITED NATIONS PEACE OPERATIONS* 19 (2006).

152. See Christoph Zürcher, *Building Democracy While Building Peace*, 22 J. DEMOCRACY 81, 82 (2011) (addressing how in many cases, the parties to a conflict may alone be unable to reach successful and fair democratic arrangements post-conflict, necessitating the presence of international actors).

153. *Id.*

example, are not the subject of normative obligations.¹⁵⁴ But other reforms now typical of reconstruction draw heavily on human rights. The reconstitution of justice systems and the ways in which nations determine the best means for addressing violations by prior regimes are two prevalent examples.¹⁵⁵ Often these efforts are embedded in a process of creating a new constitutional order for the state.¹⁵⁶ Our data show that in post-1990 conflicts with peacekeeping missions and binding or potentially binding resolutions, the Council directed the missions to protect human rights in 58% of conflicts and 82% of those that invoked Chapter VII.¹⁵⁷

1. *State of the law*

The normative undertaking that best captures the contemporary approach to post-conflict reconstruction is the creation of democratic processes as embodied in free and fair elections.¹⁵⁸ Elections institutionalize principles of inclusion and seek to build citizen loyalty to post-conflict states as opposed to ethnic or other sub-state identities.¹⁵⁹ Viewing elections as a post-conflict stabilization tool began in the post-Cold War era as part of a broader ascendance of

154. See Eric De Brabandere, *The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept*, 43 VAND. J. TRANSNAT'L L. 119, 131 (2010) (finding that the Transitional Authority in Cambodia only participated in reconstruction of infrastructure and demobilization of combatants at the behest of the Council, not as a generally accepted norm).

155. See U.N. Secretary-General, *Report on Peacebuilding in the Immediate Aftermath of Conflict*, ¶ 63, U.N. Doc. A/63/881-S/2009/304 (June 11, 2009); see also Elena Baylis, *What Internationals Know: Improving the Effectiveness of Post-Conflict Justice Initiatives*, 14 WASH. U. GLOBAL STUD. L. REV. 243, 277 (2015) (discussing how rebuilding justice systems post-conflict challenges "internationals" because each instance is unique and in many ways influenced by the nation's pre-conflict government structure).

156. See JAMAL BENOMAR, CONSTITUTION-MAKING AND PEACE BUILDING: LESSONS LEARNED FROM THE CONSTITUTION-MAKING PROCESSES OF POST-CONFLICT COUNTRIES 6 (2003) (addressing issues related to post-war constitutional construction, including the importance of having the right parties at the table and the importance of drafting interim agreements along the way); UNITED NATION DEV. PROGRAMME, UNDP GUIDANCE NOTE ON CONSTITUTION-MAKING SUPPORT 3 (2014) [hereinafter UNDP GUIDANCE] (explaining that rebuilding post-conflict political processes promotes accountability, rule of law, and protection of human rights).

157. *UN Security Council Data Set*, *supra* note 13.

158. See UNITED NATIONS PEACEKEEPING OPERATIONS, PRINCIPLES AND GUIDELINES 28 (2008) (identifying effective elections as an important step in the process of rehabilitating a nation after a civil war).

159. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 58–59 (1992) (stating that allowing everyone to vote, as opposed to limiting the privilege to a small group or certain territory, turns an exclusionary practice into a universal participatory right).

participatory rights; an idea Professor Thomas Franck labelled the “democratic entitlement.”¹⁶⁰ Built on human rights treaty commitments to free and fair elections and the increasingly widespread practice of election monitoring by the United Nations and regional organizations, the entitlement found additional support in General Assembly resolutions, membership criteria of international organizations, and decisions of international tribunals.¹⁶¹ The Council also made frequent reference to the need for democratic transitions in states in which it was engaged.¹⁶²

But applying the democratic entitlement to post-conflict societies has proven difficult and controversial.¹⁶³ While the United Nations has promoted elections as essential to legitimacy of the new political order, critics have pointed out the potential dangers accompanying electoral competition held immediately after conflict ends.¹⁶⁴ Scholars of international affairs argue that quick elections in states emerging from ethno-nationalist conflicts are positively correlated with a return to conflict.¹⁶⁵ This widely-discussed claim has given rise to a debate over how the timing and design of post-conflict elections should relate to other reconstruction imperatives—such as establishing security and creating effective state institutions—that will affect the perceived legitimacy of elections.¹⁶⁶ The question of whether the democratic

160. *Id.* at 46.

161. See Gregory H. Fox, *Democracy, Right to, International Protection*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 122, at 15, 19 (examining the usefulness of U.N. agencies and affiliates in enforcing democratic ideals in a nation); Gregory H. Fox, *The Right to Political Participation in International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 48, 48 (Gregory H. Fox & Brad R. Roth eds., 2000) [hereinafter Fox, *Right to Political Participation*] (raising questions about what effect the fostering of democratic ideals in post-conflict countries has on the idea of a democratic entitlement).

162. See Gregory H. Fox, *Democratization*, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY 69, 72 (David Malone ed., 2003) (addressing the trend in recent decades towards democracy as the de facto preferred form of national governance); Francesco Mancini, *Promoting Democracy*, in THE UN SECURITY COUNCIL IN THE TWENTY-FIRST CENTURY, *supra* note 67, at 235, 240, 249 (demonstrating instances in which the Council specifically urged referenda or elections to take place in post-conflict nations).

163. See generally Fox, *supra* note 9, at 180 (injecting a legal perspective into an already fraught debate over the effectiveness and desirability of promoting democratic institutions in post-conflict states).

164. See JACK L. SNYDER, FROM VOTING TO VIOLENCE: DEMOCRATIZATION AND NATIONALIST CONFLICT 32 (2000) (examining the risks of nationalism in electoral contests held shortly after the end of a civil war).

165. See *id.*

166. See UNDP GUIDANCE, *supra* note 156, at 24 (“In post conflict countries in particular, there is often a strong push for a speedy constitutional review process . . .

entitlement extends to the immediate post-conflict transitional period thus remains controversial.

2. *Security Council practice*

Supporting and facilitating democratic transitions has been an important part of the Security Council's strategy for post-conflict states. In 63% of all NIACs with Chapter VII, the Council tasked a peacekeeping mission with assisting in the creation of democratic institutions.¹⁶⁷ For Chapter VII conflicts, 71% were tasked to assist in the transformation of national institutions, 65% with establishing the rule of law, and 53% with supporting free and fair elections.¹⁶⁸

Resolutions authorizing peacekeeping missions in East Timor,¹⁶⁹ Mali,¹⁷⁰ Sudan,¹⁷¹ South Sudan,¹⁷² Liberia,¹⁷³ Somalia,¹⁷⁴ and elsewhere affirm the Council's belief in the palliative effect of democratic transitions on formerly warring factions.¹⁷⁵ The clearest examples of the Council approving electoral democracy as appropriate for post-conflict states are the so-called international territorial administrations of the 1990s in East Timor, Kosovo, and Bosnia.¹⁷⁶ These involved international actors directing elaborate democratic reform initiatives, involving not only elections but also wholesale constitutional revisions designed to embed pluralism and tolerance into the political culture.¹⁷⁷

However, experience from numerous constitutional processes indicates that short deadlines are almost never met in reality and, in fact, are often a hindrance to the broader goal of designing a constitution which reflects the will of the people, and is based on meaningful consultations with a broad cross-section of society.”); U.N. Secretary-General, Identical Letters dated 17 June 2005 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, U.N. Doc. A/70/95-S/2015/446, ¶ 141 (June 17, 2015) (acknowledging that calling for elections too early in a nation's rehabilitative process may have adverse effects that lead to further bloodshed and war).

167. *UN Security Council Data Set*, *supra* note 13.

168. *Id.*

169. S.C. Res. 1704, ¶ 1 (Aug. 25, 2006).

170. S.C. Res. 2100, ¶ 4 (Apr. 25, 2013).

171. S.C. Res. 1881, ¶ 1 (Aug. 6, 2009); S.C. Res. 1590, ¶ 1 (Mar. 24, 2005).

172. S.C. Res. 1996, ¶ 1 (July 8, 2011).

173. S.C. Res. 2066, ¶ 1 (Sept. 17, 2012).

174. S.C. Res. 2102, ¶ 1 (May 2, 2013).

175. Each of these resolutions either invoked Chapter VII, described the situation as a “threat to the peace,” or “decided” to grant the mission a pro-democracy mandate, meaning they were all coded as imposing binding obligations.

176. *See* S.C. Res. 1272, ¶¶ 1–2 (Oct. 25, 1999) (East Timor); S.C. Res. 1244, ¶ 11 (June 10, 1999) (Kosovo); S.C. Res. 1031, ¶ 6 (Dec. 15, 1995) (Bosnia).

177. *See* GREGORY H. FOX, HUMANITARIAN OCCUPATION 115–17 (2008) (exploring why the international community rejected models of statehood and implemented

3. *Conclusions*

Despite skepticism about the utility or desirability of moving post-conflict states decisively toward electoral democracy, Council practice shows no diversion in these settings from the broader democratic entitlement.¹⁷⁸ Certainly none of its missions have promoted alternative forms of governance. The Council has engaged with issues of democracy almost exclusively in the context of post-conflict reconstruction,¹⁷⁹ evidencing a strong and consistent commitment to promotion of democratic solutions in divided societies. While other U.N. bodies have warned repeatedly against imposing externally designed models of democratic government on post-conflict states,¹⁸⁰ the Council apparently views immediate democratic transitions to be essential.

Because this norm also has political character, the Council's practice in the area is evidence of an emerging customary norm, although the norm is not as well developed as the examples of human rights norms and non-state actors, and the status of peace agreements.

IV. CONTRIBUTIONS TO DEBATE OVER NEW LAW: *A JUS AD BELLUM FOR NIACS?*

In addition to addressing the long-standing legal debates discussed in Section III, the Council has also weighed in on a new issue: whether NIAC parties have a *jus ad bellum* obligation to cease hostilities.

A. *The Council's Challenge to a Purely Inter-State Jus Ad Bellum*

One of the most common obligations the Council has imposed on NIAC parties is to cease hostilities entirely. It did so in 82% of all NIACs in which it invoked Chapter VII and in 100% of such NIACs that

commitments to pluralism and democracy in East Timor, Kosovo, and Bosnia); Kristen Boon, *Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers*, 50 MCGILL L.J. 285, 293, 298 (2005) (discussing post-conflict legislative agendas that include democratic reforms).

178. Mancini, *supra* note 162, at 243 (noting that despite wide-spread criticism on the Council's use of democracy promotion, the Council has been devoted to creating free and fair elections since 2002 under Chapter VII).

179. See, e.g., Roland Rich, *Situating the UN Democracy Fund*, 16 GLOBAL GOVERNANCE 423, 426 (2010) (finding that the three most recent U.N.-Secretaries General have prioritized democracy building).

180. See, e.g., ORG. FOR ECON. CO-OPERATION & DEV., ACCOUNTABILITY AND DEMOCRATIC GOVERNANCE: ORIENTATIONS AND PRINCIPLES FOR DEVELOPMENT 3 (2006), <http://www.oecd.org/dac/governance-development/For%20WEB%20Accountability%20and%20democratic%20governance%20Orientations%20and%20principles%20for%20development.pdf> (noting that outside states cannot impose on other states a "one-size-fits-all" plan for development).

began after 1990.¹⁸¹ These demands are unconditional and exceptions are quite rare,¹⁸² though several are discussed below.¹⁸³ The Council has even demanded that both parties end fighting in conflicts where one side has committed extraordinarily brutal acts, and the Council itself has denounced the brutality.¹⁸⁴ Echoing canonical language in the U.N. Charter addressing inter-state disputes, the Council often explains that there can be no military solution to domestic disputes and urges parties either to engage in peace talks or adhere to peace agreements already negotiated.¹⁸⁵ In Georgia, for example, the Council declared that the parties' differences "must be addressed through negotiations and by peaceful means only."¹⁸⁶ In Sudan, it declared that "there can be no military solution to the conflict in Darfur, and that an inclusive political settlement . . . [is] essential to re-establishing peace in Darfur."¹⁸⁷ Where a peace agreement has been concluded and Chapter VII invoked, the Council demanded the parties adhere to the agreement in 92% of all NIACs.¹⁸⁸

Imposing an obligation not to resolve internal conflicts by force raises the question of whether the Council is effectively articulating a

181. *UN Security Council Data Set, supra* note 13.

182. *See, e.g.*, S.C. Res. 2053, at 1 (June 27, 2012) (asking that "all armed groups" stop acts of violence); S.C. Res. 1872, ¶ 5 (May 26, 2009) (acting under Chapter VII, the Council condemned the return of hostilities that were being undertaken to frustrate the efforts of the Transitional Federal Government); S.C. Res. 1834, ¶ 12 (Sept. 24, 2008) (demanding that armed groups discontinue violence); S.C. Res. 884, ¶ 4 (Nov. 12, 1993) (commanding the parties to desist in armed conflict); S.C. Res. 785, ¶ 3 (Oct. 30, 1992) (rejecting any revival of hostilities and demanding an end to hostilities).

183. *See infra* notes 184–87 and accompanying text.

184. In Rwanda, for example, the Council demanded on June 8, 1994 that "all parties to the conflict cease hostilities, agree to a cease-fire[,] and immediately take steps to bring an end to systematic killings in areas under their control." S.C. Res. 925, ¶ 6 (June 8, 1994). The genocide in Rwanda began in early April and did not fully end until the Rwandan Patriotic Front (RPF) took Kigali on July 4. *See GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 291–95 (1995). Indeed, the major reason for its cessation was the RPF wresting control of territory from Hutu extremists. *Id.* at 291–99. Yet, Resolution 925 demanded both that "all parties" cease hostilities and noted "with the gravest concern the reports indicating that acts of genocide have occurred in Rwanda." S.C. Res. 925, at 1, ¶ 6 (June 8, 1994). The Rwanda episode is arguably in tension with the exception for force used to halt mass human rights violations identified below. *See infra* notes 190–91 and accompanying text.

185. "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." U.N. Charter art. 2, ¶ 3; *see, e.g.*, S.C. Res. 1881, ¶ 8 (Aug. 6, 2009); S.C. Res. 1769, ¶ 18 (July 31, 2007); S.C. Res. 1202, ¶ 3 (Oct. 15, 1998); S.C. Res. 1016, ¶ 6 (Sept. 21, 1995).

186. S.C. Res. 1311, ¶ 5 (July 28, 2000).

187. S.C. Res. 1828, ¶ 9 (July 31, 2008).

188. *UN Security Council Data Set, supra* note 13.

set of *jus ad bellum* norms¹⁸⁹—for NIACs.¹⁹⁰ In this Section, we argue that the Council appears to have done so in the form of a general prohibition with several exceptions. Of all Council-imposed norms explored in our data, this would be the most radical departure from existing international law.¹⁹¹ The canonical modern expression of the *jus ad bellum* in U.N. Charter Article 2(4) applies by its terms only to inter-state conflicts;¹⁹² ICJ descriptions of the *jus ad bellum* in customary law are purely statist¹⁹³ and widely-accepted definitions of aggression from the General Assembly¹⁹⁴ and the statute of the International

189. The *jus ad bellum* is traditionally the body of norms defining when a state may resort to military force. *What Are Jus Ad Bellum and Jus In Bello?*, INT'L COMM. RED CROSS (Jan. 22, 2015), <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0>.

190. See KIRSTI SAMUELS, *POLITICAL VIOLENCE AND THE INTERNATIONAL COMMUNITY: DEVELOPMENTS IN INTERNATIONAL LAW AND POLICY* 131 (2007) (advancing that Council practice of demanding peaceful resolution of domestic disputes “provides important evidence of the normative and moral views of the international community on recourse to force in civil conflict”). As noted, in some cases the Council phrases its demand for cessation in general terms, and in others it demands that parties adhere to peace agreements. One might argue that only the former contributes to an internal *jus ad bellum* because in the latter cases the Council is simply demanding the parties adhere to commitments they themselves have created, not those imposed by international law. Note this argument assumes the peace agreements are binding, an issue discussed above. See *supra* notes 146–47 and accompanying text. If they are not binding then the distinction is illusory. Even if they are binding, the Council could hardly order one party to adhere to the terms of a treaty that the other party had materially breached. See Vienna Convention on the Law of Treaties, *supra* note 119, art. 60.

191. The opposing view on this issue is entirely plausible, but assessing all the contours of a potential internal *jus ad bellum* is well beyond the scope of this Article. See Christian Henderson & James A. Green, *The Jus Ad Bellum and Entities Short of Statehood in the Report on the Conflict in Georgia*, 59 INT'L & COMP. L.Q. 129, 133 (2010) (arguing that it is debatable whether the prohibition on the use of force is actually endorsed by the U.N. Charter).

192. “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. Charter art. 2, ¶ 4.

193. See *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶¶ 148–52 (Dec. 19); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 209 (June 27) (finding that international customary law does not contain a general right to intervene); see also *Legality of Use by State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 66, ¶ 31 (July 8) (declining to issue an advisory opinion on states' use of nuclear weapons to the World Health Organization).

194. G.A. Res. 3314 (XXIX), art. 1 (Dec. 14, 1974) (“Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.” (emphasis added)).

Criminal Court¹⁹⁵ speak exclusively of inter-state uses of force. Scholarly accounts are similarly unequivocal.¹⁹⁶

The state-centrism of the *jus ad bellum* has deep historical roots in nearly absolutist notions of protecting states' autonomy to resolve internal disputes without external interference.¹⁹⁷ In this view, the government enjoyed autonomy to put down challenges to its authority, and a rebel group enjoyed autonomy to mount such a challenge, sometimes referred to as the right to revolution.¹⁹⁸ That a government oppressed its citizens and suppressed their attempts to rise in protest has not translated into a right of other states to intervene on behalf of the regime's opponents.¹⁹⁹ But Council practice does not reflect a clear distinction between limitations on the inter-state and intra-state uses of force. Three aspects of Council practice have substantially undermined the idea of a disinterested international community standing aloof from NIACs. First, the various Council sanctions regimes have created obligations for all states to target individuals and groups defying a range of Council dictates to halt fighting or adhere

195. Resolution RC/Res.4, Attachment I, Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, art. 8 *bis* (1) (defining the "crime of aggression" as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations").

196. See, e.g., YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 6 (4th ed. 2005) (excluding intra-State conflict entirely from analysis of legality of the use of force).

197. See Eliav Lieblich, *Internal Jus ad Bellum*, 67 *HASTINGS L.J.* 687, 704 n.56 (2016) ("International law professes to be concerned with the relations of states to each other. Tyrannical conduct of a government towards its subjects, massacres and brutality in a civil war . . . are acts which have nothing to do directly or indirectly with such relations." (alteration in original) (quoting WILLIAM EDWARD HALL, *A TREATISE ON INTERNATIONAL LAW* 264 (2d ed. 1884))).

198. MALCOLM N. SHAW, *INTERNATIONAL LAW* 832–33 (7th ed. 2014); see also *Prosecutor v. Kallon*, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶ 20 (Mar. 13, 2004) ("There is no rule against rebellion in international law.").

199. E.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 209 (June 27) (noting that there is nothing in international customary law to justify state intervention on behalf of an opposition in another state); see also Chantal De Jonge Oudraat, *Humanitarian Intervention: The Lessons Learned*, 99 *CURRENT HIST.* 419, 420–21 (2000) (questioning whether humanitarian intervention is lawful under the U.N. Charter because most legal scholars argue that the U.N. Charter contains a general prohibition against intervention under Article 2(4)).

to prior peace agreements.²⁰⁰ The Council imposed sanctions in 73% of NIACs with Chapter VII and in 83% of such conflicts that began after 1990.²⁰¹ While the specific acts triggering sanctions vary widely—from violations of peace agreements, to refusal to cease hostilities, to violations of human rights—each traces its origins to resolutions imposing the non-use of force obligations described above.²⁰² The Council has thereby enlisted the entire international community in its effort to coerce NIAC parties into resolving disputes peacefully.

The second aspect of Council practice that undermines the notion that the international community is detached from NIACs is the Council's consistent but fraught choice to seek peaceful solutions to conflicts in which the incentives for parties to cooperate are often quite low. Studies of how NIACs end show that decisive military victories produce longer periods of peace than negotiated settlements.²⁰³ That the Council persists in a low-odds peacemaking strategy for NIACs suggests a commitment to intervention despite strong practical arguments for not doing so.

The third aspect of Council practice indicating the international community's interest in NIACs is the Council's condemnation of virtually every destructive consequence of the internal use of force. This includes the targeting of civilians, women, and children; large-scale internal displacements; the destruction of cultural property; the abuse of human rights; and acts amounting to international crimes.²⁰⁴

200. *E.g.*, S.C. Res. 1267, at 2, ¶ 3 (Oct. 15, 1999) (demanding that all states impose sanctions against the Taliban because it failed to comply with the Council's demand to turn over Usama bin Laden).

201. *UN Security Council Data Set*, *supra* note 13.

202. *See supra* notes 182–85 and accompanying text.

203. Edward N. Luttwak, *Give War a Chance*, 78 FOREIGN AFF. 36, 36, 44 (1999) (arguing that ceasefires or peace agreements are simply a break in the conflict that allows sides to rest and time to rearm, rather than leading to an effective peace solution); *see* Fabio Andres Diaz & Syed Mansoob Murshed, "Give War A Chance": *All-Out War as a Means of Ending Conflict in the Cases of Sri Lanka and Colombia*, 15 CIVIL WARS 281, 283, 285–87 (2013) (examining data on peace agreements and return to conflict, specifically considering both Colombia and Sri Lanka).

204. *See* S.C. Res. 2206, at 1 (Mar. 3, 2015) (condemning the large-scale displacement of civilians in South Sudan conflict); S.C. Res. 2199, ¶ 17 (Feb. 12, 2015) (demanding an end to the continued destruction of cultural property in Iraq and Syria); S.C. Res. 1894, at 1 (Nov. 11, 2009) (expressing regret for the targeting of civilians in armed conflicts); S.C. Res. 1612, at 1 (July 26, 2005) (recognizing the rights of children in all armed conflicts); S.C. Res. 1355, at 1 (June 15, 2001) (noting the concern for human rights violations and atrocities against civilians in the DR Congo); S.C. Res. 1325, at 2 (Oct. 31, 2000) (recognizing the importance of women's and girls' rights in all armed conflicts); S.C. Res. 1231, ¶ 3 (Mar. 11, 1998) (calling on

The marginal difference in intrusion on state autonomy between these interventions and an appropriately limited internal *jus ad bellum* hardly matches an absolutist view that internal uses of force are wholly beyond international regulation.²⁰⁵

B. The Nature of an Internal Jus Ad Bellum in Council Practice

If the Council now treats the fact of NIACs as an issue of legitimate international concern and views an immediate end to hostilities as its preeminent objective, then have its views coalesced into discernable norms? The few scholars who have explored a *jus ad bellum* regime for NIACs have not placed particular emphasis on Council practice. Kjell Anderson grounds the idea in an individual right to peace.²⁰⁶ Eliav Lieblisch proposes a norm extrapolated from the human right to life.²⁰⁷ Timothy Waters proposes a more limited focus on “protectable territory” within a state, intervention into which would trigger an international law violation.²⁰⁸

Exploring all the contours of a fully-developed internal *jus ad bellum* is well beyond the scope of this Article. Given the embryonic state of the law in this area, any suggested norm would need to be a modest one. Thus, we follow the inter-state *jus ad bellum* by identifying the general prohibition on force that it creates, augmented by several exceptions. The breadth of the rule’s exceptions recognizes its revolutionary nature. Three exceptions are suggested by commentators and grounded in Council practice, while a fourth is the Council’s alone.

perpetrators of human rights and humanitarian law violations in Sierra Leone NIAC to be brought to justice).

205. This claim is not an effort to collapse the *jus ad bellum/jus in bello* distinction. The cited condemnations by the Council all fit formally or notionally within the *jus in bello*. But the state autonomy claim does not map clearly on to this distinction. Its broad invocation of a zone of domestic discretion appears rather hollow if it asserts only a right to resort to internal force but not the right to use that force in the way domestic actors see fit.

206. See Kjell Anderson, *The Universality of War: Jus ad Bellum and the Right to Peace in Non-International Armed Conflicts*, in *THE CHALLENGE OF HUMAN RIGHTS: PAST, PRESENT AND FUTURE* 52, 52 (David Keane & Yvonne McDermott eds., 2012).

207. Lieblisch, *supra* note 197, at 743.

208. Timothy William Waters, *Plucky Little Russia: Misreading the Georgian War Through the Distorting Lens of Aggression*, 49 *STAN. J. INT’L L.* 176, 229 (2013) (proposing a norm that would focus on “identifying territorial lines with a functional status equal to an international frontier in relation to the use of force—territory whose violation would allow the kinds of responses that are automatically available in true international conflicts. This would create, within a single state, differentiated sovereignties derived directly from the territorial aspects of conflict”).

1. *Self-defense exception*

The first exception is for force used in self-defense, paralleling the interstate *jus ad bellum*.²⁰⁹ Either a governmental or a non-governmental actor could use force in response to a prior use of force against its members.²¹⁰ In Afghanistan, for example, after expressing “its concern about the security situation . . . , in particular the increased violent and terrorist activities by the Taliban [and] Al-Qaida,” the Council called upon the Afghan government “to address the threat to the security and stability of Afghanistan posed by the Taliban [and] Al-Qaida.”²¹¹ In DR Congo, the Security Council gave the U.N. Organization Mission in the DR Congo (MONUC) peacekeeping force a mandate to work “in close cooperation” with the government—specifically with its armed forces—to protect civilians from attacks by armed militias, to disarm those militias, and to “disrupt the military capability of illegal armed groups that continue to use violence.”²¹² In both cases, the Council legitimated forceful responses to prior attacks.²¹³

2. *Exceptions for furthering democratic legitimacy and halting mass violations of human rights*

But a blanket exception for self-defense would take no account of the reasons force had been used in the first place. An oppressive

209. A minimum threshold requirement would distinguish attacks triggering a right of self-defense from legitimate acts of law enforcement, crowd control, or the quelling of civil unrest. Elian Lieblich usefully equates this threshold with that in the inter-state *jus ad bellum*: “resort to internal hostilities can only be undertaken in self-or-other-defense against a prior use of force itself amounting to hostilities.” Lieblich, *supra* note 197, at 740.

210. The threshold could also be described as an “armed attack” per U.N. Charter article 51. Additionally, the right of self-defense would be limited to responses to the first attack. As is often remarked in the inter-state context, there is no self-defense to self-defense.

211. S.C. Res. 1806, at 2, ¶ 11 (Mar. 20, 2008); *see also* S.C. Res. 2041, ¶ 23 (Mar. 22, 2012) (using similar language for Afghan conflict); S.C. Res. 1234, at 1, ¶ 4 (Apr. 4, 1999) (expressing concern over “measures taken by forces opposing the Government in the eastern part of the Democratic Republic of the Congo” and calling for “the re-establishment of the authority of the Government of the Democratic Republic of the Congo throughout its territory”).

212. S.C. Res. 1856, ¶¶ 3, 3(a), 3(f) (Dec. 22, 2008); *see also* S.C. Res. 2076, ¶ 3 (Nov. 20, 2012) (condemning the attempts from the March 23 Movement “to establish an illegitimate parallel administration and to undermine State authority of the Government of the [DR Congo]”).

213. *See* S.C. Res. 1856, at 1, ¶ 3 (Dec. 22, 2008) (allowing the use of force in the DR Congo for the promotion of international security); S.C. Res. 1806, ¶¶ 3, 4 (Mar. 20, 2008) (authorizing the use of force in Afghanistan to protect its civilians).

government attacked by a pro-democratic insurgency and a genocidal insurgency attacked by a democratic government would be equally entitled to respond to attacks with force. Ignoring the equities involved in such conflicts would effectively replicate international law's traditional abnegation of interest in NIACs.²¹⁴ Council practice suggests two further exceptions that would temper the self-defense exception to account for the nature and goals of the regime or rebel group involved: the use of force to further democratic legitimacy²¹⁵ and the use of force to resist mass human rights violations.²¹⁶ A narrowly-drawn democratic legitimacy exception would apply to a regime—incumbent or ousted—seeking to vindicate an electoral victory deemed free and fair by external observers, preferably from the United Nations.²¹⁷

The idea of democratic legitimacy now has deep roots in Council practice, as well as that of other U.N. bodies.²¹⁸ The Council supported free and fair elections in 53% of NIACs in our data set in which Chapter VII was invoked.²¹⁹ Twice—in Haiti in 1994 and Sierra Leone in 1997—the Council approved of military force to oust regimes that

214. See INT'L COMM. OF THE RED CROSS, *THE LAW OF ARMED CONFLICT: NON-INTERNATIONAL ARMED CONFLICT* 3 (2002), https://www.icrc.org/eng/assets/files/other/law10_final.pdf (describing how historical state practice such as disallowing interference in domestic affairs in conjunction with U.N. Charter article 2(7) and preventing U.N. intervention in internal affairs work together to elucidate international law's disinterest in NIACs).

215. See *infra* note 220 and accompanying text.

216. See, e.g., S.C. Res. 1706, at 2, ¶ 1, 4 (Aug. 31, 2006) (authorizing the use of force in Darfur after expressing concern for the safety of humanitarian aid workers and the Darfur population); see also S.C. Res. 1975, ¶ 6 (Mar. 30, 2011) (allowing the U.N. Operation in Côte d'Ivoire to "use all necessary measures" to prevent the continued attacks against civilians in Côte d'Ivoire).

217. See SAMUELS, *supra* note 190, at 117–21 (detailing Council practice of rejecting "political violence against democratically elected governments").

218. See Jean d'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U. J. INT'L L. & POL. 877, 887 (2006) (finding that after the Cold War, democracy has been viewed as the more legitimate form of government); Fox, *Democracy, Right to, International Protection*, *supra* note 161, at 15 (showing democracy to be of importance to the Council of Europe and the Organization of American States); Fox, *Right to Political Participation*, *supra* note 161, at 32 (contending that the idea of democratic entitlement began with the U.N. Charter and became a seemingly legitimate practice within bodies like the General Assembly); U.N. SECRETARY-GENERAL, *GUIDANCE NOTE ON DEMOCRACY* 1 (2009), https://www.un.org/democracyfund/sites/www.un.org.democracyfund/files/file_ach/UNSG%20Guidance%20Note%20on%20Democracy-EN.pdf (noting that all states could benefit from democracy).

219. *UN Security Council Data Set*, *supra* note 13.

had overthrown democratically elected leaders.²²⁰ An additional exception for force intended to halt mass human rights violations would limit claims of self-defense when used as either justification or cover for such violations.²²¹ This exception would be grounded in two aspects of Council practice in NIACs: its frequent condemnation of human rights violations²²² and its authorization of the use of force—in whole or in part—to redress the violation of human rights.²²³

3. *Exception for anti-terrorism actions*

Finally, the Council has indicated support for internal uses of force designed to defeat terrorist groups or those affiliated with terrorists.²²⁴

220. See S.C. Res. 1132, ¶ 1 (Oct. 8, 1997) (demanding, under Chapter VII, that “the military junta take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically-elected Government and a return to constitutional order”); S.C. Res. 940, ¶ 4 (July 31, 1994) (authorizing, under Chapter VII, the creation of a multilateral force “to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti”); see also S.C. Res. 1181, at 1 (July 13, 1998) (commending the Economic Community of West African States’s (ECOWAS) role in re-establishing the democratic process in Sierra Leone); S.C. Pres. Statement 1998/5 (Feb. 26, 1998) (finding that after the ECOWAS force deposed the Sierra Leone junta, the Council had “welcome[d] the fact that the rule of the military junta [had] been brought to an end”).

221. See JAN ARNO HESSBRUEGGE, *HUMAN RIGHTS AND PERSONAL SELF-DEFENSE IN INTERNATIONAL LAW* 333–34 (2017) (arguing that allowing a right to resist mass atrocities could limit violence for forcing those launching an attack to provide a legal justification for the aggression).

222. The Council condemned human rights violations in 71% of NIACs in which Chapter VII was invoked and 80% of such conflicts that started after 1990. *UN Security Council Data Set*, *supra* note 13. Peacekeeping missions were given mandates to protect human rights in 82% of NIACs with Chapter VII. *Id.*

223. Examples include interventions authorized under Chapter VII in several countries. See S.C. Res. 1973, ¶ 4 (Mar. 17, 2011) (Libya); S.C. Res. 1264, ¶ 3 (Sept. 15, 1999) (East Timor); S.C. Res. 1101, ¶ 4 (Mar. 28, 1997) (Albania); S.C. Res. 940, ¶ 4 (July 31, 1994) (Haiti); S.C. Res. 929, ¶¶ 3, 4 (June 22, 1994) (Rwanda); S.C. Res. 836, ¶ 8 (June 4, 1993) (Bosnia and Herzegovina); S.C. Res. 794, ¶¶ 7, 10 (Dec. 3, 1992) (Somalia). See generally Inger Österdahl, *The Exception as the Rule: Lawmaking on Force and Human Rights by the UN Security Council*, 10 J. CONFLICT & SECURITY L. 1, 1–2 (2005) (arguing that the only response that the U.N. Security Council has to every situation is using humanitarian intervention); George Weber, *The Humanitarian and Human Right Duties of the United Nations Security Council*, 1 U. BALT. J. INT’L L. 221, 223 (2013) (examining how the Security Council has responded to human rights’ abuses).

224. In the inter-state setting, the Council has suggested, though not uncontroversially, that attacks by terrorist groups give rise to a right of self-defense whether or not the attacks can be attributed to the host state. See S.C. Res. 2249, ¶ 1 (Nov. 20, 2015) (noting that ISIL “has the capability and intention to carry out further

The central example is Mali, where the Council sided with an elected government in conflict with rebel groups in the north of the country, several of which the Council identified as having ties to terrorist organizations.²²⁵ After France intervened to assist the government in early January 2013, the Council welcomed “the swift action by the French forces, at the request of the transitional authorities of Mali, to stop the offensive of terrorist, extremist[,] and armed groups towards the south of Mali.”²²⁶ The Council thus endorsed the government’s use of force to defeat the terrorist-affiliated groups.

C. Conclusions

Council practice thus suggests a general condemnation of force used in NIACs with exceptions for self-defense and force used to restore democratically elected regimes to end mass human rights violations and to defeat terrorist or terrorist-affiliated groups. Much would need to change in the contemporary *jus ad bellum* and cognate fields of international law for limitations on the internal use of force to take hold. But the Council’s own preferences seem clear.

V. SECURITY COUNCIL PRACTICE AS EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

The patterns in Security Council practice we have described may be relevant to customary international law if the Council has a role in the

attacks and regards all such acts of terrorism as a threat to peace and security”); S.C. Res. 1373, at 1 (Sept. 28, 2001) (affirming the right of self-defense in light of September 11 attacks); see also S.C. Res. 1368, at 1 (Sept. 12, 2001) (reiterating the right under the U.N. Charter of states to individual or collective self-defense); Thomas M. Franck, *Terrorism and the Right to Self-Defense*, 95 AM. J. INT’L L. 839, 839–40 (2001) (finding that the United Nations passed a resolution the day of the 9/11 attack in New York to demonstrate that it recognizes a right to self-defense). But see Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, ¶ 139 (July 9) (noting that there is no right of self-defense to acts of terrorism by non-state actor).

225. See S.C. Res. 2085, at 1 (Dec. 20, 2012); see also S.C. Res. 2056, ¶ 23 (July 5, 2012) (authorizing an African Union mission to Somalia, established under Chapter VII, to take “all necessary measures” to defend the fragile Transitional Federal Government against the Al Shabaab group); S.C. Res. 2036, at 2, ¶ 1 (Feb. 22, 2012) (condemning attacks on the government “by armed opposition groups, and foreign fighters, particularly Al Shabaab, and stressing that Somali armed opposition groups and foreign fighters . . . constitute a terrorist threat to Somalia, and the international community” and authorizing African Union mission to take the necessary steps to coordinate with Somali security forces and reduce the threat posed by opposition groups).

226. S.C. Res. 2100, at 1 (Apr. 25, 2013); see also S.C. Res. 2227, at 3 (June 29, 2015) (endorsing the continued use of French forces to defeat terrorist threats in Mali).

creation of custom. In this Part, we describe a theory of how the Council participates in customary law-making. First, this Part describes the Council's unique position in the architecture of international peace and security law that endows its views on armed conflict with a particular salience. Second, it describes how the Council has used that position in practice regarding NIACs both to intervene in conflicts more frequently than states acting individually or in groups and to impose a consistent set of obligations on NIAC parties over time. Third, it asks how aggregated Council practice can be seen as fulfilling the two elements of custom traditionally required of state action: practice and *opinion juris*. Finally, this Part addresses two common objections to Council resolutions that serve as evidence of custom.

Because we view Council resolutions as *evidence* of customary law, we do not argue that resolutions themselves create custom.²²⁷ Council resolutions are simply one of the various forms of evidence to be assessed in determining the existence and content of a customary norm.²²⁸ The vigorous debate on the four substantive issues we discuss above²²⁹ results from the evidence on each issue being both diverse and inconclusive. In our view, the addition of Council practice could in some cases affect the outcome of those debates.

A. *Acts of International Organizations as a Source of Custom*

Custom is traditionally understood as primarily emanating from the acts of individual states.²³⁰ But as international organizations assume

227. Few sources of custom create new norms on their own. The exception would be so-called "instant custom," which is quite rare. See Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 435 (1983).

228. In *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 6, 2006), for example, the Inter-American Court of Human Rights reviewed decisions and statutes of international tribunals, resolutions of the General Assembly, views of the U.N. Secretary-General, and resolutions of the Council to conclude that national amnesties for crimes against humanity are invalid. *Id.* ¶¶ 105–14. Similarly, in *Tadić*, the ICTY Appellate Body considered national military manuals, national legislation, agreements concluded by the ICRC, and Council resolutions (which it deemed "of great relevance") to find that individual criminal responsibility could attach to violations of basic humanitarian law principles applicable to internal conflicts. *Prosecutor v. Tadić*, Case No. IT-94-I-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 128–36 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

229. See *supra* notes 209–26 (examining exceptions to the general prohibition on force created under the inter-state *jus ad bellum*).

230. See, e.g., ILC Draft Conclusions on Custom, *supra* note 5, at 76 (contending that states form international customary laws through their practices, "or expression, of rules of customary international law"). In *Jurisdictional Immunities of state* (Ger. v. It.;

an increasingly prominent role in global policymaking, the case for viewing their practice as evidence of custom has gained strength.²³¹ Broadly stated, the argument is that if international organizations are now understood to have the international legal personality necessary to perform a wide variety of functions previously reserved to states, there is no reason to ignore the implications for customary law that follow from the organizations' exercise of that personality.²³² The ICJ has cited General Assembly resolutions as evidence of custom on issues such as the permissible use of force, non-intervention, and the legality of the use of nuclear weapons.²³³ Other international tribunals have cited General Assembly resolutions as evidence of custom on different issues.²³⁴ The ILC recently accepted a version of this claim in

Greece intervening), Judgment, 2012 I.C.J. 99 (Feb. 3), the ICJ held that it is "State practice from which customary international law is derived." *Id.* ¶ 101.

231. See Jed Odermatt, *The Development of Customary International Law by International Organizations*, 66 INT'L & COMP. L. Q. 491, 496 (2017) (suggesting that the concept that states and international organizations help form international customary law should not be contentious); Roberts & Sivakumaran, *supra* note 82, at 116 (recognizing that it has become accepted practice to allow non-governmental organizations to create international law). Judge Takana was an early advocate of this position. See *South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Judgment, 1966 I.C.J. 6, 291 (July 18) (Tanaka, J., dissenting) (arguing that the traditional individualistic, statist conception of custom developed through repetitive actions by States will change to adapt to the new "parliamentary diplomacy" method of generating custom through actions of "organizations such as the League of Nations and the United Nations, with their agencies and affiliated institutions"); see also Michael Wood (Special Rapporteur), *Second Report on Identification of Customary International Law*, at 25 n.120, U.N. Doc. A/CN.4/672 (May 22, 2014) (collecting various supportive separate opinions of ICJ judges opining on the creation of custom by non-governmental, international bodies).

232. Mathias, *supra* note 23, at 26 (introducing the idea that once the ICJ has noted that international organizations have distinct characteristics and rights, the ILC might also determine whether they have an effect on customary international law).

233. See *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶ 162 (Dec. 19); *Legality of Use by State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, 1996 I.C.J. 66, ¶ 1 (July 8) (asking the court for an opinion on whether the use of nuclear weapons is acceptable); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 195 (June 27); see also Laurence R. Helfer & Ingrid B. Wuerth, *Customary International Law: An Instrument Choice Perspective*, 37 MICH. J. INT'L L. 563, 576 (2016) (noting the "widely-held view that U.N. General Assembly resolutions are evidence of customary international law").

234. See Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT'L L. 474, 475 (1991) (reviewing arbitral decisions on the standard for expropriated property that rely heavily on General Assembly resolutions).

provisional “conclusions” on the identification of customary law.²³⁵ The ILC position is hesitant but supportive, acknowledging that in “certain cases, the practice of international organizations also contributes to [custom].”²³⁶ The Commission elaborates that while a resolution of an international organization “cannot, of itself, create a rule of customary international law[,] . . . [a] resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development.”²³⁷

The ILC does not apply this general assessment—which we accept—to the Council.²³⁸ Instead, in keeping with much contemporary scholarship, it focuses almost exclusively on resolutions of the General Assembly.²³⁹ This Section argues that such a limited focus is unwarranted and that both the Council’s legal status and its extensive history of addressing NIACs should bring its resolutions within the ambit of the ILC’s general willingness to treat international organization practice as evidence of custom.

It is first useful to understand how patterns of Council-imposed obligations compare to General Assembly resolutions as evidence of custom, since the latter are now well-accepted.²⁴⁰ One important factor used in assessing the normative value of General Assembly

235. See ILC Draft Conclusions on Custom, *supra* note 5, at 75–76. (noting that the ILC’s adoption of conclusions evidencing international organizations’ contributions to custom “proved to be quite controversial” within the ILC); Michael Wood, *International Organizations and Customary International Law*, 48 VAND. J. TRANSNAT’L L. 609, 616 (2015) (referencing the ILC’s controversial discussion on inclusion of international organizations as contributors to custom).

236. ILC Draft Conclusions on Custom, *supra* note 5, at 76; see also JAMES CRAWFORD, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 194 (8th ed. 2012) (noting that the practice of the Council and General Assembly “may have considerable legal significance”); Niels Blokker, *International Organizations and Customary International Law: Is the International Law Commission Taking International Organizations Seriously?*, 14 INT’L ORGS. L. REV. 1, 3 (2017) (noticing that the ILC considered international organizations’ behavior when drafting general rules).

237. ILC Draft Conclusions on Custom, *supra* note 5, at 78.

238. In his Third Report, Michael Wood, the Special Rapporteur, mentions the Council as an example of an international organization organ “with more limited membership” whose resolutions “will generally have less weight in evidencing general customary international law; they may, however, have a central role in the formation and identification of particular custom.” Wood, *Third Report*, *supra* note 5, at 31–32.

239. ILC Draft Conclusions on Custom, *supra* note 5, at 107 (noting that General Assembly resolutions are important to analyze because they reflect the state members’ opinions).

240. See Helfer & Wuerth, *supra* note 233, at 576 (noting that it is a well-accepted idea that General Assembly resolutions contribute to international customary law).

resolutions—repetition over time—finds clear resonance in the patterns of Council-imposed obligations in our data.²⁴¹ But in other respects, Council resolutions and General Assembly resolutions differ. First and most obviously, Council resolutions are binding and General Assembly resolutions are not.²⁴² Second, General Assembly resolutions may accurately reflect the views of all U.N. member states if all choose to vote or a resolution is adopted by consensus while Council resolutions come from an elite body of limited membership.²⁴³ Third, the General Assembly resolutions usually cited as evidence of custom are structured as treaty-like documents that describe a series of rights and obligations phrased as rules of general application.²⁴⁴ A prominent example is the 1974 Definition of Aggression, relied upon in the Nicaragua case, which provides a detailed elaboration of when a state's unilateral use of force is unlawful.²⁴⁵ By contrast, the Council

241. See *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 70 (8 July) (suggesting that several similar and consecutive resolutions might demonstrate the development of the “*opinio juris*” needed to solidify a new rule); *id.* ¶ 73 (noting that “the adoption each year by the General Assembly, by a large majority, of resolutions” on issues in nascent customary norm); see also *UN Security Council Data Set*, *supra* note 13.

242. See U.N. Charter art. 10. (describing General Assembly resolutions as “recommendations”).

243. James A. Paul, *Security Council Reform: Arguments About the Future of the United Nations System*, GLOBAL POL’Y F. (Feb. 6, 1995), <https://www.globalpolicy.org/security-council/security-council-reform/41128-veto-analysis.html> (noting criticism of the Council as an “elite group”).

244. See *supra* note 16 and accompanying text.

245. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 195 (June 27); G.A. Res. 3314 (XXIX), art. 1 (Dec. 14, 1974); DINSTEIN, *supra* note 196, at 126 (calling the General Assembly’s definition of aggression “the most widely (albeit not universally) accepted” definition (citation omitted)). Many other resolutions containing broad conventions or directives have this similar treaty-style formatting of listing rights as generally applicable rules. *E.g.*, G.A. Res. 3281 (XXIX), Charter of Economic Rights and Duties of States, ch. 1 (Dec. 12, 1974) (demanding that States “shall” be governed by certain economic principles); G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nation, ¶ 1 (Oct. 24, 1970) (approving of a Declaration on Principles of International Law); G.A. Res. 1803 (XVII), Permanent Sovereignty Over Natural Resources, ¶ 1 (Dec. 14, 1962) (declaring that people have a right to sovereignty over their natural resources); G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, ¶ 1 (Dec. 14, 1960) (using preambular language to establish the right of individuals to dispose of their own resources or wealth without prejudice); G.A. Res. 217 (III) A, Universal Declaration on Human Rights, preamble (Dec. 10, 1948) (imposing as a rule in its preamble the right of all individuals to their inherent dignity).

resolutions in the data set are case-specific, describing only obligations related to particular conflicts.²⁴⁶ This difference may be understood as affecting the *opinio juris* value of the documents: the General Assembly resolutions are assumed to be intended to affect customary law, while no such assumption is made about the case-specific Council resolutions. In sum, the resolutions most commonly-discussed characteristics point in different directions: the first two support a normative role for Council resolutions while second two do not.

B. Council Attributes Supporting a Role in Creating Evidence of Custom

But noting these differences should not end the discussion. The Council has its own positive attributes, not shared by the General Assembly, that support treating its consistent practice as evidence of custom. The following Sections examine these attributes, which fall into two broad categories: the unique structural role of the Council as the premier international body addressing armed conflict, including NIACs, and the Council's consistent practice of imposing similar obligations in virtually all contemporary NIACs.

1. The Council's unique role in peace and security law

Treating Council resolutions as evidence of customary law is, first and foremost, a function of the Council's role in the law of international peace and security.²⁴⁷ To ignore or marginalize Council practice, treating it as no more important than or, potentially, less important than state practice, would be inconsistent with the central role in conflict mitigation that states have already assigned to the Council.

a. Authority to legitimize or condemn uses of force

First, the Council has the unique authority to legitimize or condemn uses of force by states. Inter-state uses of force that might otherwise not qualify as self-defense—the sole justification for unilateral action found in the Charter—may be rendered lawful by Council approval;²⁴⁸ instances of humanitarian intervention are prominent examples.²⁴⁹

246. *UN Security Council Data Set*, *supra* note 13.

247. See Öberg, *supra* note 24, at 897 (indicating that the United Nations creates customary international law and does not simply interpret or restate it).

248. See Erik Voeten, *The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force*, 59 INT'L ORG. 527, 530 (2005) (explaining the Council's expansive interpretation of its authority to legitimize and delegitimize state uses of force and asserting that the authority lies in Chapter VII of the U.N. Charter).

249. See RAMESH THAKUR, *THE UNITED NATIONS, PEACE AND SECURITY: FROM COLLECTIVE SECURITY TO THE RESPONSIBILITY TO PROTECT* 226 (2d ed. 2017) (describing

Similarly, interventions that might otherwise have colorable claims to legality can be authoritatively deemed unlawful by Council condemnation.²⁵⁰ The Council's dominant posture vis-à-vis states is made most vivid by its ability to terminate otherwise lawful acts of self-defense when it takes "measures necessary to maintain international peace and security."²⁵¹ No state or group of states could lawfully assume any of these Council powers.²⁵²

b. Binding state and non-state actors

Second, the Council has unique authority to bind those it addresses in its resolutions. Any normative consequences of Council action rely, at their core, on the Council's ability to bind the specific actors it seeks to influence.²⁵³ This power to bind is grounded in a series of interlocking Charter powers. Under Articles 24(1) and 25, U.N. member states authorize the Council to act on their behalf when addressing peace and security issues and agree to accept and carry out the Council's decisions.²⁵⁴ Chapter VII of the Charter allows the Council to employ forceful measures to address breaches of peace and security regardless of whether the issue would otherwise fall within a state's

the movement to outlaw humanitarian intervention without U.N. approval). *See generally* Fernando R. Tesón, *Collective Humanitarian Intervention*, 17 MICH. J. INT'L L. 323, 343–68 (1996) (detailing situations in which the Council allowed use of force for collective humanitarian intervention, including in Iraq, Somalia, Haiti, Rwanda, and Bosnia).

250. *See* Mary Ellen O'Connell, *Enforcing the Prohibition on the Use of Force: The U.N.'s Response to Iraq's Invasion of Kuwait*, 15 S. ILL. U. L.J. 453, 453 (1991) (detailing how the Council immediately condemned Iraq's invasion of Kuwait).

251. U.N. Charter art. 51. Thomas Franck and Faiza Patel long ago observed that the record of the Charter's drafting "is entirely inconsistent with the notion that, once the Security Council has taken measures, individual members are supposed to remain free to design their own military responses." Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth"*, 85 AM. J. INT'L L. 63, 65 (1991).

252. DINSTEN, *supra* note 196, at 283 (noting states' limited right of self-defense under the U.N. Charter stand in contrast to Council's near unlimited authority to respond with force to any form of aggression, even if it does not amount to an armed attack).

253. Of course, the Council may choose to issue non-binding resolutions under Chapter VII of the Charter that impose no legal obligations. Efforts to resolve some conflicts, such as Kashmir, are composed entirely of non-binding recommendations. *See* Brian R. Farrell, *The Security Council and Kashmir*, 22 TRANSNAT'L L. & CONTEMP. PROBS. 343, 357 (2013) (stating that the Council declined to bind Pakistan or India in its resolutions on the Kashmir, instead calling on the states to find peaceful resolutions).

254. U.N. Charter art. 24, ¶ 1. Article 25 provides: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." U.N. Charter art. 25.

domestic jurisdiction.²⁵⁵ The obligatory character of these measures is not affected by conflicting obligations imposed by other treaties, as Charter obligations are specifically accorded priority.²⁵⁶

Council obligations relating to NIACs are addressed to three classes of actors: (i) state parties to a conflict; (ii) non-state parties to a conflict; and (iii) states in the broader international community.²⁵⁷ While the first and third categories are innovative in the issues they address, these obligations adhere to the traditionally statist conception of Council authority. That Council “decisions” under Article 25 and particularly those enacted under Chapter VII are binding on member states—now every state in the world—is uncontroversial.²⁵⁸ Indeed, the critical pushback that accompanied the Council’s rapid expansion of its jurisdiction after the end of the Cold War was premised on the perceived danger of an unaccountable Council imposing binding

255. U.N. Charter art. 2, ¶ 7, arts. 39–42. The obligation to accept and adhere to Council decisions is repeated in Article 48 with specific regard to actions under Chapter VII. U.N. Charter art. 48.

256. U.N. Charter art. 103 (“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.”); Int’l Law Comm’n, Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ¶ 331, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (explaining that Article 103 of the Charter does not clearly define the primacy of Security Council decisions, but this primacy “has been widely accepted in practice as well as in doctrine”); *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) and (Libyan Arab Jamahiriya v. United States of America)*, in 2 MAX-PLANCK-INSTITUTE FOR INTERNATIONAL LAW, WORLD COURT DIGEST, at 417, 418 (1997) [hereinafter *Questions of Interpretation*] (“[I]n accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement . . .”).

257. See S.C. Res. 2139, ¶ 1 (Feb. 22, 2014) (condemning violations by Syrian government and non-state armed organizations); S.C. Res. 2118, ¶ 20 (Sept. 27, 2013) (directing the general international community to prevent those in the Syrian conflict from procuring chemical weapons); S.C. Res. 1577, ¶ 5 (Dec. 1, 2004) (considering appropriate measures for non-state actors party to the conflict in Burundi).

258. See *Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶ 112 (June 21); *Question of Interpretation, supra* note 256, at 418 (explaining the Council resolutions that bound the Libyan government to take specific actions); 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 790, 795 (Bruno Simma et al. eds., 3d ed. 2012) [hereinafter COMMENTARY ON THE CHARTER] (describing how the binding nature of Council decisions is derived from the language in Article 25).

obligations on weaker states.²⁵⁹ The binding nature of those resolutions, in other words, was assumed even by the Council's critics.

Since many of the normative patterns identified in the data set involve the second category,²⁶⁰ the Council's capacity to bind non-state actors requires a more extensive discussion. The Council often regulates non-state actors indirectly by obligating states to take action against non-state groups and individuals.²⁶¹ The clearest examples are the various smart-sanctions regimes, which enlist national laws and institutions to penalize individuals through travel bans, asset freezes, and other measures under Chapter VII.²⁶² One could well argue that because these sanctions are triggered by and designed to reverse acts of non-state entities, the indirect nature of the punitive measures is not a meaningful distinction from direct measures. But the Council has also addressed non-state actors directly without the mediating presence of states.²⁶³ One example is secessionist entities, which the

259. See generally Maurizio Arcari, *Limits to Security Council Powers Under UN the Charter and Issues of Charter Interpretation*, 32 POLISH Y.B. INT'L L. 239, 239 (2012) (discussing the varied approaches to interpreting the Council's power and the worry that it is extending beyond its permissible boundaries).

260. *UN Security Council Data Set*, *supra* note 13.

261. See COMMENTARY ON THE CHARTER, *supra* note 258, at 800–01; see also Enrico Carisch & Loraine Rickard-Martin, *Implementation of United Nations Targeted Sanctions*, in TARGETED SANCTIONS: THE IMPACTS AND EFFECTIVENESS OF UNITED NATIONS ACTIONS 150, 150 (Biersteker et al. eds., 2016) (arguing that while effective implementation rests on states, U.N. bodies such as the Secretariat also have implementation responsibilities).

262. See Mikael Eriksson & Peter Wallensteen, *Targeting Sanctions and Ending Armed Conflicts: First Steps Towards a New Research Agenda*, 91 INT'L AFF. 1387, 1388 (2015) (identifying twenty-seven Council-created sanctions regimes since the end of the Cold War that “target individuals, groups, companies, regimes[,] and products, for example by means of financial sanctions, travel bans, commodity trade restrictions and sectoral economic means”). Another prominent example is resolutions requiring states to take various actions against terrorist groups. *Resolutions*, SECURITY COUNCIL COUNTER-TERRORISM COMMITTEE, <http://www.un.org/en/sc/ctc/resources/res-sc.html> (last visited Feb. 7, 2018) (providing a list of the Council's Counter-Terrorism resolutions). See generally Boon, *supra* note 70, at 560–61 (examining the Sanctions Committees' duties as investigators and decision makers determining when violations occurred and which actors should be included in sanctions regimes).

263. See NON STATE ACTORS, *supra* note 87, at 6–7 (2014) (noting that the Council has called on non-state actors to respect human right obligations); Jan Klabbbers, *(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors*, in NORDIC COSMOPOLITANISM: ESSAYS IN INTERNATIONAL LAW FOR MARTTI KOSKENNIEMI 351, 354–55 (Jarna Petman & Jan Klabbbers eds., 2003) (arguing that there must be a justification for placing international obligations on non-state actors); Kooijmans, *supra* note 82, at 333; Pini Pavel Miretski, *Delegitimizing or Evolving? The Legality of UN Security Council Resolutions Imposing Duties on Non-State Actors 2* (Nov. 25, 2009) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=19

Council periodically addresses independently of their parent states.²⁶⁴ Another example is political candidates or parties who defy the results of democratic elections.²⁶⁵ Of more relevance to this study, the Council has frequently demanded that armed opposition groups refrain from a variety of actions during or in the aftermath of NIACs, such as breaching peace accords, violating human rights, or transgressing humanitarian law.²⁶⁶ Cases where the Council has made demands of armed opposition groups are wide-ranging and include the former Yugoslavia,²⁶⁷ Cambodia,²⁶⁸ Afghanistan,²⁶⁹ the DR

63689 (stating that the Council has passed resolutions which create duties for non-state actors).

264. See S.C. Res. 942, at 2 (Sept. 23, 1994) (imposing sanctions on “those areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces”); S.C. Res. 216, ¶ 1 (Nov. 12, 1965) (condemning “the unilateral declaration of independence made by a racist minority in Southern Rhodesia”); S.C. Res. 169, ¶¶ 1, 3 (Nov. 24, 1961) (addressing attempted Katangese secession from Congo, Council insists “that such [secessionist] activities shall cease forthwith, and *calls upon* all concerned to desist therefrom”); S.C. Res. 50, ¶ 1 (May 29, 1948) (addressing “all Governments and authorities concerned” on question of Palestine).

265. See S.C. Res. 1975, ¶ 1 (Mar. 30, 2011) (Côte d’Ivoire); S.C. Res. 1132, at 1 (Oct. 8, 1997) (Sierra Leone); S.C. Res. 841, at 2 (June 16, 1993) (Haiti); S.C. Res. 804, at 2 (Jan. 29, 1993) (Angola).

266. See, e.g., S.C. Res. 2113, at 4 (July 30, 2013) (condemning the human rights and humanitarian law violations occurring in Sudan); S.C. Res. 2098, at 2 (Mar. 28, 2013) (expressing concern over the transgressions of human rights and humanitarian law in DR Congo); S.C. Res. 1964, at 2 (Dec. 22, 2010) (condemning human rights violations occurring in Somalia); S.C. Res. 1935, ¶ 9 (July 30, 2010) (demanding that all groups in Sudan comply with their international human rights and humanitarian law obligations); S.C. Res. 1577, at 2, ¶ 5 (Dec. 1, 2004) (considering appropriate measures for armed organization responsible for human rights violations in Burundi); S.C. Res. 1509, ¶ 4 (Sept. 19, 2003) (demanding parties in Liberia fulfill their obligations under the peace and ceasefire agreements).

267. S.C. Res. 752, ¶ 1 (May 15, 1992) (demanding “that all parties and others concerned in Bosnia and Herzegovina stop the fighting immediately, [and] respect immediately and fully the cease-fire signed on 12 April 1992”).

268. S.C. Res. 792, ¶ 8 (Nov. 30, 1992) (demanding “that the PDK fulfil immediately its obligations under the Paris Agreements”).

269. S.C. Res. 1214, ¶ 12 (Dec. 8, 1998) (demanding that “Afghan factions put an end to discrimination against girls and women and other violations of human rights”).

Congo,²⁷⁰ Angola,²⁷¹ the Central African Republic,²⁷² and Syria.²⁷³ Council demands for “parties” or “all parties” to NIACs to cease unlawful acts or abjure violence have become almost routine.²⁷⁴ The ICJ has all but acknowledged the Council’s authority to impose legal obligations directly on non-state entities. In the Kosovo Advisory Opinion, the ICJ observed that “it has not been uncommon for the Security Council to make demands on actors other than U.N. member

270. S.C. Res. 1417, ¶ 4 (June 14, 2002) (reiterating that the Council “holds the Rassemblement Congolais pour la Democratie-Goma, as the de facto authority, responsible to bring to an end all extrajudicial executions, human rights violations[,] and arbitrary harassment of civilians in Kisangani”).

271. S.C. Res. 851, ¶ 4 (July 15, 1993) (demanding that “UNITA accept unreservedly the results of the democratic elections of 1992 and abide fully by the ‘Acordos de Paz’”).

272. S.C. Res. 2121, ¶ 15 (Oct. 10, 2013) (demanding “that all armed groups, in particular Seleka elements[,] prevent the recruitment and use of children”).

273. S.C. Res. 2139, ¶ 1 (Feb. 22, 2014) (condemning “the widespread violations of human rights and international humanitarian law by the Syrian authorities, as well as the human rights abuses and violations of international humanitarian law by armed groups, including all forms of sexual and gender-based violence, as well as all grave violations and abuses committed against children in contravention of applicable international law, such as recruitment and use, killing and maiming, rape, attacks on schools and hospitals as well as arbitrary arrest, detention, torture, ill treatment[,] and use as human shields”).

274. *See, e.g.*, S.C. Res. 2109, ¶ 14 (July 11, 2013) (demanding “that all parties immediately cease all forms of violence and human rights violations and abuses against the civilian population in South Sudan”); S.C. Res. 2098, ¶ 8 (Mar. 28, 2013) (condemning a multitude of armed groups in the DR Congo and “all other armed groups and their continuing violence and abuses of human rights”); S.C. Res. 1861, ¶ 20 (Jan. 14, 2009) (demanding all parties to conflicts in Chad and Central African Republic cease hostilities); S.C. Res. 1553, ¶ 7 (July 29, 2004) (condemning “all acts of violence,” and expressing “great concern” about continued violations of the withdrawal line in Lebanon); S.C. Res. 925, ¶ 6 (June 8, 1994) (demanding “that all parties to the conflict . . . agree to a cease-fire and immediately take steps to bring an end to systematic killings in areas under their control” in Rwanda). The Council has also used such all-encompassing language to address non-state parties in its thematic resolutions on particularly vulnerable groups in armed conflict. In Resolution 1894 on civilians in armed conflict, for example, the Council demanded that “parties to armed conflict comply strictly with the obligations applicable to them under international humanitarian, human rights[,] and refugee law, as well as to implement all relevant decisions of the Security Council.” S.C. Res. 1894, ¶ 1 (Nov. 11, 2009); *see also* S.C. Res. 1612, ¶ 1 (July 26, 2005) (condemning “the recruitment and use of child soldiers by parties to armed conflict”); S.C. Res. 1502, at ¶ 3 (Aug. 26, 2003) (affirming the “obligation of all parties involved in an armed conflict to comply fully with the rules and principles of international law applicable to them related to the protection of humanitarian personnel and United Nations and its associated personnel”); S.C. Res. 1325, ¶ 9 (Oct. 31, 2000) (providing similar obligations for “all parties” regarding women in armed conflict).

states and inter-governmental organizations.”²⁷⁵ Because the Court found that the resolution at issue did not contain such demands, it had no occasion to rule on their binding quality.²⁷⁶ But, the opinion recognized “the possibility that non-state actors can be bound by obligations demanded of them by the Security Council.”²⁷⁷

An increase in Council engagement with non-state actors appears inevitable because most conflicts it now addresses are NIACs.²⁷⁸ Eighty-seven percent (46/53) of the conflicts in the data set are NIACs.²⁷⁹ The Council would quickly relegate itself to irrelevance if it was unable or unwilling to address at least one of the parties to every NIAC. Take the conflict in the DR Congo, where much of the country has lacked state authority for almost two decades.²⁸⁰ In the eastern provinces where fighting has been concentrated, “[m]ore than 30 illegal armed groups operate . . . , fighting over territory, exploiting their natural resources[,] and committing atrocity crimes against civilians.”²⁸¹ When the Council created a novel “intervention brigade” in March 2013 to address this security vacuum, it listed seven armed groups by name and demanded that they “cease immediately all forms of violence and

275. Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 402, ¶ 116 (July 22).

276. *Id.* ¶ 115.

277. Gleider I. Hernández, *Non-State Actors from the Perspective of the International Court of Justice, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM*, *supra* note 83, at 140, 145 (highlighting that the court did not close the door on Council placing binding obligations on non-state actors); see Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, 2010 I.C.J. ¶ 117 (establishing that the court must determine on a case-by-case basis whether the Council intended to bind state or non-state actors).

278. See Prosecutor v. Tadić, Case No. IT-94-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 30 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (“[T]he practice of the Security Council is rich with cases of civil war or internal strife which it classified as a ‘threat to the peace’ and dealt with under Chapter VII . . .”).

279. *UN Security Council Data Set*, *supra* note 13.

280. See KOEN VLASSENROOT, ARMED GROUPS AND MILITIAS IN EASTERN DR CONGO 3–4 (2008), <https://www.diva-portal.org/smash/get/diva2:610652/FULLTEXT01.pdf> (explaining that the government has been filled with private individuals seeking economic gain since the 1990s).

281. Touko Piiparinen, *Intervening to Strengthen Sovereignty: The Lessons of the UN Intervention Brigade for Global Peacekeeping*, 30 INT’L REL. 154, 157 (2016); see also U.N. Secretary-General, Special Rep. on the Democratic Republic of the Congo and the Great Lakes Region, ¶ 60, U.N. Doc. S/2013/119 (Feb. 27, 2013) (detailing the duties of the intervention brigade which include dismantling armed groups and creating a conducive environment for the return of a State authority).

destabilizing activities and that their members immediately and permanently disband and lay down their arms.”²⁸²

This felt need to address the realities of contemporary armed conflict is surely the most obvious explanation for the Council expanding its reach beyond state actors. Employing such a result-oriented pragmatism as a legal justification is appropriate for a body given a deliberately open-ended mandate for the “maintenance of international peace and security.”²⁸³ In the *Reparations for Injuries* case,²⁸⁴ the ICJ relied heavily on such pragmatic justifications, instructing that the powers of an international organization are to be understood both by whether they are “necessitated by the discharge of its functions” and how they have “developed in practice.”²⁸⁵

c. Authority to intervene in internal matters such as NIACs

Third, the Council has the authority to intervene in states’ internal affairs. Because states traditionally regarded NIACs as essentially domestic affairs—struggles for political control within sovereign

282. S.C. Res. 2098, ¶ 8 (Mar. 28, 2013).

283. U.N. Charter art. 24, ¶ 1; see *Tadić*, Case No. IT-94-1, ¶ 32. Council history has been marked by a series of innovative and adaptive measures, ranging from “all necessary means” authorizations to national forces, to the vast expansion of its jurisdiction, to peacekeeping, to targeted sanctions, to the creation of criminal tribunals. This constant evolution is in keeping with the goal of the Charter’s drafters “to reserve for the Security Council the maximum possible decision-making flexibility” so that it could “respond to a theoretically unlimited range of possible threats at a time and in a manner of its choosing.” Edward C. Luck, *A Council for All Seasons: The Creation of the Security Council and Its Relevance Today*, in *THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945*, at 61, 62–63 (Vaughan Lowe et al. eds., 2008).

284. *Reparation for Injuries Suffered in Service of United Nations*, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11).

285. *Id.* at 180. The Court later accorded an organization’s own determination that certain powers were necessary to discharge its function as a presumption of legality. *Certain Expenses of United Nations*, Advisory Opinion, 1962 I.C.J. 151, 168 (July 20) (“[W]hen [an] Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization.”). The ICTR Trial Chamber invoked a similar pragmatism in rejecting a challenge to the Council’s ability to create a court with criminal jurisdiction over individuals:

[T]he Security Council provided an important innovation of international law, but there is nothing in the Defence Counsel’s motion to suggest that this extension of the applicability of international law against individuals was not *justified or called for by the circumstances*, notably the seriousness, the magnitude[,] and the gravity of the crimes committed during the conflict.

Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, Decision on the Defense Motion on Jurisdiction, ¶ 35 (July 18, 1997) (emphasis added).

communities into which outsiders have no business intruding²⁸⁶—the Council’s ability to overcome such claims of exclusive domestic jurisdiction starkly distinguish its powers from that of states acting unilaterally. Whereas international law prohibits individual states from intervening in NIACs against the wishes of the incumbent government, the Charter is now understood to authorize the Council to do so.²⁸⁷ The Council’s views on legal issues in NIACs thus result from a body of practice in which individual states could not fully engage.²⁸⁸

d. The Council as agent for U.N. member states

The fourth attribute of Council authority that supports use of its practice as evidence of customary law is its status as an agent for the U.N. membership at large. The Council is frequently described as an unrepresentative elite body that pursues policies at odds with the views of some or many other U.N. member states.²⁸⁹ If true, this claim would create a dilemma for our assessment of custom because the Council would use its unique powers to speak authoritatively on issues of armed conflict based on the views of a very small number of states. The claim of Council unrepresentativeness requires an understanding of the relation between Council resolutions and U.N. member states more generally. This Article argues for a view that attributes Council-imposed obligations to the entire U.N. membership.

286. See Sean Aughey & Aurel Sari, *Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence*, 91 INT’L L. STUD. 60, 88 (2015) (discussing how States have been reluctant to use international law as a method to regulate civil wars due to a reluctance to grant any legitimacy to the non-state armed organizations).

287. Compare U.N. Charter art. 2, ¶ 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; *but this principle shall not prejudice the application of enforcement measures under Chapter VII.*” (emphasis added)), with *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 246 (June 27) (noting I.C.J.’s argument that the principle of non-intervention in international law would be destroyed if the opposition to the state’s government could also request international intervention).

288. Council and state practice would overlap where incumbent governments consent to external involvement.

289. See Barbara Crossette, *At the U.N., a Drive for Diversity*, N.Y. TIMES (Oct. 24, 1994), <http://www.nytimes.com/1994/10/24/world/at-the-un-a-drive-for-diversity.html>.

2. *The Council's relation to U.N. member states*

Three approaches to Council-imposed obligations are possible: (i) as autonomous acts of the organization; (ii) as acts of Council member states individually; or (iii) as acts of the organization as an agent of its member states. The first view fully disengages Council resolutions from member states and considers the states as separate legal entities. While such a view may accurately describe other international organizations, it is inconsistent with the Charter's description of the Council as an agent for member states.²⁹⁰ The second and opposite approach would view Council resolutions as the individual practice of its fifteen voting states, five of which are

290. This approach found little support in the ILC, however. “[W]hat matters” about resolutions of international organization organs, the Commission stated in commentary, “is that they may reflect the collective expression of the views of *States members* of such organs.” ILC Draft Conclusions on Custom, *supra* note 5, at 107 (emphasis added); see Odermatt, *supra* note 231, at 493 (the ILC “sees States as the driving force in international law-making, and the capacity of international organizations to contribute to the development of international law is reduced to their role in expressing the will of States”).

The Commission describes one instance in which an international organization would act wholly on its own legal authority: “where member States have transferred exclusive competences to the international organization.” ILC Draft Conclusions on Custom, *supra* note 5, at 89. The Commission gives the European Union as the sole example of such a transfer. *Id.*; see also Wood, *Third Report*, *supra* note 5, at 53 (referencing only the EU as an example of an international organization with exclusive competences). While the ILC does not elaborate on the nature of “exclusive competences,” it appears to describe a state fully abrogating its capacity to act in a particular area of international relations. As an EU representative told the GA's Sixth Committee, “in areas where, according to the rules of the EU Treaties, only the Union can act it is the practice of the Union that should be taken into account with regard to the formation of customary international law.” *EU Statement—United Nation 6th Commission: Identification of Customary International Law*, EUR. UNION DELEGATION TO UNITED NATIONS (Nov. 3, 2014), <http://eu-un.europa.eu/eu-statement-united-nation-6th-commission-identification-of-customary-international-law>; see Wood, *Third Report*, *supra* note 5, at 53 n.184 (referencing this statement favorably).

The Security Council certainly does not enjoy exclusive competence in the sense that member states have ceded to it *all* their capacity to act in specific areas, but one could argue that states have given the Council exclusive authority in a narrower sense: by agreeing to abide by its decisions on specific conflicts. These decisions are not, as in the case of the EU, confined to discrete areas of policy-making. The Council's broad mandate to maintain international peace and security is virtually open-ended. But once the Council has taken a decision within its competence, member states do not retain the ability to act contrary to its dictates.

The Council can thus be understood as possessing an exclusive competence when it displaces states' freedom of action in specific instances. In those cases, Council resolutions could generate evidence of custom on its own behalf assuming the resolutions otherwise embody sufficient practice and opinion juris.

permanent members and ten of which are non-permanent members.²⁹¹ From 1990 to 2013, ninety-five states have been members of the Security Council, representing significant state practice if one were to remove the Council entirely from the picture.²⁹² While this approach hews most closely to the traditionally state-centric nature of customary law, it does not account for the unique institutional setting in which the votes take place: within a body of power that substantially exceeds that of states acting unilaterally.²⁹³ Moreover, Council action has significance for custom precisely because its interventions in NIACs now substantially exceed those of individual states.²⁹⁴ Any theory of the resolutions' provenance must consider states' evident choice of the Council as their primary vehicle for addressing NIACs.

3. Agency theory

This leaves the third approach to Council-imposed obligations: agency theory. Article 24(1) of the U.N. Charter provides that member states "confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility *the Security Council acts on their behalf*."²⁹⁵ We understand Article 24 to create an agency relationship between member states and the Council: "members, who have 'delegated' parts of their sovereignty, remain the source of authority of the Council [meaning] that the States, being the trust givers, are in consequence also the principals."²⁹⁶ Under this view,

291. See *Current Members*, U.N. SECURITY COUNCIL, <http://www.un.org/en/sc/members> (last visited Feb. 7, 2018).

292. See *Countries Elected Members of the Security Council*, U.N. SECURITY COUNCIL, <https://www.un.org/en/sc/members/elected.asp> (last visited Feb. 7, 2018) (listing all countries elected to the Council at least once since 1946).

293. See *supra* note 6 and accompanying text. The data set did not tabulate votes on Security Council resolutions, which might count against state practice if a member voted against a particular resolution.

294. See *supra* notes 66–68 and accompanying text.

295. U.N. Charter art. 24, ¶ 1 (emphasis added).

296. COMMENTARY ON THE CHARTER, *supra* note 258, at 775 (summarizing agency theory argument). Compare *id.* at 776 (arguing that the language of the Charter highlights that the Council is supposed to act in the best interest of all members, but the acts are imputable to the entire organization), and HANS KELSEN, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 280 (1950) (arguing that the Council acts not on behalf of the members, but on behalf of the entire United Nations), with Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 544 n.61 (1993) (noting that the Council's authority illustrates the members' willingness to delegate authority).

Council practice is ultimately the practice of member states.²⁹⁷ While the ICJ has only hinted at support of the agency theory,²⁹⁸ some member states made the agency argument directly early in U.N. history.²⁹⁹ More recently, many non-permanent members have cited Article 24(1) in calling for greater transparency in Council procedures, arguing that if the Council acts on their behalf they should have greater input into its deliberations.³⁰⁰ Their claim, in essence, is

297. See BRIAN D. LEPARD, *CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS* 182 (2010) (finding Council “actions provide some evidence of the views of U.N. member states—Council members directly, and all members indirectly”).

298. In its 1971 Namibia decision, the Court seemed to side with the agency view but did not pronounce squarely on the question:

It would be an untenable interpretation to maintain that, once such a declaration had been made by the Security Council under Article 24 of the Charter, on behalf of all member States, those Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it. When confronted with such an internationally unlawful situation, Members of the United Nations would be expected to act in consequence of *the declaration made on their behalf.*

Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 112 (June 21) (emphasis added).

299. See, e.g., U.N. SCOR, 472nd mtg. at 11, U.N. Doc. S/PV.472 (May 24, 1950) (statement of Ecuador) (noting that “it must be remembered that every member of the Council, under the Charter, acts not only as a representative of his country, but as a representative of all States Members of the United Nations. That particular responsibility is assumed by all members of the Council”); U.N. SCOR, 310th mtg. at 24, U.N. Doc. S/PV.310 (May 29, 1948) (statement of Syria) (stating that “each representative on the Security Council has two duties: one is to represent and present the views of his Government; the other is to represent the fifty-eight Members of the United Nations and to speak on their behalf. Article 24 of the Charter states that the Security Council should act on behalf of all the Member States”); U.N. SCOR, 59th mtg. at 176, U.N. Doc. S/PV.59 (Sept. 3, 1946) (statement of United States) (approving the view that “the Security Council does not represent individually only the States which have representatives on the Council, but represents all fifty-one United Nations. It is their agent for carrying out the purposes of the Charter, and such directions as the United Nations may give it under the Charter”); U.N. SCOR, 40th mtg. at 249, U.N. Doc. S/PV.40 (May 8, 1946) (statement of Australia) (“Our interpretation of the Charter is that each member of this Council, whether permanent or non-permanent, acts in a representative capacity that extends beyond the representation of his own Government. He is acting on behalf of all the Members of the United Nations.”).

300. See, e.g., U.N. SCOR, 7539th mtg. at 16, U.N. Doc. S/PV.7539 (Oct. 20, 2015) (statement of Niger) (stating that Article 24 clearly requires the Council to act for all Members); U.N. SCOR, 7285th mtg. at 28, U.N. Doc. S/PV.7285 (Oct. 23, 2014) (statement of St. Lucia) (arguing that all Members have an equal stake the Council’s functions because it acts on behalf of all Members); U.N. SCOR 7052nd, mtg. at 27–

that, as principals, they must be able to communicate their views to their agent fully and effectively.

The Special Court for Sierra Leone relied on the agency theory in rejecting Liberian President Charles Taylor's claim for Head-of-State immunity.³⁰¹ The question in the Taylor case was whether the Special Court constituted one of the "international tribunals" to which the ICJ had referred in the *Arrest Warrant* case as capable prosecuting heads of state unconstrained by immunity doctrines.³⁰² In deciding that it was such an international tribunal, the Special Court focused on the agreement between Sierra Leone and the United Nations establishing the Court and on the Security Council's authorization for that agreement in Resolution 1315.³⁰³

It is to be observed that in carrying out its duties under its responsibilities for the maintenance of international peace and security, the Security Council acts on behalf of the Members of the United Nations. The Agreement between the United Nations and Sierra Leone is thus an agreement between *all* members of the United Nations and Sierra Leone. This fact makes the agreement an expression of the will of the international community. The Special Court established in such circumstances is truly international.³⁰⁴

In addition, the agency theory better embodies the logic of the Charter's collective security system. The Charter famously discarded international law's traditional view of armed conflict as solely the concern of the warring parties, insisting that all member states share

28, U.N. Doc. S/PV.7052 (Oct. 29, 2013) (statement of Egypt) (noting that the Council's methods are the collective responsibility of the all Members because Article 24 indicates the Council acts on behalf of the entire membership); U.N. SCOR, 6300th mtg. at 9, U.N. Doc. S/PV.6300 (Apr. 22, 2010) (statement of Lebanon) (promoting an increase in open door meetings to promote transparency as Article 24 the Council represents all members); U.N. SCOR, 3611st mtg. at 16, U.N. Doc. S/PV.3611 (Dec. 20, 1995) (statement of Algeria) (declaring that the Council's acts must have additional legitimacy because the Council acts for all Member States).

301. See *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶ 20 (May 31, 2004).

302. *Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belg.)* 2002 I.C.J. 3, ¶ 37 (Feb. 2002).

303. *Taylor*, Case No. SCSL-2001-01-I, ¶ 35. The resolution authorized the Secretary-General to "negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with this resolution." S.C. Res. 1315, ¶ 1 (Aug. 14, 2000).

304. *Taylor*, Case No. SCSL-2001-01-I, ¶ 38 (citation omitted). The Court cited Article 24, paragraph one, of the Charter as support for the proposition in the first sentence of this passage. *Id.* ¶ 38 n.31.

an interest in maintaining the peace.³⁰⁵ The agency theory ensures that the official positions of member states on conflicts do not diverge from executive decisions of the Council on the same conflicts by making the two legally indistinguishable.

Under the agency theory, Council resolutions would not only acquire the universality critical to General Assembly resolutions' customary status, but would effectively become state practice—the most traditional source of custom. Assuming the agency theory is correct, is it sufficient to demonstrate member states' consent to Council actions relevant to custom? There are at least two reasons one might answer in the negative. First, Article 24(1) is a legal fiction, as the Council's small size and political composition make it in reality quite *unrepresentative* of the broader membership. Second, the veto ensures that interests of the P5 can take precedence over the interests of other member states on whose behalf the Council purportedly acts.

Neither of these responses is persuasive. First, the claim that aggregated Council norms uniquely rely on a fictitious consent is simply incorrect. The traditional view of customary international law is rife with legal fictions. For instance, states that remain silent during the gestation of a customary norm are usually deemed to have consented to its emergence.³⁰⁶ And each act forming relevant state practice is deemed to have been undertaken out of a sense of legal obligation *before* that obligation crystalized into a binding norm.³⁰⁷ Indeed, one might well view the entire enterprise of discerning an actual consensus among states to be grounded in fiction.³⁰⁸ A fiction of member state consent to aggregated Council norms is thus hardly unique.

305. See NICHOLAS TSAGOURIAS & NIGEL D. WHITE, *COLLECTIVE SECURITY: THEORY, LAW AND PRACTICE* 26 (2013) (contending that security is the public good enjoyed by all members of the organization).

306. SHAW, *supra* note 198, at 63–65; Charney, *supra* note 296, at 538 (arguing that it may be advantageous to engage with the legal fiction that countries who fail to object to the making of customary law have consented since customary law is traditionally created by a few states).

307. See George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541, 544 (2005) (questioning whether customary international law “can . . . ever come into existence if it requires *opinio juris*—a sense of legal obligation—before it can exist”).

308. See J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 474 (2000) (“[M]ost nations of the world lack the information, awareness, resources or inclination to fully participate in a customary law process based on presumed acceptance or consent. Since these theories rely on the acts of a few, they define away the normative conviction of states, the element essential to establish the authority of custom, thereby reducing it to a fiction.”).

An additional reason to be skeptical of the unrepresentativeness claim as support for the view that aggregated Council norms uniquely create a legal fiction is that states directly involved in conflicts often give *actual* consent to identified norms, and it is therefore incorrect to describe consent to Council norms as wholly constructed or fictitious. Many of the norms originate in peace agreements negotiated with states undergoing or just concluding NIACs. These agreements often contain detailed plans for post-conflict reconstruction initiatives to be overseen by a peacekeeping mission approved by the Council.³⁰⁹ Many tasks respond to aspects of the NIAC addressed when the conflict was active. If the Council condemned the use of child soldiers, for example, peace agreements might contain provisions for their decommissioning and rehabilitation.³¹⁰ The agreements also frequently request that the United Nations create a peacekeeping mission to oversee their implementation.³¹¹ Those oversight tasks are then incorporated into the mandate of the peacekeeping mission, which is approved by the Council.³¹² The multiple opportunities for these “specially affected” state and non-state actors to reject norms

309. See Michael Tiernay, *Which Comes First? Unpacking the Relationship Between Peace Agreements and Peacekeeping Missions*, 32 CONFLICT MGMT. & PEACE SCI. 135, 137 (2015) (explaining that parties sign peace agreements because a peace-keeping mission has been, or will be, deployed in that state); see also Bell & O'Rourke, *supra* note 116, at 975 (detailing how Council Resolution 1325 suggested incorporating women in peace agreements and peace-keeping missions).

310. See Darfur Peace Agreement, Sudan-Sudan Liberation Movement/Army-Justice and Equality Movement, art. 29, ¶ 430, May 5, 2006, http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_050505_DarfurPeaceAgreement.pdf (containing a provision for the disarmament and demobilization of child soldiers); S.C. Res. 1935, ¶ 19 (July 30, 2010) (encouraging all parties to work with the Secretary General to develop a plan to end recruitment of child soldiers); see also SEC. COUNCIL REPORT, CROSS-CUTTING REPORT: CHILDREN AND ARMED CONFLICT 4 (2015), http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/cross_cutting_report_2_children_and_armed_conflict_2015.pdf (discussing Council Resolution 2143, which speaks generally to the protection of children, preventing underage recruitment of child soldiers, and supporting the “Children, Not Soldiers” campaign).

311. See, e.g., The Comprehensive Peace Agreement, Sudan-Sudan People's Liberation Movement/Sudan People's Liberation Army, § 8.6.5, Jan. 9, 2005 (requesting the support of the U.N.'s Peace Support Mission in implementing de-mining efforts).

312. See, e.g., S.C. Res. 1590, ¶ 4(c) (Mar. 24, 2005) (granting the U.N.'s Mission in Sudan the authority to assist with de-mining efforts as requested in the Comprehensive Peace Agreement).

embedded in resolutions moves their approval well beyond the realm of fictional consent.³¹³

The second claim that veto power ensures the interests of the P5 over those of the other members epitomizes the charge that the Council is a politically elite body primarily responsive to the interests of the P5. But this overstates the veto's role. In the period covered by our data, thirty-three vetoes were cast with twenty-one of those addressing only two conflicts: Israel-Palestine and Syria.³¹⁴ During the same period, the Council passed 1485 resolutions.³¹⁵ Vetoes thus account for only 0.021% of resolutions put to a vote. More importantly, there is little evidence that the reasons for the vetoes had any relation to normative obligations otherwise routinely imposed by the Council.

4. *Delegating authority to act but not to contribute to customary law*

Even if one accepts a theory of Council agency, it is not clear that the delegation to act on member states' behalf includes the ability to contribute to the development of custom. There is an argument that the former does not necessarily include the latter. Article 24 itself is obviously silent on this question. The most straightforward answer is that such a delegation to the Council would simply retain the link between acts and normatively relevant evidence that exists for state practice. Evidence of practice is understood to inhere in state actions made legally consequential by *opinio juris*; the two cannot be disaggregated.³¹⁶ For member states to authorize the Council to act on their behalf but *withhold* normative consequences of that action would consign the "acts concerned" to a legal black hole: U.N. member states would not be acting in their own capacities, and thus no "state practice" would be created, but, with normative consequences withheld, the Council's corporate acts would make no contribution to customary

313. This is obviously not the only context in which the Council creates obligations in NIACs, but it is a common one.

314. See *UN Security Council Data Set*, *supra* note 13. For a list of all vetoed Security Council resolutions, see *Security Council-Veto List*, UNITED NATIONS, <http://research.un.org/en/docs/sc/quick/veto> (last updated Jan. 8, 2018). The states and conflicts addressed by vetoed resolutions were Nicaragua (1), Israel-Palestine (15), Cyprus (2), Bosnia (3), Guatemala (1), Macedonia (1), Myanmar (1), Zimbabwe (1), Georgia (1), Syria (6), and Ukraine (2).

315. The first resolution of 1990 was number 647; the last resolution of 2013 was number 2132.

316. In the ICJ's phrasing, for purposes of custom, "*the acts concerned*" must "amount to a settled practice." *North Sea Continental Shelf (Ger./Den.; Ger./Neth.)*, Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20) (emphasis added).

law. As a result, *no actor* could claim as its own the potentially significant contributions to custom represented by the data set.³¹⁷

5. *Conclusions*

The Charter places the Council at the center of its collective security scheme, endowing it with powers not available to member states acting unilaterally. To accept the Council's exceptional authority in NIACs but withhold any normative consequences of that authority would make little sense, since then no international actor would take ownership of this important body of practice.

C. *Frequency and Consistency of Council Practice*

The Council's role as preeminent legal regulator of armed conflict is the first component of the argument for treating its practice in NIACs as evidence of custom. The second component is the practice itself, some of which was examined in review of the four contested issues of customary law the Council has addressed.³¹⁸ The data also lend themselves to the broader question of whether the Council has largely fulfilled or abdicated its leadership role set out in the Charter system.³¹⁹ If the Council either failed to respond to the most destructive NIACs or addressed the legal issues those conflicts raise in an ad hoc or unsystematic manner, one might conclude that Council practice has little to add to customary law. The data suggest this is not the case.³²⁰ This Section shows that the Council has been omnipresent in contemporary NIACs and consistently imposed similar obligations across those NIACs.

The claim for Council relevance to custom does not depend on Council imposing these same obligations in every NIAC going forward. That is, this Article does not argue the Council will consistently displace otherwise applicable norms by legislative fiat. The Council's relevance emanates rather from a demonstrated commitment to the same norms of conduct in the NIACs in which it has intervened. That the Council has not imposed obligations in *every* NIAC is also not a critique of this Article's claim. As long as the reasons for its non-

317. The argument here is complex. If Council acts *do* count as evidence of custom they would, under the agency theory, ultimately be attributed to the Council's principals: the member states. But absent an agency theory, the normative value of Council acts would be attributed neither to member states acting in their own capacities nor imputed to member states via their agent.

318. See *supra* notes 53–181 and accompanying text.

319. *UN Security Council Data Set*, *supra* note 13.

320. *Id.*

engagement in a particular conflict are unrelated to the norms imposed in the vast majority of NIACs in which it *does* engage, the Council's absence from a few conflicts does not make its normative patterns less relevant as evidence of law.

Similarly, consistently imposed obligations are not marginalized just because the Council does not impose the same obligations in each and every NIAC it addresses. Different NIACs present different challenges to the Council. To take an example discussed above, parties in some NIACs mostly adhere to peace agreements while parties in others violate them regularly.³²¹ Although the Council does not oblige parties to adhere to such agreements in NIACs in which they are *already* being obeyed, this is not an example of inconsistent practice. It is simply responding to the circumstances of each conflict as needed.

1. Frequent Council involvement in contemporary NIACs

The Council dramatically increased its response to NIACs after the end of the Cold War, both quantitatively—by passing resolutions on more conflicts—and qualitatively—by engaging in a substantially broader range of activities, particularly post-conflict.³²² The data show that the Council passed at least one resolution on 76% (35/46) of all NIACs from 1990 to 2013 that fit the inclusion criteria.³²³ The figure is slightly higher—80% (12/15)—for NIACs that began after 1990, with only the conflicts in the Republic of the Congo, Algeria, and Nigeria receiving no resolutions.³²⁴ While it is difficult to identify with certainty the causes for Council abstention from the Republic of the

321. See *supra* notes 129–43 and accompanying text.

322. See *infra* Table 3; see also DOYLE & SAMBANIS, *supra* note 151, at 6 (describing the increase in Council activity between 1987 and 1994); Einsiedel et al., *supra* note 67, at 5–8 (acknowledging the increase of Council actions after the end of the Cold War due, in part, to the cooperation of the permanent Council members); ROBERTS & ZAUM, *supra* note 2, at 52–58 (noting the increase in the number of peacekeeping missions, the increase of post-conflict international administrations, the shift towards a broad definition of the Council's authority under the Charter, and the creation of international tribunals).

323. UN Security Council Data Set, *supra* note 13.

324. *Id.*

Congo,³²⁵ Algeria,³²⁶ and Nigeria³²⁷ conflicts, inaction does not appear to have stemmed from a reluctance to pronounce on normative issues

325. The Republic of the Congo involved a multiplicity of reasons for inaction: conditions on the ground unfavorable to external intervention, deference to regional mediation efforts, and rapid changes in the conflict dynamic. See Uppsala Conflict Data Program, *Congo: Government*, UPPSALA UNIVERSITET, <http://ucdp.uu.se/#/conflict/408> (last visited Feb. 7, 2018). In August 1997, the Council began peacekeeping preparations after the Organization of African Unity appealed to the Council to send a peacekeeping mission, echoing an earlier request from the President of the Congo. U.N. Secretary-General, *Report on the Situation in the Republic of the Congo*, ¶¶ 17–18, U.N. Doc. S/1997/814 (Oct. 21, 1997). However, in mid-October of that year, the fragile government of President Pascal Lissouba fell to the forces of Denis Sassou-Nguessou, assisted by troops from Chad and Angola. Uppsala Conflict Data Program, *supra*. In late October 1997, the Secretary-General reported that the Council had set three conditions for dispatching a force: “(a) adherence to an agreed ceasefire; (b) agreement to international control of the Brazzaville airport; and (c) a commitment by the parties to a negotiated settlement covering all political and military aspects of the crisis.” U.N. Secretary-General, *Report on the Situation in the Republic of the Congo, supra*, ¶ 3. He reported further that “[t]he Council took the view that, despite some positive political developments, those conditions had not yet been fulfilled and called upon the parties to fulfil them without delay.” *Id.* Reporting to the Council on October 21, 1997, the Secretary-General acknowledged that this (at least short-term) victory meant plans for a U.N. mission could not go forward. *Id.* ¶ 44.

326. The reasons for abstention from Algeria appear to be a combination of some Council members supporting the government in its conflict with Islamist rebels and the government’s strong resistance to any external involvement for the first six years of the conflict. The Algerian conflict began after the military cancelled the second round of elections won by the Islamic Salvation Front in December 1991. Uppsala Conflict Data Program, *Algeria: Government*, UPPSALA UNIVERSITET, <http://ucdp.uu.se/#conflict/386> (last visited Feb. 7, 2018). Both France, the former colonial power, and the United States supported the regime in its subsequent civil war. ANDREW J. PIERRE & WILLIAM J. QUANDT, *THE ALGERIAN CRISIS: POLICY OPTIONS FOR THE WEST* 52 (1996). But resistance from the Algerian parties to any reconciliation efforts played no small role in the lack of external involvement. Jonah Schulhofer-Wohl, *Algeria (1992–Present)*, in 1 *CIVIL WARS OF THE WORLD: MAJOR CONFLICTS SINCE WORLD WAR II* 103, 117 (Karl Derouen, Jr. & Uk Heo eds., 2007); Gorm Rye Olson, *Europe and the Promotion of Democracy in Post Cold War Africa: How Serious Is Europe and for What Reason?*, 97 *AFRICAN AFF.* 343, 363 (1998).

327. One could argue that the Nigeria/Boko Haram conflict was effectively addressed by a Council resolution. In May 2014, the Council’s Al Qaeda sanctions committee took the significant step of adding Boko Haram to its sanctions list, citing reasons that echo its broader normative agenda for NIACs. See *Narrative Summaries of Reasons for Listing*, U.N. SECURITY COUNCIL (May 22, 2014), https://www.un.org/sc/suborg/en/sanctions/1267/qa_sanctions_list/summaries/entity/jama%27atu-ahlis-sunna-lidda%27awati-wal-jihad-%28boko (citing numerous acts of terror including attacks on Nigerian schools and students as the reasons for listing Boko Haram). Because the sanctions committee is composed of Council members, the committee’s condemnation of Boko Haram is effectively a condemnation by the Council. See

the Council addresses regularly in other conflicts. Indeed, in two of the three conflicts—in the Republic of the Congo and Nigeria—the Council issued Presidential statements that echoed normative positions taken in other NIACs.³²⁸

In addition to addressing more conflicts since 1990, the Council also began regularly invoking Chapter VII and deploying peacekeeping missions. The Council issued Chapter VII resolutions in 48%, (22/46) of all NIACs from 1990 to 2014, and where the Council passed at least one resolution for a NIAC, it invoked Chapter VII in 63% of those cases (22/35).³²⁹ Of the seventy missions authorized by the Council since 1948, fifty-three (76%) were authorized after 1990, and fifty-eight (83%) were authorized after 1988.³³⁰ This represents an increase in propensity to use the most important legal authority and the most interventionist tool available to the Council, from an average of 0.35 missions authorized per year prior to 1990 to an average of 2.21 after 1990.³³¹

Security Council Subsidiary Bodies: An Overview, U.N. SECURITY COUNCIL, <https://www.un.org/sc/suborg/en> (last visited Feb. 7, 2018).

328. See Press Release, Security Council, Security Council Press Statement on Terrorist Attacks by Boko Haram, U.N. Press Release SC/12233-AFR/3319 (Feb. 2, 2016) (condemning the terrorist attacks by Boko Haram in Dalori village in Nigeria on January 30, 2016); S.C. Pres. Statement 2015/4 (Jan. 19, 2015) (denouncing the actions of Boko Haram in Nigeria, Chad, and Cameroon); U.N. SCOR, 7421st mtg. at 2, U.N. Doc. S/PV.7421 (Mar. 30, 2015) (addressing the Boko Haram attacks in Nigeria and appealing for international support of the humanitarian crises caused by the attacks); S.C. Pres. Statement 1997/47 (Oct. 16, 1997) (calling for a halt to the violence and respect for the civilian population in Republic of the Congo); S.C. Pres. Statement 1997/43 (Aug. 13, 1997) (advocating for a halt to the violence in the Republic of the Congo and for adherence to a previously negotiated ceasefire agreement).

329. *UN Security Council Data Set*, *supra* note 13.

330. *Id.*

331. *Id.*

Table 3: Frequency and Nature of Council Involvement in NIACs

% of Conflicts that are NIACs	87%
% of NIACs with at Least One Council Resolution	76%
% of NIACs Assigned a Peacekeeping Mission	57%
% of NIACs with Chapter VII	48%
% of Chapter VII NIACs with Sanctions Imposed	73%

The implications of the Council having addressed virtually all contemporary NIACs are two-fold. First, this negates the claim that the Council’s normative preferences are specific to particular conflicts, regions, or even time periods of the post-Cold War era. Second, and perhaps more importantly, this reaffirms the Council’s central role in the international community’s response to NIACs. The Council’s omnipresence stands in contrast to a *much lower* level of state involvement in the same NIACs. The Council has generally not intervened in NIACs alongside individual states or regional organizations but has done so *in lieu* of intervention on their part.³³² Few states either have the capacity to intervene effectively in NIACs or view intervention as furthering their national interests.³³³ Non-Council interventions from 1990 to 2013 were generally limited to a small

332. See *supra* note 3 (finding that individual states or groups of states only intervened in 31% of the same conflicts in which the Council took action).

333. See Sumon Dantiki, *Organizing for Peace: Collective Action Problems and Humanitarian Intervention*, J. MILITARY. & STRATEGIC STUD., Winter 2004, at 1, 3–6 (proposing that the lack of technological capabilities and the failure to view humanitarian crises as a direct threat to states’ interests create obstacles to collective humanitarian interventions).

group of states.³³⁴ Few states intervened in any conflict, and fewer intervened in multiple conflicts. The states that did intervene were largely (1) North Atlantic Treaty Organization (NATO) states intervening in just a handful of countries (Iraq, Afghanistan, and the former Yugoslavia); (2) former colonial powers; or (3) regional powers intervening in neighboring conflicts.³³⁵ Indeed, the data show that every non-U.S. intervention was carried out by a neighbor or a former colonial power.³³⁶ By contrast, the Council is unique in both its consistency of action and breadth of activity. Whereas the Council addressed 76% of all conflicts coded, third-party interventions in conflicts account for just 31% of our cases.³³⁷ Taking account of Council practice thus creates parity with member states' apparent delegation to the Council of their individual capacities to intervene in NIACs regularly or systematically.

2. *Consistent imposition of similar obligations*

The second element is the Council's consistent imposition of similar obligations across the NIACs with which it has engaged. A sampling of issues³³⁸ gives a sense of the Council's consistent use of the same normative tools across conflicts. In NIACs in which the Council invoked Chapter VII, it imposed the following obligations in the frequency indicated: human rights violations condemned (64% of conflicts), cessation of hostilities required (88%), adherence to peace agreements required (83%), compliance with IHL obligations mandated (82%), cessation of violations of international criminal law required (50%), freedom of movement mandatorily granted to U.N. personnel by non-state actors (82%), and sanctions imposed (73%).³³⁹ In addition, the Council authorized peacekeeping missions with

334. See *supra* note 1 (explaining that the data cited on this proposition is taken from the Uppsala Conflict Data Program). See generally, Erik Melander et al., *Organized Violence, 1989–2015*, 53 J. PEACE RES. 727, 727–28 (2016) (analyzing state-based armed conflicts, non-state conflicts, and one-sided conflicts from 1989 to 2015).

335. The non-NATO interventions during the period included Ethiopia's intervention in Somalia, multiple neighbors and the United Kingdom in Sierra Leone, France and Rwanda in DR Congo, Russia and Uzbekistan in Tajikistan, and similar interventions by neighbors in Azerbaijan, Angola, Mozambique, and Sudan. ECOWAS intervened in West African conflicts, and other temporary coalitions led by France intervened in Africa.

336. *UN Security Council Data Set*, *supra* note 13.

337. *Id.*

338. See *supra* Section III.B (discussing the use of Council-imposed obligations in different NIACs).

339. *UN Security Council Data Set*, *supra* note 13.

mandates to create or enhance democratic institutions (63%), protect human rights (82%), enhance the rule of law (65%), protect U.N. personnel and installations (82%), and support transformation of national institutions (71%).³⁴⁰

D. *Elements of Customary Law in Council Practice*

Customary law consists of practice and *opinio juris*—the “belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”³⁴¹ This Section will argue that the Council practice evidenced by the data set reflects these two traditional elements.

1. *Practice*

One of the most common criticisms of viewing international organization resolutions as evidence of custom is that they are statements divorced from action: though often articulating specific legal obligations, they lack the accompanying act or omission that *opinio juris* designates as legally relevant. But binding Council resolutions are not mere verbiage; they are themselves actions that create new legal obligations and on occasion impose punitive measures for non-compliance.³⁴² In this sense they are similar to domestic legislation, a frequently-invoked source of state practice.³⁴³ But many resolutions in the data set go farther than imposing obligations to authorize action by peacekeepers or national forces. In total, the Council established fifty-three peacekeeping missions during the data set period.³⁴⁴ The missions’ mandates initiated a series of acts on the ground by U.N. personnel.³⁴⁵ The Special Representative of the Secretary-General appointed for each mission reports regularly to the Council on progress and challenges, creating a feedback loop by which the Council adapts its mandate to new circumstances on the ground.³⁴⁶

340. *Id.*

341. North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20).

342. See Alvarez, *supra* note 16, at 874 (noting that states consider the Council’s resolutions regarding terrorism as binding resolutions strengthened by the possibility of enforcement for non-compliance).

343. ILC Draft Conclusions on Custom, *supra* note 5, at 77 (including state “legislative and administrative acts” as forms of practice relevant to custom”).

344. *UN Security Council Data Set*, *supra* note 13.

345. See Connie Peck, *Special Representatives of the Secretary-General, in THE UN SECURITY COUNCIL IN THE TWENTY-FIRST CENTURY*, *supra* note 67, at 457, 470 (illustrating how an individual peacekeeping mission brings additional influences, including supervision by the peacekeeping troops and other U.N. monitors).

346. *Id.* at 458–59.

These two types of resolutions—those only imposing obligations and those authorizing action to enforce the obligations—should not be considered distinct for purposes of identifying relevant Council practice. Rather, they should be interpreted as a continuum constituting all relevant practice. When the Council seeks to bring about an objective it typically begins with a non-binding exhortation, then moves to a binding decision, and then, if necessary, to compelling compliance.³⁴⁷ If a binding decision alone is sufficient to achieve compliance, then the Council has no need to authorize action.³⁴⁸ Its failure to act in such circumstances evidences no less commitment to the legal obligations previously imposed than if the target of the obligations had resisted, making compliance measures necessary.³⁴⁹ National legislation is not disqualified as evidence of state practice because it is obeyed in most or all cases, necessitating no enforcement action by state authorities.³⁵⁰ The same view should apply to Security Council resolutions: success in producing compliance should not militate *against* resolutions counting as evidence of custom.

Finally, two factors prominent in the ILC's assessment of state practice are also relevant to the Council. The first is the context in which evidence arises.³⁵¹ The Council has been involved in virtually every contemporary NIAC and it regularly addresses the most contentious legal issues arising from those conflicts.³⁵² There is no international body with greater involvement in NIACs and certainly

347. *E.g.*, S.C. Res. 2266, ¶ 2 (Feb. 24, 2016) (deciding to renew the imposition of sanctions on Yemen until it complied with U.N. Resolutions and returned to peaceful, political transition); S.C. Res. 2216, ¶ 1 (Apr. 14, 2015) (demanding a return to democratic political transition and an immediate cease to the use of force by Houthis); S.C. Res. 2201, ¶¶ 1–2 (Feb. 15, 2015) (deploring the Houthi dissolution of government and takeover of Yemeni government institutions and reiterating the need for resolution of differences through dialogue).

348. *See* D.B.S. Jeyaraj, *Govt Wants to Review Ban on Tamil Diaspora Organizations Listed as "Terrorists,"* DAILY MIRROR (June 26, 2015), <http://www.dailymirror.lk/77795/govt-wants-to-review-ban-on-tamil-diaspora-organizations-listed-as-terrorists> (describing Sri Lanka's willing compliance with binding Council Resolution 1373 by designating sixteen organizations as terrorist fronts and freezing the organizations' assets and economic resources).

349. *See* S.C. Res. 1373, ¶¶ 1–2 (Sept. 28, 2001) (deciding that States shall prevent the financing of terrorists and terroristic acts by cutting off financial assets and denying safe haven for any individual involved in terrorism).

350. ILC Draft Conclusions on Custom, *supra* note 5, at 91 (including a state's legislative acts as a form of recognized state practice).

351. *Id.* at 84.

352. *See supra* notes 52–55 and accompanying text (describing the extent of the Council's involvement in NIACs).

none with the authority and propensity to bind parties to legal obligations.³⁵³ Council resolutions should be accorded particular significance based on this unique role. Second, the ILC has instructed that practice of international actors is to be assessed “as a whole.”³⁵⁴ For the Council, this means taking account not just of individual resolutions or conflicts but of the Council’s approach to a legal issue across the entire range of conflicts with which it engages. This is precisely the contribution of the aggregated data.³⁵⁵

2. *Opinio juris*

The nature of evidence needed to demonstrate *opinio juris* is contested: the ILC insists *opinio juris* cannot be inferred from the mere existence of practice, while commentators note an ICJ trend of inferring *opinio juris* from a general practice.³⁵⁶ If one takes the latter view then the data would itself be sufficient, since the obligations identified are repeated in resolutions across a wide spectrum of time, geography, and intensity of conflict.³⁵⁷ If one accepts the ILC view that separate evidence is required, the evidence may be found in three places. First, the Council itself recognizes that its resolutions may affect custom. The many resolutions disclaiming any precedential value in authorizing pursuit of pirates in Somali territorial waters are the prime example.³⁵⁸ Second, the coded resolutions often make specific reference to the legal context of the obligations, referring to

353. See *supra* notes 2–4 and accompanying text (noting that the Council intervenes in NIACs at more than twice the rate of individual states or groups of states and does so in a far broader range of conflicts).

354. ILC Draft Conclusions on Custom, *supra* note 5, at 92.

355. *UN Security Council Data Set*, *supra* note 13.

356. Compare ILC Draft Conclusions on Custom, *supra* note 5, at 84 (requiring the elements of a general practice and *opinio juris* to be addressed individually with separate evidence), with CRAWFORD, *supra* note 236, at 26 (noting that the ICJ often infers the element of *opinio juris* from evidence of a general practice). See generally Frederic L. Kirgis, *Custom on a Sliding Scale*, 81 AM. J. INT’L L. 146, 148 (1987) (observing that scholars have long believed that the existence of an *opinio juris* can be inferred from a state’s consistent practice when there is little or no support against the existence of an *opinio juris*).

357. *UN Security Council Data Set*, *supra* note 13.

358. See, e.g., S.C. Res. 2077, ¶ 13 (Nov. 21, 2012) (“Affirms that the authorizations renewed in this resolution apply only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations, under the Convention, with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law . . .”); see also *supra* note 23 and accompanying text.

applicable IHL, human rights law, or the possibility of criminal accountability.³⁵⁹ The *Tadić* court found such references significant in the resolutions it cited in support of a customary norm.³⁶⁰ In these resolutions, in other words, the Council was not simply employing pragmatic conflict-resolution tools devoid of international legal value but was specifically invoking international law in order to bolster the legitimacy of the obligations it imposed.³⁶¹ Third, regardless of whether the resolutions fit a pre-existing paradigm of *opinio juris*, they have already been cited as constitutive of custom by six different international courts.³⁶² In those opinions, the resolutions were “accepted as law.”³⁶³

More broadly, characterizing these obligations as conflict-specific takes an unduly narrow view of how the Council approaches NIACs. The Council does not start anew for each conflict, but rather consistently uses the same obligations across a diverse array of NIACs.³⁶⁴ These obligations do not each represent ad hoc political compromises, as suggested by reference to the Council as an essentially “political” body. For example, the Council imposed binding or potentially binding obligations on non-state actors to respect human rights in seventy-six separate resolutions in the data set, obligated those actors to adhere to peace agreements in 202 resolutions, and required free and fair elections in post-conflict states in thirty resolutions.³⁶⁵ The data set demonstrates that the Council hardly considered these standards as one-off initiatives applicable only to single conflicts.

Finally, there is an air of formalistic unreality in applying a strict view of *opinio juris* to Council resolutions. Social science literature has long demonstrated that international institutions such as the Council play a critical role in the definition and diffusion of norms.³⁶⁶ Norms

359. See S.C. Res. 814, ¶¶ 8–9 (Mar. 26, 1993); S.C. Res. 794, ¶ 10 (Dec. 3, 1992).

360. See Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 133 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

361. See *supra* note 359.

362. See *supra* notes 41–47 and accompanying text.

363. Statute of the International Court of Justice, art. 38, ¶ 1(b) (requiring the ICJ to apply international custom as evidence of an *opinio juris*); see also 1 HUGH THIRLWAY, *THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE* 182 (2013).

364. *UN Security Council Data Set*, *supra* note 13.

365. *Id.*

366. See Robert Axelrod & Robert O. Keohane, *Achieving Cooperation Under Anarchy: Strategies and Institutions*, 38 *WORLD POL.* 226, 237 (1985) (demonstrating that having international regimes against which to measure actions is beneficial as these regimes

frequently migrate well beyond their initial application, and international organizations facilitate the process.³⁶⁷ Institutions provide venues for socialization³⁶⁸ and states use international institutions to communicate information about norms, goals, and intentions.³⁶⁹ They employ institutions to self-bind in order to lock in commitments.³⁷⁰ Institution-based efforts to signal participation in norms can lead to lasting changes in behavior.³⁷¹

These pathways to norm diffusion are hardly lost on Council members. Professor Alexander Thompson, who focuses on the politics on international organizations, argues that powerful states channel coercive strategies through international organizations like the Council.³⁷² His argument demonstrates that the intent of members

“provide information about actors’ compliance; they facilitate the development and maintenance of reputations; they can be incorporated into actors’ rules of thumb for responding to others’ actions; and they may even apportion responsibility for decentralized enforcement of rules”). Security Council action can also be seen as a form of contested multilateralism—the process by which states, unsatisfied with the ability to create norms through normal channels, can use alternative means to create new regimes. See Julia C. Morse & Robert O. Keohane, *Contested Multilateralism*, 9 REV. INT’L ORGS. 385, 387–88 (2014). Finally, Snidal, Koremenos, and others show in a series of arguments that states are deliberate and precise when designing international agreements, institutions, and organizations precisely because of the power international organizations hold. See Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3, 25–26 (1998); Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT’L ORG. 761, 767 (2001).

367. See Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 895, 899–900 (1998) (showing how norms are internalized through a “life cycle,” diffusing through a system of actors and increasing their applicability during the process).

368. See Brian Greenhill, *The Company You Keep: International Socialization and the Diffusion of Human Rights Norms*, 54 INT’L STUD. Q. 127, 129–30 (2010) (suggesting that international organizations influence states by providing a forum for states to interact and emulate norms).

369. See Alexander Thompson, *Coercion Through IOs: The Security Council and the Logic of Information Transmission*, 60 INT’L ORG. 1, 3 (2006) (proposing that states channel their policies and norms to other states through international organizations).

370. See Beth Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 INT’L ORG. 225, 229 (2010) (describing how states utilize institutions, such as the International Criminal Court, to “pre-commit” themselves to norms).

371. See generally BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW AND DOMESTIC POLITICS* 7–8 (2009) (examining how treaties are open, public commitments made by states that signal a state’s obligation to perform certain behaviors or changes in behaviors).

372. See Thompson, *supra* note 369, at 14 (examining the actions of the United States during the Gulf War as a case study to demonstrate how coercive states use international organizations to influence other states).

using the Council is to shape the expectations of target states.³⁷³ To hold that Council-imposed obligations are insufficiently infused with an intention to affect normative change is to ignore the central role the Council already plays in norm creation and diffusion. Even when informal groups of states address issues outside the structure of the Council, they frequently couple their efforts with Council resolutions for legitimacy,³⁷⁴ and the Council's legitimacy helps states overcome collective action problems and rally public support for interventionist activity.³⁷⁵ In short, international institutions generally—and the Council specifically—have been shown to assist in the diffusion of norms among states.

VI. TWO POTENTIAL OBJECTIONS

There are at least two potential challenges to our claim that the Council, acting on behalf of the entire U.N. membership, contributes evidence of custom. First, Council resolutions do not impose prospectively binding obligations applicable to all states. Second, the Council is structurally unsuited to assuming a law-making role. This Section will examine both objections.

A. *Resolutions are not prospectively binding, as required by customary international law*

The first is that patterns of past Council action are not the same as obligations that bind parties prospectively. This challenge asserts that while patterns of obligations may demonstrate the Council's normative preferences across more than two decades *just passed*, they cannot—or should not—serve as evidence of its preferences for norms in *future conflicts*. At a minimum, it could be argued, one would need to assume or demonstrate that the Council will continue to impose the same obligations going forward with the same regularity to overcome the criticism.

This claim has two variants. The first is that while the Council may continue to pass resolutions on most NIACs, it may alter or abandon its prior normative patterns. The evidence for this is scant. The

373. *Id.* at 7–9.

374. See Jochen Prantl, *Informal Groups of States and the UN Security Council*, 59 INT'L ORG. 559, 575–76 (2005) (describing the activities of the Western Contact Group on Namibia, which initially operated without a Council mandate but later cooperated with the Council to legitimize their initiative).

375. See Geoffrey P.R. Wallace, *Supplying Protection: The United Nations and Public Support for Humanitarian Intervention*, CONFLICT MGMT. & PEACE SCI. 1, 11 (2017) (finding that, in the context of United States intervention in Syria, Council approval mitigates some of the problems of collective action and increases public support).

conflicts in which the Council has imposed obligations differ in time, location, parties, issues, size, duration, and geo-political context.³⁷⁶ Equally important, the relatively uniform body of obligations was imposed by a Council whose membership varied regularly over time.³⁷⁷ Given that most conflicts examined continued for multiples years and even decades, any given conflict was likely addressed by almost seven different configurations of Council membership.³⁷⁸ That Council-imposed obligations have remained constant while almost every other aspect of conflicts fluctuates makes it highly unlikely that the Council would suddenly alter its normative response to NIACS in the future.³⁷⁹ Finally, most of the patterns we identify do not radically alter existing international law but resolve normative uncertainty or continue existing trends. This makes sharp Council departures from well-trodden paths less likely.

The second and alternative basis for the claim that patterns of obligation lack a prospective element is that the Council may address

376. The Council has addressed conflicts in every year, every region, of varying duration, of varying number of actors, of varying battle deaths and civilian casualties, at various points in conflict, and both within and outside the sphere of influence of every hegemonic state. From 1990 to 2013, the conflicts the Council addressed include those in Sub-Saharan Africa (32%), the Americas (7.5%), the Middle East and North Africa (28%), Russia, Eastern Europe, and the Commonwealth of Independent States (13%), Southeast Asia (7.5%), and South Asia (11%). *UN Security Council Data Set*, *supra* note 13. Of the conflicts that meet the criteria for inclusion in our data, fifteen began after 1990 (of which the Council addressed twelve, or 80%, through resolutions), and thirty-one began before 1990 (of which the Council addressed twenty-three, or 74%). *Id.* The majority of conflicts lasted more than a decade, though some ended in less than a year. *Id.* Some involved two main actors, such as Yugoslavia versus the Kosovo Liberation Army (KLA) in Kosovo, while others involved numerous groups with complex alliances and byzantine conflict dynamics. *Id.*

377. See *Current Members*, U.N. SECURITY COUNCIL, <http://www.un.org/en/sc/members> (last visited Feb. 7, 2018) (stating that the Council is comprised of fifteen member states: five permanent members and ten non-permanent members that are elected for two-year terms).

378. The average duration of a NIAC is difficult to calculate, in that a large portion of observations in our data involve ongoing conflicts, and many others are conflicts that began prior to the start of the data set. Using an open start date and including only NIACs that have ended, the average duration of a NIAC is approximately twenty years. Given that the Council's non-permanent members have two-year terms staggered in one-year increments, the entire non-permanent membership turns over every three years. Thus, the average conflict will have been reviewed by six to seven different Councils, meaning the Council tends to behave consistently, even as the composition of the body changes substantially.

379. This is not to say the Council would not change its practices to account for methods that performed well or poorly in the past. Peacekeeping practices, for example, have evolved substantially since the early 1990s.

fewer NIACs or become highly selective in those with which it does engage. Many point to the Council's absence from the Syrian and Ukrainian conflicts as evidence that such a retreat is already underway.³⁸⁰ But neither case has involved abstention based on new normative preferences for conflict. Council deadlock is instead related to political disagreements among Council members over the merits of the conflicts.³⁸¹ Certainly, there is no evidence that shifting normative preferences were responsible for the Council's non-engagement in Algeria, Republic of the Congo, and Nigeria, the three post-1990 NIACs in our data set on which it passed no resolutions.³⁸²

More broadly, some critics may argue that while the Council might have intended to shape norms in the past, the increasingly jingoistic tone of international relations signals a retreat from multilateralism. We do not see this as a debilitating critique. The international system has both shifts and means. Shifts do occur, during which norms or systems substantially change. Shifts created the modern system of international law and repeatedly spread its applications. But means are also important—and ultimately, the concern is whether the mean behavior of the Council over the long term creates the reasonable expectation of the application of international laws to civil conflicts. This Article claims there is a mean behavior that engenders a mean expectation, and though aberrations may occur from time to time, they in themselves only highlight the degree to which expectations have already converged on acceptable behavior.

B. *The Council is Structurally Unsuitable to Law-Making*

The second potential challenge asserts that the Council is structurally ill-suited to produce evidence of international law. This claim takes a variety of forms: the U.N. Charter does not endow the Council with law-making powers; the Council is unrepresentative of the community of states on whose behalf it purports to act; the veto privileges the P5's interests above all else; and the Council lacks attributes of due process and transparency that are essential to any

380. For an assessment of these critiques that does not accept many of their premises, see Sebastian von Einsiedel et al., *The UN Security Council in an Age of Great Power Rivalry* 3 (United Nations Univ., Working Paper Series No. 4, Feb. 2015), https://i.unu.edu/media/cpr.unu.edu/attachment/1569/WP04_UNSCAgeofPowerRivalry.pdf (arguing that the inaction in Syria and the Ukraine stemmed from political deadlock between the five permanent members of the Council).

381. *Id.* (examining the political alliance between Russia and China in relation to their joint Council vetoes).

382. See *supra* notes 323–27; see also *UN Security Council Data Set*, *supra* note 13.

legitimate law-making process. The representativeness and veto concerns were addressed above.³⁸³ Nonetheless, these questions remain. There is certainly no doubt that compared to the full representation accorded member states or their citizens in bodies, such as the General Assembly or European Parliament, the clear codification mandate of the ILC, or the opportunity for full input by affected parties in judicial bodies, like the ICJ or regional courts, the Council falls short as a source of normatively relevant practice.

One must question the salience of these all-too accurate observations after (i) twenty-three years of the Council imposing an increasingly broad range of obligations on state and non-state actors alike in NIACs,³⁸⁴ and (ii) the fourteen-year period in which the Council has been passing, albeit sporadically, explicitly law-making resolutions.³⁸⁵ More importantly, the legitimacy critiques beg the question of why attributes of other international bodies should serve as the measure of the Council's legitimacy as a participant in law-making.

The aggregation of Council actions over time allows for the introduction of a unique factor into the legitimacy calculus, namely the repetition of binding norms across a series of highly diverse conflicts. This substantial variation in the origin of oft-repeated norms distinguishes this Article's view of Council law-making from that critiqued in most analyses,³⁸⁶ which overwhelmingly focuses on either explicitly legislative resolutions³⁸⁷—Resolution 1373 (terrorist

383. See *supra* note 300 and accompanying text (discussing member states' concerns about the representativeness of the Council); *supra* notes 314–15 and accompanying text (addressing the use of Council vetoes).

384. See *supra* note 12 (examining Council resolutions on the most consequential NIACs between 1990 and 2013).

385. See Alvarez, *supra* note 16, at 874 & n.7 (stating that the Council entered into a new phase of legislative resolutions with the passage of Resolution 1373 in 2001).

386. An exception is Vincent-Joël Proulx's analysis of how a broad range of Security Council resolutions assigning responsibility for various acts contributes to the law of state responsibility. See VINCENT-JOËL PROULX, INSTITUTIONALIZING STATE RESPONSIBILITY: GLOBAL SECURITY AND UN ORGANS 157–58 (2016).

387. Even with reference to the legislative resolutions, the legitimacy critiques do not fully match the resolutions' provenance or actual reception by states. Legislative resolutions are best described as gap-fillers adding to obligations already contained in widely ratified treaties and imposing those "treaty-plus" obligations on non-party states.

financing),³⁸⁸ Resolution 1540 (weapons of mass destruction),³⁸⁹ and Resolution 2178 (foreign fighters)³⁹⁰—or on single conflict-specific acts—including creating international criminal tribunals or demarcating borders.³⁹¹

The legitimacy critique, moreover, is far from uniform or internally coherent. Some point to defects in Council process to argue that the Council has inappropriately expanded its jurisdiction under Article 39 of the Charter to include virtually any issue of general international concern.³⁹² Others cite the same defects to argue the Council has been

388. Resolution 1373 was based on the obligations in the International Convention for the Suppression of the Financing of Terrorism, which has been ratified by 187 states, though it expanded those obligations in several critical respects. PIERRE KLEIN, INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM 4 (2009), http://legal.un.org/avl/pdf/ha/icsft/icsft_e.pdf. Compare International Convention for the Suppression of the Financing of Terrorism, arts. 4, 6–8, Dec. 9, 1999, 2178 U.N.T.S. 197 (directing states to pass legislation criminalizing terrorist acts and taking steps to find terrorists and freeze their assets), with S.C. Res. 1373, at 16, ¶¶ 2–3 (Sept. 28, 2001) (expanding on the Convention by directing states to deny terrorists safe havens and accelerate the exchange of intelligence to quickly take action against suspected terrorists).

389. Resolution 1540 on nuclear, chemical, and biological weapons was negotiated to minimize new disarmament obligations on states themselves and placed most emphasis on preventing non-state actors from acquiring the weapons. S.C. Res. 1540, at 2, ¶¶ 1–2 (Apr. 28, 2004); see BOYLE & CHINKIN, *supra* note 17, at 113–14 (arguing that Resolution 1540 enhances existing treaty law by expressly excluding any rights or obligations that would conflict with current treaties). While some states expressed dissatisfaction with the breadth of the resolution, negotiations resulted in clarifying its lack of impact on existing state obligations and a “subsidiary” mechanism that left the details of national legislation on interdicting weapons up to individual states. See Ian Johnstone, *The Security Council as Legislature*, in THE UN SECURITY COUNCIL AND THE POLITICS OF INTERNATIONAL AUTHORITY 80, 92–93 (Bruce Cronin & Ian Hurd eds., 2008).

390. S.C. Res. 2178, at 2 (Sept. 24, 2004). Resolution 2178 was cosponsored by 104 states. See U.N. SCOR, 7272nd mtg. at 18, U.N. Doc. S/PV.7272 (Sept. 24, 2014). It repeated many obligations the Council had been imposing on states since the 9/11 attacks. See Anne Peters, *Security Council Resolution 2178 (2014): The “Foreign Terrorist Fighter” as an International Legal Person*, Part I, EJIL TALK (Nov. 20, 2014), <http://www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-i>.

391. See, e.g., Alvarez, *supra* note 16, at 874 (examining Resolution 1373 Counter-Terrorism and Resolution 1267 Sanctions Committees); Bjorn Elberling, *The Ultra Vires Character of Legislative Action by the Security Council*, 2 INT’L ORGS. L. REV. 337, 338–39 (2005) (describing three legislative-type resolutions); Lourdes de la Serna Galván, *supra* note 16, at 153–54 (noting the two ad hoc tribunals and demarcation of Iraq/Kuwait boundary).

392. See generally Joy Gordon, *The Sword of Damocles: Revisiting the Question of Whether the United Nations Security Council Is Bound by International Law*, 12 CHI. J. INT’L L. 605, 608–11, 609 n.12 (2012) (referencing sources that critique the Council’s broad authority).

too timid and selective in the issues and conflicts it addresses.³⁹³ Further, the critiques focus only on how the Council's membership and procedures delegitimize its actions, omitting discussion of the *positive* impact the Council often provides.³⁹⁴ As scholars Roberts and Zaum observe, "states have invested significant diplomatic capital in garnering Council authorisation for their actions."³⁹⁵ When states use force unilaterally, the first response of many international actors is that Council approval was absent.³⁹⁶ Monika Hakimi and Jacob Cogan, who describe a "state code" of norms on the use of force that stands in many ways in contrast to the formal "institutional code" of the U.N. Charter and its cognates, find that even the state code accepts the Council's primacy on the use of force questions and has done so since the Council's reinvigoration after the first Gulf War in 1991.³⁹⁷

The Council was not intended to be a law-making body. Critics of the Council as law-maker thus invoke aspects of its structure, membership, and procedures that lack the inclusiveness and due process guarantees of other law-making processes. But with most collective efforts at resolving and mitigating the effects of NIACs now largely centered in the Council, these critiques must be weighed against the substantial investment that many states—not simply the P5—have made in Council authority.

CONCLUSION

In light of evidence that the Council has imposed consistent patterns of obligation on parties to virtually every contemporary NIAC, this Article has sought to open a dialogue about the relevance of Council practice to customary international law. The data demonstrate the Council has taken a side, and arguably contributed to resolving legal debates, on three important issues: (i) human rights obligations of non-state actors; (ii) the binding nature of NIAC peace agreements; and (iii) the necessity of holding elections in post-conflict states. The data found further that the Council has at least raised the question of whether a nascent *jus ad bellum* for NIACs is emerging, based on

393. See ROBERTS & ZAUM, *supra* note 2, at 68–69 (describing inaction as one of the Council's weaknesses).

394. See *id.* at 71.

395. *Id.* at 72.

396. See Thompson, *supra* note 369, at 17–18 (describing the reactions of world leaders to the United States' invasion of Iraq at the start of the Gulf War).

397. Monika Hakimi & Jacob Katz Cogan, *The Two Codes on the Use of Force*, 27 EUR. J. INT'L L. 257, 261, 268 (2016).

resolutions that demand an end to hostilities but also delineate several permissible exceptions.

This Article argues that in imposing these obligations the Council has acted as an agent for other U.N. member states. In attributing Council-imposed obligations to the entire U.N. membership, we extend the Council's preeminent role in the collective security regime to the realm of generating practice constitutive of customary international law. Failure to account for the Council's centrality in resolving NIACs—substantially exceeding national interventions in scope and frequency—would consign this critical international practice to a legal black hole.

The data set comprises the most complete known account of Council obligations related to NIACs. The data set opens opportunities for further research in multiple directions. First, future research can help understand voting and political dynamics on the Council, such as the predictors of Council and state support for provisions in resolutions. Second, combining the data with conflict and civilian casualty data can help to elucidate the dynamic interactions between the Council and active conflicts and demonstrate which events or dynamics lead the Council to use specific provisions. Third, the data allow for analysis of Council efficacy: how Council provisions affect conflicts and post-conflict environments. Students of the Council, human rights, international humanitarian law, and conflict studies may leverage the data to tease out the complex linkages between Council politics, Council decisions, conflicts, and peace.

APPENDIX I

Security Council Terminology Coding Key

Non-Binding (1)	Possibly Binding (2)	Clearly Binding (3)
Acknowledges Having Considered Welcomes Encourages Appeals to Notes Takes note Invites Recognizes Recalls	Alarmed that Deplores Affirms Endorses (if not followed by a threat) Underlines Urges Commends Calls Upon Requests Stresses Reaffirms Supports Emphasizes Reminds Invites Reiterates Expresses deep/ grave concern	Decides Authorizes Demands Determines Resolves Condemns Endorses (if followed by a threat)
