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The Security Council and Non-State Domestic Actors:

Changes in Non-Forcible Measures between International Lawmaking and Peacebuilding

LEONARDO BORLINI*

Abstract

Elaborating on a newly compiled dataset of all Security Council resolutions passed under Chapter VII in the thirty years from 1990 to 2019, this Article is the first attempt to survey aggregated Council practice with a view to analyzing the ways in which the Council's non-forcible measures have been transformed as a consequence of the growth in importance of non-state actors in international relations. The data demonstrate that the Council has increasingly adopted resolutions that apply and draw in individuals and other non-governmental actors more than what previous studies merely suggest. Related is the second, and more significant, finding of the Article: in light of the aggregate practice analyzed, the Article argues that, by expanding the preventative use of its powers under Chapter VII of the UN Charter, the SC has inserted itself into a new interface between international lawmaking and peacebuilding. It has operated in the context of both conflict prevention and actions on generalized threats, adopting non-forcible measures that not only address the immediate objective of crisis management, but also increasingly engage in mapping out future regulation and structure of governance. Though the further expansion of these developments remains uncertain, the Article also contends that their normative implications are already significant. To mention the most salient: the establishment of direct international duties on armed groups and individuals by the Council; its growing influence on the external articulations of statehood and the internal dynamics of transitions towards peace; the mediated imposition on associations and corporations established under private law of prophylactic obligations; the creation, via its quasi-legislative resolutions, of a completely regulated international sphere where terrorists and proliferators are starved of means and chances to perpetrate attacks.

I. INTRODUCTION

In the last thirty years (1990-2019), the UN Security Council ("SC" or "Council") has adopted 1857 resolutions, nearly three times as many as during the Cold War. 758 resolutions were adopted under Chapter VII of the UN Charter, whereas in the previous 43 years the Council adopted only 22 resolutions under this chapter.[1] In these resolutions the Council has not only imposed sanctions but has also taken, directly or via member states, a wide array of other measures.[2] It has ventured into new areas, especially when dealing with non-state domestic actors (NSDAs).[3] Previous studies have focused on the exercise of seemingly unfettered coercive authority by the SC,[4] or individual instances of what, on different occasions, was or seemed to be an unprecedented use of the SC's power under

* Associate Professor of International Law, Department of Legal Studies/BAFFI CAREFIN (Centre for Applied Research on International Markets, Banking, Finance and Regulation), University Bocconi; Fulbright Research Scholar at the Fletcher School of Law and Diplomacy (Tufts University); PhD (Bocconi), LL.M (Cantab.). This article is the outcome of a research funded by the US-Italy Fulbright Commission and carried out at the Fletcher School of Law and Diplomacy: my gratitude goes to the Fletcher School for the outstanding research environment. For their comments and invaluable discussions on earlier versions of the article, I wish to thank Professors José Alvarez, Luigi Condorelli, Michael Glennon, Ian Johnstone, David Kennedy, Robert Kolb, Gerald Neuman, Roger O'Keefe, and Paolo Palchetti. I wish to thank Alfonso Langastro and Julia Simon for their excellent assistance. The present study elaborates on a dataset including all resolutions adopted under Chapter VII from 1990 to 2019 that deal with non-state domestic actors, which is the updated result of previous researches I carried out at the Graduate Institute of International and Development Studies in Geneva (September 2016-January 2017 and September 2017-May 2018). The dataset is on file with the author.

[1] LORAINE SIEVERS ET AL., THE PROCEDURE OF THE UN SECURITY COUNCIL 391 (4th ed. 2014), noting that the Council adopted 22 Chapter VII resolutions in the 1946-1989 period. Data from 1990-2019 collected manually, counting and analyzing resolutions adopted under Chapter VII as those which include: (1) an explicit determination of threat to the peace, (or a breach of the peace, or an act of aggression) followed by the adoption of one of more coercive measures based on articles 40, 41 or 42 of the Charter, and/or (2) an explicit statement that the SC is acting under Chapter VII of the Charter in the adoption of one or more operative paragraph.

[2] James Crawford, *Chance, Order, Change: The Course of International Law,* RdC 365, 301-2 (2013).

[3] In this study, the term NSDAs includes participants in international relations that are not States, State-like entities or intergovernmental organizations established by a treaty concluded between States. It comprises individuals as well as entities, the latter spanning a large range of organizations and institutions on the domestic level and, also, transnational levels. These entities cannot be identified by common sociological features as they include, *inter alia*, armed groups, corporations and other business entities, non-governmental organizations (NGOs), *de facto* regime[s], business associations, terrorist groups and criminal organizations.

[4] *Inter multa*, Thomas M. Franck, *The Security Council and 'Threats to Peace'. Some Remarks on Remarkable Recent Developments, in* LE DEVELOPPEMENT DU ROLE DU CONSEIL DE SECURITE: COLLOQUE DE DROIT INTERNATIONAL, LA HAYE, 21-23 JUILLET 1992 83 (René-Jean Dupuy ed., 1993); Giorgio Gaja, *Réflexions sur le rôle du Conseil de sécurité dans le nouvel ordre mondial. A propos des rapports entre le maintien de la paix et crimes internationaux des États*, RGDIP (1993); Rosalyn Higgins, *Peace and Security –Achievements and Failure*, 6(1) EJIL 445 (1995); Frederic L. Kirgis, *The Security Council's First Fifty Years* 89 AJIL 506 (1995); SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER (1996); Gaetano Arangio-Ruiz, *On the Security Council's «law making»*, 83 RDI 603 (2000); Monica Hakimi, *The Jus ad Bellum's Regulatory Form*, 112(2) AJIL 151 (2018).

Chapter VII of the UN Charter. Scholars have considered the Council's action with respect to 'new threats' to international peace and security, assessed the legal effects of the relevant SC resolutions, and discussed whether they were *ultra vires* or otherwise contrary to law.[5] The cumulative result has been an international legal literature on general questions regarding the changing role of the Council; the exercise of its power for the protection of general interests linked to the maintenance of peace and security; and the legitimacy of its actions.[6]

This Article proposes a new enriching approach. Elaborating on a newly compiled dataset of all SC resolutions passed under Chapter VII since 1990, it is the first attempt to survey aggregated Council practice with a view to analyzing the ways in which the Council's non-forcible measures have transformed as a consequence of the growth in importance of NSDAs in international relations. The central empirical findings of the Article are that the SC has engaged with non-governmental actors more intensely than what it is generally acknowledged and, in doing so, it has increasingly made use of Articles 39, 40 and 41 of the UN Charter by expanding the preventative use of its powers under Chapter VII. Particularly, since it began to 'outsource' its regulatory and enforcement action to informal law-making initiatives with a view to tackling criminal activities perpetrated by individuals and other non-governmental entities; to apply sanctions in a forward-looking manner in order to pursue 'regulatory strategies' with regards to situational crisis and to address their roots, such as the management of natural resources; to demand that armed groups, private entities and individuals change their course of behavior in both situational crises and with respect to generalized threats; and

[5] *Inter multa*, Micheal J. Matheson, *United Nations Governance of Post-conflict Societies*, 95 AJIL 76 (2001); David M. Malone, *The Security Council in the Post-Cold War Era: A Study in the Creative Interpretation of the UN Charter*, 35(2) NYU J. INTL. L.&POL. 487 (2003); Eric Rosand, *The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?*, 28(3) Fordham ILJ 542 (2004); Luigi Condorelli and Annalisa Ciampi, *Comments on the Security Council Referral of the Situation in Darfur to the ICC*, 3(2) JICJ 590 (2005); Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?* 59 STAN. L. REV. 415 (2006-2007); Georges Abi-Saab*, The Security Council Legibus Solutus? On the Legislative Forays of the Security Council, in* INTERNATIONAL LAW AND THE QUEST ITS IMPLEMENTATION/LE DROIT INTERNATIONAL ET LA QUÊTE DE SA MISE EN ŒUVRE. LIBER AMICORUM VERA GOWLLAND-DEBBAS 23 (Laurence Boisson de Chazournes and Marcelo Kohen eds., 2010); THE UN SECURITY COUNCIL IN THE 21 CENTURY (Sebastian von Einsiedel, David M. Malone and Bruno Stagno Ugarte eds., 2016).

[6] See David D. Caron, *The Legitimacy of the Collective Authority of the Security Council* 87 AJIL 553 (1993); Martti Koskenniemi, *The Place of Law in Collective Security*, 17(2) MICH. J. INTL. L. 456 (1995-6); W. Michael Reisman, *In Defense of World Public Order*, 95 AJIL 833 (2001); Luigi Condorelli, *Les attentats du 11 septembre et leurs suites: où va le droit international?*, RGDIP 829 (2001); Bardo Fassbender, *Uncertain Steps into a Post-Cold War World: The Role and Functioning of the UN Security Council after a Decade of Measures against Iraq*, 13(1) EJIL 273 (2002); Richard A. Falk, *What Future for the UN Charter System of War Prevention*, 97 AJIL 590 (2003); Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AJIL 275 (2008); JEREMY M. FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW 131 (2009); Georg Nolte, *The Different Functions of the Security Council with Respect to Humanitarian Law, in* THE UNITED NATIONS SECURITY COUNCIL AND WAR. EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945 205 *(*Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominik Zaum eds., 2010); Giorgio Gaja, *The Protection of General Interest in the International Community*, 364 RdC 9 (2013).

to resort (again) to 'quasi-legislative' resolutions to impose measures in the context of administrative and criminal law. The analysis of these practices leads the Article to argue that, by using non-forcible measures to engage with NSDAs under Chapter VII, the SC has inserted itself into a new interface between international lawmaking and peacebuilding. It has operated in the context of both conflict prevention and actions on generalized threats, adopting measures that not only address the immediate objective of crisis management but also increasingly engage in mapping out future regulation and structure of governance. In turn, this has led to establishment of rules and norms and the coordination of different public and private actors, both at the international and national level, for the achievement of the Council's primordial goal of ensuring international peace and security.[7]

Though the further expansion and permanence of these developments remain uncertain, their legal consequences are already significant. To mention only the most salient, by resorting to transnational public-private processes and intergovernmental networks outside the UN circuit like the Kimberley Process Certification Scheme ('KPCS' or 'Kimberley Process')[8] and the Financial Action Task Force (FATF),[9] the Council has prescribed not only rules of conduct, but also procedures about how non-state entities, including business actors, must implement those rules, especially through due diligence and compliance with international standards. Moreover, through the incorporation of such initiatives in its resolutions, the SC leverages the liability mechanisms and negative consequences for both states and private actors who act in disconformity with the prescribed norms of conduct and procedures. The use of sanctions preventively (or as 'regulation') identifies a shift in emphasis from *ex-post* to *ex-ante* measures — that is, as coercive tools that the SC is using to prospectively manage risks to peace and security. As a consequence, the Council acts as the surrogate of national governments in providing centralized responses to situational crises and establishing primary and, through the sanctions themselves, secondary rules to regulate *inter alia* the conduct of individuals, commodities, business activities and the content of peace agreements. Additionally, by demanding individuals and private entities effect a positive change in their course of behavior in order to prevent destabilizing activities by terrorists both in conflict zones and in their countries upon return, the SC

[7] Richard B, Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 AJIL 211, 212 (2014), providing the basis of this definition, but differing in the requirement that the norms be binding. See also Jacob Katz Cogan, *The Regulatory Turn in International Law*, 52 HARV. INTL. L. J. 321, 324-5 (2011). Relatedly, see Anne-Marie Slaughter, Andrew S. Tumello, and Stephan Wood, *International Law and International Relations*, 93 AJIL 367, 371 (1998), defining global governance.

[8] The Kimberley Process Certification Scheme, at: http://www.kimberleyprocess.com; (last accessed 1 Dec. 2018).

[9] A G7 meeting in 1989 in Paris established the FATF to examine money-laundering techniques and trends, review public and private anti-money laundering (AML) efforts, and propose new measures. In 1990 the FATF issued 'Forty Recommendations' to member states to improve public and private AML arrangements, and created a system of state peer review. After 9/11, nine further Recommendations were added to address terrorist financing, and a 2012 revision added a focus on nuclear proliferation and corruption. The 2012 Recommendations are available at: http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html, (last accessed 3 January 2019).

arguably generates a new set of obligations upon those actors also in situations which do not coincide with internal conflicts and are not covered by other international rules. Finally, through the renovated use of 'quasi-legislative' resolutions to tackle the activities of so-called 'foreign terrorist fighters' and terrorist financing, once again the Council imposes on all member States legally binding obligations, circumventing the time-consuming negotiation, ratification and implementation of an entirely new treaty.

Ultimately, the present inquiry aims to contribute to the elucidation of the evolution of the SC's scope of action and responsibility. In doing so, it permits us to move beyond the framework of Charter legality to examine the role of the Council within the broader international legal order. The functions that the Council performs within that order – the tasks it performs by law and through law – serve to illustrate some central issues of contemporary international law relating to the international legal system as a whole.[10] These issues run as *leitmotiv* throughout this work: on the one hand, the interplay between different functional fields of international law, specifically collective security and the law of international organizations and, on the other, human rights, humanitarian law and criminal justice.[11] Other such issues include the emergence of general interests of international society and the questions of who protects such interests;[12] the complexity of international institutionalization, a phenomenon which is not limited to interstate organizations established by international treaties but today includes intergovernmental networks, whose status as interstate organizations is debated, as well as transnational public-private partnerships.[13] The ways in which the collective security system has been reinterpreted to engage with NSDAs reflects such issues.

Following the present introductory remarks of Part I, the Article is organized as follows. Part II briefly discusses the historical, political and normative developments that explain the increased importance of NSDAs for the SC's goal of ensuring international peace and security. In particular, it examines the role of the concept of 'threat to the peace' in Article 39 of the UN Charter as a normative determinant and, at once, the main legal vehicle for the extension of SC's actions to such actors. It then elaborates on the empirical analysis of the Council resolutions in the post-1989 era in order to offer a quantitative outlook of its engagement with NSDAs and, at the same time, elucidate the various ways in which the SC has addressed the same actors. It is important to recognize that attention on increases or expansions, in and of themselves, while useful, do not fully explain what is new about a

[10] Vera Gowland-Debbas, *The Security Council and Issues of Responsibility under International law*, 353 RdC 189, 202 (2012).
[11] As Bruno Simma, *Self-Contained Regimes*, 16 NETH. YBIL 111 (1985) has persuasively shown, entirely self-contained regimes do not exist.
[12] Gaja, *supra* note 6, 26-33.
[13] José E. Alvarez, *International Organizations – Then and Now*, 100(2) AJIL 324 (2006).

phenomenon. Therefore, Part III focuses on the analysis of the transformations in the Council's use of non-forcible measures to engage with NSDAs in both conflict prevention and actions on generalized threats. It then examines the legal basis and, where it is controversial, the conformity of such measures with the UN Charter. Finally, it investigates the legal consequences and broad implications of these actions. Part IV concludes.

There is one area in which the Article does not venture: the legal constraints to which the SC is subject when it deals with NSDAs under Chapter VII of the UN Charter. A robust literature already explores possible limits on Council actions under Chapter VII, including such mechanisms as judicial review designed to police those limits.[14] Moreover, it would require an elaboration of arguments which I merely note but do not develop here, and which are not the primary purpose of this project.

II. THE SC AND NON-STATE DOMESTIC ACTORS UNDER CHAPTER VII

A. The Increased Importance of NSDAs for the SC's Action under Chapter VII of the UN Charter

Today, a study about the increased importance of NSDAs in international law should not come as a big surprise. Readers familiar with developments in international law and international relations have indeed become accustomed to the fact that with increasing frequency international rules directly address and engage such actors. The ordinary regulatory pattern still prevails as a form of a merely indirect imposition of obligations on individuals and other private entities by way of the international obligations of States to enact national precepts and prohibitions, which in turn address the same subjects.[15] The trend here is that international law increasingly regulates their legal status, imposing

[14] See, *ex multis*, José E. Alvarez, *Judging the Security Council*, 90(1) AJIL 119 (1996); ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 187-215, 308-310, 250-255 (2004); Georg Nolte, *The Limits of the Security Council's Powers and its Function in the International Legal System – Some Reflections, in* THE ROLE OF LAW IN INTERNATIONAL POLITICS 315 (Michael Byers ed., 2010); ANTONIOS TZANAKOPOULOS, DISOBEYING THE SECURITY COUNCIL: COUNTERMEASURES AGAINST WRONGFUL SANCTIONS (2011), 150-165; all assessing the legal restraints on the SC actions; Devon Whittle, *The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII*, 26(3) EJIL 671 (2015), exploring measures through which to conduct oversight of the Council, including judicial review by the ICJ or municipal courts.

[15] STEVEN RATNER, THE THIN JUSTICE OF INTERNATIONAL LAW 86 (2015): '[t]he state system appears to be a fixed attribute of the international order … as a practical matter, states remain the primary and indispensable agents of individuals'.

on them obligations in numerous sub-domains, to an extent described as 'the regulatory turn in international law'.[16]

However, these developments are less obvious if one considers the design of the collective security system as originally imagined by the drafters of the UN Charter.[17] As Hans Kelsen and Alf Ross observed soon after the adoption of the UN constitutive treaty, the SC was created in 1945 with the predominant assumption that the original members of the UN would this time give birth to a robust international peace and security organ against aggressor governments, combined with the most extensive possible expropriation of the right of individual States to use force.[18] The drafters' state-centric assumption originated from the historical genesis of the UN as an outcome of World War II, which epitomised the tragic past of the first collective security institution established under the Covenant of the League of Nations.[19] Their utmost concern is indeed best captured by the first paragraph of the preamble to the Charter, namely, 'to save succeeding generations from the scourge of war',[20] where the latter term was predominantly understood to refer to 'inter-state' war (as opposed to intra-state war).[21]

Against this historical background, it is not extraordinary that the SC's functions and powers were designed in relation to the rights and interests of States – and not those of individuals and non-governmental entities.[22] And yet, since the earliest stage of its life, the Council's exercise of authority for the purpose of maintaining international peace and security has impacted on the rights of NSDAs not only in an indirect and consequential manner but also in ways that leave member States with little discretion over the individuals and entities under their jurisdiction – a trend that has become especially pronounced since the early 2000s. Over the years, not only insurrectional movements and other non-

[16] Katz Cogan, *supra* note 7, 359.
[17] Although the words 'collective security' do not appear in the Charter's text, this was clearly the point of according the SC the power to render legally binding decisions (Art. 25) and requiring it to 'function continuously' (Art. 28(1)) so that it can respond promptly and effectively to a threat to international peace and security. See Oscar Schachter, *The Charter's Origins in Today's Perspective*, 89 ASIL PROC 45 (1995).
[18] HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL FUNCTIONS 19 (1950); ALF ROSS, CONSTITUTIONS OF THE UNITED NATIONS: ANALYSIS OF STRUCTURE AND FUNCTION 137-142 (1950).
[19] SIMON CHESTERMAN ET AL., LAW AND PRACTICES OF THE UNITED NATIONS 3-14 (2nd ed. 2016). See also Hans Kelsen's early observations on the nature of the United Nations mechanisms for safeguarding the international peace in *Collective Security and Collective Self-Defense Under the Charter of the United Nations*, 42 AJIL 783 (1948); José E. Alvarez, *What's the Security Council For?*, 17 MICH. J. INTL. L. 221 (1996); IL Jr. Claude, *A Scholar's Beginnings: A Study of the San Francisco Charter*, 40 Va. J. Int'l L. 311 (1999).
[20] U.N. Charter, pmbl. para. 1.
[21] Inter-state war was then considered serious enough to threaten 'international' peace and security and to bestow upon the SC the unprecedented authority to take measures which collectively coerce aggressor governments with the powers accorded under Chapter VII of the UN Charter. See THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 224-42, 284-92, 298-305 (1995).
[22] INGER ÖSTERDHAL, THREAT TO PEACE: THE INTERPRETATION BY THE SECURITY COUNCIL OF ARTICLE 39 OF THE UN CHARTER 18 (1998).

State actors clothed with international legal personality but also armed groups, militias, mercenaries, terrorists, pirates, migrant smugglers and human traffickers, criminal gangs and organised criminal groups, former political leaders, children, women, displaced persons, refugees and migrants, NGOs and business entities have all acquired formal relevance in the SC resolutions adopted under Chapter VII of the Charter and, on many occasions, have been subject to the coercive measures imposed by the same body.[23]

The enlargement to NSDAs of the SC's action under Chapter VII can be ascribed to a number of historical, political and normative developments. While it is beyond the scope of this article to provide detailed accounts on the background of this shift, some essential reflections on the underlying factors seem indispensable. A first reason is the mushrooming of rebellions and civil wars in sovereign States. Admittedly, this is not a new phenomenon. What is new is the multiplication of cases where ethnic groups, minorities, or political organizations take up arms against the central authorities, and promote insurgency and even secession.[24] Intrastate – or 'civil' or 'non-international'– wars in the period 1990–2017 accounted for over 90 percent of armed conflicts that resulted in more than 1,000 deaths.[25] But the definition of 'intrastate' has itself become increasingly difficult to pin down.[26] Many such conflicts since 2010 have involved transnational terrorist elements, and neighbouring States supporting one or more factions by 'proxy.'[27] Importantly, while most of the Council recent resolutions dealing with non-international armed conflicts (NIACs) make reference to international repercussions, this is hardly convincing. Rather, it is first and foremost for humanitarian reasons that the Council involved itself.[28] As evidenced by a series of resolutions adopted since the early 1990s, the SC has incrementally regarded humanitarian crises, the violations of human rights and humanitarian law, and the attacks on civilian populations as intrinsic, as opposed to extrinsic,

[23] For a comprehensive account of how SC resolutions impact on individuals, groups and corporate entities, even when they cannot be linked to state action, see LEONARDO BORLINI, IL CONSIGLIO DI SICUREZZA E GLI INIDIVIDUI (2018).

[24] Antonio Cassese, *States: Rise and Decline of the Primary Subjects of International Law, in* THE HISTORY OF INTERNATIONAL LAW 49, 68 (Bardo Fassbender, Anne Peters eds., 2012) noting that: '[t]his trend is linked to the structure of many African and Asian countries whose borders had been arbitrarily shaped by colonial countries without attention to tribes, groups, nationalities, religion, and so on. It is also linked to the end of the Cold War and the demise of two blocs of States, which has released forces and scattered authority over the planet.'

[25] See Thomas G. Weiss and Sam Daws, *The United Nations: Continuity and Change*, in THE OXFORD HANDBOOK ON THE UNITED NATIONS 5 (Thomas G. Weiss and S Daws eds., 2nd ed. 2018).

[26] The legal definition of an inter-state conflict (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, 75 U.N.T.S. 135. By contrast, NIAC is defined in the negative: 'armed conflict not of an international character.' Id. art. 3.

[27] Sebastian von Einsiedel, *Civil War Trends and the Changing Nature of Armed Conflict*, 10 UNITED NATIONS UNIVERSITY CENTRE FOR POLICY RESEARCH OCCASIONAL PAPER, at 3 (2017).

[28] Jeremy Greenstock, *The Security Council in the Post-Cold War World, in* Lowe, Roberts, Welsh and Zaum, *supra* note 6, 248, at 249.

determinants of a threat to international peace and security.[29] Although the number of internal conflicts has steadily increased from 1950 onward,[30] one survey found that, contrary to the popular belief, it declined in the 1990s.[31] Another study found that the number of SC resolutions addressing civil war situations dropped from over 70 in 1993 to below 30 in 2000.[32] Hence, it does not seem accurate to account for the treatment of NIACs as intrinsic elements of the threats to international peace and security, let alone the present importance of NSDAs for collective security, *only* as a function of the frequency of civil wars.

A second element is the relatively novel phenomenon of the formation of non-state entities (other than rebels) over the territory of sovereign States or on the territories occupied by foreign belligerents: eg, Hezbollah in Lebanon, Hamas in Gaza or the ISIL (Da'esh) in Iraq and Syria. As a consequence of States' (or recognized entities such as the Palestinian Authority's) loss of actual control, these entities often contribute to further exacerbating crises that the SC has taken upon itself to address. From a legal perspective, however, these crises do not always amount to internal conflicts and, at least in the case of ISIL, are connected to and even exacerbate phenomena which *per se* threatens peace and security.[33] Similar remarks hold true for the emergence of networks such as Al-Qaeda, which have presence across borders and whose leaders are 'most likely stateless'.[34]

In stressing the dual-role of individuals as, on the one hand, civilians or victims of violence, and, on the other, as perpetrators whose conduct may eventually threaten international peace and security, the greater attention to the human dimension of conflicts addressed by the SC reveals a third set of reasons. On the political side, one of the key inputs was provided by the campaign in the 1960s and 1970s of newly independent Asian and African States that, confronted with the Rhodesian and South African issues, demanded the inclusion of human rights agendas into the matter of international peace and security.[35] Political campaigns that upheld self-determination and fundamental rights led the UN

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[29] Peter H. Kooijmans, *The Security Council and Non-State Entities as Parties to Conflicts, in* INTERNATIONAL LAW THEORY AND PRACTICE. ESSAYS IN HONOUR OF ERIC SUY 333, 334 (Karel Wellens ed., 1998).

[30] Therése Pettersson and Peter Wallensteen, *Armed Conflicts, 1946–2014*, 52 JOURNAL OF PEACE RESEARCH 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.'

[31] Lotta Harbom and Peter Wallensteen, *Armed Conflict, 1989–2006*, 44 Journal of Peace Research 623, 624 (Table II) (2007).

[32] James Cockayne, Christoph Mikulaschek and Chris Perry, *The UN Security Council and Civil War: First Insights from a New Dataset* 6 (International Peace Institute, 2010).

[33] See, e.g., S.C.Res. 2249, U.N.Doc.S/RES/2249 (Nov. 20, 2015) on the prevention and suppression of Daesh terrorist attacks.

[34] Jan Klabbers, *(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors, in* JARNA PETNAM ET AL., NORDIC COSMOPOLITANISM. ESSAYS IN INTERNATIONAL LAW FOR MARTTI KOSKENNIEMI 351, 359 (2003).

[35] Thomas M. Franck, *Collective Security and UN Reform: Between the Necessary and the Possible* 6(2) Chi. J. Int'l L. 597, 601-2 (2006).

General Assembly (GA) to predetermine the 'threats' even before the Security Council did.[36] As egregious human rights violations continued over the following five decades, UN organs themselves – especially the GA – played an active role in developing and disseminating new normative perspectives and policies which have, in turn, brought changes to the way in which the SC executes its mandate.[37] The concepts of 'human security' and 'responsibility to protect' (R2P) are two prominent examples in this respect.

Human security – broadly understood as the protection of 'the vital core of all human lives' in ways that enhance human freedoms and human fulfilment including freedom from want and freedom from fear[38] – was included in the GA's World Summit Outcome in 2005.[39] Whilst the SC has not explicitly adopted the concept in its resolutions, the combination of the concept of 'security' with human freedoms has had an impact on the deliberation of security, including international security within the UN, placing the individual – rather than the State – at the core of modern understandings of international security.[40] Similarly, the concept of R2P has also influenced the Council's actions, placing the renowned legal-political-moral debate over the limitations of sovereignty squarely before the same body.[41] Elaborated as an alternative to the largely discredited doctrine of 'humanitarian intervention' by the International Commission on Intervention and State Sovereignty (ICISS), R2P, under Council resolutions, is essentially directed not at the Council itself but rather at national authorities that bear the primary responsibility to protect civilians.[42] Like 'human security', the R2P doctrine has sustained the legitimacy of the shift in perspective from protecting States *qua* States to protecting human security, especially where the SC is confronted with crimes such as vicious killings of innocent civilians, repeated acts of rape of women and children, and the systematic coercion of young people, abducted from their homes and trained to become killers and rapists themselves, thus opening the possibility for enforcement measures under Chapter VII.[43]

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[36] NIGEL D. WHITE, KEEPING THE PEACE: THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY 164-169 (2nd ed. 1997).
[37] Michael N. Barnett and Martha Finnemore, *Political Approaches, in* Weiss and Daws, *supra* note 25, 41, 48–50.
[38] Commission on Human Security, *Human Security Now* 4, 10 (New York, Commission on Human Security, 2003).
[39] G.A. Res. 60/1 (2005 World Summit Outcome), ¶ 143, U.N.Doc. A/RES/60/1 (24 October 2005).
[40] Christopher K. Penny, *Human Security, in* Weiss and Daws, *supra* note 25, 635, 640.
[41] See Carsten Stahn, *The Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AJIL 99 (2007).
[42] *E.g.*, S.C.Res. 1674, ¶ 4, 8, U.N.Doc.S/RES/1674 (April 28, 2006) on the protection of civilians in armed conflicts and the several following resolutions on the same theme; S.C.Res. 1973, pmbl. ¶ 4, U.N.Doc.S/RES/1973 (March 17, 2011) reiterating the responsibility of the Libyan authorities to protect the Libyan population and the primary responsibility of parties to armed conflicts to ensure the protection of civilians. Similarly, e.g. S.C.Res. 2093, pmbl. ¶ 12, U.N.Doc.S/RES/2093 (March 6, 2013) recognising the responsibility of the Federal Government of Somalia; S.C.Res. 2139, ¶ 9, U.N.Doc.S/RES/2139 (Feb. 22, 2014) stressing the primary responsibility of the Syrian authorities.
[43] JOSÉ E. ALVAREZ, THE IMPACT OF INTERNATIONAL ORGANIZATIONS ON INTERNATIONAL LAW 135-141 (2017).

Additionally, over the last three decades, States and international organizations have, at an unprecedented pace, entered into agreements, passed resolutions, and created institutions and networks, both formal and informal, that impose and enforce direct and indirect international duties on private actors and individuals in order to support and facilitate a State's authority vis-à-vis those under or even beyond its jurisdiction.[44] One of the outcomes of this substantive expansion, articulation and deformalization of international law has been the increased importance of private actors, both in terms of their participation in the creation and enforcement of informal law, and, above all, as means to buttress and facilitate the application of international rules to NSDAs.[45] As we shall see, this trend has also informed the SC's increasingly frequent turn to the private sector, especially for dealing with criminal activity (such as terrorism financing; money laundering; trafficking in natural resources and piracy), as well as ancillary conduct (such as terrorism narrative). Here the SC has experimented with innovative approaches to law enforcement and, on occasions, also regulation. Individuals and non-governmental entities take on a different valence. Rather than being agents whose conduct threatens international peace and security, or being civilians and victims of violence to be protected, they become instruments to facilitate the SC's mandate.

Finally, the notion of 'threat to peace' stands as the most important normative determinant and, at the same time, the legal vehicle for the extension of the Council's actions regarding NSDAs. As Thomas Franck wrote over 16 years ago in the context of *jus ad bellum,* 'it is clear from the drafting history of the Charter that the representatives at San Francisco had not intended to authorize a role for the UN in civil wars.' Frank noted that there have been attempts to identify somewhat artificial 'international' dimensions to domestic tragedies such as refugee flows, but the meaning of 'threats to the peace, breaches of the peace, and acts of aggression' has been redefined both experientially and situationally.[46] As detailed in the next section, by re-interpreting the very notion of 'threat to peace', the SC is reviewing and redefining its authority regarding the permissible scope of its current and future work, and, hence, continually updating its operational code.[47]

[44] Katz Cogan, *supra* note 7, 325. For an in-depth analysis of such developments see ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).
[45] E.g. JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 217 (2005); JEAN D'ASPREMONT, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POST-NATIONAL LAW 1-20 (2010).
[46] See THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 39-42 (2002).
[47] On the term '*operational code*': W. MICHAEL REISMAN, FOLDED LIES: BRIBERY, CRUSADES AND REFORMS 16 (1979).

B. 'Threat to Peace' as a Legal Vehicle for the Inclusion of NSDAs in the SC's Actions under Chapter VII

The SC's interpretation of 'a threat to the peace' in Article 39 of the UN Charter should be read as part of wider norms and ideas which shape how UN organs exercise their authority in a constantly changing international setting. It is, in fact, an amphibolic concept, that indeterminately hypothesizes, unlike 'aggression' and 'breach to the peace', a 'threat to peace' as not necessarily characterized by the use of force, nor by an international unlawful act. This indeterminacy is enabled by the fact that the Council's discretion about what constitutes a 'threat to peace' is almost unlimited.[48] Article 39 does not set any limits *pour cause*.[49] In the abstract, anything could be a threat to the peace and to international security, especially in today's globalized world, where events influence each other across the globe at impressive speed. However, not everything, at any given time, can justifiably create such a situation. This is why the Council is invested with the power to determine it on a case-by-case basis. The only conceivable limit to its determination in this respect seems that which derives from the belief of the generality of States.[50]

The concept of a threat to international peace can thus be expanded to embrace a wide range of State conduct, as well as all situations internal to a State, that may be considered to have a significant impact in the surrounding region.[51] From the early years, the Council has taken advantage of this flexibility and applied Article 39 to a broad range of situations beyond inter- and intrastate armed confrontations. It has accommodated Article 39 to, *inter alia*, massive flows of refugees to other

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[48] Jean Combacau, *Le Chapitre VII de la Charte des Nations Unies: résurrection ou métamorphose?, in* LES NOUVEAUX ASPECTS DU DROIT INTERNATIONAL 139, 145 (Rafâa B. Archour and Slim Laghmani eds., 1994), describing 'threat to peace' as the real 'grey area' in the practice of the SC.

[49] Among the many authors who contend that the SC has no limit in the determination of a 'threat to peace', see Kelsen, *supra* note 18, 727: '[i]t is completely within the discretion of the Security Council to decide what constitutes a "threat to peace"'; Rosalyn Higgins, *International Law, Rhodesia and the UN,* 23 World Today 94 (1967), arguing that the power to determine a threat to peace belongs to the SC and the SC alone; JEAN COMBACAU, LE POUVOIR DE SANCTION DE L'ONU: ETUDE THÉORIQUE DE LA COERCITION NON MILITAIRE 100 (1974): 'une menace pour la paix au sens de l'art. 39 est une situation dont l'organe compétente pour déclencher une action de sanctions déclare qu'elle menace effectivement la paix'; W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AJIL 83, 93 (1993): 'Chapter VII is, to use Professor Hart's nice expression, "open-textured"; (...) a 'threat to peace' is, and was obviously designed to be, subjectively determined'. But see *contra* Prosecutor v Tadić, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 24 (Oct. 2, 199).

[50] See BENEDETTO CONFORTI ET AL., THE LAW AND PRACTICE OF THE UNITED NATIONS 233 (5th ed. rev., 2018).

[51] Thus, in 1991, the Council recognized that the fighting in Yugoslavia amounted to a 'threat to international peace and security' because of its 'consequences for countries in the region, in particular in the border areas of neighbouring countries. S.C.Res. 713, pmbl. ¶ 3–4, U.N.Doc.S/RES/713 (Sept. 25, 1991) . In 2004, to take just one more example (from among many), when seized of the situation in Côte d'Ivoire, the Council noted, simply, that the 'persistent challenges to the stability [of that country] . . . pose[d] a threat to international peace and security in the region'. S.C.Res. 1528, pmbl. ¶ 17, U.N.Doc.S/RES/1528 (Feb. 27, 2004).

States;[52] deliberate targeting of civilians and other protected persons;[53] serious violations of human rights and humanitarian law;[54] terrorism;[55] proliferation of weapons of mass destruction;[56] illicit trafficking in small arms and light weapons;[57] other threats to 'human' security such as Ebola;[58] and, recently, the challenges posed by foreign fighters both in conflict zones and in their countries upon return.[59] These are all situations where NSDAs take center stage. Hence, the SC has not confined its action to structured entities like armed groups and parties to internal conflicts, but has in various cases targeted individuals and their undertakings, too.[60] Theoretically, it is even possible to imagine situations where the conduct of associations and corporations established under private law can be of critical relevance for the preservation of international security.[61] This could be the case, for example, of the private sector's seemingly key role in extending the duration, and exacerbating the deadliness, of the contemporary 'resource wars'. Indeed, thanks to the Council's involvement, the UN has played an important part in uncovering the private sector's role in a number of resource-related armed conflicts.[62]

This development in the Council's practice, formalized in its general statement on the changing nature of threats to the peace in 1992,[63] has in turn contributed to the generation of a broader notion

[52] See S.C.Res. 688, pmbl. ¶ 3, U.N.Doc.S/RES/688 (April 5, 1991) (Iraq); S.C.Res. 1529, pmbl. ¶ 9, U.N.Doc.S/RES/1529 (Feb. 29, 2004).
[53] E.g., S.C.Res. 1894, ¶ 3, U.N.Doc.S/RES/1894 (Nov. 11, 2009).
[54] According to MICHAEL MATHESON, COUNCIL UNBOUND: THE GROWTH OF UN DECISION MAKING ON CONFLICT AND POST-CONFLICT ISSUES AFTER THE COLD WAR 46 (2006), the Council's actions on Rhodesia and South Africa in the 1960s and 1970s 'can be seen as the first steps toward the use of Chapter VII to achieve human rights objectives that became much more frequent after the end of the Cold War. See e.g., S.C.Res. 929, pmbl. ¶ 10, U.N.Doc.S/RES/929 (June 22, 1994) (Rwanda); S.C.Res. 1556, pmbl. ¶ 17, U.N.Doc.S/RES/1556 (July 30, 2004) (Darfur); S.C.Res. 1970, pmbl. ¶ 2, U.N.Doc.S/RES/1970 (Feb. 26, 2011) (Libya); S.C.Res. 2165 (July 14, 2014), pmbl. ¶ 18, U.N.Doc.S/RES/2165 (Syria).
[55] It bears notice that, under the SC resolutions, 'terrorism' in general – and not only 'international' terrorism – is regarded as a threat to international peace and security. See, eg, S.C.Res. 1368, pmbl. ¶ 1, U.N.Doc.S/RES/1368 (Sept. 12, 2001) ('any act of *international terrorism*, as a threat to international peace and security') (emphasis added).
[56] E.g. S.C.Res. 1540, pmbl. ¶ 1, U.N.Doc.S/RES/1540 (April 28, 2004).
[57] S.C.Res. 2117, pmbl. ¶ 4, U.N.Doc.S/RES/2117 (Sept. 26, 2013).
[58] S.C.Res. 2176, pmbl. ¶ 11, U.N.Doc.S/RES/2176 (Sept. 15, 2014).
[59] S.C.Res. 2178, pmbl. ¶1, 8-10, U.N.Doc.S/RES/2178 (Sept. 24, 2014); S.C.Res. 2396, ¶ 2-3, 10, 12-13, 15, U.N.Doc.S/RES/2396 (Dec. 21, 2017).
[60] Within the context of counter-terrorism resolution, the SC regarded not only terrorist organisations or other non-state armed groups but also single individuals as threats to international peace and security. For instance, S.C.Res 1735, pmbl. ¶ 14, U.N.Doc.S/RES/1735 (Dec. 22, 2006, one of the resolutions adopted for the 1267 sanctions regime, stressed the importance of meeting the threat that 'individuals, groups, undertakings and entities' associated with Al-Qaida, Usama bin Laden and the Taliban represent to 'international peace and security'.
[61] BARDO FASSBENDER, THE UNITED NATIONS CHARTER AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY 149 (2009).
[62] See eg S.C. Report of the Panel of Experts on Violations of Security Council Sanctions against UNITA, ¶ 78, 79, U.N.Doc. S/2000/203 (2000) (hereinafter 'Security Council Report on UNITA'); S.C. Report of the Panel of Experts Appointed Pursuant to S.C.Res. 1306 (2000), ¶ 19, U.N.Doc. S/2000/1195 (2000) in relation to Sierra Leone.
[63] S.C. Presidential Statement S/23500, 31 January 1992: '[T]he absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security'.

of peace,[64] easing the extension of the Council's purview – now increasingly 'envisioned, designed, and justified as a means of stabilizing, securing, and strengthening fragile states'[65]. The new approach has integrated 'structural' and 'security' aspects of peace, which, of course, has to be durable.[66] The underlying change in the Council's approach to 'threats to peace' is especially evident in the resolutions that it has adopted since 2013.[67] The relevant characterizations represent larger steps that build upon earlier incremental initiatives taken by the Council, with the same body often elevating to the level of threats to peace, or as contributing factors to such threats, situations and conduct of non-governmental entities in matters traditionally considered to be within the scope of state authorities, or the long-standing prerogatives of other UN bodies and international institutions. Thus, the activities of NSDAs, which were heretofore merely visible in the 'penumbra' of the notion of 'threat to peace', tend now to be viewed nearer its core. Among many others, an illustrative example is Resolution 2347 (2017), where the Council emphasized 'that the unlawful destruction of cultural heritage, and the looting and smuggling of cultural property in the event of armed conflicts, notably by terrorist groups, … can fuel and exacerbate conflict and hamper post-conflict national reconciliation, thereby undermining the security, stability, governance, social, economic and cultural development of affected States'.[68] The Resolution goes on to express its strong concern 'about the links between the activities of terrorists and organized criminal groups that, in some cases, facilitate criminal activities, including trafficking in cultural property, illegal revenues and financial flows as well as money-laundering, bribery and corruption'.[69]

C. Collective Security and NSDAs: Empirical Findings

It was with the Council's new activism, after the fall of the Berlin Wall, that the Chapter VII resolutions started to increasingly apply to and draw in individuals and other non-governmental

[64] ROBERT KOLB, INTERNATIONAL LAW ON THE MAINTENANCE OF PEACE. JUS CONTRA BELLUM 90-98 (2018).
[65] Jacob Katz Cogan, *Stabilization and the Expanding Scope of the Security Council's Work*, 109 AJIL 324, 326-9 (2015).
[66] Eg S.C.Res. 1261, pmbl. ¶ 2, U.N.Doc.S/RES/1261 (Aug. 30, 1999).
[67] For example, in S.C.Res. 2127, pmbl. ¶ 3, U.N.Doc.S/RES/2127 (Dec. 5, 2013), the Council, operating under Chapter VII, expressed its 'deep concern' about the 'continuing deterioration of the security situation in the [Central African Republic], characterized by a *total breakdown in law and order* [and] the *absence of the rule of law*" (emphases added). In S.C.Res. 2177, pmbl. ¶ 5, U.N.Doc.S/RES/2177 (Sept. 18, 2014), the Council '[d]etermin[ed] that the unprecedented extent of the Ebola outbreak in Africa constitute[d] a threat to international peace and security.' Lately, in S.C.Res. 2442, ¶ 2, U.N.Doc.S/RES/2442 (Nov. 6, 2018), acting under Chapter VII, the Council highlighted 'that piracy *exacerbates instability in Somalia* by introducing large amounts of illicit cash that fuels additional crime, corruption, and terrorism' (emphases added).
[68] S.C.Res. 2347, pmbl. ¶ 5, U.N.Doc.S/RES/2347 (March 24, 2017), 24 March 2017.
[69] Ibid., pmbl. ¶ 9.

actors. I am hardly the first to discuss the Council's exercise of authority over NSDAs. Single cases of such exercise of power have been widely debated in the literature. However, I am unaware of any prior study of aggregated Council practice carried out with the intention to analyze how the Council's actions based on Chapter VII of the UN Charter and, particularly, non-forcible measures, have changed as a consequence of the growth in importance of NSDAs for the SC's goal of ensuring international peace and security. In quantitative terms, the data I analyzed are illustrative of the preponderance of NSDA in the Council's actions based on Chapter VII. Out of the 758 resolutions expressly adopted under Chapter VII from 1990-2019, 408 resolutions (54%) dealt with NSDAs by explicitly making individuals subject to the Council's protection, addressing a threat to peace that individuals and other non-governmental entities created or contributed to generate, and resorting to private entities as means to carry out the Council's mandate.

The distribution over time of Chapter VII resolutions and, particularly, those addressing NSDAs, discloses more about how far the SC – and the UN – has progressively come from the original conception of the Charter imagined by its drafters. As Table A and Chart B vividly illustrate, not only did SC Chapter VII resolutions grow exponentially in the contemporary period – which is most apparent if one compares the SC's first 44 years (corresponding roughly to the Cold War era) to the 30 years since the end of 1989 – but, in particular, Chapter VII resolutions dealing with individuals and other non-governmental entities also grew dramatically. In 1990, the Council relied explicitly on Chapter VII in 27% of the total number of resolutions passed that year. 40% of those Chapter VII resolutions engaged with individuals and other non-state entities. Since then, the SC has gone below that annual percentage of Chapter VII 'non-state centric' resolutions only seven times, six of which before 2003. Indeed, the total number of these resolutions in 2017 alone equals the number of all Chapter VII resolutions adopted in 1946-1989 (i.e. 22). And in 2005 and between 2014 and 2016 the numbers of these resolution were even higher than 22. If one compares the total number of Chapter VII resolutions about NSDAs before and after the end of the Cold War, the difference is striking. Only 4 out of 22 Chapter VII resolutions adopted in the entire 1944-1989 period dealt with the activities of NSDAs.[70] The total number of Chapter VII non-state centric resolutions each year since 1997 is consistently higher than this figure. Further, in 2007, over 53% of the Council resolutions invoking Chapter VII addressed situations concerning individuals and other non-governmental

[70] The exclusion of the case of Rhodesia should be noted. It was the first time that the Council made use of its competence under Article 41 of the Charter. However, as Mybes S. McDougal and W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AJIL 1 (1968), point out, the Rhodesia case is unique in all its ramifications. In particular, although in the course of time a bloody internal armed conflict broke out, the SC never dealt with it. It was the government of what – short of recognition by other states – in all other respects was a state in the sense of public international law and in any case purported to be a state that was the target of its action.

entities. The total percentage of the same acts relative to the annual number of Chapter VII resolutions adopted have since then stayed well above 50% except for only 2010, when this percentage was 47%.

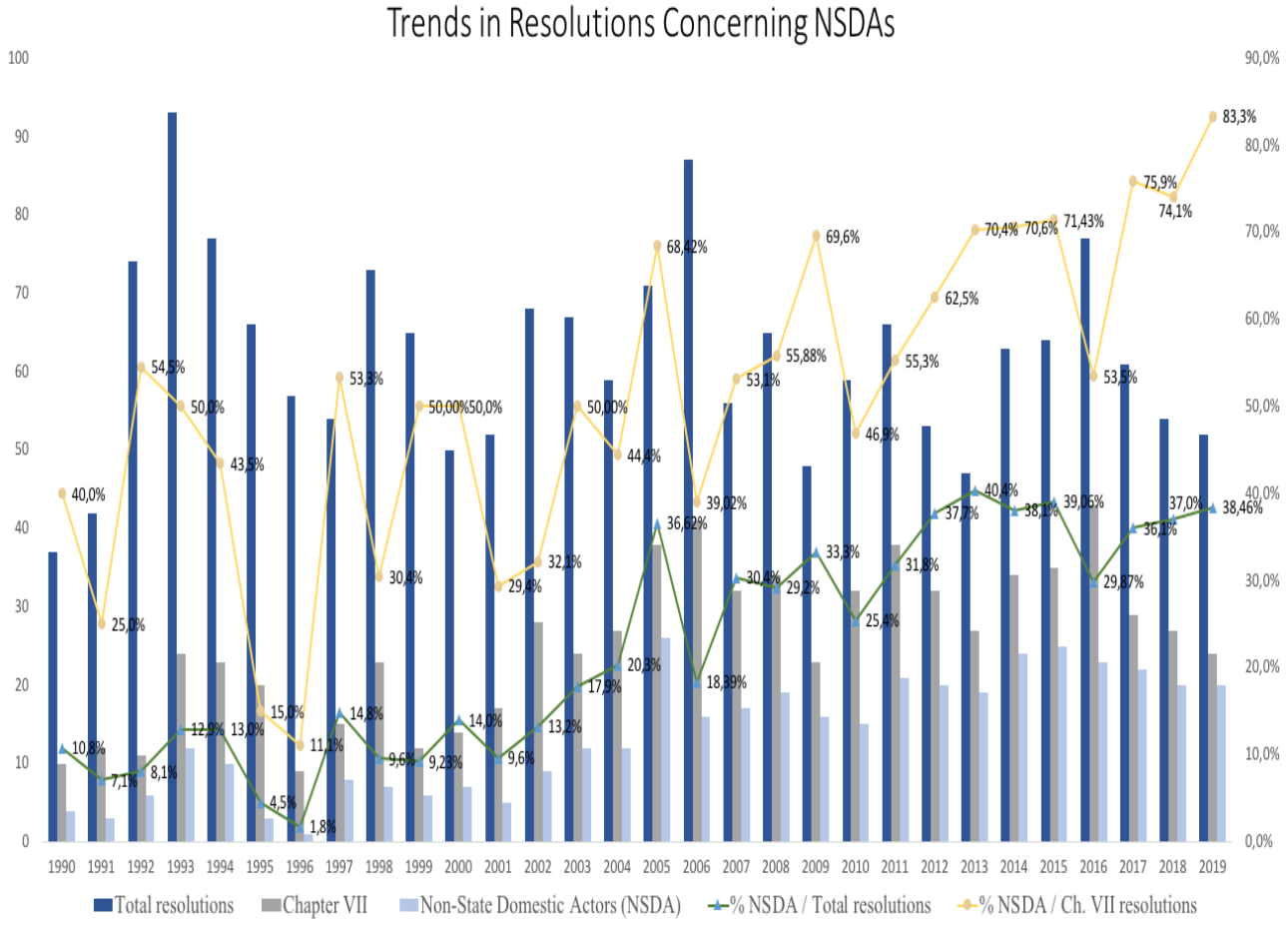
As Table A indicates, this trend continued on track through 2019, when the Council adopted 20 Chapter VII resolutions dealing with NSDAs out of 24 total resolutions based on Chapter VII, yielding a percentage of 83%. These numbers clearly suggest that, especially over the last fifteen years, the SC has made vastly increased use of its Chapter VII powers to engage with NSDAs as a means for advancing the UN mandate to preserve peace and security. Looking specifically at the very high percentage of resolutions dealing with NSDAs of the last eight years (70% on average), the clear impression is that the Council has engaged with NSDAs more intensely than what conventional wisdom seems to suggest. So far as I am aware, indeed, very little quantitative work has been done on this subject, and, even in important studies, scholars tend to merely note the growing relevance of non-state entities in SC resolutions.[71] Assuming for a moment that the normative relevance of the different resolutions is the same, the following elaborations are interesting.

[71] Eg, Nico Krisch, *Introduction to Chapter VII: The General Framework, in* THE CHARTER OF THE UNITED NATIONS. A COMMENTARY: VOLUME II 1237, 1271 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus eds., 3rd ed. 2012) just observes that 'the Security Council has on several occasions taken enforcement action against non-State entities, especially armed groups and parties to internal conflicts' and 'in various case targeted individuals as well'. MACHIKO KANETAKE, THE UN SECURITY COUNCIL AND DOMESTIC ACTORS. DISTANCE IN INTERNATIONAL LAW 3 (2017) notes that '[e]specially, since the 1990s, the UN Security Council's exercise of authority has had significant impact on the rights of individuals', only indicating as 'illustrative' the practices of targeted sanctions, territorial administrations, and ad hoc international criminal tribunals

Table A

Year	Total Resolutions	Chapter VII	Non-State Domestic Actors (NSDA)	% Ch VII res./total	% NSDA res. / Total	% NSDA res. / Ch. VII
1990	37	10	4	27,03%	10,81%	40,00%
1991	42	12	3	28,57%	7,14%	25,00%
1992	74	11	6	14,86%	8,11%	54,55%
1993	93	24	12	25,81%	12,90%	50,00%
1994	77	23	10	29,87%	12,99%	43,48%
1995	66	20	3	30,30%	4,55%	15,00%
1996	57	9	1	15,79%	1,75%	11,11%
1997	54	15	8	27,78%	14,81%	53,33%
1998	73	23	7	31,51%	9,59%	30,43%
1999	65	12	6	18,46%	9,23%	50,00%
2000	50	14	7	28,00%	14,00%	50,00%
2001	52	17	5	32,69%	9,62%	29,41%
2002	68	28	9	41,18%	13,24%	32,14%
2003	67	24	12	35,82%	17,90%	50,00%
2004	59	27	12	45,76%	20,34%	44,44%
2005	71	38	26	53,52%	36,62%	68,42%
2006	87	41	16	47,13%	18,39%	39,02%
2007	56	32	17	57,14%	30,36%	53,13%
2008	65	34	19	52,31%	29,23%	55,88%
2009	48	23	16	47,92%	33,33%	69,57%
2010	59	32	15	54,24%	25,42%	46,88%
2011	66	38	21	57,58%	31,82%	55,26%
2012	53	32	20	60,38%	37,74%	62,50%
2013	47	27	19	57,45%	40,43%	70,37%
2014	63	34	24	53,97%	38,10%	70,59%
2015	64	35	26	54,69%	39,06%	71,43%
2016	77	43	23	55,84%	29,87%	53,49%
2017	61	29	22	47,54%	36,07%	75,86%
2018	54	27	20	50,00%	37,04%	74,07%
2019	52	24	20	46,15%	38,46%	83,33%

Chart B



Our data, however, also hint at something else. The SC is deploying Chapter VII in ways that would have astounded the Charter's drafters *particularly* when it addresses the situation surrounding individuals and other non-state entities. The assortment of the Council's measures based on Chapter VII resolutions sheds light on these profound changes. Except for the provisional measures requested to the parties to the Palestinian conflict under Article 40 of the Charter[72] and the measures prescribed in the early 1960s to member States and the UN General Secretary to address the military and paramilitary actions during the crisis in Congo,[73] during the Cold War years, individuals and private entities were essentially remote *de facto* beneficiaries of the Council's actions under Chapter VII. By contrast, within only a few years after the fall of the Berlin Wall, the SC had *inter alia* set up *ad hoc*

[72] E.g. S.C.Res. 54, ¶ 2, 4-5, U.N.Doc.S/RES/54 (July 15, 1948). Interestingly, the Palestinian war of 1948 meant that the SC was, for the first time, confronted with a non-state entity. Although a number of Arab States were involved, at that stage the conflict was not yet an inter-state war, but it was abundantly clear that international peace and security were at stake.

[73] E.g. S.C.Res. 169, ¶ 4-7, U.N.Doc.S/RES/169 (Nov. 24, 1961).

criminal tribunals and specified the crimes within their jurisdictions (International Criminal Tribunals of Rwanda and Former Yugoslavia);[74] ordered a State to extradite its nationals for trials elsewhere, despite the contrary provisions of a multilateral treaty (Libya);[75] purported to regulate the behavior of non-state entities (the Bosnian Serb Party; the Taliban);[76] frozen the assets of alleged malefactors without notice or process (Kadi);[77] and enacted new rules of law on particular matters (terrorism; proliferation of weapons of mass destruction).[78] More recently, the SC practice has shown a further increase in the variety of the tools of action, ranging from robust peacekeeping authorized to use force against armed groups and criminal gangs (DRC, Mali, CAR, South Sudan),[79] referral of cases to the ICC (Darfur and Libya);[80] sanctions for violations of human rights and humanitarian law (e.g., DRC; CAR; Mali);[81] authorizations to use of forcible measures against pirates (Somalia),[82] migrant smugglers and human traffickers (Libya);[83] and attempts to regulate the conduct of individuals without leveraging on a pre-existent multilateral discipline (foreign terrorist fighters).[84]

A closer look at the responses of the Council once it determines the existence of a threat to peace reveals that significant transformations to both forcible and non-forcible measures used by the Council under Chapter VII in the post-Cold War era have occurred. They embrace changes in the use of the measures adopted under Articles 40, 41 and 42 of the Charter, their objectives, contents, targets and the involved actors, as well as the role of subsidiary organs created by the UN executive body. Let us briefly look at the most evident developments. In the context of the recommendatory function under Chapter VII of the UN Charter, for example, our dataset shows that the SC addresses itself directly to various different non-state entities and the measures prescribed are also significantly diverse. A particularly marked development is the number of resolutions directly addressed to armed

[74] S.C.Res. 827, ¶ 2, U.N.Doc.S/RES/827 (May 25, 1993); S.C.Res. 955, ¶ 1, U.N.Doc.S/RES/955 (Nov. 8, 1994).
[75] S.C.Res. 748, ¶ 1, U.N.Doc.S/RES/748 (March 31, 1992). The SC explicitly demanded to surrender named persons also through S.C.Res. 1054, ¶ 1, U.N.Doc.S/RES/1054 (April 26, 1996) (Sudan); and S.C.Res.1267, ¶ 2, U.N.Doc.S/RES/1267 (Oct. 15, 1999) (Afghanistan).
[76] S.C.Res. 942, ¶ 3, U.N.Doc.S/RES/942 (Sept. 23, 1994); S.C.Res. 1267, ¶ 1, U.N.Doc.S/RES/1267 (Oct. 15, 1999).
[77] S.C.Res. 1390, ¶ 2, U.N.Doc.S/RES/1390 (Jan. 28, 2002).
[78] S.C.Res. 1373, ¶ 1-2, U.N.Doc.S/RES/1373 (Sept. 28, 2001); S.C.Res. 1540, ¶ 1-3, supra note 56.
[79] S.C.Res. 2098, ¶ 9, 10, 12, U.N.Doc.S/RES/2098 (March 28, 2013) (DRC); S.C.Res. 2164, ¶ 13(a)(i), U.N.Doc.S/RES/2164 (June 25, 2014) and S.C.Res. 2295, ¶ 9, U.N.Doc.S/RES/2295 (June 29, 2016) (Mali); S.C.Res. 2149, ¶ 30(a)(i), U.N.Doc.S/RES/2149 (April 10, 2014) (CAR); S.C.Res. 2304, ¶ 8-10, U.N.Doc.S/RES/2304 (Aug. 12, 2016) (South Sudan).
[80] S.C.Res. 1593, ¶ 1-2, U.N.Doc.S/RES/1593 (March 31, 2005); S.C.Res. 1970, ¶ 4-6, *supra* note 54.
[81] S.C.Res. 1804, ¶ 5, U.N.Doc.S/RES/1804 (March 13, 2008) (DRC); S.C.Res. 2127, ¶ 54, 57, *supra* note 67 (CAR); S.C.Res. 2374, ¶ 1-8, U.N.Doc.S/RES/2374 (Sept. 5, 2017) (Mali).
[82] S.C.Res. 1816, ¶ 7(b), U.N.Doc.S/RES/1816 (June 2, 2008); S.C.Res 1851, ¶ 4, U.N.Doc.S/RES/1851 (Dec. 6, 2008) later extended the authorization to Somalia's land territory.
[83] Compare eg. S.C.Res. 2240, U.N.Doc.S/RES/2240 (Oct. 9, 2015); S.C.Res. 2312, U.N.Doc.S/RES/2312 (Oct. 6, 2016); S.C.Res.2380, U.N.Doc.S/RES/2380 (Oct. 5, 2017) and S.C.Res.2437, U.N.Doc.S/RES/2437 (Oct. 3, 2018) with authorizations to inspect and seize ships in certain cases also without the consent of the flag State.
[84] S.C.Res. 2178, *supra* note 59, ¶ 5-6.

groups.[85] Research conducted by the Harvard Law School Program on International Law and Armed Conflict finds that, out of the resolutions issued by SC from 1946 to 2016, 127 address the activities of armed groups, 90 of which – or approximately 71% – are armed groups in African States, particularly CAR, DRC, Mali, Somalia, Sudan and South Sudan.[86] As to the temporal scope of relevant resolutions identified in that research, 119 out of 127 – or 94% – date from 2000 to 2016, whereas the remaining 8 resolutions date from 1995-1999 and address armed groups operating in Afghanistan, Angola, East Timor, Guinea-Bissau, Liberia or Sierra Leone.[87] Of the SC resolutions adopted in 2017-2019, 56 address armed groups and their responsibility in human rights abuses and violations, 33 of which (59%) concerning African countries. By including also these in the analysis, the trends evidenced by that research are fully confirmed as 95% of the relevant resolutions date from the period 2000 to 2019. Virtually all these resolutions incorporate recommendations, requests and demands to armed collective actors, ranging from, 'parties to the conflict', 'militias', 'rebels', 'terrorist groups', 'guerrillas', 'illegal armed groups', 'violent and extremist groups' etc., which mostly remained undefined. Substantively, the measures prescribed in this area have mixed features, ranging from *e.g.* requesting ceasefire or respecting existing ceasefire,[88] to freeing prisons or hostages,[89] creating demilitarized zones and humanitarian corridors to ensure humanitarian assistance and the protection of civilians,[90] respecting human rights, etc.[91] In most cases, they are provisional measures under Article 40 of the Charter aimed at preventing an aggravation of the relevant situations.[92]

Until the fall of the Berlin wall, recourse to the mandatory measures under Article 41 of the Charter was scarce and unorthodox. After years of Cold War paralysis, the Council has resorted to these tools vastly more often, especially in relation to challenges to international security caused by NSDAs.[93] The evolution of Article 41 mandatory measures was indeed the logical outcome given

[85] See also the data for the 1990-2013 period analysed by Gregory H. Fox, Kristen E. Boon and Isaac Jenkins, *The Contributions of the United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law* 67(3) Am. U. L. Rev. 649, 663-7 (2008).
[86] Jessica S. Burniske, Naz K. Modirzadeh, and Dustin A. Lewis, *Armed Non-State Actors and International Humanitarian Law: An Analysis of the Practice of the U.N. Security Council and U.N. General Assembly* (Harvard Law Sch. Program on Int'l Law & Armed Conflict, 5 June 2017) 5, available at: http://nrs.harvard.edu/urn-3:HUL.InstRepos:33117816, (last accessed 22 February 2020).
[87] *Ib*., 6-7.
[88] E.g. S.C.Res. 1865, ¶ 14, U.N.Doc.S/RES/1865 (Jan. 27, 2009) (Côte d'Ivoire).
[89] E.g. S.C.Res. 1010, ¶ 2, U.N.Doc.S/RES/1010 (Aug. 10, 1995) (Bosnia-Erzegovina)
[90] E.g. S.C.Res. 2164, ¶ 4-5, U.N.Doc.S/RES/2164 (June 25, 2014) (Mali); S.C.Res. 2277, ¶ 13, U.N.Doc.S/RES/2277 (March 30, 2016) (DRC).
[91] E.g. S.C.Res. 1464, ¶ 7, U.N.Doc.S/RES/1464 (Feb. 4, 2003) (Côte d'Ivoire).
[92] U.N. Charter, *supra* note 20, Article 40.
[93] U.N. Charter, Article 41 mentions examples of economic and diplomatic measures; building upon the list, the Council has developed a wide range of specific instruments, in particular in the economic sphere.

threats to peace not only in territorial crises, but also by transnational phenomena (terrorism, proliferation of weapons of mass destruction and organized crime), as well as the inclusion of grave violations of humanitarian law and human rights in the fabric of collective security. Since the early 1990s, the SC has thus ventured into a number of areas not typically associated to Article 41. A prominent one has been criminal justice, with measures targeted not at political leadership per se, but at individual violators of international criminal law. Article 41 also provides the basis for 'quasi-legislation', which arose in the 2000s with sweeping resolutions on terrorist financing and proliferation of weapons of mass destruction. As to the practice of sanctions, key changes have been widely explored. It suffices to recall their essential features here.

The reluctance of many countries to support the use of military force has accentuated the essential space sanctions 'occupy'. Therefore, sanctions have become *the* instrument of choice in addressing contemporary international security challenges.[94] Since 1966, the UN executive body has established 30 sanctions regimes, in Southern Rhodesia and South Africa (the only two mandatory sanctions regimes imposed during the first four-and-half decades of its existence), the former Yugoslavia (2), Haiti, Iraq (2), Angola, Rwanda, Sierra Leone, Somalia and Eritrea, Eritrea and Ethiopia, Liberia (3), DRC, Côte d'Ivoire, Sudan, Lebanon, DPRK, Iran, Libya (2), Guinea-Bissau, CAR, Yemen, South Sudan and Mali, as well as against ISIL (Da'esh) and Al-Qaida and the Taliban. As of 31 December 2019, the Council had 14 such sanctions regime in place. Also, the past quarter century has witnessed a significant transformation in the use of UN sanctions. Following considerable human rights criticism over Council-authorized comprehensive economics sanctions on Iraq under Resolution 687, the Council turned to more targeted sanctions.[95] Thus, as early as 1994, the UN executive body experienced a model of sanctions based on listing nominally designating individuals and entities. A clear departure from measures analogous to sanctions against States, however, was only taken with the extension of the sanctions regime imposed on the Taliban in 1999[96] to Al-Qaida in 2000 and, in so doing, removing the link between Al-Qaida and the territory of Afghanistan,[97] which was then followed in 2011 by the complete separation of the two regimes.[98] Since then, the practice of sanctions changed from State-oriented to individual-oriented sanctions because 'these specific measures, by

[94] Sue Eckert, *The Role of Sanctions,* in von Einsiedel, Malone and Stagno Ugarte, *supra* note 5, 413.
[95] W. Michael Reisman and Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programs* 9 EJIL 86, 101-124 (1998).
[96] The first "generation" of smart sanctions against non-state actors in the 1990s were pragmatically driven measures against those in control of territories even though they had not achieved recognition as legitimate leaders of states. Specifically, in the cases of sanctions against the military officers involved in the coup d'état in Haiti (1994), the UNITA's leaders and their families (1997), and the military junta in Sierra Leone (1998), the designated individuals were apprehended functionally, as members of government or of a political faction based in a particular state.
[97] S.C.Res. 1267, U.N.Doc.S/RES/1267 (Oct. 15, 1999); S.C.Res. 1333, U.N.Doc.S/RES/1333 (Dec. 19, 2000).
[98] S.C.Res. 1988, U.N.Doc.S/RES/1988 (June 17, 2011); S.C.Res. 1989, U.N.Doc.S/RES/1989 (June 17, 2011).

their nature, could only be applied to specific targets'.[99] Conceived in such a way as to avoid adverse consequences for the population, targeted (or 'smart') sanctions, which are normally complemented by embargos on specific commodities as a way to apply pressure on conflict groups by cutting off their source of financing and weapons, include individual financial sanctions and travel bans as a means of focusing measures on the decision-makers and their principal supporters responsible for threats to peace.[100]

Regarding the use of force, certain sanctions regimes have been accompanied by the resorting to authorized use of force.[101] Examples include the Council calling on states acting individually, collectively, or through regional arrangements to use 'all necessary means' against individuals and structured groups for such objectives as the protection of civilians under the threats of physical violence in Côte d'Ivoire;[102] the suppression of piracy off the costs of Somalia; the protection of civilians and civilian populated areas under the threat of attack in Libya; or the suppression of the trafficking of migrants in the Mediterranean Sea. Interestingly, the SC has never formally invoked Article 42, and the relevant decisions simply make a general reference to Chapter VII. Doctrinal positions about the use of Article 42 are indeed diverse.[103] However, it is commonly accepted that authorizations to the use of force fall within the ambit of this article.[104] Such authorizations against NSDAs have been unquestionably prevalent. In the period between 1990 and 2019 there have been 29 non-UN-Peace or enforcement operations mandated by the SC 'with all necessary means to fulfil its responsibilities': 24 concern non-state actors directly (see, e.g, Resolution 1125 (1997), or Resolution 2085 (2012)) or indirectly (because they mandate to restore peace or security or stabilize the situation).

The peacekeeping practice too, although not absent in the Cold War period, has enormously expanded thereafter. The Council, acting under Chapter VII, has mandated peacekeeping forces to

[99] Alain Pellet and Alina Miron, *Sanctions*, ¶ 35 MPEPIL (August 2013).
[100] Alvarez, *supra* note 43, at 108, arguing that 'the Council's smart sanctions are also an example of how the "administrative" turn in how IOs govern them and others', involving 'the ongoing staffing, supervising, and coordinating of an extensive bureaucracy of UN-based counter-terrorism monitoring bodies.'
[101] 'Use of force' in this context should be interpreted widely to include, for instance, naval demonstration and blockades. See also the explicit mention of such measures in Article 42 of the UN Charter. The Article does not undertake any detailed analysis of forcible measures. Although there are shared insights and commonalities between Article 41 and Article 42 measures, a copious literature already investigates the practice of the authorizations to the use of force against NDSAs as well as the implications of peacekeeping missions increasingly focused on stabilization and extended to the so-called 'peace-enforcement'.
[102] S.C.Res. 1609, U.N.Doc.S/RES/1609 (June 24, 2005).
[103] See ALEXANDER ORAKHELASHVILI, COLLECTIVE SECURITY 223-6 (2011).
[104] Giorgio Gaja, *Use of Force Made or Authorized by the United Nations, in* THE UNITED NATIONS AT THE AGE OF FIFTY 38, 51 (Christian Tomuschat ed., 1995), for example, argues in broader terms that Article 42 has to be seen as the basis of all types of military intervention, including peacekeeping.

use force beyond self-defense for limited objectives. In some cases, these authorizations of use of force have had humanitarian related objectives, for example to protect safe havens or 'safe areas', or convoys for the purposes of humanitarian assistance, or to restore democracy. In other cases, the use of force has been authorized for police purposes.[105] These types of actions, a concrete operation on the ground, are often directed against NSDAs, especially armed groups and insurgents. The line of evolution goes from the DRC in the 1960s, where the use of force was conceded beyond self-defense in order, among others, to 'prevent the occurrence of civil war'; to Yugoslavia in the 1990s, where the United Nations Protection Force (UNPROFOR) could use force to deter attacks against safe havens, ensure its freedom of movement and protect humanitarian convoys; and, finally, the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), in 2013, where a whole brigade was created in the DRC with offensive military tasks against armed groups.[106]

III. THE TRANSFORMATION OF THE SC NON-FORCIBLE MEASURES

A. The Preventative Use of Non-Forcible Measures between International Rulemaking and Peacebuilding

While changes in size or in the direction (say, from stability to increase), in and of themselves, can certainly be informative, they do not fully explain what is new about a phenomenon. Accordingly, we now turn to assessing the substance of the Council's use of non-forcible measures to engage with NSDAs with a view to analyzing a significant and unexplored transformation in its practice. Understandably, the changes in the SC's measures reflect the very nature of contemporary international security challenges. As threats to international peace and security have evolved, innovation in the design and application in the measures prescribed or imposed by the Council has ensued. As documented *supra* §II.C, the UN executive body has vastly made use of its powers under Chapter VII of the UN Charter in the post-Cold War period to engage with individuals and other non-governmental actors. And this change in focus has been accompanied by significant changes in the

[105] The SC has also established complex peacebuilding operations endowed with sweeping powers of governance, including legislative and executive, to ensure the rule of law, including human rights, in post-conflict countries. On the main lines of development of UN peace-keeping see, *ex multis*, Gregory L. Naarden and Jeffrey B. Locke, *Peacekeeping and Prosecutorial Policy: Lessons from Kosovo*, 98 AJIL 727 (2004); RAMESH THAKUR, UNITED NATIONS, PEACE AND SECURITY. FROM COLLECTIVE SECURITY TO THE RESPONSIBILITY TO PROTECT 29-55 (2nd ed. 2017); CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 280-31 (4th ed. 2018).

[106] I have analyzed these developments elsewhere. Borlini, *supra* note 23, 348–372.

measures prescribed by the UN executive body. However, the systematic study of its post-Cold War resolutions reveals a further important development: especially starting from the mid-2000s, the SC has adapted non-forcible measures under Articles 39, 40 and 41 of the Charter to regulate the conduct of NSDAs, as well as to address the shift of its concern from states to the protection of populations from human rights and humanitarian law violations, by expanding the *preventative* use of its powers under Chapter VII. The point requires further explanation.

Whilst it is undisputed that the concept of a 'threat' to the peace in Articles 39 of the UN Charter involves preventative actions well beyond situations of 'imminent attacks', to what extent this notion embraces measures of conflict prevention and action on generalized threats rather than ongoing specific conflicts is still 'a matter of dispute.'[107] But surveying the Council's post-Cold War practice unquestionably shows that, in addressing the growing gravity of the threats rooted in non-state actors and attempting to secure civilians and human rights, the same body has progressively expanded the temporal scope of its action and used its powers under Chapter VII preventatively, with a view to creating lasting conditions of peace and security. In other words, rather than being only concerned with the short-term closing of existing portals of violence and insecurity, the SC has become increasingly involved in 'building' peace and security in the long term; hence, preventing new conflicts, the losses and violence resulting from uncontrolled generalized threats, and relapses into conflict where this was quelled (so-called 'post-conflict reconstruction'), at least as long as the renewed eruption of violence remains a real risk. What is important to underscore here is that in the longer run, to be effective, the Council's measures meant to address the immediate causes of insecurity are accompanied by norms and other measures aimed at creating the positive conditions for preventing the eruption of new crises and controlling the sources of potential violence.[108]

This signifies that the SC has inserted itself into a new interface between international peacebuilding and lawmaking.[109] Specifically when engaging with NSDAs, it has operated in the context of both conflict prevention and actions on generalized threats, adopting Chapter VII measures that not only address the immediate objective of crisis management, but also increasingly engage in mapping out future regulation and structure of governance.[110] This temporal shift towards *future-*

[107] Nico Krisch, *Article 39, in* Simma, Khan, Nolte and Paulus, *supra* note 71, 1272, at 1279. See also the literature referred to therein.
[108] Kolb, *supra* note 64, at 25.
[109] Steven R. Ratner, *The Security Council and International Law, in* THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY 591-605 (David M. Malone ed., 2004).
[110] See Katz Cogan, *supra* note 7, at 324, describing regulation as the 'creation of public authoritative obligations on private parties to act or to refrain from acting in certain ways or the establishment of authoritative duties'. The general idea of regulation used here may be quite similar to the one applied in the domestic context (if we think of that term, broadly speaking, as governmental control of or influence on individual behavior). However, because of the particular

oriented measures is typically necessitated by the deep rooting in domestic communities of NSDAs' relevant activities.[111]

The course under discussion is particularly discernible when observing the evolution of non-forcible measures under Chapter VII of the Charter. The preventative use and the regulatory nature of such measures are clear in the increased use of sanctions 'as regulation', that is a shift away from sanctions as merely punitive measures towards tools the Council uses to prospectively manage risks to peace and security;[112] the wide array of direct injunctions demanding individuals and non-governmental entities changes in their course of behavior in both situational crises and generalized threats; the progressive outsource by the Council of its regulatory and enforcement action against non-state criminal activities to informal law-making initiatives; the recently renovated adoption of openly 'legislative' resolutions to impose measures in the context of administrative and criminal law against terrorists. In large part, these measures can (and are clearly intended to) lead to changes in States' and non-governmental entities' behavior that endure after a specific crisis is over. In these respects, our data reveal that the SC has engaged with the private sector through the endorsement of informal law-making and related enforcement initiatives in the context of nearly one-third of the situational crises it has addressed under Chapter VII since 2000.[113] It has imposed sanctions in a forward-looking manner in at least 9 out of 14 (64%) of the sanction regimes currently in place. Where it has acted under Chapter VII to face generalized threats caused by terrorism, the Council has recently enacted quasi-legislative resolutions with increased frequency. Finally, as §III.B *infra* discusses extensively, in the 1990s, the SC began adopting decisions setting out provisions directly addressed to non-State entities, a practice featured by a dramatic increase from 2009 to 2019. The trajectory of such practices is also significant: they progressively grow after 2003 and consolidate in the five-year period between 2015 and 2019.

Acting under Chapter VII, the SC has, therefore, turned more vigorously to a range of non-forcible measures for preventative attempts at broader forms of regulation and systems of governance. As a 'regulator' – a public order body that operates within a public law framework – it has been

structure in which international law operates, many of the institutional imports, manifestations, and dynamics of regulation in the national setting are not perfectly transferable into the international sphere. That is not to say that the lessons of domestic experience or the methodologies and approaches of domestic law scholars are not helpful. In fact, they are. Rather, it is that the distinctive architecture of international law must always be considered when doing so. For one helpful attempt, among many, on analyzing the distinctive nature of such architecture, see Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law* 115 Yale L.J. 1490 (2006).

[111] Katz Cogan, *supra* note 65, at 324-6.

[112] Kristen Boon, *U.N. Sanctions as Regulation*, 15 CH. J. I. L. 543 (2016).

[113] More precisely, the SC has resorted to such instruments in 8 out of 26 situational crises (31%) of the situational crises addressed under Chapter VII since 2000. See further *infra* III.C.

promoting reforms in member States and creating – both directly and indirectly – obligations for States and non-State entities alike to control their future behavior. Part of this engagement has marked a move by the Council towards a much deeper involvement in the internal governance structures of States, also experimentally in areas traditionally considered to be outside the scope of its action (*e.g.* organized crime). At the same time, in its attempts to regulate prospectively situational crises and generalized threats, the SC has asserted its authority with regularity on individuals and non-governmental entities, also when they were not linked to State action, through the articulation of rules, norms and procedures.[114] In the relevant resolutions it often eschews state discretion and, instead, dictates with growing specificity the provisions to be adopted at the domestic level. The idea is to control or influence private actors' future behavior through the creation of duties and norms, the Council's endorsements of existing international binding and not-binding rules, and the application of the same norms.[115] Importantly, the regulatory use of non-forcible measures to address the situations surrounding NSDAs has both public and private dimensions. The former is evident when the SC acts under Chapter VII of the UN Charter to adopt decisions that are applicable to all member States or request assistance to other UN agencies, such as UNODC, UNHCR UNICEF, and ICAO, as well as other international bodies like INTERPOL.[116] In parallel, however, the Council contributes to regulate the private sector, engaging banks and other financial intermediaries, the diamond industry, media, airlines, shipping companies, and freight-forwarders.[117]

Because of the political process by which SC resolutions are drafted and negotiated, the hallmarks of effective rules (precision, transparency, accessibility, congruence, and the imposition of sanctions for non-compliance) obviously vary with the single acts.[118] Besides, as is known far and wide, only SC decisions are binding.[119] However, as I shall illustrate in the following sections, the combined use of the specific measures under investigation, their integration and sequencing, and the

[114] There are a variety of ways in which duties for individuals might be constructed and numerous options for structuring enforcement. On the latter aspect see, e.g., Steven Shavell, *The Optimal Structure of Law Enforcement* 36 J.L. & Econ. 255, 270-75 (1993).

[115] See also Katz Cogan, *supra* note 7, at 324-5, recalls: '[b]ecause international law is a multilevel system, with decisions taken at the international, national, and sub-national levels, the imposition of duties upon private actors and the provision for the public enforcement of such duties can be effectuated directly (without requiring state assistance for their imposition) and indirectly (depending on state and possibly sub-state action for their activation)'.

[116] E.g. S.C.Res. 2309, ¶ 4, U.N.Doc.S/RES/2309 (Sept. 22, 2016). See also S.C.Res. 2365, U.N.Doc.S/RES/2365 (June 30, 2017) on mine action.

[117] E.g. S.C.Res. 2331, ¶ 3(a), 6, 13, U.N.Doc.S/RES/2331 (Dec. 20, 2016); S.C.Res. 2309, ¶ 4-5, U.N.Doc.S/RES/2309 (Sept. 22, 2016); S.C.Res. 2354, ¶ 4(e), U.N.Doc.S/RES/2354 (May 24, 2017).

[118] On effective rulemaking see JULIA BLACK, RULES AND REGULATORS, Chapter VI (1997); Colin S. Diver, *The Optimal Precision of Administrative Rules* 93 Yale L.J. 65, 67 (1983).

[119] The term 'resolution' as used in the UN practice has a generic sense, including recommendations and decisions, both of which have a vague and variable meaning in the Charter. The ICJ, on the other hand, reserves the expression 'decision' for binding resolution and 'recommendation' for non-binding ones. See Certain Expenses of the United Nations (Article 17 Paragraph 2 of the Charter), I.C.J., ¶ 163.

association of the informal law promoted by the Council with external formalized procedures are all elements that should be considered when examining the conditions under which the rules created or promoted by the Council are put into action. For each of these relevant practices, I now turn to examine the legal basis, where such basis is controversial, the conformity with the UN Charter and, eventually, the legal consequences and broader implications.

B. The Use of Recommendations Under Chapter VII and NSDAs: 'Outsourcing' Regulation and Enforcement to Intergovernmental Networks and Hybrid Institutionalized Processes

Once the SC determines the existence of threats to the peace under Article 39 of the Charter it: 'shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.' While the identification of the precise legal basis for the recommendations issued under Chapter VII still raises some marginal doctrinal discussion,[120] the use of the *droit recommandatoire* by the SC to preserve international peace and security could not be more extensive. Virtually every Council resolution adopted under Chapter VII incorporates one or more recommendations. On the basis of the maxim *in maiore minus est*, indeed, where the SC can *decide*, it can also *recommend*. Moreover, although it is under no procedural obligation to do so, the SC often resolves to approach a given situation by first 'inviting', 'requesting', 'encouraging', 'calling upon' or 'urging' the addressees – be they States and/or non-state entities – to engage in and/or desist from certain conduct. Among the different tools the Council has at its disposal to respond to threats to international peace, recommendations – which merely express a *voluntas agendi* or *operandi* – are the least intrusive on the addressee's autonomy: they do not modify rights and obligations under international law and, thus, do not permit otherwise unlawful actions against the target. Our dataset indicates that, when operating under Chapter VII, the SC addresses recommendations directly to many different NSDAs, ranging from militias and armed groups,[121] to NGOs and members of the civil society,[122] commercial enterprises,[123] entire industries,[124] mass media

[120] According to Krisch, *supra* note 107, 1271, at 1296: 'While enforcement measures are provided for in Arts 40 to 42, Art. 39 allows the SC to make recommendations for the maintenance or restoration of international peace and security'. But see *contra* Conforti and Focarelli, *supra* 50, at 239-40, 277-8.
[121] Eg, S.C.Res. 2448, ¶ 7, U.N.Doc.S/RES/2448 (Dec. 13, 2018) (CAR).
[122] Eg, S.C.Res. 1408, pmbl. ¶ 8, U.N.Doc.S/RES/1408 (May 6, 2002).
[123] Eg, S.C.Res. 2000, ¶ 16, U.N.Doc.S/RES/2000 (July 27, 2011).
[124] Eg, S.C.Res 1306, ¶ 10, U.N.Doc.S/RES/1306 (July 5, 2000).

actors,[125] political parties,[126] mercenaries,[127] donors for technical assistance programs involved in post-conflict situations,[128] and so on. Given the non-binding nature of recommendations, this extensive practice has not raised any objection by the UN members. The wide scope *ratione personae* of recommendations corresponds to an equally extensive scope *ratione materia*. From the point of view of substance, the measures recommended are most diverse and the areas in which the SC intervenes reflect the considerable expansion of the concept of 'threat to peace' enshrined in Article 39 of the Charter.[129] They include, to name a few: the respect of humanitarian and human rights norms;[130] reforms for transparency in the administration of the *res publica*, including those directed to tackle corruption and corruption-related crimes;[131] and even economic development[132] and the management of natural resources.[133]

Although the NSDAs' omnipresence in SC recommendations is now almost unremarkable, the different implications of these acts have hardly been systemically examined. A group of recommendations is especially relevant for the present analysis as it illustrates how the Council has been 'outsourcing' its regulatory to informal law-making and enforcement initiatives and, engaging the private sector with a view to tackling non-state criminal activities that threaten or contribute to threaten international peace and security. In countering criminal conduct perpetrated by individuals and non-governmental entities such as terrorism and related auxiliary activities, as well as crimes traditionally considered to be within the scope of State authorities or other international bodies like mineral and wildlife trafficking,[134] the SC has exercised its soft powers to promote informal norms that not only address the immediate goal of conflict/crisis management, but also contribute to shape future regulation of legitimate business. On several occasions, the Council has found that conflict actors, criminal networks and terrorist organizations have profited from trading illicit goods, illicit markets and using the financial sector for their illicit ends.[135] It has therefore begun to leverage

[125] Eg, S.C.Res. 2354, U.N.Doc.S/RES/2354 (May 24, 2017), which focuses on countering terrorist narratives.
[126] Eg, S.C.Res. 2343, ¶ 8, U.N.Doc.S/RES/2343 (Feb. 23, 2017).
[127] S.C.Res. 1479, ¶ 14, U.N.Doc.S/RES/1479 (May 13, 2003).
[128] Eg, in relation to the situation in Côte d'Ivoire, S.C.Res. 2162, ¶ 11, U.N.Doc.S/RES/2162 (June 25, 2014).
[129] For a fuller discussion see Borlini *supra* note 23, at 143-234.
[130] Eg, S.C.Res. 2147, ¶ 29, U.N.Doc.S/RES/2147 (March 28, 2014) (DRC).
[131] Eg, S.C.Res. 1941, ¶ 3-4, U.N.Doc.S/RES/1941 (Sept. 29, 2010) (Côte d'Ivoire); S.C.Res. 2190, ¶ 1-4, U.N.Doc.S/RES/2190 (Dec. 15, 2014) (Liberia).
[132] Eg, S.C.Res. 1521, U.N.Doc.S/RES/1521 (Dec. 22, 2003).
[133] Eg, S.C.Res. 2101, ¶ 23-25, U.N.Doc.S/RES/2101 (April 25, 2013) (Côte d'Ivoire).
[134] See lately S.C.Res. 2220, pmbl. ¶ 7, U.N.Doc.S/RES/2220 (May 22, 2015), defining 'the link between illegal exploitation of natural resources and the proliferation and trafficking of arms *as major factor fueling and exacerbating many conflicts'* (emphases added).
[135] Among many other recent examples, see S.C.Res. 2117, *supra* note 57, in which the Council, acting under Chapter VII, recalled 'the linkage between the illegal exploitation of natural resources, including poaching and illegal trafficking of wildlife, illicit trade in such resources, and the proliferation and trafficking of arms as one of the major factors fuelling and exacerbating conflicts in the Great Lakes region of Africa,' (pmbl. ¶ 4) and then recognized 'the close connection

informal (or soft) law developed by international organizations, intergovernmental networks and institutionalized hybrid processes outside the UN circuit and, through such norms and processes,[136] experiment with an approach to law enforcement and regulation that draws on the informal 'enforcement power' of commercial enterprises.[137] As observed early, the data show that, besides being an integral part of the SC efforts to defeat terrorism, this development has regarded 31% of the situational crises it has addressed in the post-Cold War era. Table C summarizes our elaborations from the data on each of the regulatory initiatives concerned.

Table C

Informal Lawmaking Processes

Contact Group Piracy Somalia			*FATF*			*Kimberley Process*			*Oecd Guidelines*		
Resolutions	**Year**	**Situation**	**Resolutions**	**Year**	**Situation**	**Resolutions**	**Year**	**Situation**	**Resolutions**	**Year**	**Situation**
S/RES/1897	2009	Somalia	S/RES/1617	2005	Threats to international peace and security caused by terrorist acts	S/RES/1385	2001	Sierra Leone	S/RES/2021	2011	Congo
S/RES/1918	2010	Somalia	S/RES/1803	2008	Non Proliferation of Weapons	S/RES/1408	2002	Liberia	S/RES/2078	2012	Congo
S/RES/1950	2010	Somalia	S/RES/1810	2008	Non Proliferation of Weapons	S/RES/1446	2002	Sierra Leone	S/RES/2101	2013	Côte d'Ivoire
S/RES/1976	2011	Somalia	S/RES/1929	2011	Non Proliferation of Weapons	S/RES/1459	2003	Kimberley	S/RES/2136	2014	Congo
S/RES/2020	2011	Somalia	S/RES/1977	2011	Non Proliferation of Weapons	S/RES/1478	2003	Liberia	S/RES/2153	2014	Côte d'Ivoire
S/RES/2077	2012	Somalia	S/RES/1989	2011	Threats to international peace and security caused by terrorist acts	S/RES/1521	2003	Liberia	S/RES/2198	2015	Congo
S/RES/2125	2013	Somalia	S/RES/2083	2012	Threats to international peace and security caused by terrorist acts	S/RES/1607	2005	Liberia	S/RES/2219	2015	Côte d'Ivoire
S/RES/2184	2014	Somalia	S/RES/2094	2013	Korea	S/RES/1643	2005	Côte d'Ivoire	S/RES/2262	2016	CAR
S/RES/2246	2015	Somalia	S/RES/2129	2013	Threats to international peace and security caused by terrorist acts	S/RES/1647	2005	Liberia	S/RES/2293	2016	Congo
S/RES/2316	2016	Somalia	S/RES/2160	2014	Afghanistan	S/RES/1689	2006	Liberia	S/RES/2339	2017	CAR
S/RES/2383	2017	Somalia	S/RES/2161	2014	Threats to international peace and security caused by terrorist acts	S/RES/1727	2006	Côte d'Ivoire	S/RES/2360	2017	Congo
S/RES/2442	2018	Somalia	S/RES/2195	2014	Threats to international peace and security	S/RES/1731	2006	Liberia	S/RES/2389	2017	Congo

between international terrorism, transnational organized crime, drugs trafficking, money-laundering, other illicit financial transactions, illicit brokering in small arms and light weapons and arms trafficking', as well as 'the link between the illegal exploitation of natural resources, illicit trade in such resources and the proliferation and trafficking of arms as a major factor fuelling and exacerbating many conflicts' (pmbl. ¶ 8).

[136] A distinction can be drawn between output informality, in the sense that the instruments produced are not intended to be legally binding, and process informality, when the involved actors and law-making methods are different from a state-to-state process. Output informality overlaps with the concept of soft law. See Joost Pauwelyn, *Informal International Lawmaking: Framing the Concept and Research Questions,* in INFORMAL INTERNATIONAL LAWMAKING 15-16, 22 (Joost Pauwelyn, Ramses Wessel and Jan Wouters eds., 2012).

[137] James Cockayne, *Confronting Organized Crime and Piracy, in* von Einsiedel, Malone and Stagno Ugarte, *supra* note 5, 299, at 304-7.

S/RES/2500	2019	Somalia	S/RES/2199	2015	Threats to international peace and security caused by terrorist acts	S/RES/1753	2007	Liberia	S/RES/2399	2018	CAR
			S/RES/2253	2015	Threats to international peace and security caused by terrorist acts	S/RES/1760	2007	Liberia			
			S/RES/2255	2015	Afghanistan	S/RES/1782	2007	Côte d'Ivoire			
			S/RES/2270	2016	Korea	S/RES/1792	2007	Liberia			
			S/RES/2322	2016	Threats to international peace and security caused by terrorist acts	S/RES/1819	2008	Liberia			
			S/RES/2331	2016	Children and armed conflicts	S/RES/1842	2008	Côte d'Ivoire			
			S/RES/2347	2017	Maintenance of international peace and security	S/RES/1854	2008	Liberia			
			S/RES/2368	2017	Threats to international peace and security caused by terrorist acts	S/RES/1893	2009	Côte d'Ivoire			
			S/RES/2395	2018	Threats to international peace and security caused by terrorist acts	S/RES/1903	2009	Liberia			
			S/RES/2462	2019	Threats to international peace and security caused by terrorist acts: Preventing and combating the financing of terrorism	S/RES/1946	2010	Côte d'Ivoire			
			S/RES/2482	2019	Threats to international peace and security	S/RES/1961	2010	Liberia			
			S/RES/2501	2019	Threats to international peace and security caused by terrorist acts	S/RES/1980	2011	Côte d'Ivoire			
						S/RES/2025	2011	Côte d'Ivoire			
						S/RES/2045	2012	Côte d'Ivoire			
						S/RES/2079	2012	Liberia			
						S/RES/2101	2013	Côte d'Ivoire			
						S/RES/2127	2013	CAR			
						S/RES/2128	2013	Liberia			
						S/RES/2134	2014	CAR			
						S/RES/2153	2014	Côte d'Ivoire			
						S/RES/2217	2015	CAR			
						S/RES/2219	2015	Côte d'Ivoire			
						S/RES/2262	2016	CAR			
						S/RES/2301	2016	CAR			
						S/RES/2339	2017	CAR			
						S/RES/2387	2017	CAR			
						S/RES/2399	2018	CAR			
						S/RES/2448	2018	CAR			

The trend started with the SC's attempt to constrain financing of the National Union for the Total Independence of Angola (UNITA) through trade in so-called conflict diamond in the 1990s, which also found application in some West African conflicts of the period.[138] These efforts led directly to the worldwide effort to curb the illicit trade in conflict diamonds, which has culminated in the establishment of the KPCS, which pursue this goal through the cooperation between governments and the private sector and the SC formally endorsed with Resolution 1459.[139] The Kimberley Process

[138] See S.C.Res. 1173, ¶ 12(b), U.N.Doc.S/RES/1173 (June 12, 1998). In December 1998 Global Witness brought to the world's attention how UNITA had generated $3.7 billion in revenue through the illicit sale of conflict diamonds through major diamond companies such as De Beers and in the world's diamond trading centers.
[139] S.C.Res. 1459, pmbl. ¶ 1-3, ¶ 3-9, U.N.Doc.S/RES/1459 (Jan. 28, 2003).

is thus the first example of a code of conduct for business entities developed by public and private actors (governments, industry and civil society), whose standards have been integrated into the Council's regulatory toolkit.[140] It involves a global certification scheme implemented through domestic law, whereby States seek to ensure that the diamonds they trade are from Kimberley-compliant countries by requiring detailed packaging protocols and certifications, coupled with chain-of-custody warranties by companies.[141] By means of its recommendations to both UN members and the Process itself, sixteen years after Resolution 1459 (2003), the Council continues to look at the KPCS as a partner in countering conflict actors.[142] The KPCS has now been referred to by the Council and/or the related Panels of Experts in the sanctions applicable to Angola, Sierra Leone, Liberia, Côte d'Ivoire, and the CAR, and the principles apply to 99.8% of the global diamond trade.[143]

Similarly, in the attempt to mitigate the linkage between the illegal exploitation of natural resources and activities of armed groups in the DRC,[144] Côte d'Ivoire,[145] and the CAR,[146] the SC has recently recommended the implementation by those countries and their neighboring States of the OECD Due Diligence Guidelines for importers, processing industries and consumers of, respectively, Congolese, Ivorian, and Centro-African minerals.[147] These Guidelines provide a framework for detailed due diligence as a basis for responsible supply chain management of minerals, as well as all other mineral resources. Companies potentially sourcing minerals or metals from those conflict-affected areas should directly implement the prescribed standards of conduct and procedures, so as to avoid contributing to conflict by their mineral purchasing decisions and practices. But, absent translation into domestic pieces of legislation, the Guidelines lacks genuine force and effectiveness.

Soft law has been given greater status in the context of counter-terrorism regimes, where the FATF has gained an authoritative status via Council's recommendations and contemporary sanctions practice. The standards produced by the FAFT have clarified the normative content of the obligation imposed by the SC with Resolution 1373 (2001) on all member State to 'prevent and suppress the financing of terrorist acts.'[148] One of the immediate challenges the Counter-Terrorism Committee

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[140] John G. Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AJIL 819, 835 (2007).
[141] Ian Smillie, *Blood Diamonds and Non-State Actors*, 46(4) VJTL 1009, 1009-1014 (2013).
[142] See recently S.C.Res. 2448, ¶ 41(f), U.N.Doc.S/RES/2448 (Dec. 13, 2018). On the enforcement of the Kimberly process by the SC see Krisch, *supra* note 71, at 1239, 1252.
[143] See: https://www.kimberleyprocess.com/en/what-kp (last accessed 2 December 2019).
[144] Eg, S.C.Res. 2021, pmbl. ¶ 9, ¶ 6-7, U.N.Doc.S/RES/2021 (Nov. 29, 2011).
[145] Eg, S.C.Res. 2101, ¶ 23-25, U.N.Doc.S/RES/2101 (April 25, 2013).
[146] Eg SC Res. 2399, ¶ 23, U.N.Doc.S/RES/2399 (Jan. 30, 2018).
[147] The OECD Due Diligence Guidelines for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. The third edition of the Guidelines is available at: https://www.oecd.org/daf/inv/mne/mining.htm, (last accessed 18 November 2020).
[148] S.C.Res. 1373, *supra* note 78, ¶ 1(a).

(CTC)[149] faced was how to measure compliance with the Resolution 1373. Given that this act does not provide a definition of terrorism, developing clear-cut standards by which states would be assessed was seen as important.[150] In an attempt to institutionalize the FATF Recommendations, Resolution 1566 (2004) asked the CTC to develop a set of best practices implementing Resolution 1373 (2001).[151] Thus, two years after its endorsement of the Kimberley Process, the Council – acting under Chapter VII – strongly urged member States to implement the 'comprehensive international standards' embodied in the FATF Recommendations.[152] Beginning in 2005, a crescendo of resolutions adopted under Chapter VII to counter terrorism, its financing, and the proliferation of weapons of mass destruction, has incorporated similar impetus for the implementation of the FATF standards by state members.[153] Importantly, the FATF standards go beyond the general terms of Resolution 1373 (2001) to include measures like seizing property used in the financing of terrorism, and requiring of the private sector a wide array of preventive activities concerning customer identification, customer due diligence, record keeping, and reporting of suspicious transactions. Moreover, while generated by an intergovernmental body, the FATF Recommendations operate through compliance mechanisms and due diligence carried out by private financial institutions and other designated private actors.[154]

The Council has also established links with another hybrid informal lawmaking initiative in the specification and implementation of its actions against piracy off the coast of Somalia. The several multilateral naval operations that were initiated after the SC authorized the use of force against pirates within Somalia's territorial waters in June 2008 required operational coordination not only of states, but also international shipping bodies and other non-state stakeholders.[155] In January 2009 UN member states set up – outside the UN system, but with the Council's vocal endorsement[156] – the Contact Group on Piracy off the Coast of Somalia (CGPCS), an ad-hoc coordination mechanism,

[149] *Ib*., ¶ 6, establishing the Committee, 'consisting of all the members of the Council, to monitor implementation of this resolution (…)'.
[150] Ben Saul, *Definition of Terrorism in UN the UN Security Council: 1985-2004*, 4(1) ChJIL 141, 164-5 (2004).
[151] S.C.Res. 1566, ¶ 7, U.N.Doc.S/RES/1566 (Oct. 8, 2004). For a precise reconstruction see Ian Johnstone, *The UN Security Council, Counterterrorism and Human Rights*, in COUNTERTERRORISM: DEMOCRACY'S CHALLENGE 335, 338 (Andrea Bianchi and Alexis Keller eds., 2008).
[152] S.C.Res. 1615, ¶ 7, U.N.Doc.S/RES/1615 (July 29, 2005).
[153] Eg, lately, S.C.Res. 2462, ¶ 4, 14, 21, 23 and 28, U.N.Doc.S/RES/2462 (March 28, 2019).
[154] The FATF Recommendations have therefore opened up for changed roles for private actors in the public sector and with respect to the prevention of money laundering and terrorist financing has diluted the boundaries between the public and private sector, the latter acting as a form of 'private policeman' of its customers. See, among others, Stavros Gadinis, *Three Pathways to Global Standards: Private, Regulation and Ministry Networks*, 109(1) AJIL 1, 1-6; 28-33 (2015); Leonardo Borlini, *Soft law, Soft organizations e regolamentazione 'tecnica' di problemi di sicurezza pubblica e integrità finanziaria*, 100(2) RDI 356, 364-89 (2017).
[155] Tullio Treves, *Piracy, Law of the Sea and Use of Force: Developments off the Coast of Somalia*, 20(2) EJIL 399 (2009).
[156] S.C.Res. 1897, U.N.Doc.S/RES/1897 (Nov. 30, 2009).

operating through working groups, that is open to states, international organizations and the private sector.[157] The CGPC develops its own norms for commercial shipping self-awareness and self-protection, particularly in the forms of best management practices and the Djibouti Code of Conduct, adopted in 2009 under the auspices of the International Maritime Organization.[158] These guidelines are designed to coordinate how different public and private actors implement the relevant aspects of the resolutions adopted by the SC.[159] Like the Kimberley Process, the CGPCS involves private sector actors, such as shipping associations, in both the development and implementation of norms.

One of the reasons public-private strategies like the KPCS, the CGPCS and, to a different extent, the FATF Recommendations are attractive to the Council is because they are less costly than pure public regulation: the UN is not required to be the primary author or enforcer. In this respect, the SC has chosen these softer forms of legalization as superior institutional arrangements.[160] As widely observed, such instruments do not create norms recognized as legally binding under Article 38 of the ICJ Statute. And the SC recommendations which incorporate them are obviously deprived of binding effects too: they do not create obligations, rights and/or powers on the addressees (s.c. 'substantive effects').[161] One can attach to the same recommendations only some effects *minoris generis* – different from a binding effect – in particular, the obligation of the State addressed to take their content into consideration in good faith[162] – and, through the reference to international standards concerned, the determination of how the behavior solicited by the Council should operate (modal effect).[163] All things considered, however, the most important implication of SC recommendations lies not so much in the production of substantive legal effects, possibly *minoris generis*, as in the impetus they give to the transformation of international law in a manner more consistent with the

[157] Detailed information on the functioning of the CGPCS and its five working groups are available at: http://oceansbeyondpiracy.org/matrix/activity/contact-group-piracy-coast-somalia-cgpcs,(accessed 20 January 2020).
[158] Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, at: http://www.imo.org/en/OurWork/Security/PIU/Pages/Content-and-Evolution-of-the-Djibouti-Code-of-Conduct.aspx,(accessed 20 January 2020).
[159] Cockayne, *supra* note 137, 229-30.
[160] Jean d'Aspremont, *From a Pluralization of International Norm-Making Processed to Pluralization of the Concept of International Law, in* Pauwelyn, Wessel and Wouters, *supra* note 136, 185, at 198, contends that international actors 'consciously and purposefully placed these new normative activities outside the traditional framework of international law'. For a classic study of the benefits and shortcomings of informal norms see, *ex multis*, Kenneth W. Abbot and Duncan Snidal, *Hard and Soft Law in International Governance*, 54(3) INT'L ORG., 421, 434-450 (2000).
[161] On such definition see further Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16(5) EJIL 879, 881-2 (2005).
[162] Sir Hersch Lauterpacht, with characteristic seriousness and optimism, underlined that this was not an empty obligation, arguing that that good faith obligates a State that does not intend to comply with the act to explain its reasons. Hersch Lauterpacht, *Separate opinion in the ICJ's Advisory Opinion of June 7, 1955* concerning the Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, in ICJ Reports (1955) 115–22, at 119.
[163] On the basis of an extensive analysis of the ICJ jurisprudence, Divac Öberg, *supra* note 161, at 892, argues that 'modal effects establish how and when substantive effects operate'.

values and interests shared by the community of UN Member States. From this angle, the normative implications of such a practice are significant at least for two reasons.

To start with, the Council has inserted itself into the field of business regulation. By outsourcing part of its action against trafficking, money laundering, terrorist financing and piracy to intergovernmental networks and institutionalized hybrid processes where government policies and business operations closely intersect, the UN executive body has prescribed not only norms of conduct, but also operational norms and procedures about how business actors must implement those norms, especially through due diligence and compliance with international standards, which, at least in the case of the KPCS and FATF recommendations, are precisely framed and capable of creating accurate predictions of future behavior.[164] The resulting central role of legitimate business is a prominent normative development in SC practice. Importantly, the SC has emerged as an entity capable of prescribing, interpreting and promoting primary rules of conduct for private actors, as well as standards and processes for facilitating their enforcement. Symmetrically, private businesses are increasingly supporting the implementation and enforcement of international law also in the framework of collective security. [165]

Moreover, the Council leverages the liability mechanisms and negative consequences established for non-compliance by the informal instruments at issue.[166] The FATF standards and the Kimberley Process were indeed developed within established structures of authority, with sufficient bases in effective power to secure consequential control, and by authorized procedures. In turn, compliance is associated with significant benefits, and non-compliance can be 'sanctioned' by the threat/or imposition of severe deprivations, essentially of an economic nature.[167] The substantive expansion, articulation and deformalization of international law, epitomized by soft hybrid arrangements like the Kimberley Process, corresponds here to mechanisms of 'soft liability' and 'soft sanctions'[168]

[164] Compliance and non-compliance with norms cannot be divorced from extra-legal factors such as the very formulation of a given norm. As Christine Chinkin, *Normative development in the international legal system*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 21, 24 (Dinah Shelton ed., 2000) notes even *legal* norms 'are not monolithic, and it is intuitively accepted that some norms are accorded greater weight than others and some are precisely framed, while others are open-ended, indeterminate, and incapable of creating precise preconditions of future behavior.

[165] For this general argument see Jay Butler, *The Corporate Keepers of International Law*, 114(2) AJIL 189 (2020).

[166] See, among others, Daniel Thürer, *Soft Law – Norms in the Twilight between Law and Politics, in* INTERNATIONAL LAW AS PROGRESS AND PROSPECT 159, 166 (Daniel Thürer ed., 2009): 'Despite the fact that such codes are not legally binding, supervision procedures have been devised to ensure that they are in fact put into action. In other words: soft law is sometimes coupled with hard procedures.'

[167] Alvarez, *supra* note 13, 343-344.

[168] Some authors do not hesitate to speak of soft liability, soft dispute settlement and soft sanctions. See, for example, Ignaz Seidl-Hohenveldern, *International «Economic» Soft Law*, 163 RdC, 165-246 (1997) and, with critical tones, JAN KLABBERS, THE CONCEPT OF TREATY IN INTERNATIONAL LAW 158 (1996).

generating continuous pressure for compliance with the underlying standards.[169] Despite their 'soft' essence, these mechanisms and the consequences that may arise out of non-compliance have assured a widespread use of the underlying instruments among UN Members and, hence, if one wishes, the effectiveness of the recommendations by means of which the Council promotes them. It is no secret that the power of the FATF and the Kimberley Process comes from the potential cost of non-compliance – respectively, the exclusion from the international financial system, and significant limitations of the opportunity to trade diamonds. Therefore, even without attaching to non-compliance sanctions based on Article 41 of the UN Charter, by incorporating these standards, the SC makes the most of the interplay between the social dynamics surrounding membership in the FATF and the Kimberley Process and the negative consequences they establish for both States and, less directly, private actors who act in disconformity with the prescribed rules of conduct.

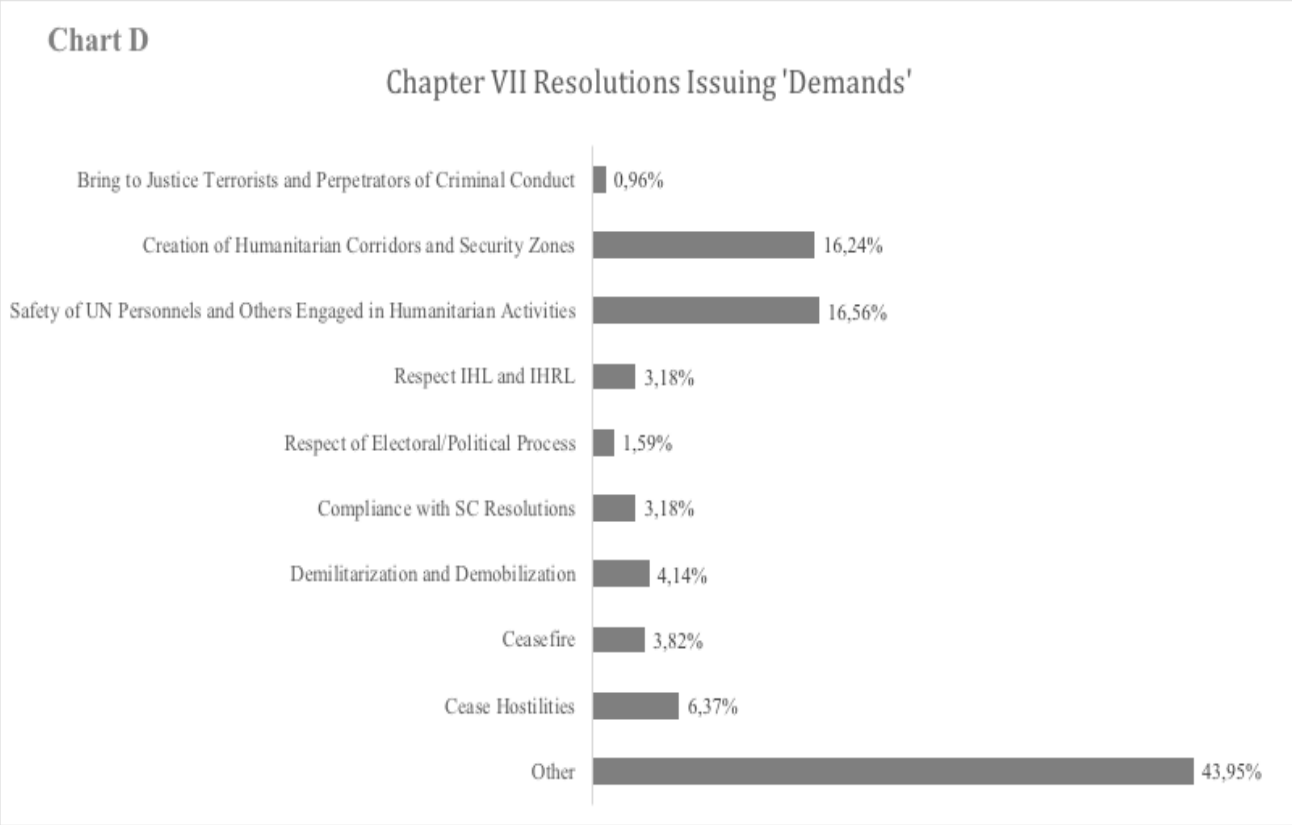
C. Direct Injunctions or 'Demands' to NSDAs Under Chapter VII

1. Practice

In its increasingly lengthy resolutions, the Council addresses a variety of actors beyond the circle of UN member States and other intergovernmental organizations. Our analysis of 1857 resolutions between 1990 and 2019 evidences that contemporary Council action stands out because the UN executive body has constituted NSDAs as the formal addressees of its injunctions under Chapter VII, by directly 'demanding' not only States, but – 335 times overall – also parties of internal conflicts, non-state armed groups, and natural and legal persons, a wide range of conduct. A clear pattern emerging from our data, and evidenced in Chart D below, 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. Many resolutions use as their point of departure existing human rights obligations in major multilateral treaties. A similar pattern is apparent with regard to IHL and international criminal law. Another important feature of this practice by the SC is the imposition of a cease-fire regime to NSDAs, including disarmament obligations. Noticeably, council practice also

[169] Together with the specificity of their normative content that renders them readily applicable as sufficiently identifiable prescriptive behavior, the existence of follow-up mechanisms generating pressure for compliance helps us to gauge the real weight of the informal instruments at issue and understand where they are positioned along an ideal spectrum from soft to hard. On this continuum see Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements,* 71 AJIL 296 (1977).

demonstrates scant willingness to excuse or ignore non-state actors' violation of NIAC peace agreements containing all the obligations of the parties which are normally later also elaborated upon in SC resolutions: demobilization of combatants, promotion of human rights and democratic institutions, constitutional reforms, and a host of other conflict-abatement devices[170] More strikingly though, the Council has ordered NSDAs courses of actions that are not otherwise covered by existing international rules.



Although the meaning of the verbs other than 'decide' is one of many uncertainties concerning the interpretation of SC resolutions,[171] and, generally, the terms of a resolution ought to be interpreted 'on a case-by-case basis by considering all circumstances',[172] the use of the verb 'demand' under

[170] See also the analysis in Fox, Boon and Jenkins, *supra* note 85, 676-678.
[171] Pierre d'Argent, Jean d'Aspremont Lynden, Frédéric Dopagne and Raphael van Steenberghe, *Article 39, in* LA CHARTE DES NATIONS UNIES: COMMENTAIRE ARTICLE PER ARTICLE: VOLUME I 1131, 1167 (Jean-Pierre Cot, Allain Pellet and Mathias Forteau eds., 3rd ed. 2005).
[172] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970), Advisory Opinion, 1971 I.C.J. Rep. 16, ¶114 (June 21); Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403, ¶ 94 (July 22) (Independence in Respect of Kosovo). See also Michael C. Wood, *The Interpretation of Security Council Resolution: Revised*, 20 MAX PLANCK UNYB 3 (2016).

Chapter VII typically suggests the Council's *intention* to oblige an addressee.[173] Thereby, the SC intends to create obligations for individuals and collective entities other than States, thus departing from the general approach of the Charter, which relies primarily on member State action to implement collective decisions.[174] And indeed, in its well-known *Kosovo* Advisory Opinion, the ICJ seems to have assumed that it was the Council's intention to impose an obligation on the KLA and other Kosovo Albanians groups.[175] The outstanding aspect of such practice is that the SC's mandatory requests have been *directly* addressed to armed groups and other non-governmental entities. In such exercise of its authority over NSDAs the intermediary presence of member States over the same actors is, hence, annulled. While during the Cold War, the Council still hesitated to directly address actors under Chapter VII if their statehood was uncertain under international law,[176] since the 1990s, the Council has regularly generated demand under Chapter VII toward 'all parties' of internal conflicts including specific non-state armed groups. Among the early cases, Resolutions 942 in September 1994 and 1010 in August 1995 on the Bosnian war, respectively, demanded under Chapter VII that 'the Bosnian Serb party' – whose statehood was contested[177] – accept a proposed territorial settlement,[178] and 'give access' to UN and ICRC personnel and respect their rights'.[179] Others examples include Resolution 814 on the Somali civil conflict, in which the SC demanded under Chapter VII that all Somali parties and factions comply with their ceasefire agreements;[180] and Resolution 1127 (1997) on the situation in Angola. In this resolution the Council expressed its grave concern over the serious difficulties in the peace process which it ascribed mainly to the UNITA's lag in implementing its obligations under the peace agreements.[181] Acting Under VII, it thus demanded that both parties (but, in particular, UNITA) to comply fully and without further delay their obligations under such agreement.[182] Resolution 1127 (1997) is remarkable since, on the one hand, it is addressed to a group which is not a State and does not even presume to be a State, while, on the other, this group was evidently held to be legally responsible for its wrongful conduct by the Council.

The above-referred resolutions constitute the archetype of several others the Council adopted under Chapter VII in the following three decades, especially to deal with conflicts such as those in

[173] Krisch, *supra* note 71, 1265.
[174] Ib., 1270, according to whom 'the Council has [indeed] created [such] obligations.'
[175] See Independence in Respect of Kosovo, I.C.J., *supra* note 172,¶ 115.
[176] Kooijmans, *supra* note 29, 334-5, discussing a series of resolutions adopted in the 1960s and 1970s on Southern Rhodesia.
[177] See extensively JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 406–407 (2nd ed. 2007).
[178] S.C.Res. 942, ¶ 3, U.N.Doc.S/RES/942 (Sept. 23, 1994).
[179] S.C.Res. 1010, ¶ 1-2, U.N.Doc.S/RES/1010 (Aug. 10, 1995).
[180] S.C.Res. 814, ¶ 8, U.N.Doc.S/RES/814 (March 26, 1992).
[181] S.C.Res. 1127, pmbl. ¶ 4 and 7, U.N.Doc.S/RES/1127 (Aug. 28, 1997).
[182] Ibid. ¶ 1.

Bosnia, Angola, Afghanistan, the DRC, Sierra Leone, Sudan, Mali, Somalia, Côte d'Ivoire, Rwanda, Uganda, Yemen and CAR.[183] Our data show that in such resolutions the SC demanded compliance with its (different) requests in the context of NIACs and post-conflict situations to the parties or particular non-state armed groups as diverse as the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups in Bosnia,[184] the *Front de Libération du Congo* (FLC), *Rassemblement Congolais pour la Démocratie (RCD)*, *Mouvement du 23 mars* (M23) and Mai Mai in DRC;[185] *Ivoirian Force Nouvelles* in Côte d'Ivoire;[186] Seleka coalition and anti-Balaka in CAR;[187] Lord's Resistance Army (LRA) in DRC, Uganda, CAR and South Sudan,[188] the Houthis in Yemen,[189] and Sudan Liberation Army Abdul Wahid (SLA/AW) in Sudan.[190]

While the aforementioned Chapter VII demands were addressed to non-state armed groups in the context of civil wars and internal crises, Resolutions 2170 and 2178 further widen the scope of the addressees of Chapter VII injunctions to single individuals. In order to strengthen the sanctions regime built by Resolution 1267 and subsequent resolutions, Resolution 2170 extended asset freeze measures to six additional individuals in ISIL and Al-Nusra Front.[191] Resolution 2170 differs from previous resolutions adopted under the 1267 sanctions regime in that the Council directly instructed 'ISIL, ANF [Al-Nusra Front], and all other *individuals,* groups, *undertakings* and *entities* associated with Al-Qaida' to cease all violence and disarm 'with immediate effect', and 'all *foreign terrorist fighters* associated with ISIL and other terrorist groups to which such fighters belong' to withdraw immediately.[192] A similar demand was made by Resolution 2178 on foreign terrorist fighters, which was adopted at the meeting of 24 September 2014.[193] Assuming that the Chapter VII 'demands' are intended to impose obligations, Resolutions 2170 and 2178 were thus meant to create international obligations on individual persons, undertakings and entities associated to Al-Qaida and foreign terrorist fighters themselves.

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[183] On this incremental practice, see also Ezequiel Heffes, Marcos Kotlik and Brian Frenkel, *Addressing Armed Opposition Groups, through Security Council Resolutions: A New Paradigm?,* 18 MAX PLANCK UN YB 32, 33 (2014); Fox, Boon and Jenkins, *supra* note 85, 663-667 (2018).
[184] S.C.Res. 1244, ¶ 15, U.N.Doc.S/RES/1244 (June 10, 1999).
[185] Eg S.C.Res. 1355, ¶ 2, 5, 6, U.N.Doc.S/RES/1355 (June 15, 2001); S.C.Res. 2078, ¶ 7, U.N.Doc.S/RES/2078 (Nov. 28, 2012).
[186] Eg S.C.Res. 1603, ¶ 10, U.N.Doc.S/RES/1603 (June 3, 2005).
[187] Eg S.C.Res 2301, ¶ 6, U.N.Doc.S/RES/2301 (July 26, 2016).
[188] Eg S.C.Res. 2277, ¶ 17, U.N.Doc.S/RES/2277 (March 30, 2016); S.C.Res. 2387, ¶ 6-7, U.N.Doc.S/RES/2387 (Nov. 15, 2017); S.C.Res 2360, ¶ 10, U.N.Doc.S/RES/2360 (June 21, 2017).
[189] Eg S.C.Res. 2216, ¶ 1, U.N.Doc.S/RES/2216 (April 14, 2015).
[190] Eg S.C.Res. 2249, *supra* note 33, ¶ 34, 46
[191] S.C.Res. 2170, ¶ 19, U.N.Doc.S/RES/2170 (Aug. 15, 2014).
[192] Ibid., respectively, ¶ 4 and 7, emphases added.
[193] S.C.Res. 2178, *supra* note 59, ¶ 1, demanding 'that *all foreign terrorist fighters* disarm and cease all terrorist acts' (emphasis added).

2. Can SC Resolutions Directly Impose Binding Obligations on NSDAs?

The proposition that the SC intends to oblige armed non-state actors raise the distinct question as to whether it has such authority at all to prescribe obligations incumbent on NSDAs. Although in examining the practice under discussion, Krisch asserts rather flatly that 'Article 39 and 41 are flexible enough to accommodate non-governmental targets',[194] and few commentators seem to accept such position *de plano*,[195] that the SC has the authority to impose obligations directly on individuals is still very much in dispute.[196] Further complicating the matter there are only few certainties. First, in the *Kosovo* opinion, the ICJ did not rule out the potential binding effect of SC resolutions in principle. It did not even limit it to non-state actors that enjoy international legal personality.[197] However, the key passage contained in paragraph 115 of the advisory opinion[198] is too concise to provide a general test for the SC's exercise of authority directly over non-state actors. In particular, the ICJ did not respond to the distinct inquiry of whether the same body has the authority to oblige non-state actors in the first place.[199] Secondly, the UN, as an international organisation created by a treaty, could prescribe obligations incumbent on individuals without seeking their consent provided that, first, the actors are subject to UN member States' jurisdiction and, second, the constituent treaty entrusted the UN with such powers expressly or by necessary implication.[200] When it comes to the SC's authority over individuals and non-state like entities, the main question thus concerns the second

[194] Krisch, *supra* note 71, 1270-1.
[195] See eg Vladyslav Lanovoy, *The Use of Force by Non-State Actors and the Limits of Attribution of Conduct*, 28(2) EJIL 563, 564-5 (2017); Fassbender, *supra* note 61,149.
[196] See, among others, Christian Tomuchat, *The Applicability of Human Rights Law to Insurgent Movements, in* KRISENSICHERUNG UND HUMANITÄRER SCHUTZ: CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: FESTSCHRIFT FÜR DIETER FLECK 573, 586 (Horst Fischer, Ulrike Froissart, Wolff Heintschel von Heinegg, Christian Rapp eds., 2004); Kanetake, *supra* 71, 131, who share the contention that the SC has not such a power; ANNE PETERS, BEYOND HUMAN RIGHTS. THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW (2011), 93-99 who takes myriad routes to find the limited conditions under which the SC can impose obligations directly on individuals. I discussed these and other positions in-depth in Borlini, *supra* 23, 274-294.
[197] Independence in Respect of Kosovo, I.C.J., *supra* note 172, ¶ 117, finding the 'it can established on a case-by-case basis, (…) for the Council intended to create binding legal obligations'.
[198] Ibid., ¶ 115, where the ICJ held that '[t]here is no intention, in the text of the Security Council's resolution 1244 (1999), that the Security Council intended to impose, *beyond that*, a specific obligation to act or a prohibition from acting to such other actors,' emphases added.
[199] Marko Divac Öberg, *The Legal Effects of the United Nations Resolutions in the Kosovo Advisory Opinion*, 105 AJIL 81, 83 (2011).
[200] A legally binding obligations can, from that perspective, only be admitted under the premises that the States have consented as representative of persons and groups under their jurisdiction, so that the internationally relevant consent of those actors must be assumed too.

condition, namely, the scope of the UN's authority under the UN Charter.[201] Finally, repeated resolutions directly imposing injunctions on NSDAs may be considered an indication of the Council Members' legal opinion that these actors can indeed be saddled with international legal obligations. Perhaps more importantly, the lack of any official manifestation of dissent,[202] indicates that UN Members somehow *consented* – even if tacitly – to the practice described, which is presently extensive.

It is with these few elements in mind that one should address the question of whether the SC can directly bind NSDAs under Chapter VII. A doctrinal explanation for the hard formulation of resolutions under discussion is that in armed conflicts, individuals and armed groups are in any event bound directly by applicable international law.[203] Accordingly, the SC resolutions would not impose new legal obligations on these actors, but rather in essence they reinforce and clarify the obligations that already arise from treaties and customary law. However, this position is at variance with the SC practice. The notion of 'armed group' emerging from such practice does not always reflect the stricter criteria for the application of international humanitarian law (IHL), especially as to the degree of the organization of the group.[204] Questions of status or international legal personality, however, do not hamper SC action, which is pragmatic on these aspects.[205] In practice, the issue of the level organization of armed groups is important in certain conflicts in Africa, notably in the DRC, CAR or in the Lake Chad region, where there exists a number of armed groups with a very loose degree of organization.[206] The difficulty here is to consider which legal framework is applicable to these entities, despite the high level of violence they exert, often in a context where state institutions are at best weak, or, more often, completely failing. It is therefore highly problematic to determine if and which rules of IHL cover the conduct of groups like the Mai Mai in the DRC, the anti-Balaka in CAR, various 'vigilante groups' in the Lake Chad region, or criminal bands in Mali. Overall, whereas many such rules 'are directly concerned with regulating the position and activities of individuals, and many

[201] See Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 194 I.C.J. Rep. 174, ¶ 180, 182 (April 11); Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 25 (July 8).
[202] Neither the Repertoire of the Practice of the Security Council between 1946 and 2019, nor the official declarations of States indicate manifestation of dissent regarding the adoption of the relevant resolutions. Repertoire of the Practice of the Security Council, available at: https://www.un.org/securitycouncil/content/repertoire/structure (last accessed on 4 April 2020).
[203] See extensively Peters, *supra* note 196, 194-232 and the literature referred to therein.
[204] See Annyssa Bellal, 'ICRC Commentary of Common Article 3: Some questions relating to organized armed groups and the applicability of IHL', EJIL: Talk! Blog of the European Journal of International Law (October 5, 2017), https://www.ejiltalk.org/icrc-commentary-of-common-article-3-some-questions-relating-to-organized-armed-groups-and-the-applicability-of-ihl/ , (accessed 2 October 2019) and the literature referred to therein.
[205] Borlini, *supra* note 23, 167-174.
[206] For example, there is clearly a crossing of the boundaries towards criminal bands and armed groups in the DRC and in Mali.

more indirectly affect them',[207] there persists, however, a gap in the regulation of the use of force by non-state actors.[208] The same holds true for the protection of human rights with regard to harmful activities of armed groups in conflict situations: the existing gap of regulation is only partly filled by IHL and international criminal law.[209] There are convincing arguments that human rights obligations apply to armed groups in situations of conflict, varying with their organization and the penetration of their authority within the territory.[210] If one accepts this position, the pre-existing international human rights obligations are only clarified by the SC resolutions. In contrast, by assuming more restrictive approaches that deny the application of human rights obligations to non-state armed groups,[211] one should necessarily infer that the SC goes beyond existing legal positions. But the recent practice reveals cases where the conduct ordered by the SC *ratione materiae* is *certainly* not covered by pre-existing existing norms of international law.[212]

This is the case for the Council's different injunctions to NSDAs regarding post-conflict situations, especially the creation of democratic processes as embodied in free and fair elections. Other such instances are included in the category 'Other' in Chart D. For example, with resolution 2348 (2017) on the situation in DRC, the Council demanded 'that all armed groups cease immediately all […] destabilizing activities, [including] the illegal *exploitation* […] *of natural resources'*.[213] Obviously the exploitation of natural resources can amount to a violation of international law when committed by a foreign State and its organs.[214] However, there is no general international rule which directly prohibits individuals and private entities the same conduct, especially if they are members of

[207] LIESBETH ZEGVELD, THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 97 (2002); ROBERT JENNINGS ET AL., OPPENHEIM'S INTERNATIONAL LAW: VOLUME I 846 (9th ed. 2008).

[208] On different mechanisms of accountability in respect of non-state actors see eg Cedric Ryngaert, *State Responsibility and Non-State Actors, in* NON-STATE ACTORS IN INTERNATIONAL LAW 163 (Math Noortman, August Reinisch and Cedric Ryngaert eds., 2015).

[209] Andrew Clapham, *The Complexity of the Relationship between Human Rights Law and the 1949 Geneva Conventions, in* THE 1949 GENEVA CONVENTIONS: A COMMENTARY 701 (Andrew Clapham, Paola Gaeta and Marco Sassòli eds., 2015).

[210] ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 271–316 (2006).

[211] LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICTS 194 (2002).

[212] Heffes, Kotlik and Frenkel, *supra* note 182, 45-52 and DANIËLLA DAM-DE JONG, INTERNATIONAL LAW AND GOVERNANCE OF NATURAL RESOURCES IN CONFLICT AND POST-CONFLICT SITUATIONS 45-52 (2015), make a similar finding. For a further verification of this argument see the list of the international obligations on insurgents and armed groups discussed in Andrew Clapham, *Focusing on Armed Non-State Actors, in* INTERNATIONAL LAW IN ARMED CONFLICT 766, 771-782 (Andrew Clapham and Paola Gaeta eds., 2014).

[213] S.C.Res. 2348, ¶ 15, U.N.Doc.S/RES/2348 (March 31, 2017), emphases added. The SC reiterated the same order in S.C.Res. 2360, *supra* note 188, ¶ 10; S.C.Res. 2389, ¶ 5, U.N.Doc.S/RES/2389 (Dec. 8, 2017); S.C.Res. 2409, ¶ 20, U.N.Doc.S/RES/2409 (March 27, 2018). Even the same generic demand of 'ceasing all destabilizing activities' is not covered by a pre-existing international rule.

[214] On the customary nature of the principle of permanent sovereignty of natural resources, which constitutes the foundation on which the protection and management of natural resources in modern international law is based, see Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 244 (December 19, 2005).

'domestic' movements.[215] The SC also goes surely beyond existing legal positions with the afore-mentioned demands to individuals, entities and foreign terrorist fighters in resolutions 2170 (2014) and 2178 (2014). Noticeably, with resolution 2170 (2014) the Council demands a cessation of all violence,[216] *i.e.* regardless of a geographically and temporally limited armed conflict/crisis, reasonably including any terrorist attack or destabilizing action that may hypothetically be committed in States other than Iraq or Syria.[217]

Given the foregoing analysis, what is the possible legal basis for the Council to impose obligations on individuals? So far SC resolutions appear to unambiguously impose strict legal obligations on private actors in situations of NIACs. In this connection, our data indicate that several resolutions have demanded armed groups and individuals to immediately cease hostilities, comply with the previously agreed ceasefires, guarantee safe access to humanitarian assistance and the like (Chart D). These demands too are provisional measures under Article 40 of the Charter aimed at preventing an aggravation of the relevant situations without impairing the rights, claims or position of the parties concerned. As pertinently stressed by Krisch, 'Article 40 mentions a call on "*the parties concerned*"'[218], which can be understood as to accommodate non-governmental entities. The SC can indeed create binding effects with resolutions based on Article 40 of the Charter,[219] and it is not limited *ratione materiea* to specific types of measures, provided that they do not produce more than 'stand-still' or 'cooling-off' effects. There is thus an issue of coherence here: as the SC increasingly qualifies as threats to the peace situations of civil war and internal crises, it must also be able to tailor and address its action to groups and individuals which represent the source of the threat. On the other hand, the lack of State control over these entities is evident: '[i]f a Security Council resolution aims to have a peacemaking effect, it must directly address the armed non-state group'.[220]

As to the so far quite unique deviations from this pattern represented by the two resolutions on foreign terrorist fighters, the assessment is more complex. The measures demanded seem definitive in nature and not neutral by definition; hence, they are hardly qualifiable as 'provisional'. The remaining option is to rely on Article 41 of the UN Charter.[221] This nearly all-encompassing solution

[215] Dam-De Jong, *supra* note 212, 42-6.
[216] S.C.Res. 2170, ¶ 4, *supra* note 191.
[217] For other examples, see S.C.Res. 814, ¶ 8, U.N.Doc.S/RES/814 (March 26, 1993) (Somalia); S.C.Res. 1214, ¶ 12-14, U.N.Doc.S/RES/814 (Dec. 8, 1998) (Afghanistan); S.C.Res. 2149, ¶ 4, supra 79.
[218] Krisch, *supra* note 71, 1270, emphases added.
[219] Nico Krisch, *Article 40 in* Simma, Khan, Nolte, Paulus, *supra* note 71, 1297, 1303. See also See S.C.Res. 1696, pmbl. ¶ 10, U.N.Doc.S/RES/1696 (July 31, 2006).
[220] Peters, *supra* note 196, at 98.
[221] A third candidate may be the dynamic interpretation of Art. 25 of the UN Charter, which provides that '[t]he members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'. For a convincing criticism of this interpretation see Borlini *supra* 23, 287-9.

could in theory be able to provide the SC with the authority to impose obligations on non-state actors, including individuals. However, it remains to see whether UN members are fully aware of the repercussions of allowing the SC to generate a new set of obligations, under international law, incumbent not only on non-state armed groups but also on individuals and private entities. In this respect, it is not irrelevant that all the recent resolutions on terrorism were unanimously adopted and were not challenged.[222] It has been authoritatively suggested that the lack of adequate opposition – which must be adequately verified – may be taken as 'acquiescence, if not acceptance' of the measures therein included. [223] The practice described does not, however, lead to the conclusion that the Charter should be interpreted in a way, which necessarily justifies the attribution of a vertical binding direct effect to SC resolutions, nor that a customary rule is developing in that direction.[224] It merely indicates that UN Members somehow consented – even if tacitly – to measures partly overriding the Council's powers, in so far as they were perceived as being genuinely instrumental to peace-enforcement purposes and, hence, the protection of fundamental values of the international community associated with the maintenance of international peace and security. [225]

D. Sanctions as Regulatory Instruments

As a result of the shift from comprehensive to "smart" sanctions, the principal targets of UN sanctions today are not States but individuals, private entities, rebels, criminal networks and armed groups associated with conflicts.[226] In addressing these actors, the SC has used Art. 41 for attempts at broader forms of regulation. As documented also in Chart E, in part, this is the indirect results of traditional short-term regulation, such as economic embargos. Because the Council has often found that conflict actors and criminal networks have profited from trading illicit goods and trafficking, it has sought to produce leverage over these actors by resorting to sanctions mechanisms to counter

[222] Chiara Ragni, *International Legal Implications concerning 'Foreign Terrorist Fighters'* 101(4) RDI 1052, 1084 (2018).
[223] Arangio-Ruiz, *supra* note 4, 689.
[224] Ibid., 691, where the author points out: 'However frequently certain UN *ultra vires* actions may have been inadequately resisted or even accepted or acquiesced in, there is no reason to infer therefrom that States in general or the so-called 'organized international community' have either accepted Charter interpretations allegedly justifying the relevant Security Council practice or participated in the formation of a customary rule so empowering that body'.
[225] On acquiescence in international law see extensively, Ian C. Macgibbon, *The Scope of Acquiescence in International Law*, 31 BYIL 143 (1954); BENEDETTO CONFORTI, LA FUNZIONE DELL'ACCORDO NEL SISTEMA DELLE NAZIONI UNITE 22-35, 94-115 (1968).
[226] All new sanctions since 2010 have been targeted, with the exception of the sanctions against Libya in S.C.Res. 1970, *supra* note 54, and S.C.Res. 1973, *supra* note 42. On the individualization of sanctions, see Larissa van den Herik, *Peripheral Hegemony in the Quest to Ensure Security Council Accountability for Its Individualized UN Sanctions Regimes*, 19 J. CONFLICT & SEC. L. 427 (2014).

these activities. So, it has developed and enforced arms control obligations, especially on small arms in Africa and on weapons of mass destruction globally.[227] Also, it has considered whether general systems for air traffic control in parts of Africa would be necessary in order to better enforce existing arms embargoes, has demanded the establishment of an aircraft registry in Liberia, and has required compliance with procedural requirements of the Convention on International Civil Aviation in the Great Lakes region.[228]

Most prominently though, contemporary sanctions regimes are often designed to lead changes in State behavior and other actors that endure after the conflict is over and sanctions are lifted. The analysis of relevant practice clearly shows that the Council is increasingly applying sanctions in a forward-looking manner, involving both states and non-states actors. Instances of these regulatory sanctions vary from 'positive' signaling the Council's support for particular courses of actions to solve internal conflicts and even comprehensive reforms at the domestic level; to sequencing and linking the lifting of sanctions to reforms aimed at incentivizing lasting conditions of peace and security in the relevant territories; to the sustained attention to informal norms related to criminal conduct of non-state actors and hybrid public/private regulatory strategies aimed at both industry and governmental actors.[229] Besides, its subsidiary committees oversee members states compliance not only with specific sanctions regimes, but also with more general standards the SC sets (for example, on child soldiers) and the guidelines for private business actors it issues (for example, on non-payment of ransom to terrorist groups and on illicit trade in small and light weapons).[230]

What is important to highlight here is that all these developments in the sanctions regimes established to address NSDAs suggest that the UN executive body has shifted away from sanctions as merely punitive measures towards tools it uses to prospectively manage risks to peace and security prospectively.[231] The use of sanctions as regulatory instruments is one of the most glaring aspects of the Council's action against NSDAs.[232] However, this cannot be reduced only to Selznick's famous

[227] See, *e.g.*, S.C.Res. 1467, U.N.Doc.S/RES/1467 (March 18, 2003) and S.C.Res. 1540, *supra* note 56.
[228] See, *e.g.*, S.C.Res. 1807, U.N.Doc.S/RES/1807 (March 31, 2007).
[229] See generally Boon, *supra* note 112, at 554–64.
[230] See, respectively, S.C.Res. 2133, ¶ 10, U.N.Doc.S/RES/2133 (Jan. 27, 2014) and S.C.Res. 2370, ¶ 10, U.N.Doc.S/RES/2370 (Aug. 2, 2017).
[231] The Council's forward-looking sanctions are to be distinguished from what is usually referred to as SC legislation. Legislative actions involve the application of rules of general application to all member States. The regulatory use of sanctions is by definition situational and often integrated with other ad-hoc tools such as peacekeeping missions.
[232] It is important to flag that the Council has engaged in other forms of regulation under Article 41 in the past. The 1993 and 1994 creation of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, for example, involved the establishment of two new judicial institutions, and created a legal obligation for all member states to cooperate. In establishing the Tribunals, the Security Council engaged in regulatory activities by approving statutes that the International Law Commission had drafted and empowering the tribunals to elaborate and give content to the corpus of international criminal law through their jurisprudence.

definition of regulation as 'the sustained and focused control exercised by a public authority over activities valued by the community'.[233] Sanctions regimes imposed to address threats to peace caused by NSDAs are, at once, more specific and complex. As just hinted at, two main elements emerge. To begin with, the analysis of sanctions practice addressing individuals and other non-state-like entities identifies a shift in emphasis from *ex-post* to *ex-ante* measures.[234] What is more, through this practice, not only does the Council address the immediate goal of conflict/crisis management, but it also contributes to shape future regulation and governance,[235] *inter alia*, by complementing the public regulatory aspect common to all UN sanctions with private regulatory strategies that engage a variety of actors to assist with implementation and compliance. These two aspects – the temporal dimension of sanctions and their comprehensive regulatory outcome – are normally merged into single sanctions regimes. For the sake of clarity, I shall analyze them piecemeal.

Let us start with examining the temporality of sanctions. By temporality I mean the dimension of SC resolutions that relate to the regulation of future conduct.[236] Certainly, the core of many sanctions imposed under Article 41 of the UN Charter continues to be *ex-post* measures applied as a result of specific conduct considered to be a threat to peace and security, such as restrictions or prohibitions on access to funding, weapons, travel, and other assets.[237] UN sanctions have thus been employed to *stigmatize* and *constrain* armed groups and criminal networks in their ability to conduct proscribed activities, for example, in Angola, the CAR, Cote d'Ivoire, the DRC, Guinea Bissau, Liberia, Libya, Mali, Sierra Leone, South Sudan and Somalia. But the Council is also increasingly applying sanctions in a forward-looking manner, making positive behavioral demands on state and non-state actors to support democratic processes, the management of common resources, and good governance.[238] Besides, the Council and its subsidiary bodies sequence the application of sanctions to increase responsiveness, such that the imposition of negative *ex-post* coercive measures are combined with the incentive of their lifting in order to achieve secondary regulatory goals.[239] As

[233] Philip Selznick, *Focusing Organizational Research on Regulation in* REGULATORY POLICY AND THE SOCIAL SCIENCES 363, 363 (Roger Noll ed., 1985).
[234] See extensively Boon, *supra* note 112, at 554-564.
[235] Whereas theories of regulation focus on direct influence, the concept of governance is much more based upon hybrid procedures and arrangements. See, *ex multis*, Renate Mayntz, *New Challenges to Governance Theory in* GOVERNANCE AS SOCIAL AND POLITICAL COMMUNICATION 27 (Henrik Bang ed., 2009).
[236] I take the term from Boon, supra note 112. On the relationship between rules applied *ex-ante* and standards applied *ex-post*, see Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 Duke L.J. 557 (1992).
[237] See generally Gray, *supra* note 84, at 274-80.
[238] High Level Review of United Nations Sanctions, *Compendium November 2015 (Based on UN Doc. A/69/941-S/2015/432)*, 84 (2015).
[239] After a situation is added to its agenda, the Council will typically begin by authorizing the imposition of sanctions and establishing a sanctions committee as a subsidiary organ. The SC may either immediately impose sanctions, or signal that specific measures, such as an arms embargo, travel ban, and asset freeze will be imposed in future resolutions. As the situation develops, the Council refines the list of measures reacting to the situation on the ground and in response to

observed early, our data reveal that, all these elements considered, 64% of the sanctions regimes currently in place are use also as regulatory tools.

Examples of 'positive' *signaling* include those used for better management of natural resources and animal products related to the prohibition of poaching and trade in wildlife products, justified by the link to organized crime in the CAR;[240] the Council expression of its intention to consider imposing sanctions against any party that impedes an incipient or reconciliation process in Liberia, Burundi, Sudan and Guinea Bissau;[241] its many indications that a range of (other) sanctions are available should the parties to a given conflict not abide by the terms of relevant resolutions.[242] In addition, sanctions and peacebuilding are here linked by repeated references to and backstopping of peace agreements. SC sanctions against the Taliban are an interesting example of how sanctions could contribute to ceasing violent conflict through incentivizing reconciliation. Even though the sanctions did not achieve their objective, due to factors that lay beyond their design, SC Resolution 1988 (2011) provides a good example of an effort to shift the calculations towards a negotiated settlement. Sanctions were first imposed in 1999, with the objective of inducing the Taliban regime to extradite Osama bin Laden. Within months, the regime (an arms embargo, asset freeze and travel ban) was expanded to include the Al Qaida and its associates. Following 9/11, the regime was extended globally and later to groups such as Boko Haram and ISIL (Da'esh). In 2011, the Council decided to split this sanctions regime: one focusing on the Taliban and a second on Al Qaida and associated groups. The rationale was to provide a pathway towards de-listing for Taliban members willing to reconcile, renounce violence and sever ties to transnational terrorism. A precondition for the Taliban to participate in the Afghan peace talks had been the prospect of being taken off the sanctions list.[243] Council's efforts to employ sanctions to support peace agreements are also manifest, for example, in the case of the Comprehensive Peace Agreement for Liberia.[244] Similar approaches are discernible in other internal armed conflict situations. The sanctions imposed on Côte d'Ivoire via resolution 1572 specifically link respect for the Linas-Marcoussis Peace Agreement and implementation of related

information provided by the Panel of Experts. Hence, sequencing is an important aspect of the temporality of sanctions refers to the situations where the Council refines the list of measures in reaction to the situation on the ground. Boon, *supra* note 112, 562.

[240] *E.g.* S.C.Res. 2127, ¶ 16 and 56, *supra* note 67.

[241] See *e.g.* S.C.Res. 2237, ¶ 8, U.N.Doc.S/RES/2237 (Sept. 2, 2015) (Liberia); S.C.Res. 2248, ¶ 6, U.N.Doc.S/RES/2248 (Nov. 12, 2015) (Burundi); S.C.Res. 2363, ¶ 23, U.N.Doc.S/RES/2363 (June 29, 2017) and S.C.Res. 2429, ¶ 49, U.N.Doc.S/RES/2429 (July 13, 2018) (Sudan); S.C.Res. 2404, ¶ 6, U.N.Doc.S/RES/2404 (Feb. 28, 2018) (Guinea Bissau).

[242] *E.g.* S.C.Res. 1612, ¶ 9, U.N.Doc.S/RES/1612 (July 26, 2005) (Children in armed conflicts); S.C.Res. 2127, ¶ 56, *supra* note 67 (CAR); S.C.Res. 2374, ¶ 20, U.N.Doc.S/RES/2374 (Sept. 5, 2017) (Mali).

[243] S.C.Res 1988, *supra* note 98.

[244] S.C.Res. 1521, ¶¶ 4(c), 14 and 24, *supra* note 132 under which the Council lifted the previous sanctions and immediately reimposed them in support of new objectives of peace enforcement.

commitments with the imposition of sanctions.[245] The Sudan sanctions regime follows a similar pattern too.[246]

From a regulatory perspective, another significant aspect of the sanctions on Liberia has been the *linking* of the lifting of the same measures to the implementation of domestic reforms endorsed by Council resolutions, such as the creation of an arms stockpile marking and identification system, a weapons storage system and the control of arms and ammunition;[247] the reorganization of the government's administrative infrastructure to ensure that the revenues from the timber industry are used for legitimate purposes and the benefit of the people;[248] and the establishment of a certificate-of-origin scheme for rough diamonds.[249] *Sequencing* has been sharp, among others, in the CAR[250] and DRC[251] sanctions regimes, where the SC authorized additional measures by expanding the base for targeting individuals to include those providing support for armed groups or criminal networks through the illicit exploitation of natural resources including diamonds, gold, wildlife as well as wildlife products in and from that state. Also, the base for targeting individuals was expanded in July 2018 to include the engagement by criminal networks in activities that destabilize South Sudan through the illicit exploitation or trade of natural resources.[252] An important and recent example of sequencing has been regarding the adjustment of the Libya sanctions regime in August 2014 and the further elaboration of the designation criteria in March 2015 and June 2017,[253] which led to the travel bans and asset freezes imposed in June 2018 on six individuals identified as the main perpetrators of illegal activities relating to human trafficking and the smuggling of migrants.[254]

Equally important for the Council's approach to NSDAs is the integration of responsive and hybrid regulation into contemporary sanctions practice: operating in a decentered, polycontextural environment, the SC has resorted to sanctions regimes to alter the behavior of a multiplicity of public

[245] S.C.Res. 1461, ¶¶ 1, 2 and 11, U.N.Doc.S/RES/1461, (Jan. 5, 2003); and S.C.Res. 1572, ¶19, U.N.Doc.S/RES/1572, (Nov. 15, 2004).
[246] S.C.Res. 1591, ¶¶ 1 and 7, U.N.Doc.S/RES/1591, (March 29, 2005).
[247] S.C. Letter dated 21 July 2015 from the Panel of Experts on Liberia established pursuant to resolution 1521 (2003) addressed to the President of the S.C., ¶ 27-31, U.N.Doc.S/2015/558 (July 23, 2015).
[248] See S.C.Res. 1521, *supra* note 132.
[249] S.C.Res. 1549, U.N.Doc.S/RES/1549 (June 17, 2004). Liberian sanctions were intended to stop the funding from diamonds and timber. In particular, due to the national government's lack of control over diamond mines and forests in the early 2000s, and ex-combatant's simultaneous monopolization of these natural resources to secure funding, there was a debate over whether these resources would fuel conflict or make a vital contribution to the state.
[250] S.C.Res. 2127, *supra* note 67; S.C.Res. 2134, U.N.Doc.S/RES/2134 (Jan. 28, 2014); S.C.Res. 2196 (Jan. 22, 2015). See further the recent S.C.Res. 2399, *supra* note 146.
[251] S.C.Res. 1596, U.N.Doc.S/RES/1596 (May 3, 2005); S.C.Res. 1649, U.N.Doc.S/RES/1649 (Dec. 21, 2005); S.C.Res. 1771, U.N.Doc.S/RES/1771 (Aug. 10, 2007); S.C.Res. 2078, supra note 184; and S.C.Res. 2136, U.N.Doc.S/RES/2136 (Jan. 30, 2014).
[252] S.C.Res. 2428, U.N.Doc.S/RES/2428 (July 13, 2018).
[253] S.C.Res. 2174, U.N.Doc.S/RES/2174 (Aug. 27, 2014); S.C.Res. 2213, U.N.Doc.S/RES/2213 (March 27, 2015); and S.C.Res. 2362, U.N.Doc.S/RES/2362 (June 29, 2017).
[254] See S.C. Press Release, U.N.Doc. SC/13371 (June 7, 2018).

and private actors with the intention of creating the positive conditions for preventing the eruption of new crises. Unlike imposed regulations, where the regulator establishes and imposes rules and measures compliance, a number of UN sanctions regimes 'now emphasize the importance of guidance from non-state actors such as industry groups'.[255] In recent sanctions, there has been a move away from the situation where the Council has the sole responsibility for ensuring the success of the regulation, to using other participants in the market to assist with implementation and compliance.[256] By resorting to the network of sub-organs, member States, international organizations and private actors involved to execute and implement its resolutions, and drawing on their capacity to regulate themselves, the SC has integrated new elements of responsive regulation into its sanctions practice.[257] Common to all UN sanctions are public regulatory strategies, which place obligations on member States. For example, several sanctions regimes impose regular reporting requirements on member States. Frequently, burdens are higher on neighboring or regional states, where borders are porous or where transport hubs facilitate sanction breaking.[258] Besides, since the SC has no intelligence gathering capacity of its own (other than reports provided by Panels of Experts or information shared by member States), it requires states to implement national schemes to monitor borders and financial transactions. However, the integration of responsive regulation elements into the sanctions practice involves today private regulatory strategies, which rely on the expertise and recommendations of groupings of experts, states, and industry interests, who are involved in producing, monitoring, and enforcing the norms produced.[259]

The emphasis on private regulatory strategies to deal with NSDAs was clearly discernible in November 2010, when the Council had one of its own creations generate guidance for private businesses and adopted 'due diligence guidelines' prepared at its request by a group of experts monitoring implementation of sanctions on the DRC. These were intended to 'mitigate the risk' of conflict in eastern DRC arising out of the provision of direct and indirect support to illegal armed

[255] Boon, *supra* note 112, at 561.
[256] This resonates with Julia Black's approach of fragmented regulation. While dismissing the conventional understanding as command-and-control as inappropriate for a decentered society, Julia Black, *Critical Reflections on Regulation*, 27 Austl. J. Leg. Phil. 1 (2002), at 20, suggests the following definition: 'regulation is the sustained and focused attempt to alter the behavior of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behavior-modification.'
[257] The idea of a responsive approach to regulation, which is usually illustrated through a metaphorical model of dual pyramids of support and sanctions and seeks to promote attention to the regulatory context, is premised on features of responsiveness that include plurality, dynamism and deliberation, all of which are often encountered in SC activities. See Jeremy Farrall and Marie-Eve Loiselle, *The UN Security Council as Regulator and Subject of the Rule of Law: Conflict of Confluence of Interest?, in* STRENGTHENING THE RULE OF LAW THROUGH THE SECURITY COUNCIL 4 (Jeremy Farrall and Hilary Charlesworth eds., 2016).
[258] Boon, *supra* note 112, at 556.
[259] TERENCE C. HALLIDAY ET AL., TRANSNATIONAL LEGAL ORDERS 8 (2015).

groups, sanctions busters, and 'criminal networks and perpetrators of serious violations of international humanitarian law and human rights abuses, including those within the national armed forces.'[260] The Council indicated that sanctions could be imposed against any entity, including businesses, that failed to exercise due diligence in accordance with these guidelines. A year later, the Council adopted a similar due diligence approach to remove Eritrean extractive enterprises from global supply chains and extended the regime to the provisions of financial services, including insurance and reinsurance, that would facilitate investment in the Eritrean extractive sector.[261] Notably, both guidelines were strongly suggestive of how States should themselves regulate business. Still, as examined *supra* III.B, an even more obvious regulatory development of this sort is the SC's use of international standards produced by intergovernmental networks and hybrid public/private initiatives.

To conclude, the substantive legal effects of sanctions imposed by the Council under Article 41 of the UN Charter are well-known.[262] Little needs to be said here. Essentially, selective embargoes and "individual" sanctions – which, with the publication by the SC of lists containing hundreds of names and other data on individuals and private entities, offers a striking visible account of the growing proximity between the exercise of power by the Council and the position of these actors – are legally binding on States who remain the sole formal addressees of the Council's decisions. As exposed in Chart E, the precise content of obligations imposed on member States varies, obviously, with the measures concerned. In turn, the legal position of NSDAs is only indirectly affected, through the implementation by UN members of the Council's decisions.[263] Definitely more important for the purposes of this study are the broader consequences of the use of sanctions as regulation.

By increasingly imposing sanctions under Article 41 of the UN Charter to regulate commodities, peace agreements, and internal armed conflict,[264] the Council has influenced the external articulations of statehood and the internal dynamics of transitions towards peace. Concretely, the repeated efforts to employ sanctions to enforce peace agreements have the effect of formalizing, at least in part, the

[260] S.C.Res. 1952, U.N.Doc.S/RES/1952 (Nov. 29, 2010).
[261] S.C.Res. 2023, U.N.Doc.S/RES/2023 (Dec. 5, 2011).
[262] For a detailed account see Eckert, *supra* 94.
[263] Among other things, it is known to all observers that the activities of sanctions committees and panels of experts have severe implications for the rights of individuals and organizations 'named and shamed' in their reports. The mere act of listing their names may indeed result in restrictive entry and transit controls, and/or the freezing of the assets of the actor in question.
[264] CHRISTINE BELL, PEACE SETTLEMENTS AND INTERNATIONAL LAW: FROM LEX PACIFICATORIA TO JUS POST BELLUM 183 (2008), arguing that the post-cold-war peace settlement context has required international law to mutate in order to regulate the mediation and implementation of peace settlements.

'obscure' status of peace agreements with non-state actors.[265] Moreover, where Council resolutions impose sanctions against armed groups who violate the terms of a peace agreement or integrate terms of peace agreements into the sanctions resolutions directly, the SC actions might be seen to transform the status of those actors or agreements in international law.[266] In addition, sanctions can provide a temporary accountability mechanism within conflicts for criminal conduct of NSDAs, when judicial processes are absent or compromised.[267] Finally, another important implication of the Council's use of sanction as regulation is the formal endorsement of initiatives such as the FAFT and the KPCS. It is no secret that today much global governance is exercised through standards and that many of the relevant norms are enunciated through informal gatherings of politicians, civil servants or private industry representatives in various configuration. What is innovative here is the Council's attempt to institutionalize these standards through its sanctions resolution, as well as the fact that, national laws implementing UN sanctions regimes impose obligations on private actors, *e.g*., with obligations to report (Kimberley) or to have heightened scrutiny in place (FATF). UN sanctions thus serve as a vehicle through which informal arrangements impose binding obligations on private actors.

[265] Michael Wood, *The Law of Treaties and the UN Security Council: Some Reflections*, in THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 244, 245 (Enzo Cannizzaro ed., 2013). See also Kooijmans, *supra* note 29, 333-46, discussing the 'internationalization' of peace treaties with UNITA in Angola through sanctions resolutions.

[266] International Law Association, *ILA Draft 3rd Report on Non-State Actors Prepared by the Co-rapporteurs, Cedric Ryngaert and Jean d'Aspremont: Conference Report Washington 6-9* (2014). See also Sandesh Sivakumaran, *Binding Armed Opposition Groups*, 55 INT'L & COMP. L. Q. 369 (2006).

[267] For example, the Council applied sanctions on the instigators of the 2012 coup d'état in Guinea-Bissau, to deter these individuals and others from staging a subsequent coup. Cf. Statement by the President of the Security Council, U.N.Doc.S/PRST/2009/11 (May 5, 2009).

Chart E

	Comprehensive	Arms	Financial	Travel	Aviation	Oil	Diamonds	Timber	Other	Panel of Experts	Security Council Resolutions
Somalia (1992–)		√	√	√					√	√	733 (1992), 1407 (2002), 1772 (2007), 1844 (2008), 1907 (2009), 2023 (2011), 2036 (2012), 2093 (2013), 2142 (2014), 2182 (2014), 2244 (2015), (2016), 2385 (2017), 2444 2498 (2019)
ISIL e Al Qiada (1999–)		√	√	√						√	1267 (1999), 1333 (2000), 1393 (2002), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008), 1904 (2009), 1988/1989 (2011), 2082/2083 (2012), 2199 (2015), 2331 (2016), 2347/2368/2379/ 2388/2396 (2017), 2462 (2019)
Iraq (1990–2003)	√	√	√								661 (1990), 1483/1518 (2003), 1546 (2004)
Iraq (res. 1483) (2003–)		√	√							√	
Democratic Republic of Congo (2003–)		√	√	√	√					√	1493 (2003), 1596 (2005), 1807/1857 (2008), 1952 (2010), 2198 (2015), 2293 (2016), 2360 (2017), 2424 (2018), 2478 (2019), 2528 (2020)
Sudan I (1996–2001)				√	√				√		
Sudan II (2004–)		√	√	√						√	1054 (1996), 1070 (1996), 1556 (2004), 1591 (2005), 1672 (2006), 1945 (2010), 2200 (2015), 2265 (2016), 2340 (2017), 2400 (2018), 2455 (2019)
Lebanon/Syria (2005–)			√	√							1636 (2005), 1701 (2006)
North Korea (2006–)		√	√	√		√			√	√	1718 (2006), 1874 (2009), 2087/2094 (2013), 2207 (2015), 2270/2276/2321 (2016), 2345/2356/2371/ 2375/2397 (2017), 2407 (2018), 2464 (2019), 2515 (2020)
Libya I (1992–2003)		√	√		√				√		748 (1992), 883 (1993),
Libya II (2011–)		√	√	√		√				√	1970/1973/ 2009/2016 (2011), 2095 (2013), 2146 (2014), 2214/2213 (2015), 2278/2292 (2016), 2357/2362 (2017), 2420/2441 (2018), 2473 (2019), 2509, 2526 (2020)
Afghanistan (1999–)		√	√	√						√	1452 (2002), 1735 (2006), 1988 (2011), 2082 (2012), 2160 (2014), 2255 (2015), 2501 (2019)
Guinea-Bissau (2012–)				√							2048 (2012)

	Comprehensive	Arms	Financial	Travel	Aviation	Oil	Diamonds	Timber	Other	Panel of Experts	Security Council Resolutions
Central African Republic (2013–)		√	√	√						√	2127 (2013), 2134 (2014), 2196 (2015), 2262 (2016), 2339 (2017), 2399 (2018), 2454/2488 (2019), 2507, 2536 (2020)
Yemen (2014–)		√	√	√						√	2140 (2014), 2216 (2015), 2266 (2016), 2342 (2017), 2402 (2018), 2456 (2019), 2511 (2020)
South Sudan (2015–)		√	√	√						√	2206 (2015), 2271/2280/2290 (2016), 2353 (2017), 2418/2428 (2018), 2471(2019), 2521 (2020)
Mali (2017–)			√	√						√	2374 (2017), 2432 (2018), 2484 (2019)
Former Republic of Jugoslavia (1991–1996)	√	√	√	√	√						713 (1991), 757 (1992), 820 (1993), 942 (1994)
Kosovo (1998–2001)		√									1160 (1998), 1367 (2001)
Liberia (1992–2001)		√	√	√			√	√		√	788 (1992), 1343 (2001), 1478/1521 (2003), 1532 (2004), 1753 (2006), 1903 (2009), 2288 (2016)
Liberia (2001–2003)		√	√	√			√	√		√	
Liberia (2003–2016)		√	√	√			√	√		√	
Haiti (1993–1994)	√	√	√	√	√	√					841 (1993), 873 1993), 917 (1994)
Angola (UNITA) (1993–2002)		√	√	√		√	√		√	√	864 (1993), 1127 (1997), 1173 (1998)
Rwanda (1994–2008)		√								√	918 (1994), 997/1011 (1995), 1823 (2008)
Sierra Leone (1997–2010)		√		√		√	√			√	1132 (1997), 1171 (1998), 1306 (2000), 1940 (2010)
Eritrea Ethiopia (2000–2001)		√									1298 (2000)
Costa d'Avorio (2004–2016)		√	√	√			√			√	1572 (2004), 1584/1643 (2005), 1893 (2009), 1975/1980 (2011), 2283 (2016)
Iran (2006–2015)		√	√	√						√	1737 (2006), 1747 (2007), 1803 (2008), 1929 (2009), 2231 (2015)

E. Measures in the Context of Criminal and Administrative Law. The Renovated Practice of 'Quasi-Legislative' Decisions

While most SC resolutions seek to end a conflict or resolve a particular crisis, some go further and attempt to control the future behavior of NSDAs in general and abstract terms. This was the case with the measures adopted to defeat international terrorism and to counteract nuclear proliferation

among non-state entities, especially among terrorist groups, against which the Council does not limit itself to impose sanctions on specific issues, but has taken steps to establish a general and abstract regulation – originally with Resolutions 1373 of September 28, 2001 and 1540 of April 28, 2004, both adopted unanimously – that raised the issue of new powers, of 'legislative' nature, taken by the Council itself. [268] The characteristic of these resolutions is indeed the provision of a series of measures, sometimes envisaged in specific treaties, but that ultimately impose themselves under Article 41 also on the UN Member States who are not and do not want be parties to them – to be adopted against international terrorism and/or the safeguard of nuclear nonproliferation, regardless of concrete crises and without time limits.[269]

Until very recently, the only two cases of 'quasi-legislative' resolutions were the above-mentioned Resolution 1373 – which requires all States to interrupt the financing of terrorist operations and criminalize the willful provision of such funding[270] – and Resolution 1540 – which requires States to adopt and enforce appropriate laws to prevent the proliferation of nuclear, chemical, and biological weapons, and specifies the ultimate target of the measures it prescribes, the 'non-state actors', to whom it purports such proliferation.[271] Then, after a length hiatus, the Council adopted a third quasi-legislative resolution in 2014 on the prevention and suppression of the recruiting, organizing, transporting or equipping of foreign terrorist fighters, introduced by President Obama at a special session of the Council attended by heads of States.[272] More recently, on 21 December 2017, the Council adopted Resolution 2396, a complex instrument whose key objective is the prevention of new terrorist attacks by foreign terrorist fighters affiliated with ISIL upon return after the fall of the Caliphate. The measures it promotes are mainly prophylactic in nature and build on U.S. laws regarding the use of identification technology and resulting data.[273] Specifically, Resolution 2396 imposes on all Member States the obligation to collect, process and analyze passenger name record (PNR) data and to ensure that this data is used by and shared with all competent national authorities

[268] Scholars have generally defined legislative acts as having four essential features: they are unilateral in form; create or modify some element of a legal norm; are directed to all relevant actors; and are capable of repeated application over time. Kirgis, *supra* note 4, 520, quoting EDWARD YEMIN, LEGISLATIVE POWERS IN THE UNITED NATIONS AND SPECIALIZED AGENCIES (1969). In general, legislation *stricto sensu* signifies, in a shared submission, the creation of prospective, general and abstract rules of conduct that bind all the subjects of the legal systems in the unlimited future. Abi-Saab, *supra* note 5, 26-7.

[269] José E. Alvarez, *Hegemonic International Law Revisited*, 97 AJIL L. 873, 874 (2003). In Professor 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 AJIL 175, 176 (2005).

[270] S.C.Res. 1373, ¶ 1 and 2, *supra* note 78.

[271] S.C.Res. 1540, ¶ 1 and 2, *supra* note 56.

[272] S.C.Res. 2178, ¶ 5, *supra* note 59.

[273] The diplomatic pressure exerted by the United States for the adoption of the resolution at hand is no secret. Cf. S.C. Press Release, U.N.Doc.SC/13138 (December 21, 2017).

involved in the prevention and suppression of terrorism.[274] Member States are also under an obligation to set up databases and lists containing advanced passenger information (API) for use by law enforcement, customs, border security, military and intelligence agencies in order to perform adequate screening on travelers and conduct risk assessments and investigations.[275] Lastly, it sets forth the obligation to develop and implement systems for the collection of biometric data and calls upon the Member States to share, where necessary, the data gathered by these systems.[276] The expressly stated objective is to detect in a timely manner the movement of all individuals suspected of being foreign terrorist fighters and, in such a way, prevent potential terrorist attacks. The last resolution adopted on the matter is Resolution 2462 (2019), a landmark policy document in its recognition of the FATF standards, which details the general obligation to criminalize terrorist financing embodied in Resolution 1373 (2001) – extending it to the willful provision of funding for the benefit of terrorist organizations or individual terrorists 'for any purpose, including but not limited to recruitment, training, or travel' and 'even in the absence of a link to a specific terrorist act'.[277] Notably, in spite of its explicit request to safeguard humanitarian aid and humanitarian organizations, in its specification of the obligation to criminalize terrorist financing, Resolution 2462 does little concrete to reduce the risk of financial segregation for non-profit organizations inherent to the FAFT system.

Despite the small number of these resolutions, the literature they spawned, particularly Resolutions 1373 and 1540, is vast.[278] Now, their recent revitalization is remarkable and, as I explain below, illustrative of a significant normative development in the Council's efforts to counter terrorism and related conduct of non-state actors. However, the scholarly attention is motivated by the central question they raise, *i.e.* whether such resolutions fall within the powers conferred on the Council by Article 41 or are *ultra vires*. As might be expected, the Council's efforts to defeat international terrorism and to counteract nuclear proliferation among non-state entities through 'quasi-legislative' resolutions have been very controversial. This also because, in spite of the peremptory language of these resolutions, requiring concrete action by States, the target of this action, *i.e.* the terrorist individuals and entities and other non-state entities, not to mention 'terrorism' itself, remain

[274] S.C.Res. 2396, ¶ 12, *supra* note 59.
[275] Ibid., ¶ 13.
[276] Ibid., ¶ 15.
[277] S.C.Res. 2462, ¶ 5, *supra* note 153.
[278] See, *ex multis*, Paul C. Szasz, *The Security Council Starts Legislating*, 96 AJIL 901 (2002); Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law,* 30(2) Yale J. Int'l L. 489 (2005); Luis Miguel Hinojosa-Martínez, *The Legislative Role of the Security Council in its Fight Against Terrorism: Legal, Political and Practical Limits*, 57 INT'L & COMP. L.Q. 333 (2008); Rosand, *supra* note 5; Alvarez, *supra* note 43, at 116-127; Abi-Saab; *supra* 5.

undefined. To the limited scope of this writing, there is no need to follow retrospectively all the threads of the debate this practice ignited. It requires but essential summary here.

In favor of the legality of 'quasi-legislative' resolutions it has been argued – as is routine whenever one is facing an innovative practice of the SC – that the UN Charter is the constitution of the international community and should be interpreted as a 'living instrument' in an evolutionary and teleological way, and in accordance with the relevant practice.[279] The argument that denies the existence of a Council's general authority to legislate is more convincing, both because Article 41 – as well as Article 39 where it evokes a 'threat to peace' – clearly refers to concrete issues, and because at least Resolution 1540 has raised several reservations and vocal criticism by a significant number of States.[280] Finally, because, although lately progressively repeated, the Council's legislative experiments have remained isolated. In the end, both the adoption and the implementation of these resolutions depend on the cooperation of States: if the Council's powers were stretched beyond credibility, States retain the right to ignore the expression of those powers and refuse to comply.[281] Governments in general or as a class who called for a global response to – borrowing from Professor Reisman – 'a common danger, not simply to individual States, but to a system of world public order'[282] have implemented (or shall implement) those resolutions not because they recognized (recognize) or acquiesced (acquiesce) to the exercise by the Council of a general legislative power of which these cases are but particular instances; not even because of their formal mandatory character under Chapter VII; but mainly because they found (find) that it corresponded (corresponds) to their felt needs and interests.[283]

We shall now move on to the analysis of the main implications of the practice under examination. Lawmaking stand in obvious tension with the idea of a police function that underlies the broad powers of the SC under Chapter VII. Under the Charter, no UN body was granted legislative powers with the GA being the primary organ to develop broader, long-term regulation on non-mandatory basis. But the Council's renewed practice of quasi-legislative resolutions has come to challenge this framework.

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[279] Matthew Happold, *Security Council Resolution 1373 and the Constitution of the United Nations*, 16(3) Leiden J. Int'l L. 593 (2003).

[280] Eg, ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 114 (2007), criticizing the Council for its 'essentially ad-hoc and unsystematic approach to law-making, which results from Council action on specific issues'; Luigi Condorelli, *Le pouvoir législatif du Conseil de sécurité des Nations Unies vu à la 'loupe Salmon' in* DROIT DU POUVOIR, POUVOIR DU DROIT : MELANGES OFFERTS A JEAN SALMON 1229, 1231 (Nicolas Angelet ed., 2008) speaking of 'une expropriation rampante de l'espace du droit conventionnel'.

[281] Crawford, *supra* note 2, 328.

[282] Micheal Reisman, *In Defense of a World Public Order*, 95 AJIL 834 (2001).

[283] On the other hand, the prudent use of 'quasi-legislative' resolutions by the Council suggests that even accepting that these acts are *intra vires* (or within the legal authority of the Council), this does not necessarily mean it is wise for the UN executive body to legislate in this way. For an informed discussion of some of the reasons why this may be unwise see Johnstone, *supra* note 6, 275-308.

Treating the security threats at issue as 'weakest-link goods',[284] the SC has aimed to decenter the administration of collective security away from itself by harnessing individual States so as to create a completely regulated international sphere in which terrorists and proliferators are starved of means and occasions to perpetrate attacks. In pursuit of this goal, the Council has sought to create shared frameworks for action by introducing new, abstract, and general rules of international law which are open-ended and applicable to all States. Importantly, the newest legal instruments enacted to counter international terrorism are developed and implemented within a complex statutory and institutional framework, where the powers and prerogatives of supranational and international institutions directly involved in criminal policy strategies, are extended to the detriment of domestic jurisdiction.[285] At present, said strategies no longer solely revolve around punitive measures – the real *idola* of the fight against terrorism – but, as powerfully displayed by Resolution 2396, also around administrative measures aiming to neutralize the danger posed to society by the alleged terrorist. With this change in focus, a new important development is introduced: the measures imposed by the SC, circumventing the time-consuming negotiation, ratification and implementation of an entirely new treaty, are now used as a control mechanism *ante delictum*, and as a preventive tool of policy. The SC has thus contributed to the emergence of a new preventive and proactive criminal justice system, labelled by some as 'criminal security law.'[286]

IV. CONCLUSIONS

This Article has explored one of the vexing problems with the collective security system – the system's challenges with addressing threats to peace caused by the conduct of individuals, both private and corporate, and other non-governmental entities. It has unrevealed the dissonance inherent in the fact that a body like the UN Security Council, which is created and built to deal with State actors, increasingly takes measures which target, rather than only impact, individuals and collective entities *per se*, i.e. even when they cannot be linked to State action. Specifically, in light of evidence that the Council has undertaken consistent patterns of actions when addressing NSDAs – as agents whose conduct threatens international peace and security; civilians and victims of violence to be

[284] MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 222 (Alan Sheridan trans., 1995).
[285] All these legal instruments circulate among the different legal orders, from municipal legal systems (particularly the U.S.) to the international order and vice versa, passing through the regional legal systems (e.g. the European Union). Borlini, *supra* note 23, 308.
[286] John Vervaele, *Economic Crime and Money Laundering: A New Paradigm for the Criminal Justice System?*, in RESEARCH HANDBOOK OF MONEY LAUNDERING (Brigitte Unger & Daan Van Der Linde eds, 2013).

protected; or facilitators of the Council's action – the Article has sought to offer a detailed cartography of the evolution of the SC's contemporary practice and powers, matured from a painstaking review of the bulk of its existing resolutions and elaborations on a dataset including all resolutions adopted under Chapter VII over the last thirty years. The data demonstrate that, after the fall of the Berlin Wall, the Council has increasingly adopted resolutions that apply and draw in non-governmental actors more than what previous studies merely suggest: out of the 758 resolutions expressly adopted under Chapter VII in the period considered, 408 resolutions (54%) dealt with NSDAs, and this trend has dramatically increased over the last eight years (70% on average). With this change in focus, significant changes in the measures prescribed by the Council has followed.

Related is the second, and more significant, finding of the Article. The correctness of the Hegelian law – that merely quantitative differences beyond a certain point pass into qualitative changes – finds further validation here. The exercise of the Council's power to take non-forcible measures has been the theatre of a central development in its practice: the analysis of SC resolutions based on our data shows further that, as a result of the growth importance of NSDAs for its mission of advancing international peace and security, the SC is increasingly making use of Article 39, 40 and 41 of the UN Charter, by expanding the preventative use of its powers. In light of the aggregate practice analyzed, the Article argues that, in addressing the growing gravity of the threats rooted in non-state actors and attempting to secure civilians and human rights, the SC has operated in the context of both conflict prevention and actions on generalized threats, adopting Chapter VII measures that not only address the immediate objective of crisis management, but also increasingly engage in mapping out future regulation and structure of governance.

This practice has been extraordinary, far beyond what the founders of the UN intended or probably even imagined. Operating in a decentered, polycontextural environment, the SC has engaged in implicit interpretations of the Charter through its operational activities,[287] and, hence, increasingly resorted to a range of innovative tools – experiments with private enforcement and hybrid regulation; direct injunctions to NSDAs demanding measures not otherwise covered by international law and even, on occasions, permanent in nature; sanctions as responsive regulation; quasi-legislative resolutions imposing new criminal and administrative measures – to alter the behavior of a multiplicity of public and private actors with the intention of creating lasting conditions for peace and security. Simply put, the relevant SC resolutions consciously transcend the solution of particular

[287] On the UN bodies' implicit interpretations of the law through their operational activity see Oscar Schachter, *The UN Legal Order: An Overview, in* THE UNITED NATIONS AND INTERNATIONAL LAW 9 (Christopher C. Joyner ed., 1997): 'The task faced by most UN bodies is practical and instrumental (…). Problems are analyzed, proposed solutions negotiated, decisions reached. Interpretation is implicit in the measures adopted.'

conflicts, by seeking to compel actions deemed essential to preventing new conflicts, as well as the losses and violence resulting from uncontrolled generalized threats, i.e. diminishing conflict in general.

The Article also contends that, though the further expansion of these developments remains uncertain, their normative implications are already significant. Let us briefly recap the most remarkable: the establishment of direct international duties by the SC on groups and individuals whose conduct threatens peace and international security. The Council's growing influence, through sanctions regimes' increased coverage and specificity, on the external articulations of statehood and the internal dynamics of transitions towards peace, as well as the formalization and 'internationalization' of peace agreements with non-state actors. The mediated imposition on associations and corporations established under private law of due diligence and scrutiny obligations, with the Council emerging as a body capable of prescribing, interpreting and promoting primary rules of conducts for businesses, as well as procedures for facilitating their enforcement.[288] The creation, via quasi-legislative resolutions, of a completely regulated international sphere where terrorists and proliferators are starved of means and chances to perpetrate attacks, and the contribution to the emergence of a "criminal security law".

A final remark. The dataset compiled for this Article comprises the most complete known account of Council resolutions dealing with NSDAs. It opens opportunities for further research in multiple directions. First, future research can help to discuss critically the operations of Council powers. Much like a *deus ex machina*, the Council is called upon to effectuate what the available means of international law (or the will of States) prove unable to do by short-circuiting them through the use of its exceptional powers under Chapter VII. But any transformation of its practice, corresponds to a change in the exercise of (sometimes brutal) public powers, and a debate must take place on whether the increased and diversified preventative use of non-forcible measures within a complex world is the best response to perceived threats caused by individuals and private entities. Second, the data allow for analysis of Council efficacy: how Council provisions dealing with NSDAs affect conflicts, post-conflicts environments and generalized threats. Third, students of the UN, human rights, international humanitarian law, and international criminal law may leverage the data to tease out the complex and evolving linkages between Council decisions, security and justice.

[288] Such authority of the Council may be regarded as a form of 'international public executive and judicial control' of private economic activities, which Professor Friedman some fifty years ago expected to be exerted in 'a further stage in international legal organization'. WOLFGANG FRIEDMAN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964).