

**THE FUNCTIONAL THRESHOLD:  
DIRECT INTERNATIONAL LEGAL REGULATION OF  
COLLECTIVE NONSTATE ENTITIES AND THE LAW  
OF INTERNATIONAL PEACE AND SECURITY**

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*This article explores transformations in international law with respect to collective nonstate entities, challenging the mainstream view that international law stipulates rights and obligations directly binding on such entities only on an exceptional basis. Through the example of the U.N. Charter’s regime for international peace and security, this article demonstrates the normative change within international law to directly addressing rights and obligations to collective nonstate entities, without the interposition of any state. The article argues that the normative inclusion of collective nonstate entities within binding international law may be conceptualized and explained as involving the operation of a “functional threshold.” Specifically, only the functionally critical collective nonstate entities, i.e., entities perceived as indispensable for the performance of the legal regime’s function, have acquired direct rights and obligations under international law.*

I. INTRODUCTION

Collective nonstate entities (CNEs) are neither established by nor directly or indirectly derived from states. In addition to business corporations, nongovernmental organizations, armed groups, and political opposition groups, this category includes entities such as humanitarian organizations, advocacy groups, international terrorist networks, secessionist groups, and indigenous peoples.<sup>1</sup> Much writing has been produced on international law’s expanding engagement with CNEs and the various nonbinding and informal ways in which international law regulates such entities’ conduct.<sup>2</sup> Yet, leading general

1. These entities are typically referred to in international legal practice and scholarship as “non-state actors.” However, this term suffers from critical imprecision, as it sometimes encompasses individuals and entities directly emanating from states or states’ collective action, such as international organizations, informal formations of states, sub-units of federal states, state organs, state agencies, and organs and other bodies of international organizations. This article employs “collective nonstate entities” as a more precise term to refer only to collective entities (to the exclusion of individuals) that do not emanate from states (to the exclusion of international organizations and other formations of states).

2. See generally NON-STATE ACTORS AND INTERNATIONAL LAW (Andrea Bianchi ed., 2009) (providing a selection of key writings on the topic of “non-state actors” and international law); ANDREW CLAPHAM, HUMAN RIGHTS OBLI-

works on international law have regularly portrayed CNEs as principally outside binding international law's<sup>3</sup> direct regulatory purview but for a few exceptional cases.<sup>4</sup> Indeed, mainstream international legal doctrine has largely considered the direct binding regulation of CNEs legally impossible or nonexistent in positive law, particularly in relation to obligations.<sup>5</sup> However, the reality is that CNEs possess many more rights and obligations under contemporary international law than we have been led to believe.

Since the early 1990s, the U.N. Security Council (Security Council, Council, or SC) has used Chapter VII of the U.N. Charter to impose direct obligations upon various nonstate entities, such as rebel groups, political leadership groups, militias, and terrorist organizations.<sup>6</sup> States have not challenged this practice, and when presented with the opportunity in the *Kosovo* advisory opinion, the International Court of Justice (ICJ) did not question the Security Council's competence to

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GATIONS OF NON-STATE ACTORS (2006) (examining the legal protections against "the threats to the enjoyment of human rights . . . from non-state actors"); NON-STATE ACTORS AS STANDARD SETTERS (Anne Peters et al. eds., 2009) (assessing non-state actors' role in shaping the international processes of standard setting); PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM (Jean d'Aspremont ed., 2011) (featuring a collection of contributions that explore the role and status of "non-state actors" from the perspective of "a particular theory or tradition of international law, a region, an institutional regime, or a particular subject-matter").

3. Binding international law involves international legal rights and obligations, i.e. strict entitlements and duties, that are legally binding (obligatory as opposed to optional) as a matter of international law. Both mainstream positivist and critical scholarship would likely consider the adjective "binding" superfluous: For the former, it goes without saying that international law is binding. For the latter, questions of formal legal validity and legally binding character are of little consequence. However, the expression emphasizes the focus of the present query. This article therefore uses "binding international law" as a benchmark and as a lens of inquiry. The term is not intended to anthropomorphize international law, but rather to insert space between states and international law as a normative system.

4. *E.g.*, MALCOLM SHAW, INTERNATIONAL LAW 1–2, 156, 193–98 (8th ed. 2017); JAMES CRAWFORD, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 105–16 (9th ed. 2019); JAN KLABBERS, INTERNATIONAL LAW 84–89 (2013); INTERNATIONAL LAW 228–33 (Malcolm Evans ed., 5th ed. 2018); JEFFREY DUNOFF, INTERNATIONAL LAW 169–91 (4th ed. 2015).

5. *See infra* Part II.

6. *See infra* Part III.

do so in any way.<sup>7</sup> Armed opposition groups have been addressees of obligations under customary humanitarian law and humanitarian law treaties,<sup>8</sup> and they have been called to respect fundamental human rights—norms originally designed to define the limits of state authority vis-à-vis persons within its jurisdiction.<sup>9</sup> International courts have held that news publishers, business entities, advocacy groups, and various other orga-

7. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22) (including no discussion of the Security Council's competence) [hereinafter *Kosovo Advisory Opinion*].

8. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3314, 75 U.N.T.S. 31 (Common article 3 to the Geneva Conventions); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, 1125 U.N.T.S. 3 (assuming that the armed opposition group would qualify as a “national liberation movement”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609; Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 19, May 14, 1954, 249 U.N.T.S. 216; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 172; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137; *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), ¶ 22 (May 31, 2004), [http://www.rscsl.org/Documents/Decisions/CDF/Appeal/131/SCSL-04-14-AR72\(E\)-131.pdf](http://www.rscsl.org/Documents/Decisions/CDF/Appeal/131/SCSL-04-14-AR72(E)-131.pdf) [<https://perma.cc/YK9E-2SZC>] (“[I]t is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties.”).

9. *E.g.*, Institut de Droit International, L'application du droit international humanitaire et des droits fondamentaux de l'homme dans les conflits armés auxquels prennent part des Entités non étatiques ¶ 2 (1999) (Belg.), translated in INST. INT'L L., THE APPLICATION OF INTERNATIONAL HUMANITARIAN LAW AND FUNDAMENTAL HUMAN RIGHTS, IN ARMED CONFLICTS IN WHICH NON-STATE ENTITIES ARE PARTIES ¶ 2 (1999) (“[A]ll parties in armed conflicts in which non-State entities [defined as ‘parties to internal armed conflicts’] are parties, irrespective of their legal status . . . have the obligation to respect international humanitarian law as well as fundamental human rights.”); Liesbeth Zegveld, Accountability of Armed Opposition Groups in International Law 97–132 (2002); Int'l. L. Ass'n.: The Washington Conference (2014), *Third Report Prepared by the Co-Rapporteurs, Cedrik Ryngaert and Jean d'Aspremont*, 5–6; CLAPHAM, *supra* note 2, at 271–312.

nizations have rights under human rights treaties.<sup>10</sup> Airlines have rights and obligations under air transportation and aviation treaties, such as the E.U.-U.S. Open Skies Agreement,<sup>11</sup> while operators of nuclear installations and shipowners are liable for damage caused by their activities under numerous civil liability treaties, such as the Vienna Convention on Civil Liability for Nuclear Damage<sup>12</sup> and the International Civil Liability Convention for Oil Pollution Damage.<sup>13</sup> Corporations operate alongside states on the deep seabed within the framework of U.N. Convention on the Law of the Sea (UNCLOS), assuming a plethora of environmental, technology transfer, and other international law obligations.<sup>14</sup> Furthermore, the 2008

10. *E.g.*, *Sunday Times v. United Kingdom*, App. No. 6538/74, 2 Eur. H.R. Rep. 245 (1979) (finding that the actions taken against the *Sunday Times* violated multiple rights the newspaper possessed under the European Convention on Human Rights, such as the freedom of expression under article 10); *Ligue du Monde Islamique v. France*, App No. 36497/05 & 37172/05, (2009) (finding that France's refusal to allow two religious organizations to sue a newspaper in French courts violated their rights under article 6 of the European Convention on Human Rights).

11. United States European Union Air Transport Agreement, Apr. 30, 2007, 46 I.L.M. 470 (including the rights of airlines to operate flights, carry transit traffic, and establish offices in the parties' territory in articles 3 and 10 and the obligation for aircraft to comply with laws on admission, departure, operation, and navigation in article 7); Case C-366/10, *Air Transp. Ass'n of America v. Sec'y of State for Energy and Climate Change*, 2011 E.C.R. I-13755, ¶¶ 82, 84.

12. Article II(1) of the Convention states that the "operator of a nuclear installation shall be liable for nuclear damage upon proof that such damage has been caused by a nuclear incident – (a) in his nuclear installation; or (b) involving nuclear material coming from or originating in his nuclear installation . . ." "Operator of a nuclear installation" is defined in art. I(1)(a)-(c) to include any "partnership" and "any private or public body whether corporate or not." Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, 1063 U.N.T.S. 265.

13. Article III(1) of the Convention provides that shipowners "at the time of an incident [of oil discharge from vessel], or, where the incident consists of a series of occurrences, at the time of the first such occurrence, shall be liable for any pollution damage caused by the ship as a result of the incident." The "owner" is defined in article I(2)-(3) to include any "partnership" and "any private or public body whether corporate or not." International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3.

14. Article 137(1) of UNCLOS stipulates for example that "No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or *juridical person* appropriate any

ECOWAS Supplementary Act requires investors and their local corporate vehicles to conduct environmental and social impact assessments and comply with extensive social impact, labor, human rights, and corporate governance requirements.<sup>15</sup>

Scholarship has principally sought to accommodate normative phenomena involving CNEs from outside the paradigms of international law or binding law.<sup>16</sup> However, even when international law is conceptualized narrowly as state-made law,<sup>17</sup> CNEs operate in contemporary international law as both holders of rights and bearers of obligations. As the above examples make apparent, states, international organizations, as well as international and municipal courts and tribunals, and other stakeholders to international legal processes have treated certain CNEs as possessing both rights and obligations under treaties, customary international law and secon-

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part thereof . . . 3. No State or natural or *juridical person* shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part.” United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (emphases added); see Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, Case No. 17, Order of Feb. 1, 2011, 17 ITLOS Rep. 10 (discussing obligations and responsibility of states and nonstate entities under UNCLOS Part XI); Case C-308/06, Int’l Ass’n of Indep. Tanker Owners (Intertanko) v. Sec’y of State for Transp., 2008 E.C.R. 312, ¶¶ 63–64 (distinguishing addressees of Part XI from the other parts of UNCLOS).

15. Article 14(2) of the ECOWAS Supplementary Act states that “Investors shall uphold human rights in the workplace and the community in which they are located. Investors shall not undertake or cause to be undertaken, acts that breach such human rights. Investors shall not manage or operate the investments in a manner that circumvents human rights obligations, labour standards as well as regional environmental and social obligations, to which the host State and/or home State are Parties.” Article 14(4) provides that “Investors shall act in accordance with fundamental labour standards as stipulated in the ILO Declaration on Fundamental Principles and Rights of Work, 1998.” Articles 12, 15, and 17 contain similar “shall” formulations. Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for Their Implementation with ECOWAS, ch. 3 (Dec. 19, 2008), <https://investmentpolicy.unctad.org/international-investment-agreements//3266/download> [https://perma.cc/P4K-PN5H].

16. See *infra* Part II.

17. Traditional approaches to international law regularly posit that international legally binding rules originate only from states and derivatively from inter-governmental organizations, with states determining both the content of specific rules and the sources in which these rules may be found.



dary acts of international organizations directly without the interposition of any state.<sup>18</sup> In other words, international law directly governs CNEs in diverse contexts and applies to them directly, not through any state or municipal law.

There is thus an apparent disconnect between mainstream international legal doctrine and the actual practice of international law with respect to CNEs. However, because relevant practice has normative value in international law, the existence and increasing occurrence of CNEs possessing direct international legal rights and obligations impacts both the content and structures of binding international law. The mainstream international law doctrine must accordingly be revised to properly acknowledge the normative inclusion of CNEs as addressees of rights and obligations under international law.

This article explores the phenomenon of international legal rights and obligations of CNEs through the example of the law of international peace and security, and in particular the practice of the U.N. Security Council. Security Council practice presents a suitable case study, as the Council is a focal point of international law development<sup>19</sup> and regularly deals with international matters involving CNEs.<sup>20</sup> Through analysis of Security Council practice, this article demonstrates that, while it is possible for CNEs to have direct rights and obliga-

18. The term “interposition” refers to the question of who holds the right or obligation, i.e., whether it is the entity itself or whether it is a right or obligation of some state. Anne Peters refers to a similar idea as “mediation,” invoking the German concept of “Mediatisierung.” ANNE PETERS, *BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW*, 61 n. 6 (Jonathan Huston trans., 2016).

19. See generally Vera Gowlland-Debbas, *The Functions of the United Nations Security Council in the International Legal System*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 277 (Michael Byers ed., 2001) (discussing the Security Council’s “collective and institutionalized mechanisms for the enforcement of international legal norms . . .”); George Nolte, *The Limits of the Security Council’s Powers and its Functions in the International Legal System: Some Reflections*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 320, 324–25 (Michael Byers ed., 2001) (discussing the Security Council’s law-making role); JAMES CRAWFORD, *International Law as an Open System*, in *International Law as an Open System: Selected Essays* 1, 21 (James Crawford ed., 2002) (noting how the Security Council “regularly addresses injunctions to all sorts of bodies, opposition groups, and even individuals, using the language of international rights and obligations.”).

20. See *infra* Part III.

tions under positive international law, international law is selective in its direct regulation of CNEs: only certain CNEs acquire only certain international legal rights and obligations, and only in certain circumstances. In order to explain this selectivity, this article introduces the concept of the *functional threshold*. This article argues that rights and obligations of CNEs develop in response to specific matters of international concern when states consider particular entities to be *functionally critical*, i.e., indispensable to a legal regime's function of providing the necessary normative framework to realize the regime's purpose. The normative inclusion of CNEs among addressees of binding international law is thus based on the shared perception that the conduct of particular CNEs either critically disrupts or facilitates the regime's function.

This article does not claim that only binding international law matters.<sup>21</sup> Nor does it maintain that binding law is inherently the most preferable regulatory tool for international coordination in matters involving CNEs. Rather, by focusing on binding international law, this article magnifies one aspect of the highly complex normative reality of CNEs.<sup>22</sup> Binding international law fundamentally structures and shapes practice in the international domain and the relationships therein because of its established structures of recognition, invocation, and enforcement. This article thus examines whether international law has changed not only in terms of its nonbinding norms but also on the level of binding rules.

Rules are only the beginning of the story; "questions of implementation, compliance, effectiveness, and enforcement" are equally important and inherently follow.<sup>23</sup> However, it is

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21. The normative and regulatory capacity of nonbinding rules as well as informal law and practices are well-documented. *See, e.g.*, Monica Hakimi, *The Jus ad Bellum's Regulatory Form*, 112 AM. J. INT'L L. 151 (2018) (discussing informal regulation in the Security Council practice in the area of *jus ad bellum*).

22. Somewhat paradoxically, the gap in scholarship has been not in the absence of alternative normative frameworks but precisely in relation to the most classical aspect of international law: international rules and international legal rights and obligations. However, just as the exclusive focus on binding law to the exclusion of other normativities results in reductionist insights regarding the legal processes in the international arena, so too does the programmatic marginalization of binding international law.

23. ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 38 (2007).



precisely the logically preceding question of the existence of CNEs' direct rights and obligations in international law, and the lack of literature clearly establishing this existence, that has caused much unnecessary difficulty. Continued doubts about the permissibility and existence of international legal rights and obligations of CNEs have clouded the application of international law, including by municipal courts, and complicated the use of binding international law as a regulatory tool for dealing with matters of international concern involving CNEs.<sup>24</sup> Establishing binding international law as a generally available tool for direct regulation of CNE's may therefore assist with some of the ongoing revisions of international legal frameworks relating to the activities of CNEs, such as the International Labour Organization (ILO)'s "Decent Work in Global Supply Chains" agenda currently under consideration.<sup>25</sup>

The vast majority of international legal scholarship dealing with CNEs in binding international law has considered the topic from the perspective of the doctrine of subjects (or personhood) of international law. Literature has accordingly revolved around the question of whether or not CNEs—or a particular category of CNEs—may be considered subjects of international law.<sup>26</sup> The reason for this approach has been the

24. See, e.g., Duncan Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137, 174 (2005) (arguing that "[w]ithout a better understanding of international law as 'law' . . . , analyses of compliance and effectiveness may lack a firm foundation.").

25. The ILO has identified its dominantly indirect regulation of employers as inadequate for the realities of global supply chains and is looking for regulatory alternatives. Unfortunately, the formulation of such alternatives so far seems to lack sophistication. See Int'l Lab. Off., Report IV: Decent Work in Global Supply Chains, ILO Doc. ILC.105/IV, at 65–68 (2016) (identifying normative options for closing governance gaps in global supply chains).

26. See, e.g., Christian Walter, *Subjects of International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2007) (listing a number of CNEs as "atypical subjects of international law."); Ruth Wedgwood, *Legal Personality and the Role of Non-Governmental Organizations and Non-State Political Entities in the United Nations System*, in NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW: INTERNATIONAL LAW—FROM THE TRADITIONAL STATE ORDER TOWARDS THE LAW OF THE GLOBAL COMMUNITY 21, 36 (Rainer Hofmann & Nils Geissler eds., 1998) (examining the international legal personality of NGOs and "non-state political entities");

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underlying belief that, unless an entity is a subject of international law, it cannot possess international legal rights and obligations. However, studying CNEs through the prism of legal subjectivity has not been very fruitful.<sup>27</sup> The subjects doctrine has practically served as a conceptual barrier preventing any substantive inquiry into CNEs in binding international law.<sup>28</sup> This article therefore takes a different approach, analyzing CNEs from the perspective of rules, rights and obligations.

Part II of this article discusses the conventional narrative regarding CNEs in binding international law. This narrative perpetuates the mainstream view that CNEs generally cannot have direct rights and obligations under international law, thereby excluding such entities from the legal and conceptual framework. Part III subsequently demonstrates, in technical legal detail, the existence of both direct rights and obligations of CNEs in positive international law through an examination of Security Council practice. Part IV analyzes the observed dynamic and dynamism underpinning the emergence of direct rights and obligations of CNEs in international law and presents a new theoretical framework to explain the mechanism of the normative inclusion of CNEs among the addressees of binding international law. The article concludes by discussing broader legal and policy implications of the state practice of treating CNEs as having direct rights and obligations under international law, arguing that mainstream interna-

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Patrick Dumberry, *L'entreprise, sujet de droit international? Retour sur la question à la lumière des développements récents du droit international des investissements*, in *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 103–22 (2004) (exploring the question whether a corporation may be a subject of international law); Pieter 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 (Karel Wellens ed., 1998) (considering the “position of non-state parties to internal conflicts” under international law).

27. See, e.g., Jan Klabbers, *(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors*, in *NORDIC COSMOPOLITANISM: ESSAYS IN INTERNATIONAL LAW FOR MARTTI KOSKENNIEMI* 351, 369 (Jarna Petman & Jan Klabbers eds. 2003) (arguing that it is “unlikely that subjects doctrine will come to accommodate non-state entities without further ado.”).

28. ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 49 (1995); Vaughan Lowe, *Corporations as International Actors and International Law Makers*, 14 *ITALIAN Y.B. INT'L L.* 23, 26 (2004); Klabbers, *supra* note 27 at 353, 367; Andrew Clapham, *Focusing on Armed Non-State Actors*, in *THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT* 768–69 (Andrew Clapham & Paola Gaeta eds., 2015).

tional law doctrine must be revised to properly acknowledge the normative inclusion of CNEs within binding international law.

## II. THE CONVENTIONAL NARRATIVE: EXCLUDING COLLECTIVE NONSTATE ENTITIES FROM BINDING INTERNATIONAL LAW

Despite the prominence of many CNEs in matters of international concern and in international legal phenomena, the conventional narrative concerning these entities in binding international law has predominantly been one of exclusion: Mainstream thought has refused to acknowledge CNEs as possible or actual addressees of rules of international law, consequently excluding CNEs and their actions from binding international law's purview.<sup>29</sup>

The conventional narrative maintains that, because CNEs cannot be considered subjects of international law, they cannot have direct rights and obligations as a matter of course. If states wish to regulate the conduct of these entities in a legally binding manner, they must do so indirectly, by committing to each other either to enact particular municipal laws or to take other measures, such as administrative decisions, within their own jurisdictions. Any international regulation of CNEs is therefore accomplished through a "conception of representation."<sup>30</sup> Exceptions for specific, individually-recognized non-state entities, such as the Holy See, the Order of Malta, and

29. *Supra* note 4; WADE MANSSELL & KAREN OPENSHAW, INTERNATIONAL LAW: A CRITICAL INTRODUCTION 40–42 (2d ed. 2019); Hersch Lauterpacht, *The Subjects of International Law*, in COLLECTED PAPERS OF SIR HERSCH LAUTERPACHT 137 (Elihu Lauterpacht ed., 1970); JAMES CRAWFORD, CHANGE, ORDER, CHANGE: THE COURSE OF INTERNATIONAL LAW 192–211 (2014); Cedric Ryngaert, *Non-State Actors: Carving out a Space in a State-Centred International Legal System*, 63 NETH. INT'L L. REV. 183, 191 (2016); OLIVIER DE SCHUTTER, THE ACCOUNTABILITY OF MULTINATIONALS FOR HUMAN RIGHTS VIOLATIONS IN EUROPEAN LAW 3 (2004). *But see* Restatement (Third) Foreign Rel. L. U.S. pt. 2 (Am. Law Inst. 1987) (noting that "individuals and private juridical entities can have any status, capacity, rights, or duties given them by international law or agreement.").

30. CRAWFORD, *supra* note 19, at 27 (explaining that international law involved an exclusive concept of representation, signified by the *Mavrommatis* formula, according to which "[w]here individuals were affected by the actions of other states, it was really the rights of the claimant's state that were affected").

recognized insurgents and belligerents, can be accommodated, but are merely anomalies.<sup>31</sup>

While the mainstream international law doctrine has shifted to recognize international organizations and individuals as addressees of certain rules of international law, the conventional narrative regarding CNEs still flows from the classic positivist conception of international law as principally interstate law. Under this formulation, only states and state-like entities can hold rights and bear obligations directly. Although other entities can potentially participate in and influence international legal processes, including lawmaking, international law does not—and cannot—confer rights or obligations directly upon them.

Much of the discussion relating to CNEs has consequently revolved around arguments of legal impossibility. International law or its particular elements, such as the doctrines of subjects and sources, have not been considered flexible enough to accommodate CNEs within the binding regulatory framework.<sup>32</sup> Some commentators have acknowledged the capacity of international law to bestow direct rights and impose obligations on CNEs, but they have maintained that, with the exception of certain rights under international human rights law and certain obligations under international humanitarian law, no such rights or obligations exist as a matter of positive law.<sup>33</sup>

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31. Andrea Bianchi, *Looking Ahead: International Law's Main Challenges*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 392, 393 (David Armstrong ed., 2009).

32. See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 66 (7th ed. 2008) (discussing the issue from the perspective of corporations); PATRICK DAILLIER, MATHIAS FORTEAU & ALAIN PELLET, *DRIT INTERNATIONAL PUBLIC* 716 (8th ed. 2009) (discussing the issue from the perspective of “private persons”).

33. E.g., MARKOS KARAVIAS, *CORPORATE OBLIGATIONS UNDER INTERNATIONAL LAW* 17 (2013); Eric De Brabandere, *Human Rights Obligations and Transnational Corporations: The Limits of Direct Corporate Responsibility*, 4 HUM. RTS. & INT'L LEGAL DISCOURSE 66, 73 (2010); Koen de Feyter, *Globalisation and Human Rights*, in INTERNATIONAL HUMAN RIGHTS LAW IN A GLOBAL CONTEXT 51, 77 (Felipe Gómez Isa & Koen de Feyter eds., 2009); Nigel Rodley, *Non-State Actors and Human Rights*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 523, 526, 543 (Scott Sheeran & Nigel Rodley eds., 2014).

Many authors have therefore considered classical international law to be largely inadequate to capture and process the complex power structures and novel legal phenomena of a globalized world.<sup>34</sup> Scholarship's dominant conceptual approaches to changing realities have been to (i) theorize the new normative phenomena involving CNEs through alternative normative frameworks, such as transnational law, global law, global administrative law, and pluralist post-national law;<sup>35</sup> or (ii) focus on other types of legal normativity such as soft law, private (self-)regulation, and informal lawmaking, emphasizing the importance of socialization and voluntary compliance.<sup>36</sup> In fact, much of the contemporary thinking about international governance does not even seem to consider formal

34. See, e.g., Klabbers, *supra* note 27, at 353–54 (arguing that “international law has failed to seriously incorporate non-state actors into its framework” and “can only problematically be applied to activities involving actors other than states.”).

35. See generally, Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1009–10 (2004) (explaining the fragmentation of global law and its normative implications); Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance*, 42 VAND. J. TRANSNAT'L L. 501 (2009) (analyzing non-state actors role in shaping international regulation through the framework of “Transnational New Governance”); LAW AND LEGALIZATION IN TRANSNATIONAL RELATIONS (Christian Brüttsch & Dirk Lehmkuhl eds., 2007) (arguing that “[l]egalization has transformed . . . the institutions of global governance and the broader frameworks of agency that enable different actors to participate and operate in world politics”); Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301 (2007) (introducing an analytical framework for understanding “plural normative centers” based on “on norm-generating communities—rather than nation-states”); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005) (“provid[ing] a survey of major developments and central questions in the emerging global administrative law”).

36. See generally, INFORMAL INTERNATIONAL LAWMAKING (Joost Pauwelyn, Ramses Wessel & Jan Wouters eds., 2012) (assessing the impact of the rise of “informal international lawmaking”); A. Claire Cutler, *Private International Regimes and Interfirm Cooperation*, in THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE 23 (Rodney Bruce Hall & Thomas Biersteker eds., 2002) (discussing the “development of private international regimes as institutionalized manifestations of private authority”); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004) (explaining how government networks contribute to global governance).

international law as a factor structuring interactions within the international domain.

States have strategically sustained the conventional narrative on CNEs, arguably to maintain their privileged position and control over binding international law. Still, in certain instances, states and intergovernmental organizations have treated CNEs as possessing international rights and obligations directly, without the interposition of any state.

### III. DIRECT RIGHTS AND OBLIGATIONS OF COLLECTIVE NONSTATE ENTITIES IN THE LAW OF INTERNATIONAL PEACE AND SECURITY

Contemporary practice of international law does not correspond to the conventional narrative on CNEs. The law of international peace and security and the practice of the U.N. Security Council demonstrate the existence and operation of direct international legal rights and obligations of CNEs and exemplify the normative shift within international law to allow these entities to possess rights and obligations without the interposition of any state.

#### A. *The Security Council, International Law, and Collective Nonstate Entities*

Since the 1990s, the Security Council has dealt with an increasing number of matters involving CNEs in the exercise of its “primary responsibility for maintenance of international peace and security.”<sup>37</sup> The Council’s mandate has also progressively broadened as the concepts of “peace” and “threat to international peace and security” have expanded beyond armed conflicts to include humanitarian, economic, social, and ecological issues.<sup>38</sup> Armed groups, terrorist networks, po-

37. U.N. Charter art. 24.

38. *E.g.*, S.C. Res. 2165, at 3 (July 14, 2014) (declaring humanitarian situation a threat to international peace and security); S.C. Res. 1540, at 1 (Apr. 28, 2004) (declaring proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, a threat to international peace and security); S.C. Res. 1521, at 1–2 (Dec. 22, 2003) (declaring “proliferation of arms and armed non-State actors, including mercenaries” a threat to international peace and security); S.C. Res. 748, at 1 (Mar. 31, 1992) (declaring terrorism a threat to international peace and security); S.C. Res. 1373, at 1 (Sep. 28, 2001) (declaring terrorism a threat to international peace and security in a Chapter VII resolution); S.C. Res. 2177, at 1 (Sept. 18, 2014) (de-



litical opposition groups, and other similar entities have frequently been at the root of these matters, and today only a minority of Security Council acts do not involve the conduct of CNEs in some respect. Over this period of time, the Security Council has also undergone a process of legalization<sup>39</sup> and has consequently generated a significant body of practice on the treatment and operation of CNEs under international law.

Some scholars have questioned the propriety of making inferences about international law from Security Council acts because of their factual and contextual uniqueness<sup>40</sup> and the political and essentially executive character of the Council.<sup>41</sup> The Security Council is clearly a supremely political body, tasked with the maintenance of international peace and security rather than the maintenance of international law.<sup>42</sup> Its legal

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clarifying Ebola outbreak a threat to international peace and security). For commentary, see e.g., Karel Wellens, *The UN Security Council and New Threats to the Peace: Back to the Future*, 8 J. CONFLICT & SECURITY L. (2003) (exploring the evolution of the concepts of “peace” and “threat to the peace” in Security Council practice after the end of the Cold War and the impact of this development on several branches of international law); Anne Peters, *Article 24*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 761, 784 (Bruno Simma ed., 3d ed. 2012) (discussing the concept of “threat to the peace”). See also U.N. President of the S.C., Note dated Jan. 31, 1992 from the President of the Security Council, at 3, U.N. Doc. S/23500 (Jan. 31, 1992) (noting the emergence of new threats to peace after the end of Cold war, which arise from economic, social, humanitarian and ecological instability).

39. While the Security Council would only rarely refer to international law explicitly in the early decades of its existence, since the end of the Cold War it has increasingly employed legal language and characterized issues in legal terms. Today, the Security Council largely conducts its work through legal determinations, and it is not afraid to act as an enforcer of law. Wellens, *supra* note 38, at 30; Gowlland-Debbas, *supra* note 19, at 288–91 (discussing the application of law of state responsibility by the Security Council).

40. Nolte, *supra* note 19.

41. Nico Krisch, *Chapter VII Powers: The General Framework*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 38, at 1239; Georges Abi-Saab, *The Security Council Legibus Solutus? On the Legislative Forays of the Council*, in INTERNATIONAL LAW AND THE QUEST FOR ITS IMPLEMENTATION 23, 24 (Laurence Boisson de Chazournes & Marcelo Kohen eds., 2010).

42. ANTONIO CASSESE, INTERNATIONAL LAW 234 (2001); Wellens, *supra* note 38, at 30–31, 50; Christian Henderson, *The Centrality of the United Nations Security Council in the Legal Regime Governing the Use of Force*, in RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW 120, 123 (Nigel White & Christian Henderson eds., 2013); HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 735 (1950).

pronouncements and determinations are thus subordinated to its primary mandate,<sup>43</sup> and the invocation of an alleged violation of international law often plays only an incidental role in its overall activity.<sup>44</sup> The Council also enjoys broad discretion, both in deciding what constitutes a threat to international peace and security and how to respond to such a threat. This discretion necessarily results in “contingency decisions which are the outcomes of political activity.”<sup>45</sup> However, law is always applied in a particular factual setting. Even if the Security Council’s actions might at first glance appear to be random, ad hoc and discretionary exercises of police powers, the factual contingency neither diminishes their legal character nor prevents identification of general trends in the Council’s legal practice.<sup>46</sup> The use of legal arguments indicates the speaker’s conviction of the relevance of the law to the matter at hand, and such statements are therefore to be accorded legal meaning.<sup>47</sup> Moreover, when a body as politically significant as the

43. While the maintenance of international law and the maintenance of international peace and security are closely connected, they are not necessarily the same. Terry Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter*, 26 NETH. Y.B. INT’L L. 33, 46 (1995); Wellens, *supra* note 38, at 32.

44. This can mean, for example, that the Security Council may act when its members agree that a particular situation endangers international peace and security, not only when a violation of international law occurs. The two may but need not coincide. A violation of international law does not automatically amount to endangering the peace, a threat to the peace, or a breach of the peace and lead to the activation of the Security Council. Conversely, when the Security Council determines that a situation threatens international peace and security, this does not automatically signify that international law has been breached. A closer scrutiny of each instance is required.

45. Gowlland-Debbas, *supra* note 19, at 288.

46. *See id.* at 287–88 (arguing that “a legal construction can be made of Council’s discretionary determinations under Article 39, and the resulting actions—in other words, of what are in fact random and discretionary exercised of police powers”); Wellens, *supra* note 38, 47–66 (discussing how Security Council actions taken in the maintenance of international peace and security have impacted the content of international law).

47. That said, the absence of Security Council action does not allow for an inference regarding the Council’s legal views (for example, that the Council considers a particular action a breach of international law, or in accordance with international law, or outside of the legal limits of the Council’s powers), unless there is an indication to this effect, for example in a presidential statement or in the recorded statements of Security Council

Security Council and with such a high procedural bar to adopt any decision speaks to specific legal issues, its pronouncements necessarily influence the contours of the relevant legal norms.<sup>48</sup> These pronouncements directly and indirectly affect the legal positions of states as well as other entities, generate legal consequences, and make new normative expectations possible, even outside of the Council's formal lawmaking powers.<sup>49</sup>

International law operates within the Security Council and its decision making in two basic ways: First, international law factors into the Security Council's deliberations and decisions by providing applicable rules to the issues at hand, as well as legal limits on the Security Council's actions.<sup>50</sup> Second,

members. The politics within the Council fundamentally affect what issues and situations it will take up, as well as what determinations and measures it will adopt in response to these issues and situations. The Security Council must achieve the required majority and avoid the exercise of a veto by any of the five permanent members to take any substantive action. However, if the Council acts in a particular manner, it may be inferred that it considers the action to be within its powers and in accordance with applicable international law.

48. See Steven Ratner, *The Security Council and International Law*, in *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 591, 593–95 (David Malone ed., 2004) (stating that “when the Council does speak on international law, many actors will listen” and even arguing that “the legal declarations of the Council almost certainly have a greater impact on international actors than do those of the ICJ”); Hakimi, *supra* note 21, at 167 (explaining that “the Council's authority is legally salient”).

49. See Gowlland-Debbas, *supra* note 19, at 287–88 (arguing that Security Council practice “engender[s] legal consequences and mak[es] possible new normative expectations.”); Vera Gowlland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 *INT'L & COMP. L. Q.* 76 (1994) (arguing that Security Council pronouncements or determinations made under article 39, “whilst emanating from a political process, have far-reaching legal consequences, which are determined by the UN, and which create new legal relationships within the framework of the Charter”); Abi-Saab, *supra* note 41, at 25–26 (noting the Council's power to make binding determinations in certain cases); Nolte, *supra* note 19, at 323–24 (discussing the legal implications of Security Council determinations).

50. For discussion of limits of the Security Council's powers, see Nolte, *supra* note 19, at 315–26; NICHOLAS TSAGOURIAS & NIGEL WHITE, *COLLECTIVE SECURITY: THEORY, LAW AND PRACTICE* 281–318 (2013); BOYLE & CHINKIN, *supra* note 23, at 229–33; DAVID SCHWEIGMAN, *THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER: LEGAL LIMITS AND THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE* 163–204 (2001); Peters, *supra* note 38, at 816–17; ERIKA DE WET, *STUDIES IN INTERNATIONAL LAW: THE CHAP-*

international law is a product of the Security Council's work in the form of prescriptions, interpretations, endorsements, and enforcement of international law.<sup>51</sup> Expressed in more technical terms, the Security Council engages in the creation, application and enforcement of international law by declaring the existence of a particular international legal right or obligation, by characterizing particular conduct as lawful or unlawful, by invoking or endorsing a particular rule of international law, by imposing sanctions for violations of international law, etc. The Security Council thus specifically (A) creates new international legal rights and obligations through its binding decisions; and (B) develops international law through its binding and non-binding acts (i) by interpreting and applying existing international law, both treaty and customary, and (ii) by contributing to the formation of new customary international law, both as a relevant forum for the practice of states and possibly on its own.<sup>52</sup>

Analysis of the Security Council's legal practice with respect to binding international law is challenging in that only some of its resolutions are formally legally binding—decisions in the strict sense—while other acts are merely nonbinding

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TER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 137 (2004); Abi-Saab, *supra* note 41, at 24–25. Compare these writings with Gabriel Oosthuizen, *Playing the Devil's Advocate: The United Nations Security Council is Unbound by Law*, 12 LEIDEN J. INT'L L. 549–63 (1999).

51. This is an adapted classification of Steven Ratner. Ratner, *supra* note 48, at 591. For general discussions of the Security Council's lawmaking powers, see e.g., Krisch, *supra* note 41; Peters, *supra* note 38, at 787; BOYLE & CHINKIN, *supra* note 23, at 109–16; Nolte, *supra* note 19, at 320, 324–25.

52. See, Ratner, *supra* note 48 (discussing the Security Council's engagement with international law); Kiel Delbrück, *Article 25, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, supra* note 38, at 409 (explaining that in 1945, the creation of a binding decision-making power for the organization and the Security Council was a core element of the concept of the United Nations Organization); Rosalyn Higgins, *The Development of International Law by the Political Organs of the United Nations* 59 PROC. AM. SOCIETY INT'L L. ANN. MEETING (1921-1969) 116, 117 (1963) (discussing that the political organs of the U.N. provide a clear forum for the individual as well as collective practice of states and contribute to the clarification and development of law). On the issue of whether Security Council practice may contribute to the formation of customary law, see G.A. Res. 73/203, annex, Identification of Customary International Law, Conclusion 4(2) (Dec. 20, 2018).

recommendations.<sup>53</sup> Further complicating the analysis, the legally binding quality of a decision does not hinge on any specific procedure of adoption or any formal elements. In the *Namibia* Advisory Opinion, the ICJ specifically rejected an argument that for a Security Council resolution to be legally binding, it must contain an explicit invocation of Chapter VII of the U.N. Charter.<sup>54</sup> Instead, the ICJ stated that the binding effect must be determined in each case individually, “having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all other circumstances that might assist in determining the legal consequences of the resolution.”<sup>55</sup> Although the Security Council’s drafting practices have been inconsistent and have changed over time to facilitate political compromises, its resolutions have nevertheless evinced a rather formulaic language. In particular, the Council seems to have developed a normative spectrum in its contemporary practice, at the very end of which are resolutions of unequivocally legally binding nature. These resolutions include a determination of the existence of a threat to or breach of international peace and security; an explicit reference to Chapter VII; and commanding verbs, such as “decides” or “demands,” which evidence that the Council has taken a decision within the meaning of Article 25 of the U.N. Charter.<sup>56</sup>

53. Presidential statements and presidential press statements are not legally binding. Stefan Talmon, *The Statements by the President of the Security Council*, 2 CHINESE J. INT’L L. 448, 453 (2003). Additionally, the same SC resolution may contain different types of legal acts, i.e., both decisions and recommendations. For a full discussion, including the interplay between resolutions adopted under Chapter VII and those adopted under Chapter VI of the U.N. Charter, see Peters, *supra* note 38, at 793.

54. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 114 (June 21) [hereinafter *South West Africa Advisory Opinion*]. The U.N. Secretariat takes the same view. 2003 U.N. Jurid. Y.B. 538–39, U.N. Doc. ST/LEG/SER.C/41.

55. *South West Africa Advisory Opinion*, 1971 I.C.J. 16, ¶ 114.

56. For discussion, see Michael Wood, *The Interpretation of Security Council Resolutions, Revisited*, 20 MAX PLANCK Y.B. U.N. L. ONLINE 1, 14 (2017); John Bellinger, *The Security Council Resolution on Syria: Is it Legally Binding?*, LAWFARE (Sept. 28, 2013), <https://www.lawfareblog.com/security-council-resolution-syria-it-legally-binding> [<https://perma.cc/6HFB-H6XM>]. Note that when interpreting Security Council resolutions on Kosovo in the *Kosovo Advi-*

Creating or altering legal rights and obligations is only the smaller part of the Security Council's legal role. More significant is the effect of the Council's practice on existing international law and the formation of customary international law. Consequently, the Council's formally nonbinding acts have no less importance than its binding decisions in establishing the current state and development of international law.<sup>57</sup>

B. *Collective Nonstate Entities as Addressees of Binding International Law in Security Council Resolutions*

Security Council acts are primarily directed at U.N. member states and the other organs of the United Nations—most frequently the Secretary-General. However, the Security Council acts, including its binding decisions, may also address other entities: all states, including non-member states, other international and regional organizations, individuals and, since the end of the Cold War and with increasing frequency, CNEs.<sup>58</sup>

To provide a representative cross-section of the Security Council's treatment of CNEs under its decisions and binding international law more broadly, this section explores four particular items on the Council's agenda: Angola (1992-2002); Kosovo (1998-2001); the conflict in Syria (2012-2018); and the nonproliferation of weapons of mass destruction. Despite their complexity, these matters clearly demonstrate the existence of direct international legal rights and obligations of CNEs as a matter of positive law, and they disclose a discernible pattern and dynamic in the Council's treatment of CNEs.

*sory Opinion*, the ICJ considered even softer “calls on” language to have binding effect. *Kosovo Advisory Opinion*, 2010 I.C.J. 403, ¶ 116.

57. For legal declarations of existing rights and obligations—in contrast to the formulation of new rights and obligations—it arguably matters little whether the relevant resolution was adopted under Chapter VI or VII of the Charter.

58. In addition to the resolutions cited below, see, e.g., S.C. Res. 942 (Sept. 23, 1994) (Bosnia and Herzegovina); S.C. Res. 1034 (Dec. 21, 1995) (Bosnia and Herzegovina); S.C. Res. 1355 (Jun. 15, 2001) (Congo); S.C. Res. 2136 (Jan. 30, 2014) (Congo); S.C. Res. 2296 (Jun. 29, 2016) (Sudan and South Sudan); S.C. Res. 2480 (Jun. 28, 2019) (Mali); SECURITY COUNCIL REPORT, SPECIAL RESEARCH REPORT NO. 1: SECURITY COUNCIL ACTION UNDER CHAPTER VII: MYTHS AND REALITIES 13–14 (June 28, 2008), <https://www.securitycouncilreport.org//cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/%20Report%20Chapter%20%20%202008.pdf> [https://perma.cc/HPV3-HQCZ].



The determination of whether a Security Council act directly addresses a CNE is a question of interpretation. The proper method for interpreting Security Council acts has been the subject of debate because of the political character of the body and its working methods.<sup>59</sup> In addition to the specific institutional features of the Council, the text of an act might not be drafted by lawyers, and the quality of the drafting may be affected by time pressure (though in most cases the language of the resolutions is the result of detailed negotiations).<sup>60</sup> Ambiguity is frequently considered a virtue rather than a flaw, as it facilitates the formation of compromise and consensus.<sup>61</sup> Different Council members with different “groups of friends” may take leadership in the drafting as “penholders,”<sup>62</sup> making comparisons across acts relating to different agenda items difficult. Most of the negotiating and drafting history is confidential and the public record generally embodies any compromise already reached.<sup>63</sup> Above all, interpretation is a fundamentally hermeneutic process determined by the characteristics and limitations of language.<sup>64</sup>

Nevertheless, a certain consensus on the general method of interpretation of Security Council resolutions has devel-

59. Gowlland-Debbas, *supra* note 19, at 288.

60. Wellens, *supra* note 38, at 20–21; Wood, *supra* note 56, at 11–13.

61. Michael Byers, *Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity*, 10 GLOB. GOVERNANCE 165 (2004); Wood, *supra* note 56, at 11–13; Christian Henderson, *International Measures for the Protection of Civilians in Libya and Côte d’Ivoire*, 60 INT’L & COMP. L. Q. 767, 771 (2011).

62. Teresa Whitfield, *Groups of Friends, in UN SECURITY COUNCIL IN THE 21ST CENTURY* 491, 491-505 (Sebastian von Einsiedel, David Malone, & Bruno Stagno Ugarte eds., 2015); SECURITY COUNCIL REPORT, THE PENHOLDER SYSTEM. RESEARCH REPORT (2018), <https://www.securitycouncilreport.org/atf//%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Penholders.pdf> [<https://perma.cc/5T8Q-GXTD>].

63. Indeed, the Security Council President regularly opens the Council’s formal meetings by referring to “the understanding reached in prior consultations”. See, e.g., U.N. SCOR, 2991st mtg. at 2, U.N. Doc. S/PV.2991 (May 30, 1991); U.N. SCOR 5608th mtg. at 2, U.N. Doc. S/PV.5608 (Dec. 22, 2006); U.N. SCOR 6249th mtg. at 2, U.N. Doc. S/PV.6249 (Dec. 21, 2009); U.N. SCOR 7083d mtg. at 2, U.N. Doc. S/PV.7083 (Dec. 16, 2013); U.N. SCOR 8359th mtg. at 2, U.N. Doc. S/PV.8359 (Sep. 21, 2018).

64. JÖRG KAMMERHOFER, UNCERTAINTY IN INTERNATIONAL LAW: A KELSENIAN PERSPECTIVE, 87–138 (2011) (discussing theories of hermeneutics and language).

oped.<sup>65</sup> The interpretative rules in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT),<sup>66</sup> which emphasize the ordinary meaning, context, and a treaty's object and purpose, provide a starting point, while other factors reflecting the unique nature of Security Council resolutions should also be considered.<sup>67</sup> These additional factors include the particular drafting process of Security Council resolutions, the character of resolutions as products of a voting process, the fact that resolutions are binding on all U.N. member states regardless of their participation in the resolutions' formulation, statements made by Security Council members at the time of adoption, other Security Council resolutions on the same issue, and subsequent practice of relevant U.N. organs and affected states.<sup>68</sup>

This method fairly accurately describes how interpreters, such as the ICJ, other international bodies, states, and individ-

65. *Kosovo Advisory Opinion*, 2010 I.C.J. 403, ¶¶ 94–100; *South West Africa Advisory Opinion*, 1971 I.C.J. 16, ¶¶ 89, 114.

66. Vienna Convention on the Law of Treaties, art. 31, 32, May 23, 1969, 1155 UNTS 331 [hereinafter VCLT].

67. E.g., Wood, *supra* note 56, at 11–13; Michael Wood, *Security Council Resolution 687 (1991)*, in CONCEPTUAL AND CONTEXTUAL PERSPECTIVES ON THE MODERN LAW OF TREATIES 790–808 (Michael Bowman & Dino Kritsiotis eds., 2018); Nico Krisch, *Article 39*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 38, at 713; Peters, *supra* note 38, at 798; Wellens, *supra* note 38, at 20; *Kosovo Advisory Opinion*, 2010 I.C.J. 403, ¶ 94; Prosecutor v. Ayyash, STL-11-01/1, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, ¶ 26 (Special Trib. for Lebanon Feb. 16, 2011). However, note that the International Criminal Tribunal for the Former Yugoslavia, when considering how to interpret its statute adopted in SC Res. 827 (1993) (May 25, 1993), made no reference to the VCLT at any point. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

68. *Kosovo Advisory Opinion*, 2010 I.C.J. 403, ¶ 94; *South West Africa Advisory Opinion*, 1971 I.C.J. 16, ¶ 114. Admittedly, this list is relatively unstructured and intended only to provide demonstrative examples, rather than an exhaustive methodology. Michael Wood has suggested an interpretative framework, according to which four factors that should be considered when interpreting Security Council resolutions: (i) the overall political background and the particular background of the Security Council action; (ii) the role of the Security Council under the Charter; (iii) the Security Council's working methods; and (iv) the manner in which the Security Council resolutions are drafted. Michael Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK Y.B. U.N. L. 73, 74 (1998).

ual lawyers naturally work with Security Council resolutions.<sup>69</sup> For example, in the *Kosovo* advisory opinion, the ICJ specifically considered the question of “for whom the Security Council intended to create binding legal obligations”<sup>70</sup> in Resolution 1244. The Court stated that it needed to proceed on a case-by-case basis and consider all relevant circumstances, with the language serving as an important indicator.<sup>71</sup> The Court ultimately identified the resolution’s addressees from the drafting, examining the ordinary meaning of the terms in their context and with regard to its object and purpose.<sup>72</sup>

The practice of the Security Council of treating CNEs as possessing rights and obligations under international law must be distinguished at the outset from the Security Council’s practice of targeted sanctions. The Council’s targeted sanctions are often presented as the means through which the Security Council deals with CNEs because they are designed to alter the conduct of such entities.<sup>73</sup> However, in terms of formal legal technique, the sanctions resolutions create obligations only for states to adopt certain measures within their domestic jurisdictions in relation to CNEs. The resolutions do not impose international legal obligations on the targeted entities directly.

69. *Cf.* Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. Rep. 151, 175–77 (July 20); *South West Africa Advisory Opinion*, 1971 I.C.J. 16, ¶¶ 107–16; *Kosovo Advisory Opinion*, 2010 I.C.J. 403, ¶¶ 113–18; U.N. Secretariat, *supra* note 54. The ICJ President Schwebel has nevertheless reportedly maintained that verbatim records of Security Council meetings need not be scrutinized to correct or confirm the ordinary meaning otherwise deduced. Wellens, *supra* note 38, at 20.

70. *Kosovo Advisory Opinion*, 2010 I.C.J. 403, ¶ 117 (emphasis added).

71. *Id.*

72. *Id.* at ¶¶ 95–100, 113–18.

73. For examples of Security Council targeted sanctions resolutions, see S.C. Res. 1373, ¶¶ 1–2 (Sept. 28, 2001); S.C. Res. 1988, ¶ 1 (June 17, 2011); S.C. Res. 1989, ¶ 1 (June 17, 2011). See generally, Maria-Lydia Bolani, *Security Council Sanctions on Non-State Entities and Individuals*, 56 REVUE HELLENIQUE DE DROIT INTERNATIONAL 401 (2003) (discussing the new practice of “smart sanctions” against “non-state entities and individuals” by the Security Council); TARGETED SANCTIONS: THE IMPACTS AND EFFECTIVENESS OF UNITED NATIONS ACTION (Thomas Biersteker, Sue Eckert & Marcos Tourinho eds., 2016) (presenting an in-depth analysis on the evolution of targeted sanctions and their impact).

### 1. *Angola (1992–2002)*

The Security Council's approach to the situation in Angola elucidates its early practice of normative engagement with CNEs and the process through which the Council began treating these entities as addressees of binding international law.

In the earlier years of Angola's civil war, which began in the mid-1970s, the Council dealt exclusively with the conflict's state-to-state aspects, addressing its resolutions only to the Angolan government and other states involved—most prominently Cuba and South Africa. However, from the beginning of the 1990s, following the termination of foreign involvement in the conflict, the Angolan peace process focused on the relationship between the government and its main domestic opponent, União Nacional para a Independência Total de Angola (UNITA).

The Security Council acknowledged UNITA for the first time in the preamble of Resolution 696 in May 1991, welcoming the forthcoming formal signature of peace accords between the government of Angola and UNITA.<sup>74</sup> Subsequently, when the implementation of the peace accords did not proceed as envisaged, the Security Council addressed UNITA in the next resolution, for the first time in an operative paragraph, “[u]rg[ing] the Angolan parties to comply” with the accords.<sup>75</sup>

After the governing party (MPLA) won the elections held pursuant to the peace accords in September 1992, UNITA began to obstruct the implementation of the accords. When UNITA resumed its military activities, the Security Council adopted SC Resolution 785, “[s]trongly condemn[ing] such resumption of hostilities and urgently demand[ing] that such acts cease.”<sup>76</sup> The Council “[c]all[ed] upon” the MPLA and UNITA “to abide by all the commitments under the peace accords.”<sup>77</sup> It also “[r]eaffirm[ed]” its intention to “hold responsible any party” that refused to join in a reconciliation dia-

74. S.C. Res. 696, at 1 (May 30, 1991) (“*Welcoming* the decision of the Government of the People’s Republic of Angola and the National Union for the Total Independence of Angola to conclude the peace accords for Angola . . .”).

75. S.C. Res. 747, ¶ 5 (Mar. 24, 1992).

76. S.C. Res. 785, ¶ 3 (Oct. 30, 1992).

77. *Id.* ¶ 7.

logue, and “reiterated its readiness to consider all appropriate measures under the Charter . . . to secure implementation” of the peace accords.<sup>78</sup> The Council warned UNITA that if it failed to abide by the peace accords, it would be rejected by the international community, which would not accept any results of the use of force.<sup>79</sup>

As UNITA continued to contest the election result and the security situation in Angola worsened, the Security Council continued to “[u]rg[e]” UNITA and the Angolan government to implement the peace accords<sup>80</sup> and “[d]emand[ed] that the two parties” observe the ceasefire.<sup>81</sup> The Security Council additionally “[s]trongly condemn[ed] violations of international humanitarian law,”<sup>82</sup> “call[ed] upon both parties to abide by their [international humanitarian law] obligations,”<sup>83</sup> and imposed several specific demands on UNITA.<sup>84</sup> Concluding that Angola was once again on the verge of a civil war because of UNITA’s conduct and noting that the already grave humanitarian situation was further deteriorating,<sup>85</sup> the Council “[s]trongly condemn[ed] the persistent violations by

78. *Id.* ¶ 9.

79. *Id.* at 1.

80. S.C. Res. 793, ¶ 5 (Nov. 30, 1992); S.C. Res. 804, ¶ 5 (Jan. 29, 1993).

81. S.C. Res. 793, ¶ 4 (Nov. 30, 1992); S.C. Res. 804, ¶ 2 (Jan. 29, 1993).

82. *See* S.C. Res. 804, ¶ 10 (Jan. 29, 1993) (“*Strongly condemns* violations of international humanitarian law, in particular the attacks against the civilian population, including the extensive killing carried out by armed civilians . . .”).

83. *Id.* *See also* S.C. Res. 811, ¶ 11 (Mar. 12, 1993) (“*Strongly appeals* to both parties strictly to abide by applicable rules of international humanitarian law, including unimpeded access for humanitarian assistance to the civilian population in need”); S.C. Res. 834, ¶ 13 (June 1, 1993) (similar text as S.C. Res. 811); S.C. Res. 851, ¶ 19 (July 15, 1993) (similar text as S.C. Res. 811); S.C. Res. 864, ¶ 15 (Sept. 15, 1993) (“*Reiterates* its appeal to both parties to . . . strictly to abide by applicable rules of international humanitarian law”).

84. S.C. Res. 804, ¶¶ 11–12 (Jan. 29, 1993) (“*Demands* that UNITA immediately release foreign nationals taken hostage” and “*Strongly condemns* attacks against UNAVEM II personnel in Angola, and *demands* that the Government and UNITA take all necessary measures to ensure their safety and security.”). The Security Council also “reiterat[ed] its readiness to consider all appropriate measures under the Charter of the United Nations to secure implementation of ‘the Acordos de Paz.’” S.C. Res. 793, ¶ 7 (Nov. 30, 1992); S.C. Res. 804, ¶ 18 (Jan. 29, 1993).

85. S.C. Res. 811, at 1 (Mar. 12, 1993); S.C. Res. 834, at 1 (June 1, 1993); S.C. Res. 851, at 1 (July 15, 1993); S.C. Res. 864, at 1 (Sept. 15, 1993).

UNITA of the major provisions of the ‘Acordos de Paz’,” and intensified its demands on UNITA in the subsequent resolutions.<sup>86</sup> The Council made determinations of illegality as to UNITA’s conduct,<sup>87</sup> and it repeatedly declared its readiness to enforce the peace accords.<sup>88</sup>

In SC Resolution 851, the Council moved from general statements to a specific elaboration of its enforcement intentions, warning UNITA of an impending arms embargo.<sup>89</sup> When UNITA failed to comply with the Security Council’s demands, the Council ultimately “[d]etermin[ed] that, as a result of UNITA’s military actions, the situation in Angola constitute[d] a threat to international peace and security,”<sup>90</sup> and it established an arms and petroleum embargo on UNITA,<sup>91</sup> explicitly acting under Chapter VII. In imposing the embargo, the Council specifically cited its “[d]etermin[ation] to ensure respect for its resolutions and the full implementation of the ‘Acordos de Paz’,”<sup>92</sup> and threatened the imposition of further sanctions against UNITA, such as a trade embargo and travel restrictions on UNITA personnel.<sup>93</sup>

The vehemence of Security Council resolutions abated once direct negotiations between UNITA and the Angolan government resumed. Explicit “demands” on UNITA disap-

86. S.C. Res. 811, ¶¶ 1–3, 5 (Mar. 12, 1993); S.C. Res. 823, ¶ 4 (Apr. 30, 1993); S.C. Res. 834, ¶¶ 3–5 (Jun. 1, 1993); S.C. Res. 851, ¶¶ 4–6, 9, 15, 17 (July 15, 1993); S.C. Res. 864, ¶¶ 6–8, 11, 14, 16 (Sept. 15, 1993).

87. S.C. Res. 834, ¶ 6 (June 1, 1993) (“*Affirms* that such occupation [of certain locations by UNITA] is a violation of the ‘Acordos de Paz’ . . . .); S.C. Res. 851, ¶ 7 (July 15, 1993); S.C. Res. 864, ¶ 9 (Sept. 15, 1993); S.C. Res. 851, ¶ 18 (Jul. 15, 1993) (“*Reiterates* its strong condemnation of the attack by UNITA forces, on 27 May 1993, against a train carrying civilians, and reaffirms that such criminal attacks are clear violations of international humanitarian law . . . .”); S.C. Res. 864, ¶ 13 (Sept. 15, 1993) (“*Strongly condemns* the repeated attacks carried out by UNITA against United Nations personnel working to provide humanitarian assistance and reaffirms that such attacks are clear violations of international humanitarian law . . . .”).

88. S.C. Res. 811, ¶ 4 (Mar. 12, 1993) (“*[R]eaffirms* that it will consider all appropriate measures under the Charter of the United Nations to advance the implementation of the ‘Acordos de Paz’ . . . .”); S.C. Res. 834, ¶ 8 (June 1, 1993) (identical text as S.C. Res. 811).

89. S.C. Res. 851, ¶ 12 (July 15, 1993).

90. S.C. Res. 864, Part B, at 3 (Sept. 15, 1993).

91. *Id.*

92. *Id.*

93. *Id.* ¶ 26.



peared from the resolutions' text,<sup>94</sup> but when hostilities resumed the Council resolutions again increased in urgency.<sup>95</sup> When UNITA failed to comply with its obligations under the *Acordos de Paz*, the 1994 Lusaka Protocol,<sup>96</sup> and Security Council resolutions,<sup>97</sup> the Council re-intensified its "demands" on UNITA<sup>98</sup> and strengthened the sanctions regime.<sup>99</sup> Acting under Chapter VII, the Security Council "[s]tr[es]se[d] the need for UNITA to comply fully with all the obligations set out in resolution 1127 (1997)."<sup>100</sup>

SC Resolution 1135, adopted in September 1997, represented a new milestone in the Security Council's normative engagement with UNITA. The Council determined the existence of a threat to international peace and security and, explicitly acting under Chapter VII, "[d]emand[ed] that UNITA comply" with the obligations the Council previously imposed on it.<sup>101</sup> The Security Council continued treating UNITA as a direct addressee of obligations under its resolutions thereafter, including explicitly under Chapter VII, setting forth new obligations for UNITA, enforcing previously formulated ones, and invoking UNITA's obligations under international humanita-

94. S.C. Res. 890 (Dec. 15, 1993); S.C. Res. 903 (Mar. 16, 1994).

95. S.C. Res. 922 (May 31, 1994); S.C. Res. 932 (June 30, 1994); S.C. Res. 945 (Sept. 29, 1994); S.C. Res. 952 (Oct. 27, 1994); S.C. Res. 966 (Dec. 8, 1994); S.C. Res. 1008 (Aug. 7, 1995); S.C. Res. 1045 (Feb. 8, 1996); S.C. Res. 1064 (July 11, 1996); S.C. Res. 1075 (Oct. 11, 1996); S.C. Res. 1087 (Dec. 11, 1996); S.C. Res. 1098 (Feb. 27, 1997); S.C. Res. 1102 (Mar. 31, 1997); S.C. Res. 1106 (Apr. 16, 1997).

96. The Lusaka Protocol, signed on November 15, 1994, was another internationally-sponsored peace agreement between the Angolan government and UNITA.

97. S.C. Res. 1127, at 1 (Aug. 28, 1997) ("*Strongly deploring* the failure by UNITA to comply with its obligations under the '*Acordos de Paz*' (S/22609, annex), the Lusaka Protocol and with relevant Security Council resolutions, in particular resolution 1118 (1997) . . .").

98. S.C. Res. 1118 ¶ 13 (June 30, 1997); S.C. Res. 1127, .

99. S.C. Res. 1118 ¶ 13 (June 30, 1997); S.C. Res. 1127, ¶¶ 1–3 Part B ¶ 14.

100. S.C. Res. 1130, ¶ 1 (Sept. 29, 1997).

101. S.C. Res. 1135, at 2, ¶ 5 (Oct. 29, 1997) ("*Determining* that the present situation constitutes a threat to international peace and security in the region, . . . *Acting* under Chapter VII of the Charter of the United Nations, *Demands* that UNITA comply immediately and without any conditions with the obligations set out in resolution 1127 (1997) . . ."). The Council also articulated other "demands" on UNITA in this resolution. *Id.* ¶¶ 3–4.

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rian law, human rights law, and refugee law.<sup>102</sup> When the Angolan government gained the upper hand in the fighting and in this sense the situation in Angola stabilized, the Council ceased addressing UNITA in the operative paragraphs of its resolutions. While still often acting under Chapter VII, the Council stipulated obligations only for states and dealt with internal U.N. arrangements.<sup>103</sup> The Security Council ceased being seized of the matter in December 2002.<sup>104</sup>

## 2. *Kosovo (1998–2001)*

The Security Council first took formal action on Kosovo on March 31, 1998 through SC Resolution 1160, acting under Chapter VII. In addition to addressing the government of the Federal Republic of Yugoslavia, the Council made several “calls” on the “Kosovar Albanian leadership” and “all elements in the Kosovar Albanian community.”<sup>105</sup> The Council “[c]ondemn[ed] acts of terrorism by the Kosovo Liberation Army [KLA] or any other group” in the resolution’s preamble.<sup>106</sup> It also imposed an arms embargo on the Federal Republic of Yugoslavia, including Kosovo,<sup>107</sup> and declared its readiness to take additional measures in the absence of constructive progress toward peaceful resolution of the situation.<sup>108</sup>

As the security and humanitarian situations deteriorated, the Security Council proceeded to adopt unequivocal language imposing legal obligations on the CNEs involved. Affirming that the situation in Kosovo constituted a threat to international peace and security and explicitly acting under

102. S.C. Res. 1149 (Jan. 27, 1998); S.C. Res. 1164 (Apr. 29, 1998); S.C. Res. 1173 (June 12, 1998); S.C. Res. 1176 (June 24, 1998); S.C. Res. 1180 (June 29, 1998); S.C. Res. 1190 (Aug. 13, 1998); S.C. Res. 1202 (Oct. 15, 1998); S.C. Res. 1213 (Dec. 3, 1998); S.C. Res. 1219 (Dec. 31, 1998); S.C. Res. 1221 (Jan. 12, 1999); S.C. Res. 1229 (Feb. 26, 1999); S.C. Res. 1237 (May 7, 1999); S.C. Res. 1268 (Oct. 15, 1999); S.C. Res. 1295 (Apr. 18, 2000).

103. S.C. Res. 1336 (Jan. 23, 2001); S.C. Res. 1348 (Apr. 23, 2001); S.C. Res. 1374 (Oct. 19, 2001); S.C. Res. 1404 (Apr. 18, 2002); S.C. Res. 1412 (May 17, 2002); S.C. Res. 1432 (Aug. 15, 2002); S.C. Res. 1433 (Aug. 15, 2002); S.C. Res. 1439 (Oct. 18, 2002).

104. S.C. Res. 1448 (Dec. 9, 2002).

105. S.C. Res. 1160, ¶¶ 2, 4 and 6 (Mar. 31, 1998).

106. *Id.* at 1.

107. *Id.* ¶ 8.

108. *Id.* ¶¶ 6, 19.

Chapter VII,<sup>109</sup> the Council “[d]emand[ed] that all parties, groups and individuals immediately cease hostilities and maintain a ceasefire in Kosovo,”<sup>110</sup> and that “the Federal Republic of Yugoslavia and the Kosovo Albanian leadership take immediate steps to improve the humanitarian situation.”<sup>111</sup> The Council “[c]all[ed] upon” “the Kosovo Albanian leadership” and the Federal Republic of Yugoslavia to enter into a dialogue and fully cooperate with the Prosecutor of the International Criminal Tribunal for the former Yugoslavia.<sup>112</sup> The Council further “[i]nsist[ed] that the Kosovo Albanian leadership condemn all terrorist action, and emphasize[d] that all elements in the Kosovo Albanian community should pursue their goals by peaceful means only.”<sup>113</sup> The Council then repeated its “demands” on “the Kosovo Albanian leadership” in October 1998 in SC Resolution 1203, which was also adopted under Chapter VII.<sup>114</sup>

Consensus within the Security Council subsequently developed, resulting in the Council adopting only nonbinding SC Resolution 1239 relating to humanitarian concerns in May 1999.<sup>115</sup> However, in the wake of NATO air strikes under Operation Allied Force and in light of the continuing violence and grave humanitarian and refugee situation, the Security Council proceeded to adopt SC Resolution 1244, once again under Chapter VII, through which the U.N. effectively took control of Kosovo.<sup>116</sup> The resolution laid down the framework for the administration of Kosovo, creating an international civil presence (the United Nations Interim Administration Mission in Kosovo, UNMIK) and an international security presence (the Kosovo Force, KFOR). As to its addressees, SC

109. S.C. Res. 1199, at 2 (Sept. 23, 1998).

110. *Id.* ¶ 1.

111. *Id.* ¶ 2.

112. *Id.* ¶¶ 3, 13. The ICJ deemed these operative paragraphs “demands addressed *eo nomine* to the Kosovo Albanian leadership.” *Kosovo Advisory Opinion*, 2010 I.C.J. 403, ¶ 116.

113. S.C. Res. 1199, ¶ 6 (Sept. 23, 1998). Again, the ICJ considered this paragraph to constitute a “demand” on the Kosovo Albanian leadership. *Kosovo Advisory Opinion*, 2010 I.C.J. 403, ¶ 116.

114. S.C. Res. 1203, at 2, ¶¶ 4–6, 10–11 (Oct. 24, 1998). Once more, the ICJ considered these operative paragraphs “demands” on the Kosovo Albanian leadership. *Kosovo Advisory Opinion*, 2010 I.C.J. 403, ¶ 116.

115. S.C. Res. 1239 (May 14, 1999).

116. S.C. Res. 1244, at 2 (June 10, 1999).

Resolution 1244 primarily imposed obligations on the Federal Republic of Yugoslavia and the U.N. Secretary-General. With respect to CNEs, the Council “[d]emand[ed] that the KLA and other Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization,”<sup>117</sup> and demand[ed] that the parties cooperate fully in [the] deployment” of the international civil and security presences.<sup>118</sup>

As the situation stabilized, the Security Council subsequently adopted only two more resolutions relating to Kosovo. In SC Resolution 1345, the Council reiterated its support for SC Resolution 1244, “[d]emand[ed]” the cessation of armed actions against the governmental authorities, and “[u]nderlin[ed]” the requirement for “all parties to act with restraint and full respect for international humanitarian law and human rights.”<sup>119</sup> In SC Resolution 1367, the Council terminated the arms embargo.<sup>120</sup>

### 3. *Syria (2012–2018)*

The Security Council’s engagement with the Syrian conflict has been greatly affected by the impending Russian veto, which initially precluded any legally binding decisions on the matter. The rare early resolutions involved only nonbinding appellations, primarily calling on the Syrian government to respect its commitments and agreements, and expressing support for humanitarian assistance and the U.N. Supervision Mission (UNSMIS).<sup>121</sup> Still, these resolutions also referred to CNEs. The Council “[c]ondemn[ed] . . . human rights abuses by armed groups,”<sup>122</sup> “[c]all[ed] upon all parties in Syria, including the opposition, immediately to cease all armed violence,”<sup>123</sup> and “[c]all[ed] upon the Syrian armed opposition groups and relevant elements to respect relevant provisions of

117. S.C. Res. 1244, ¶ 15 (June 10, 1999).

118. *Id.* ¶ 8.

119. S.C. Res. 1345, ¶¶ 3–4, 7 (Mar. 21, 2001).

120. S.C. Res. 1367, ¶¶ 1–2 (Mar. 31, 2001).

121. S.C. Res. 2042, ¶¶ 1–3, 10 (Apr. 14, 2012); S.C. Res. 2043, ¶¶ 1–2, 7–8, 11 (Apr. 21, 2012); S.C. Res. 2059, ¶ 2 (July 20, 2012).

122. S.C. Res. 2042, at 1 (Apr. 14, 2012); S.C. Res. 2043, at 1 (Apr. 21, 2012).

123. S.C. Res. 2042, ¶ 4 (Apr. 14, 2012); S.C. Res. 2043, ¶ 3 (Apr. 21, 2012).

the Preliminary Understanding.”<sup>124</sup> The Council also made a variety of other “calls” on the CNEs involved, such as to cooperate with the U.N. and humanitarian organizations to facilitate the provision of humanitarian assistance and guarantee the safety of UNSMIS personnel.<sup>125</sup>

The dynamics within the Security Council changed in the late summer of 2013 with evidence of the use of chemical weapons in Syria. The Security Council unanimously adopted SC Resolution 2118, in which it determined that the use of chemical weapons constituted a threat to international peace and security and amounted to a “violation of international law.”<sup>126</sup> The Council, “[d]emand[ed]” the Syrian government and opposition groups not to develop, acquire or use chemical weapons (and in the case of the nonstate groups also nuclear and biological weapons),<sup>127</sup> and “decid[ed] that all parties in Syria shall cooperate” with the investigation and the destruction and verification program of the Organization for the Prohibition of Chemical Weapons.<sup>128</sup> The Security Council restated the illegality of chemical weapons and reiterated its demands relating to such weapons in subsequent resolutions.<sup>129</sup>

After 2014, the majority of the Security Council resolutions dealing with Syria focused on two broad aspects of the

124. S.C. Res. 2043, ¶ 4 (Apr. 21, 2012). This was the case despite the fact that the opposition groups were not parties to the Preliminary Understanding, which was agreed between the Syrian government and the United Nations. See U.N. Secretary-General, *United Nations Supervision Mechanism*, U.N. Doc. S/2012/250 (Apr. 19, 2012).

125. S.C. Res. 2042, ¶¶ 8, 10 (Apr. 14, 2012); S.C. Res. 2043, ¶¶ 9, 11 (Apr. 21, 2012); S.C. Res. 2059, ¶ 2 (July 20, 2012).

126. S.C. Res. 2118, ¶¶ 1–2 (Sept. 27, 2013).

127. *Id.* ¶¶ 4–7, 19.

128. *Id.* ¶ 7. The Security Council also “[d]ecid[ed] [that] in the event of non-compliance with this resolution, including unauthorized transfer of chemical weapons, or any use of chemical weapons by anyone in the Syrian Arab Republic, to impose measures under Chapter VII of the United Nations Charter.” *Id.* ¶ 21.

129. See, e.g., S.C. Res. 2209, at 1–2, ¶¶ 1–6 (Mar. 6, 2015); S.C. Res. 2235, at 1, ¶¶ 1–4, 7 (Aug. 7, 2015); S.C. Res. 2314, at 1, ¶ 2 (Oct. 31, 2016); S.C. Res. 2319, at 1, ¶ 3 (Nov. 17, 2016). These resolutions did not repeat the formal determination of a threat to international peace and security; however, the Security Council declared its readiness to impose Chapter VII measures in the event of future noncompliance with S.C. Res. 2118 (2013). S.C. Res. 2209, ¶ 7 (March 6, 2015); S.C. Res. 2235, ¶ 15 (Aug. 7, 2015); S.C. Res. 2314, ¶ 2 (Oct. 31, 2016); S.C. Res. 2319, ¶ 3 (Nov. 17, 2016).

conflict: its political resolution and the deteriorating humanitarian situation. In SC Resolution 2139, in light of escalating violence and a rising death toll, the Security Council “[s]trongly condemn[ed] . . . the human rights abuses and violations of international humanitarian law by armed groups.”<sup>130</sup> Although the Council did not explicitly determine the existence of a threat to international peace and security in the resolution, it made a large number of “demands” on “all parties,”<sup>131</sup> including to stop all violence and “cease and desist from all violations of international humanitarian law and violations and abuses of human rights.”<sup>132</sup> In SC Resolution 2165, adopted in July 2014, the Security Council formally determined that “the deteriorating humanitarian situation in Syria constitute[d] a threat to peace and security in the region,” explicitly referring to Article 25 of the U.N. Charter.<sup>133</sup> Identifying “the need for all parties to respect the relevant provisions of international humanitarian law”<sup>134</sup> and “stress[ing] the need to end impunity for violations of international humanitarian law and violations and abuses of human rights,”<sup>135</sup> the Council “[r]eiterate[d] that all parties . . . must comply with their obligations under international humanitarian law and international human rights law and must fully and immediately implement the provisions of its resolution 2139 (2014) and the Presidential Statement of 2 October 2013.”<sup>136</sup> The Council also imposed several obligations relating to the facilitation of humanitarian assistance<sup>137</sup> and declared its readiness to take

130. S.C. Res. 2139, ¶ 1 (Feb. 22, 2014).

131. *Id.* ¶¶ 2–6, 8–10, 15; S.C. Pres. Statement 2013/15, ¶¶ 5, 8–9 (Oct. 2, 2013).

132. *Id.* ¶ 2.

133. S.C. Res. 2165, at 2 (July 14, 2014).

134. *Id.*

135. *Id.*

136. *Id.* ¶ 1.

137. *Id.* ¶¶ 6, 8 (“*Also decides* that all Syrian parties to the conflict shall enable the immediate and unhindered delivery of humanitarian assistance directly to people throughout Syria . . . including by immediately removing all impediments to the provision of humanitarian assistance” and “*Decides* that all Syrian parties to the conflict shall take all appropriate steps to ensure the safety and security of United Nations and associated personnel, those of its specialized agencies, and all other personnel engaged in humanitarian relief activities as required by international humanitarian law”).



further measures in the event of noncompliance “by any Syrian party.”<sup>138</sup>

The sharp political division within the Security Council between the Western states, supporting the Syrian opposition groups, and the Russian Federation, supporting Assad’s regime, prevented the Council from adopting legally binding decisions on the conflict’s political aspects.<sup>139</sup> However, the Council continued to explicitly determine the humanitarian situation in Syria to constitute a threat to peace and security and to refer to Article 25 of the Charter in its resolutions dealing with the conflict’s humanitarian aspect.<sup>140</sup> The Council extensively addressed both Syrian opposition groups and the Syrian authorities, specifically “[d]emand[ing]” that all parties comply with international humanitarian law, international human rights law, and its earlier acts and allow access for humanitarian convoys.<sup>141</sup> The Council also reiterated its readiness to take enforcement action in case of noncompliance “by any party to the Syrian domestic conflict.”<sup>142</sup> In SC Resolution 2401, which the Security Council adopted in response to the intensification of violence in Eastern Ghoura, Rukhban, and Raqqa, the Security Council set a number of additional obliga-

138. *Id.* ¶ 11.

139. S.C. Res. 2254 (Dec. 18, 2015); S.C. Res. 2268 (Feb. 26, 2016); S.C. Res. 2336 (Dec. 31, 2016). Although even in these resolutions, the Council referred the obligations of “all parties” “under international law, including international humanitarian law and international human rights law as applicable” S.C. Res. 2254, ¶ 13 (Dec. 18, 2015), S.C. Res. 2268, ¶ 5 (Feb. 26, 2016). Similar formulation may be found in S.C. Res. 2191, ¶ 4 (Dec. 17, 2014).

140. S.C. Res. 2191, at 3 (Dec. 17, 2014); S.C. Res. 2258, at 4 (Dec. 22, 2015); S.C. Res. 2332, at 4 (Dec. 21, 2016); S.C. Res. 2393, at 4 (Dec. 19, 2017); S.C. Res. 2449, at 4 (Dec. 13, 2018). An exception to this pattern was S.C. Res. 2328 (Dec. 19, 2016), relating to the Asad regime’s siege of Aleppo. The Council set out its concerns regarding the humanitarian situation, but the impending Russian veto prevented a formal determination of a threat to international peace and security.

141. S.C. Res. 2191, ¶ 1 (Dec. 17, 2014); S.C. Res. 2258, ¶ 1 (Dec. 22, 2015); S.C. Res. 2332, ¶¶ 1, 4 (Dec. 21, 2016); S.C. Res. 2393, ¶¶ 1, 4 (Dec. 19, 2017); S.C. Res. 2449, ¶¶ 2, 4, 5 (Dec. 13, 2018).

142. S.C. Res. 2191, ¶ 6 (Dec. 17, 2014). *See also* S.C. Res. 2258 ¶ 6 (Dec. 22, 2015), S.C. Res. 2332, ¶ 6 (Dec. 21, 2016), S.C. Res. 2393, ¶ 7 (Dec. 19, 2017) and S.C. Res. 2449, ¶ 7 (Dec. 13, 2018) (all reaffirming that the Security Council will take further measures under the Charter of the United Nations in the event of non-compliance with the earlier resolutions).

tions for “all parties.”<sup>143</sup> These new obligations included “demands” to cease hostilities; allow humanitarian assistance and medical and civilian evacuations; demilitarize medical and civilian facilities; and avoid establishing military positions in populated areas.<sup>144</sup> The Council also “[r]eiterat[ed] its demand” on “all parties” “to comply with their obligations under international law,” including international human rights law and international humanitarian law, and specified the required protection of civilians, medical and humanitarian personnel, hospitals, and other medical and civilian facilities.<sup>145</sup>

In addition to imposing obligations on CNEs, the Syrian conflict also provides an example of an explicit conferral of rights upon these entities. The Security Council recognized the value of humanitarian relief work from its early resolutions on Syria, “[c]all[ing] on all parties in Syria, in particular the Syrian authorities,” to cooperate in the provision of humanitarian assistance.<sup>146</sup> As the humanitarian situation deteriorated and a political consensus within the Security Council emerged, the Council imposed several “demands” on “all parties, in particular the Syrian authorities” to facilitate humanitarian relief operations, to allow the delivery of humanitarian assistance, and to provide humanitarian access.<sup>147</sup> In SC Resolution 2165, the Security Council then supplemented the obligations imposed on the Syrian state and on the CNEs involved in the

143. S.C. Res. 2401, at 1, ¶¶ 1, 5–6, 8, 10 (Feb. 24, 2018).

144. *Id.*

145. S.C. Res. 2401, ¶¶ 7–8 (Feb. 24, 2018) (“*Reiterates* its demand, reminding in particular the Syrian authorities, that all parties immediately comply with their obligations under international law, including international human rights law, as applicable, and international humanitarian law, including the protection of civilians as well as to ensure the respect and protection of all medical personnel and humanitarian personnel exclusively engaged in medical duties, their means of transport and equipment, as well as hospitals and other medical facilities . . .” and “*Demands* that all parties facilitate safe and unimpeded passage for medical personnel and humanitarian personnel exclusively engaged in medical duties, their equipment, transport and supplies, including surgical items, to all people in need, consistent with international humanitarian law and *reiterates its demand* that all parties demilitarize medical facilities, schools and other civilian facilities and avoid establishing military positions in populated areas and desist from attacks directed against civilian objects”).

146. S.C. Res. 2042, ¶ 10 (Apr. 14, 2012); S.C. Res. 2043, ¶ 11 (Apr. 21, 2012).

147. S.C. Res. 2139, ¶¶ 4–6 (Feb. 22, 2014).

conflict<sup>148</sup> with the explicit conferral of a right, “authoriz[ing]” the United Nations humanitarian agencies and their “implementing partners”<sup>149</sup> to use routes across conflict lines and specified border crossings “in order to ensure that humanitarian assistance, including medical and surgical supplies, reaches people in need throughout Syria through the most direct routes.”<sup>150</sup> The Security Council periodically restated the humanitarian organizations’ right to use the routes and crossings thereafter.<sup>151</sup>

#### 4. *Nonproliferation of Weapons of Mass Destruction*

By 2004, it was widely understood that nonstate entities’ acquisition of weapons of mass destruction (WMDs) presented a real danger, and there was a strong political will to address what was perceived as a gap in the existing nonproliferation regime.<sup>152</sup> In April 2004, the Security Council unanimously

148. S.C. Res. 2165, ¶¶ 6, 8 (July 14, 2014); *see also supra* note 137 and accompanying text.

149. The implementing partners have consisted of a number of nongovernmental humanitarian organizations, including the Syrian Arabic Red Crescent, the International Red Cross and Red Crescent Societies and the Syrian American Medical Society. CHRISTIAN ELS, KHOLOUD MANSOUR & NILS CARSTENSEN, *FUNDING TO NATIONAL AND LOCAL HUMANITARIAN ACTORS IN SYRIA: BETWEEN SUB-CONTRACTING AND PARTNERSHIPS* 4–5, 10–12, 32–33 (Kerren Hedlund ed., 2016).

150. S.C. Res. 2165, ¶ 2 (July 14, 2014) (“Decides that the United Nations humanitarian agencies and their implementing partners are authorized to use routes across conflict lines and the border crossings of Bab al-Salam, Bab al-Hawa, Al Yarubiyah and Al-Ramtha, in addition to those already in use, in order to ensure that humanitarian assistance, including medical and surgical supplies, reaches people in need throughout Syria through the most direct routes, with notification to the Syrian authorities”).

151. S.C. Res. 2191, ¶ 2 (Dec. 17, 2014); S.C. Res. 2258, ¶ 2 (Dec. 22, 2015); S.C. Res. 2332, ¶ 2 (Dec. 21, 2016); S.C. Res. 2393, ¶ 2 (Dec. 19, 2017); S.C. Res. 2449, ¶ 3 (Dec. 13, 2018).

152. U.N. Secretary-General, *A More Secure World: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change*, ¶¶ 12, 107–44, U.N. Doc. A/59/565 (Dec. 2, 2004); S.C. Res. 1373, ¶ 3 (Sept. 28, 2001); U.N. SCOR, 59th Sess., 4950th mtg., at 3, 5, 9, 17, 22, U.N. Doc. S/PV.4950 (Apr. 22, 2004); U.N. SCOR, 59th Sess., 4956th mtg. at 3, U.N. Doc. S/PV.4956 (Apr. 28, 2004). *See generally, e.g.*, SECURITY COUNCIL REPORT, CROSS-CUTTING REPORT NO. 2: THE SECURITY COUNCIL’S ROLE IN DISARMAMENT AND ARMS CONTROL: NUCLEAR WEAPONS, PROLIFERATION AND OTHER WEAPONS OF MASS DESTRUCTION 22–23 (Sept. 1, 2009), <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/%20>

adopted, under Chapter VII, SC Resolution 1540,<sup>153</sup> in which it affirmed that the proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constituted a threat to international peace and security.<sup>154</sup> The Council accordingly established an extensive nonproliferation regime to prevent “non-State actors” from manufacturing, acquiring, possessing, developing, transporting, transferring, or using WMDs and their means of delivery.<sup>155</sup>

Although the objective of the resolution was to inhibit the conduct of nonstate entities and to counter the international black market for WMDs, SC Resolution 1540 imposed all obligations only upon states, expanding their existing nonproliferation obligations to their relations with “non-State actors.”<sup>156</sup> The resolution also did not contain any statement on the legality or illegality of the acquisition, use, and proliferation of WMDs specifically by nonstate entities, as if international law did not directly prohibit such nonstate activities.

The Resolution 1540 nonproliferation regime has remained inter-state, without an explicit articulation of international law’s prohibition against the use of WMDs and related conduct by “non-State actors.”<sup>157</sup> However, in SC Resolution 2118 on the Middle East, which the Security Council adopted in reaction to the chemical attack in Ghouta, Syria, the Council’s approach changed.<sup>158</sup> In the preamble, the Security

September%202009.pdf [https://perma.cc/DK9U-MQZ3]; Jack Beard, *Countering the Threat Posed by Non-State Actors in the Proliferation of Weapons of Mass Destruction*, 92 AM. SOC. INT’L L. PROC. 173, 173 (1998).

153. S.C. Res. 1540 (Apr. 28, 2004).

154. *Id.* at 1.

155. S.C. Res. 1540 (Apr. 28, 2004).

156. The resolution required states (i) to refrain from providing support to nonstate entities attempting to develop, acquire, manufacture, possess, transport, transfer or use weapons of mass destruction; (ii) to adopt and enforce municipal laws that prohibit nonstate entities from engaging in such activities; and (iii) to take measures to establish domestic controls. *Id.*

157. S.C. Res. 1673 (Apr. 27, 2006); S.C. Res. 1810 (Apr. 25, 2008); S.C. Res. 1977 (Apr. 20, 2011); S.C. Res. 2325 (Dec. 15, 2016); 2016 Comprehensive Review, SECURITY COUNCIL COMMITTEE ESTABLISHED PURSUANT TO RESOLUTION 1540 (2004), <http://www.un.org/en/sc/1540/comprehensive-and-annual-reviews/2016-comprehensive-review.shtml> [https://perma.cc/5MV5-7MVF] (last visited Nov.13, 2020).

158. The Security Council resolutions on Syria do not explicitly refer to Chapter VII, but they do contain explicit determinations of a threat to peace as well as commanding language, such as “decides” and “demands.” It is gen-

Council referred to resolution 1540<sup>159</sup> and “reaffirm[ed]” that the proliferation of chemical weapons constituted a threat to international peace and security and their use amounted to “a serious violation of international law.”<sup>160</sup> Determining the existence of a threat to international peace and security and referring to Article 25 of the Charter,<sup>161</sup> the Council “[d]etermin[ed] that the use of chemical weapons anywhere constitute[d] a threat to international peace and security,”<sup>162</sup> and “[c]ondemn[ed] in the strongest terms any use of chemical weapons in the Syrian Arab Republic, in particular the attack on 21 August 2013, in violation of international law.”<sup>163</sup> The Council then proceeded to “[d]eman[d] that non-state actors not develop, acquire, manufacture, possess, transport, transfer, or use nuclear, chemical or biological weapons and their means of delivery.”<sup>164</sup> The Council concluded by expressing readiness to adopt enforcement measures in the event of “non-compliance with the resolution, including unauthorized transfer of chemical weapons, or any use of chemical weapons by anyone in the Syrian Arab Republic.”<sup>165</sup>

The Security Council thus unambiguously extended the legal obligations articulated for states in the 1540 regime to nonstate entities. On the face of SC Resolution 2118, it may have arguably been unclear whether the Council was creating new obligations for “non-State actors” not to acquire, use, and proliferate WMDs, or whether it was simply invoking existing obligations. However, the better view is that the Council was

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erally understood that the absence of a reference to Chapter VII was a political concession necessary to avoid a Russian veto, but it does not affect the binding nature of these resolutions. To compare on-record statements of the United States, Luxembourg, United Kingdom, Azerbaijan, Republic of Korea, Argentina, and Australia, which explicitly refer to the binding character of the resolution, with the statement of the Russian Federation, see U.N. SCOR, 68th Sess., 7038th mtg. U.N. Doc. S/PV.7038 (Sept. 27, 2013). For commentary, see Bellinger, *supra* note 56. For a more measured view, see *Syria: From Stalemate to Compromise*, WHAT’S IN BLUE (Sept. 27, 2013), <http://www.whatsinblue.org/2013/09/syria-adoption-of-a-chemical-weapons-resolution.php> [<https://perma.cc/2U7R-QYWH>].

159. S.C. Res. 2118, at 1 (Sept. 27, 2013).

160. *Id.* at 1–2.

161. *Id.*

162. *Id.* ¶ 1.

163. *Id.* ¶ 2.

164. *Id.* ¶ 19.

165. S.C. Res. 2118, ¶ 21 (Sept. 27, 2013).

both applying the prohibitions on WMDs to CNEs and augmenting those prohibitions with its own legally binding demand, thereby creating an additional legal source for the prohibitions.

The Security Council's demands on CNEs relating to WMDs were repeated in various resolutions on the Middle East: SC Resolution 2209, SC Resolution 2235, and SC Resolution 2319.<sup>166</sup> In SC Resolution 2319, the Security Council further "[r]eaffirm[ed] that the use of chemical weapons constitutes a serious violation of international law," and "reiterate[ed] that those individuals, entities, groups or Governments responsible for any use of chemical weapons must be held accountable."<sup>167</sup>

*C. Observations on Collective Nonstate Entities' International Legal Rights and Obligations in Security Council Practice*

The cases of Angola, Kosovo, Syria, and the nonproliferation of WMDs demonstrate that since the early 1990s, the Security Council has prescribed new direct rights and obligations, including explicitly under Chapter VII, for CNEs, including armed groups, militias, political factions, opposition groups, terrorist organizations, and nongovernmental humanitarian organizations. In doing so, the Council has employed linguistic formulations directly addressing the respective CNEs in an unconditional and mandatory—as opposed to facultative and aspirational—manner, and has treated these entities as holding rights and obligations under international law directly, without the interposition of any state.<sup>168</sup> Indeed, as the law generally applicable to and applied by the Security Council

166. S.C. Res. 2209 (Mar. 6, 2015); S.C. Res. 2235 (Aug. 7, 2015); and S.C. Res. 2319 (Nov. 17, 2016). Resolution 2319 was a response to the conclusion of the Organization for the Prohibition of Chemical Weapons and the United Nations Joint Investigative Mechanism that the Islamic State in Iraq and the Levant (ISIL) used Sulphur mustard gas in Syria.

167. S.C. Res. 2319, at 1 (Nov. 17, 2016).

168. The interpretation of Security Council resolutions and their individual provisions both in terms of legal force and in terms of addressees may be debatable due to the inherent challenges and ambiguities. However, this conclusion holds even under a restrictive interpretative approach limiting positive instances of direct rights and obligations to unequivocally legally binding decisions, which unambiguously address CNEs.



is international law, the rights and obligations prescribed for such entities are rights and obligations under international law.

At the same time, the Security Council has treated CNEs as having certain existing and preexisting international legal obligations, commonly invoking such obligations, demanding compliance with them, and specifying the content of particular obligations under relevant branches of international law, in particular international humanitarian law and international human rights law. The Security Council has also regularly held CNEs responsible for violations of both the newly imposed and preexisting obligations by determining particular conduct to be illegal, condemning noncompliance, and adopting or threatening to adopt enforcement measures to secure compliance. The Security Council's normative engagement with CNEs thus extends well beyond the imposition of targeted sanctions on such entities through state-addressed measures. Rather, the Council treats these entities as directly regulated by binding international law.

The direct regulation of CNEs has not superseded the Security Council's overall preference for state-based regulation and support for strong statehood.<sup>169</sup> Security Council resolutions continue to address the majority of their operative paragraphs to states (and other U.N. organs), and the resolutions' structure and language show the Council's continued distinct treatment of states and CNEs.<sup>170</sup>

169. The Security Council regularly articulates its commitment to territorial integrity of states in preambles. *E.g.*, S.C. Res. 922, at 1 (May 31, 1994). However, explicit supporting statements may be identified in operative paragraphs as well. *E.g.*, S.C. Res. 864, ¶ 5 (Sep. 15, 1993).

170. One frequently noted distinction is that the Council tends to use the term "human rights abuses" when referring to nonstate entities and "human rights violations" when referring to states. This difference was allegedly initially promoted by Amnesty International to position human rights as a project of the protection of individuals against states. While some resolutions indeed make such a distinction, others do not. *Compare* S.C. Res. 2139, ¶ 1 (Feb. 22, 2014) (referring to "violations of human rights" in relation to the Syrian government and to "human rights abuses" in relation to the armed groups), *with* S.C. Res. 1231, ¶ 3 (Mar. 11, 1999) (referring to "violations of human rights" in relation to the rebels in Sierra Leone). The distinction today seems rather inconsequential. *See also* JESSICA BURNISKE, NAZ MODIRZADEH & DUSTIN LEWIS, ARMED NON-STATE ACTORS AND INTERNATIONAL HUMAN RIGHTS LAW: AN ANALYSIS OF THE PRACTICE OF THE U.N. SE-

Substantive obligations of states and CNEs regularly appear side by side, evidencing that the obligations of states and CNEs are independent. First, some Security Council resolutions involve instances in which CNEs are treated as possessing obligations identical in content to those of states, such as to observe international humanitarian law, to respect a cease-fire, or to provide humanitarian access.<sup>171</sup> In such instances, the Council either designs or interprets a rule of international law to address both CNEs and states. Second, in situations involving conduct unique to CNEs, the Council specifies particular obligations to apply exclusively to such entities, such as the obligation to demilitarize or to release hostages, thereby differentiating the international legal rights and obligations of states and CNEs.<sup>172</sup>

The practice of imposing new and enforcing existing international legal obligations on CNEs is admittedly at odds with the Security Council's character as a treaty-based interstate mechanism. Arguably, the Security Council's powers should be limited to direct regulation of states by the terms of the U.N. Charter and by the principles of treaty law, in particular the *pacta tertiis* rule that treaties can bind only their own parties.<sup>173</sup> CNEs have not consented to the Security Council's competence.<sup>174</sup> Under the consent-based principles of treaty law, such entities should therefore only be indirect targets of Security Council decisions, such as in the context of the Security Council's sanctions regimes. Still, the very language of its resolutions exhibits the Security Council's perception of its own competence over CNEs, although the source of this competence may be difficult to discern.

Scholarship has suggested alternative explanations for the Security Council's competence over CNEs, including constitu-

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CURITY COUNCIL AND U.N. GENERAL ASSEMBLY 10 (2017) (analyzing textual references to international human rights law in relation to armed nonstate actors in the Security Council and General Assembly practice).

171. See *supra* Section III.B.

172. See *supra* Section III.B.

173. VCLT, *supra* note 66, arts. 35–38.

174. Under the U.N. Charter, it is the U.N. member states who agree to accept and carry out the decisions of the Security Council. U.N. Charter art. 25.

tionalist views of the Charter<sup>175</sup> and the reinterpretation of the Council's mandate as a guarantor of international peace and security on behalf of the international community.<sup>176</sup> Most importantly, however, states have not protested against the Security Council's widespread practice of directly addressing CNEs in its resolutions.<sup>177</sup> The *Kosovo* advisory proceedings,<sup>178</sup> in which more than forty states participated, would have provided a prime opportunity for objection, as a core issue was whether SC Resolution 1244 bound the Kosovo Albanian leadership—to whom the ICJ referred as the “authors of the declaration of independence”—and prohibited them from declaring independence. However, none of the participating states questioned the Security Council's competence to impose obligations directly on the Kosovo Albanian leadership or other Kosovar groups, and neither did the ICJ.<sup>179</sup> The ICJ ultimately found that the resolution did not bind the Kosovo Albanian leadership, given that the resolution did not specifically mention the leadership, in contrast to specifically referring to the KLA, other armed Kosovo Albanian groups, the U.N. member states, the U.N. Secretary-General, and the Special Representative of the Secretary-General for Kosovo.<sup>180</sup> However, the Court noted without any reservation that “it ha[d] not been uncommon for the Security Council to make demands on actors other than the United Nations Member States and inter-

175. *E.g.*, Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (1998); Peters, *supra* note 38, at 803.

176. Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS 195, 266 (1993).

177. On states' right to protect against the decisions of the Security Council and novel types of decision making, see Nicolas Angelet, *Protest Against Security Council Decisions*, in *INTERNATIONAL LAW: THEORY AND PRACTICE: ESSAYS IN HONOUR OF ERIC SUY 277* (Karel Wellens ed., 1998); Peters, *supra* note 38, at 784.

178. *Kosovo Advisory Opinion*, 2010 I.C.J. 403.

179. The only participants in the advisory proceedings suggesting that the Security Council did not have the authority to set forth obligations for the Kosovar Albanian leadership were the authors of the declaration of independence themselves. However, the leadership took this position to avoid any applicability of SC Res. 1244 to themselves, in case the ICJ were to interpret the resolution as prohibiting the declaration of independence.

180. *Kosovo Advisory Opinion*, 2010 I.C.J. 403, ¶ 115 (“There is no indication, in the text of the Security Council 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.”).

governmental organizations. More specifically, a number of Security Council resolutions adopted on the subject of Kosovo prior to Security Council resolution 1244 (1999) contained demands addressed *eo nomine* to the Kosovo Albanian leadership.<sup>181</sup> The ICJ thus acknowledged that CNEs may be and have been bound by Security Council resolutions, and that the Security Council had the competence to impose both obligations to act and prohibitions from acting upon such entities.

Even outside of the advisory proceedings, states have not challenged the Security Council's practice with respect to CNEs. In fact, the practice confirming the Security Council's power to impose direct obligations on CNEs, as well as the CNEs' capacity to be the addressees of such obligations, is overwhelming.<sup>182</sup> While these issues could have originally

181. *Id.* ¶ 116. The Court gave specific examples of such demands. *Id.* ("For example, resolution 1160 (1998) '[c]all[ed] upon the authorities in Belgrade and the leadership of the Kosovar Albanian community urgently to enter without preconditions into a meaningful dialogue on political status issues' (resolution 1160 (1998), para. 4; emphasis added). Resolution 1199 (1998) included four separate demands on the Kosovo Albanian leadership, i.e., improving the humanitarian situation, entering into a dialogue with the Federal Republic of Yugoslavia, pursuing their goals by peaceful means only, and co-operating fully with the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (resolution 1199 (1998), paras. 2, 3, 6 and 13). Resolution 1203 (1998) '[d]emand[ed] . . . that the Kosovo Albanian leadership and all other elements of the Kosovo Albanian community comply fully and swiftly with resolutions 1160 (1998) and 1199 (1998) and cooperate fully with the OSCE Verification Mission in Kosovo' (resolution 1203 (1998), para. 4). The same resolution also called upon the 'Kosovo Albanian leadership to enter immediately into a meaningful dialogue without preconditions and with international involvement, and to a clear timetable, leading to an end of the crisis and to a negotiated political solution to the issue of Kosovo'; demanded that 'the Kosovo Albanian leadership and all others concerned respect the freedom of movement of the OSCE Verification Mission and other international personnel'; '[i]nsist[ed] that the Kosovo Albanian leadership condemn all terrorist actions'; and demanded that the Kosovo Albanian leadership 'co-operate with international efforts to improve the humanitarian situation and to avert the impending humanitarian catastrophe' (resolution 1203 (1998), ¶¶ 5, 6, 10 and 11)").

182. Indeed, the Security Council inherently revises its powers, including Chapter VII powers, through its own practice. The limits of the Council's powers are accordingly constantly moving in response to situations considered to constitute "threats to the peace" and in response to the measures that the Security Council can practically and politically take to maintain or restore international peace and security. *E.g.*, Bianchi, *supra* note 31, at 396; Jacob Katz Cogan, *Stabilization and the Expanding Scope of the Security Council's*

been debated, almost thirty years of states' uniform acquiescence with this sustained practice has turned the issues moot.<sup>183</sup> The Security Council has consequently expanded its formal lawmaking powers to include the competence to impose obligations and confer rights on states and CNEs alike, thereby weakening the consent-based conception of its competencies. As a result, the Council's practice demonstrates the existence of direct international legal rights and obligations of CNEs in positive international law.

#### IV. NORMATIVE INCLUSION OF COLLECTIVE NONSTATE ENTITIES AMONG ADDRESSEES OF BINDING INTERNATIONAL LAW: THE FUNCTIONAL THRESHOLD

In addition to demonstrating the existence of direct international legal rights and obligations of CNEs in positive law, the Security Council practice also makes apparent that international law is selective in its direct regulation of such entities. Only certain CNEs become addressees of only certain international legal rights and obligations, and only in certain circumstances. The regulation of CNEs in international law is in this sense fragmented. This observed selectivity begs the question as to when such direct rights and obligations emerge and whether there is an underlying mechanism that explains their occurrence and the conditions under which they develop, or whether their emergence is simply ad hoc.

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*Work*, 109 AM. J. INT'L L. 324–339, 325 (2015); Peters, *supra* note 38, at 800–07; Christian Tomuschat, *Article 33*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 38, at 1082.

183. On acquiescence, see generally I. C. MacGibbon, *The Scope of Acquiescence in International Law*, 31 BRIT. Y.B. INT'L L. 14 (1954); Nuno Sérgio Marques Antunes, *Acquiescence*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, (2006) (online encyclopedia), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-el373?rskey=QXuJrP&result=1&prd=MPIL>; David Bederman, *Acquiescence, Objection and the Death of Customary International Law*, 21 DUKE J. COMP. & INT'L L. 31 (2010); G.A. Res. 73/203, *supra* note 60, Conclusion 10(3) (characterizing acquiescence as a “[f]ailure to react over time to a practice” that stands side by side with verbal and physical acts of states as evidence of *opinio juris*). On the role of acquiescence in the development of the U.N. system and its capacity of to remedy even the most obvious illegal acts of the organs, see BENEDETTO CONFORTI & CARLO FOCARELLI, *THE LAW AND PRACTICE OF THE UNITED NATIONS* 43, 54, 69–70, 268, 298–99, 302, 327, 348, 400 (4th ed. 2010).

Existing international law literature offers only limited guidance. Peter Kooijmans suggested in the late 1990s that the Security Council would impose obligations upon CNEs when the entities were parties to an internationalized peace agreement, because such agreements could confer international legal personality on those entities.<sup>184</sup> Anne Peters, on the other hand, argued that the Security Council directly regulates armed groups in the context of non-international armed conflicts because of lack of state control over those groups.<sup>185</sup> However, the Security Council has treated CNEs as direct addressees of binding international law even in other circumstances.<sup>186</sup> Additionally, these rationales cannot explain all dimensions of the observed selectivity, in particular with respect to the content of specific rights and obligations.

Most general considerations of international law's engagement with CNEs, as well as advocacy calling for direct regulation of particular CNEs,<sup>187</sup> have typically emphasized the economic, political or social power of CNEs in today's world relative to states, communities, and human beings.<sup>188</sup> Accordingly, in those views, it is the size, wealth, or operation in the territory of multiple states which should warrant an entity's direct regulation through binding international law. Upon closer look, however, the normative inclusion of CNEs among addressees of binding international law does not depend on the abstract absolute magnitude of an entity; the dynamic is more nuanced.

#### A. *Dynamics of Inclusion*

Although the Security Council's treatment of CNEs as addressees of binding international law has now become widespread, the Council was initially reluctant to address CNEs directly in its resolutions. Originally designed as a body of and

184. Kooijmans, *supra* note 26, at 340.

185. Peters, *supra* note 38, at 802.

186. Consider the example of the Kosovo Albanian leadership (as distinct from the KLA). *See supra* Section III.B.2.

187. Consider, for example, the campaign to impose human rights obligations on transnational corporations.

188. *E.g.*, Sarah Joseph, *Taming the Leviathans: Multinational Enterprises and Human Rights*, 46 NETH. INT'L L. REV. 171, 171 (1999); ALICE DE JONGE, TRANSNATIONAL CORPORATIONS AND INTERNATIONAL LAW: ACCOUNTABILITY IN THE GLOBAL BUSINESS ENVIRONMENT 73 (2011).



for states, the Security Council has always supported statehood and the state-centered status quo within the international domain. The Security Council has also been hesitant to interfere in states' internal affairs. The Council's practice of prescribing new legal rights and obligations for CNEs, treating various CNEs as addressees of existing international law obligations, and enforcing these rights and obligations, has thus been fundamentally cautious and incremental.

This incrementalism has taken place within the context of individual situations before the Council, with the early example of UNITA providing an instructive illustration.<sup>189</sup> Even though UNITA had been the key internal opposition group in Angola for decades, at first the Security Council did not address UNITA in its resolutions on the situation. It was only in response to the withdrawal of the foreign states involved in the conflict, the failing of the peace process, UNITA's resumption of hostilities, the deteriorating humanitarian conditions of the local civilian population, the overall destabilization, and the inability of the territorial state to gain control over the situation that the Security Council started imposing obligations on UNITA through its resolutions. The Council then gradually escalated its demands vis-à-vis UNITA, imposing new obligations, invoking additional existing international law obligations, and enforcing those obligations depending on the circumstances on the ground. Still, the Security Council's general reluctance to acknowledge and directly address CNEs in its resolutions was apparent even with each additional obligation extended to UNITA.<sup>190</sup>

Over time, the Security Council has increasingly dealt with key CNEs involved in matters on its agenda. It has regularly directly addressed CNEs in its acts, and it has bestowed rights and imposed a variety of international legal obligations on such entities. The Council has become more willing to address CNEs involved in a situation from the very outset of its

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189. See *supra* Section III.B.2.

190. The Angolan example also illustrates the inherent fluidity and conduct-based nature of the normative inclusion of CNEs in binding international law. The Security Council would only address UNITA directly when it considered UNITA's particular conduct to endanger international peace and security. As soon as UNITA ceased the relevant conduct, it came out of the purview of the Security Council's regulatory activity. See *infra* Section III.B.1.

involvement in a matter.<sup>191</sup> This has been the case both in terms of imposing new obligations, including explicitly under Chapter VII, and invoking existing international legal obligations, especially when the Council had previously extended those obligations to CNEs in the context of other matters.<sup>192</sup>

Nonetheless, the Security Council has continued to favor an individualized, situation-specific determination of which CNEs will be treated as addressees of its resolutions. The Council has not adopted any “legislative” resolution that would impose new obligations on collective nonstate entities generally, outside of the context of a particular situation.<sup>193</sup> As illustrated by the example of nonproliferation of WMDs, the Council has been unwilling to impose general nonproliferation obligations on CNEs, as many states perceive the imposition of such general obligations as excessive interference in states’ internal affairs.<sup>194</sup> Instead, the Council only explicitly articulated a prohibition against the development, acquisition and use of WMDs by CNEs for the first time in the situation-specific context of the Syrian conflict.<sup>195</sup>

Moreover, the significance of the nonstate conduct in matters on the Council’s agenda has led to shifts in the Coun-

191. *E.g.*, S.C. Res. 2071 (Oct. 12, 2012) (involving Mali).

192. The Security Council practice leading to the introduction of direct rights and obligations has been quite spontaneous, with the determination of particular entities as functionally critical being reflected in the Council’s actual conduct. However, international law assigns legal relevance and intentionality to these spontaneous acts, as law regularly implies intent from conduct. HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 369 (1978). *See also* Wellens, *supra* note 38, at 32 (stating that even if unintentional and incidental, the Security Council impacts the development of international law).

193. For discussion of “legislative” resolutions of the Security Council, see Peters, *supra* note 38, at 783; Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT’L L. 175, 176 (2005); THE SECURITY COUNCIL AS GLOBAL LEGISLATOR (Vesselin Popovski & Trudy Fraser eds., 2014); Abi-Saab, *supra* note 41, at 26–27; Tullio Treves, *The Security Council as Legislator*, in THE DIVERSITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF PROFESSOR KALLIOPI K. KOUFA 61 (Aristotle Constantinides & Nikos Zaikos eds., 2009).

194. U.N. SCOR, 59th Sess., 4950th mtg., U.N. Doc. S/PV.4950 (Apr. 22, 2004); U.N. SCOR, 59th Sess., 4950th mtg., U.N. Doc. S/PV.4950 (Resumption 1) (Apr. 22, 2004); U.N. SCOR, 59th Sess., 4956th mtg. at 3, U.N. Doc. S/PV.4956 (Apr. 28, 2004).

195. S.C. Res. 2118 (Sept. 27, 2013); see discussion of this resolution, *supra* Section III.B.4.

cil's thematic resolutions.<sup>196</sup> Although thematic resolutions are not formally binding, they present a legal opinion regarding any existing obligations that attach to the CNEs involved. For example, the intensification of the recruitment and use of child soldiers by states and nonstate armed groups and the growing public outrage over that practice have prompted the Council to begin to specifically mention CNEs in the thematic resolutions on "Children and Armed Conflict".<sup>197</sup> The Council has "demand[ed] that all relevant parties" cease violations of applicable international law against children and take special measures to protect them.<sup>198</sup> The resolutions articulated increasingly concrete provisions to protect children and established a unique monitoring, reporting, and engagement mechanism.<sup>199</sup>

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Several interrelated factors have enabled the development of the Security Council's practice of directly regulating CNEs. First, the political dynamics within the Security Council changed with the end of the Cold War, unblocking its decision-making processes. Second, the Security Council responded to the changed aspirations for world governance that emerged after the Cold War in the broader international community. These aspirations have led to redefining the notion of peace and strengthening commitment to various humanitarian, environmental, and human rights values.<sup>200</sup> Third, the nature of security threats has changed to increasingly encompass activities of CNEs.<sup>201</sup> Finally, Security Council practice has

196. Thematic resolutions are adopted in the context of the Security Council's thematic debates. These resolutions deal with generic issues as opposed to specific situations. For a list of the thematic issues on the Council's agenda, see Thematic Issues, UNITED NATIONS SEC. COUNCIL, <https://www.un.org/securitycouncil//items> [<https://perma.cc/6F95-RKFV>] (last visited Nov. 13, 2020).

197. S.C. Res. 1261 (Aug. 30, 1999); S.C. Res. 1314 (Aug. 11, 2000); S.C. Res. 1379 (Nov. 20, 2001); S.C. Res. 1460 (Jan. 30, 2003); S.C. Res. 2143 (Mar. 7, 2014); S.C. Res. 2225 (June 18, 2015).

198. S.C. Res. 2068, ¶ 2 (Sept. 19, 2012); S.C. Res. 2143, ¶ 1 (Mar. 7, 2014); S.C. Res. 2225, ¶ 1 (June 18, 2015).

199. S.C. Res. 1612 (July 26, 2005).

200. See U.N. President of the S.C., *supra* note 38, at 2. See also *supra* Section III.A.

201. Jacob Katz Cogan has suggested that the Security Council has in fact been "[i]ncreasingly engaged in the protection of states from nonstate actors." Although he includes both individual and CNEs within his definition of "nonstate actors", his analysis primarily focuses on individuals. Jacob Katz

materialized against the backdrop of a growing sense that no entity is a priori excluded from international law.<sup>202</sup>

Admittedly, analyzing Security Council action is challenging because most of the Council's discussions and key negotiations take place during informal meetings and consultations, and no public record is available.<sup>203</sup> Still, Security Council acts and public meeting records suggest that the Council will include a CNE among the direct addressees of its resolutions only when its members conclude, on the basis of a factual assessment of the situation on the ground, that (i) the conduct of a particular CNE specifically challenges international peace and security, and (ii) the entity either prevents or is indispensable for the attainment of a specific objective that the Council pursues in the maintenance of international peace and security, such as the containment of a humanitarian catastrophe or nonproliferation of chemical weapons or protection of cultural property. If these factors are met, the Security Council may then (i) explicitly prescribe a new obligation or right for the CNE; (ii) specify a preexisting obligation which may or may not have been previously declared as specifically applicable to CNEs; (iii) elaborate a previously applied general obligation, such as compliance with international humanitarian law, into obligations of specific conduct, such as prohibitions on attacks against civilians, indiscriminate employment of weapons in populated areas, and shelling and aerial bombardment; (iv) clarify or transform its earlier request for a CNE to act or cease to act into an unequivocal legal obligation; and (v) demand a CNE's compliance with stipulated obligations or im-

Cogan, *Stabilization and the Expanding Scope of the Security Council's Work*, 109 *AM. J. INT'L L.* 324, 324 (2015).

202. See CRAWFORD, *supra* note 19, at 5 (elaborating the notion of contemporary international law as an open system); ROLAND PORTMANN, *LEGAL PERSONALITY IN INTERNATIONAL LAW* 276 (2010) (articulating a contemporary conception of international law as an open system from which no entities are a priori excluded).

203. The Security Council public meeting records regularly refer to "the understanding reaching in its prior consultations." See, e.g., the records relating to the Security Council's early engagement with UNITA. U.N. SCOR, 45th Sess., 2991st mtg, U.N. Doc. S/PV.2991 (May 30, 1991); U.N. SCOR, 47th Sess., 3232d mtg, U.N. Doc. S/PV.3232 (June 8, 1993). On the Security Council proceedings and working methods, see generally LORAINÉ SIEVERS & SAM DAWS, *THE PROCEDURE OF THE UN SECURITY COUNCIL*, 19–109 (4th ed. 2014).

plement other enforcement measures. In so doing, the Security Council responds to the needs identified in the particular situation, using factual analysis to guide its choice of measures, including escalating or discontinuing action vis-à-vis the CNE. If the Security Council and the permanent members are prepared to act in the matter at all, this choice would seem unconstrained by the political dynamics among the Security Council members.<sup>204</sup>

### B. *The Concept of the Functional Threshold*

Examination of Security Council practice suggests that the Council treats CNEs as addressees of binding international law when its members consider that the function of the Charter regime<sup>205</sup> of providing a suitable normative framework for the maintenance of international peace and security requires the normative inclusion of certain CNEs within binding international law.<sup>206</sup> In response to a matter affecting international peace and security, a political consensus develops within the Security Council that the maintenance of international peace and security requires the international legal framework to apply directly to certain CNEs, such as an armed group, a political opposition group, or a humanitarian organization, *in addition to* states. The Security Council thus incorporates particular CNEs within international law's system of coordination to fulfill the Charter regime's function.

Certain CNEs are considered indispensable for the performance of the Charter regime's function. These *functionally*

204. Consider the process of the Security Council's involvement in the Syrian conflict discussed *supra* Part III.B.4. See also *supra* note 115 and accompanying text in relation to Kosovo.

205. The term "regime" is used here simply to refer to a set of rules which relate to the same subject-matter. As such, the term does not refer to the regime theories developed in the field of international relations, such as in Andreas Hasenclever, Peter Mayer & Volker Rittberger, *Integrating Theories of International Regimes*, 26 REV. OF INT'L STUDIES 3 (2000).

206. References to positions and intentions of states are meant neither to objectify the ascertainment of these positions and intentions, nor to suggest mono-causality in social and political processes. However, governments ultimately arrive at particular positions through their internal procedures, which they then present externally and reflect in their diplomatic affairs. A form of (careful) reductionism with respect to the interactions and factors involved in states' judgments therefore seems justified to facilitate any discussion.

*critical* entities either disrupt or facilitate the regime's function, and Security Council members have adjusted the content of existing law to account for the entities' relevant capacities, all from the perspective of the maintenance of international peace and security.<sup>207</sup>

The centrality of the notion of function indicates that the selective normative inclusion of CNEs among addressees of binding international law in Security Council practice may be characterized as involving the operation of a functional threshold.<sup>208</sup> This concept describes an observed trigger for the creation of international rules that address certain rights and obligations directly to specific CNEs. Additionally, the functional threshold effectively operates as a normative threshold for CNEs' relevance to international law's regulatory purposes: the point at which certain entities become addressees of international legal rights and obligations. Although the concept does not claim or aspire to encompass every single instance of practice in matters of international concern involving CNEs,

207. CNEs' capacities can be defined in positive or negative terms. *See, e.g.*, S.C. Res. 2249, ¶ 1 (Nov 20, 2015) (“[N]otes that [ISIL] has the capability and intention to carry out further attacks and regards all such acts of terrorism as a threat to peace and security . . .”); S.C. Res. 788, ¶ 12 (Nov. 19, 1992) (“Commends the efforts of Member States, the United Nations system and humanitarian organizations in providing humanitarian assistance to the victims of the conflict in Liberia, and in this regard reaffirms its support for increased humanitarian assistance . . .”).

208. The term functional threshold here makes no reference to the functionalist theory in international relations nor to the “functional vocabularies” of “managerialism” described by Koskenniemi. ERNST HAAS, *BEYOND THE NATION-STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION* (1964) (theorizing international integration through the framework of functionalism and the example of International Labour Organization); Martti Koskenniemi, *The Politics of International Law – 20 Years Later*, 20 *EUR. J. INT’L L.* 7 (2009). As such, this article makes no claims about an ongoing process of global integration, or its inevitability or preferability, as the international relations theory of functionalism might posit. The theoretical framework also entails no assumptions about the rationality of states in the construction of legal regimes’ purposes and specific regulatory objectives, nor in the introduction of direct rights and obligations for CNEs as rationalist and behavioral economic approaches would do. *See, e.g.* LAUGE N. SKOVGAARD POULSEN, *BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES* 25–46 (2015) (analyzing the proliferation of bilateral investment treaties with reference to rationalist and behavioral economics).



the functional threshold delineates a discernible pattern in the practice of states.

The functional threshold is not exclusive to the law of international peace and security. The aspiration to provide a suitable normative framework for the fulfilment of a legal regime's purpose has fueled the introduction of rights and obligations for CNEs in areas as diverse as the UNCLOS deep seabed regime; international aviation law; liability for environmental harm; international humanitarian law, particularly the laws on protection of victims of armed conflict and protection of cultural property; weapons law, such as the law on conventional weapons; human rights law; and international investment law.<sup>209</sup>

Some theoretical approaches have posited that the general function of international law is to "safeguard international peace, security and justice,"<sup>210</sup> "maximize the common good,"<sup>211</sup> or "tell stories . . . of freedom, equality, and universality."<sup>212</sup> The function of international legal rules in relation to a particular regulatory purpose may also be found in the treaty law concept of "object and purpose," which the VCLT employs both as an independent substantive standard for assessing the legality of state behavior in relation to a treaty<sup>213</sup>

209. Klara Polackova Van der Ploeg, *Collective Non-State Entities in International Law* (Aug. 15, 2018) (unpublished Ph.D. dissertation, Graduate Institute of International and Development Studies) (on file with the Graduate Institute of International and Development Studies Library); *supra* notes 6–15 and accompanying text.

210. Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law*, 281 RECUEIL DES COURS 23 (1999).

211. HIGGINS, *supra* note 28, at 1.

212. Martti Koskenniemi, *Constitutionalism, Managerialism and the Ethos of Legal Education*, 1 EUR. J. LEGAL STUD. 1, 21 (2007). Other authors have been highly critical of these efforts, arguing either that one cannot identify a singular function of law or that a generally formulated singular function lacks the specificity necessary for resolution of specific issues and interpretative controversies. Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3, 13–14 (G. Teubner ed., 1997); Philip Allott, *The True Function of Law in the International Community*, 5 IND. J. GLOBAL LEGAL STUD. 391 (1998); Martti Koskenniemi, *What is International Law For?*, in INTERNATIONAL LAW 29, 29–31 (M. Evans ed., 2014).

213. VCLT *supra* note 66, arts. 18, 19, 41, 58.

and as a component of treaty interpretation methodology.<sup>214</sup> However, in the concept of the functional threshold, the notion of function relates to the particular political consensus on the normative arrangement required within an international legal regime to deal with a matter of international concern involving CNEs.

The performance of a legal regime's function takes place through specific regulatory objectives, which elaborate on and implement the regime's overall purpose. For example, under the U.N. Charter regime, the specific regulatory objective of providing humanitarian assistance to victims of a particular armed group narrows the focus of the maintenance of peace and security to the necessary normative arrangements. While a regime's overall purpose and the specific regulatory objectives may be explicit or implicit, and their precise content may be the subject of debate or change over time, they are always present. Their understanding gives direction to the whole legal regime and guides the particular normative arrangements, including any political consensus on the incorporation of CNEs directly in international law as a system of coordination.

International legal regimes, such as the U.N. Charter regime for international peace and security, the deep seabed regime, the nuclear civil liability regime, human rights protection, and the law on weapons, essentially represent normative responses to matters of international concern. In the case of the Security Council and the U.N. Charter regime, states have developed a shared understanding that certain matters of international peace and security prominently featuring CNEs cannot be adequately addressed through harmonized domestic laws or exclusively state-addressed international law. As such, they have begun to treat these entities as addressees of binding international law.

214. *Id.* arts. 31, 33. For discussion of the concept of "object and purpose," see generally, Jan Klabbers, *Treaties, Object and Purpose*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 6–7, 10–11, 14–16 (2006) (online encyclopedia), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-el681?rskey=NuU7MW&result=1&prd=MPIL>; ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 137 (2d ed. 2007); Dino Kritsiotis, *The Object and Purpose of a Treaty's Object and Purpose*, in *CONCEPTUAL AND CONTEXTUAL PERSPECTIVES ON THE MODERN LAW OF TREATIES* 237 (Michael Bowman & Dino Kritsiotis eds., 2018).

The perceived urgency of the legal regime's function takes precedence over the normative rigidity of existing international law categories, which strongly favor states and state-based structures, as well as states' inherent disinclination to introduce direct international regulation of CNEs. States generally resist the normative inclusion of CNEs among addresses of binding international law due to concerns about their own conceptual and factual dominance within the international legal order. The direct regulation of CNEs has been suggested to infringe on states' prerogatives in the international domain and question the capacities of states and adequacy of purely interstate, state-addressed regulation.<sup>215</sup> The direct regulation of CNEs also challenges states' sovereignty by removing the entities concerned from individual states' *domaine réservé*, and thus from their immediate and exclusive control. Most worrying for some, this direct regulation is often mistakenly thought to render CNEs "subjects of international law," implying their equality to and independence from states.<sup>216</sup> Nevertheless, in the case of the Security Council, states have set forth direct rights and obligations for CNEs to more efficiently maintain international peace and security.

Law can only adequately fulfil its regulatory role "if it applies effectively to the forms of social organization which in practice control them."<sup>217</sup> The concept of the functional

215. See, e.g., Joel Delbrück, *The Changing Role of the State in the Globalising World Economy*, in *MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS* 56, 69 (P. Bekker et al. eds., 2010) (arguing that "the State is caught up in a multi-layered system of governance, with partly competing and partly cooperating entities vested with public authority and decision-making power . . . [and] has had to expose itself to the ensuing normative and *de facto* impacts on its domestic sphere"); Menno Kamminga, *The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?*, in *STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE* 387, 388 (Gerard Kreijen et al. eds., 2002) (noting concerns of critics that "the influence of NGOs on the international plane has been growing out of all proportion, that special interest groups cannot be expected to balance all relevant interests, [and] that only States can be relied upon to do so . . .").

216. Kamminga, *supra* note 215; Jose Alvarez, *Are Corporations Subjects of International Law?*, 9 *SANTA CLARA J. INT'L. L.* 1, 3 (2011).

217. C. Wilfred Jenks, *Multinational Entities in the Law of Nations*, in *TRANSNATIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP* 70, 72 (Wolfgang Friedmann, Louis Henkin & Oliver Lissitzyn eds., 1972). Cf. Jochen Abr. Frowein, *Discussion*, in *NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW: INTERNATIONAL LAW—FROM THE TRADITIONAL STATE*

threshold elaborates on this general proposition by magnifying the link between the normative inclusion of CNEs among addressees of binding international law and the notion of a legal regime's function. Direct rights and obligations of CNEs only develop when states consider particular entities indispensable to providing the normative framework necessary to fulfill a legal regime's purpose. It is this link that explains which entities will acquire which rights and obligations in which circumstances. The functional threshold thus clarifies that an entity's international legal relevance is established in reference to the function of a particular legal regime, rather than in reference to some abstract power of the entity within the international system. At the same time, the concept of the functional threshold makes it clear that the normative inclusion of CNEs among addressees of binding international law occurs within the context of a specific legal regime. The incorporation of CNEs in binding international law has thus not occurred on the macro level of general or common international law, but rather through the mezzo level of specialized legal regimes, such as the U.N. Charter regime of international peace and security.<sup>218</sup>

### C. *Contingency of the Normative Inclusion*

The direct regulation of CNEs takes place through complex political processes of interaction and interest formulation, both at the international level and within states' internal political processes. The understanding of what normative arrangement is required is fundamentally contingent on these processes and is a product of the discourse developed within the particular area of international law. The resulting practice is thus dependent both on objective factors, such as the nature of the matter of international concern and the conduct of par-

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ORDER TOWARDS THE LAW OF THE GLOBAL COMMUNITY 59 (Rainer Hofmann & Nils Geissler eds., 1999) (arguing that wherever power is being exercised states will treat powerholders as important in international law and, under certain circumstances, will take up international legal relations with them without recognizing them as states).

218. International law may be described as a normative structure involving three regulatory planes of different scope: (i) a micro level of individual norms of international law, (ii) a mezzo level of specialized regimes of international law, and (iii) a macro level of general or common international law.

ticular CNEs involved, and on the subjective positions, interests, agendas, and interactions of states.

Within the Security Council, the subjective element has shaped all relevant factors involved: (i) the understanding of the Charter regime's purpose and specific regulatory objectives, (ii) the characterization of particular CNEs as functionally critical, and (iii) the determination of what particular right or obligation should be conferred on the functionally critical entity.<sup>219</sup> Ultimately, it is the narratives surrounding a matter of international concern involving CNEs and the ensuing positions of states, rather than notions of perfect rationality,<sup>220</sup> that guide individual acts of state practice and explain the choice between different normative arrangements. CNEs themselves, though lacking formal lawmaking authority in international law conceptualized as state-made law, may be paramount in the particular discourse and shared understanding that CNEs need to be directly regulated in binding international law. For example, CNEs have participated in the Security Council's formal meeting debates,<sup>221</sup> Arria-formula meetings,<sup>222</sup> and visiting missions.<sup>223</sup>

219. In the Security Council context, further complexity and variance arise from different states acting as penholders on particular issues, and individual items on the Security Council's agenda involving different groups of friends. *See supra* note 62 and accompanying text.

220. Indeed, normative arrangements need not be rational solutions to strategically defined problems. Whether specific normative arrangements are actually rational or appropriate under particular models of rationality or based on accurate underlying assumptions is irrelevant from the perspective of legal normativity (although over time, any disparity in the expected outcome may lead to the change of law).

221. CNEs participate in Security Council meetings when invited by the Council. U.N., Provisional Rules of Procedure of the Security Council, Rule 39, U.N. Doc. S/96/Rev.7, U.N. Sales No. E.83.I.4 (1983); U.N. President of the S.C., Note by the President of the Security Council, ¶ 50, U.N. Doc. S/2006/507 (July 19, 2006); U.N. President of the S.C., Note by the President of the Security Council, ¶ 59, U.N. Doc. S/2010/507 (July 26, 2010); U.N. President of the S.C., Note by the President of the Security Council, ¶ 92, U.N. Doc. S/2017/507 (Aug. 30, 2017). The participation of NGOs in the Security Council open debates is widespread.

222. *E.g.*, U.N. President of the S.C., Note by the President of the Security Council, ¶ 54, U.N. Doc. S/2006/507 (July 19, 2006); U.N. President of the S.C., Note by the President of the Security Council, ¶ 98, U.N. Doc. S/2017/507 (Aug. 30, 2017). Amnesty International has been invited to Arria-formula meetings on at least 20 occasions. Arria-formula meetings have also hosted, for example, Burundi opposition parties 'FRODEBU' and

The understanding of a regime's purpose and specific regulatory objectives, the tools necessary for the realization of that purpose and objectives, and the determination of which CNEs, if any, are functionally critical within the legal regime, is not fixed and may be reinterpreted over time. The changed idea of what constitutes a threat to international peace and security shifted the conception of which issues and social relationships concern international peace and security. It also altered the understanding of what the Charter regime's purpose of maintaining international peace and security involves, as well as what normative means are necessary for the legal regime's function, including whether the normative inclusion of particular CNEs within binding international law is required.

Accordingly, the concept of the functional threshold does not suggest inevitability in the development of direct rights and obligations of CNEs in international law, but rather emphasizes an element of contingency in that course of action. For the same reason, the functional threshold cannot unfailingly predict when direct regulation will take place. Nonetheless, there is a greater likelihood that states will treat a CNE as directly possessing international rights and obligations under a particular legal regime if certain factors are present. In the Security Council context, CNEs may pass the threshold and be considered functionally critical on account of their constructive or disruptive capacity to interfere with international peace and security. Whether CNEs constitute a danger or a helpful presence, they will be deemed functionally critical when states recognize the entities' political, technical, legitimizing, or

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'UPRONA', represented by Parliamentarians for Global Action; Polisario; Crimean Tatar National Movement; Syrian National Coalition; and other international NGOs, such as CARE International, Médecins Sans Frontières and Oxfam. SECURITY COUNCIL REPORT, ARRIA-FORMULA MEETINGS (Oct. 16, 2019), [https://www.securitycouncilreport.org/atf//%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/\\_methods\\_.pdf](https://www.securitycouncilreport.org/atf//%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/_methods_.pdf) [<https://perma.cc/EV63-TQZJ>]; SIEVERS & DAWS, *supra* note 213, at 91.

223. U.N. President of the S.C., Note by the President of the Security Council, ¶ 55, U.N. Doc. S/2006/507 (July 19, 2006); U.N. President of the S.C., Note by the President of the Security Council, ¶ 68, U.N. Doc. S/2010/507 (July 26, 2010); U.N. President of the S.C., Note by the President of the Security Council, ¶ 123, U.N. Doc. S/2017/507 (Aug. 30, 2017); SECURITY COUNCIL REPORT, SECURITY COUNCIL VISITING MISSIONS (Aug. 2, 2019), <https://www.securitycouncilreport.org/un-security-council-working-methods/visiting-mission.php> [<https://perma.cc/Q5HJ-9VHL>].



other capacities in the maintenance of international peace and security and therefore desire such entities' cooperation.

#### D. *Adaptation of International Law*

Although the concept of the functional threshold encapsulates the existence of a normative threshold for the inclusion of CNEs among addressees of binding international law, the concept is descriptive, not normative. As a matter of positive law, the operation of the functional threshold—at least in its present configuration—does not suggest that international law has developed to prescribe that states *should* confer certain direct rights and obligations on certain CNEs. Accordingly, this article does not argue that direct regulation of CNEs should take place in certain or all circumstances.

Fundamentally, the concept of the functional threshold captures a mechanism through which states have adapted international law to the changing character of international law's social body and of the social phenomena underpinning matters of international concern—in particular, the prominence of CNEs and consequent shifts in significant conduct and key relationships. Because international law is shaped by its underlying social reality,<sup>224</sup> the inclusion of CNEs among addressees of binding international law has developed in state practice as a normative response to the changes in this social reality.

Historically, international law could adequately regulate international life through states, which could channel and control collective conduct within their jurisdiction, including any international effects of that conduct. The majority of human conduct was limited to the territory of an individual state, and states dominated both domestically and internationally in economic, political and social terms. However, human activities, resources, wealth, and their impact, are no longer confined to the territory of individual states. Global social structures have transformed to account for the growing interdependencies of states and human communities, greater transborder cooperation, disassociation of economic power from fixed territory, delocalization of global elites, extraterritorial

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224. Bianchi, *supra* note 31, at 393; ANDREW CLAPHAM, *BRIERLY'S LAW OF NATIONS: AN INTRODUCTION TO THE ROLE OF INTERNATIONAL LAW IN INTERNATIONAL RELATIONS* 41 (7th ed. 2012).

exercises of public authority, increased private self-regulation, and the transfer of public tasks to nongovernmental and supranational organizations.<sup>225</sup> Saskia Sassen has described how economic globalization transformed the territorial organization of economic activity and politico-economic power: The contemporary economic system centered on cross-border flows and global telecommunications has produced a “new geography of power,” which affects states’ sovereignty and exclusive territoriality.<sup>226</sup> These shifts have not been limited to the economic sphere; they may also be observed in other areas, including security, the environment, and health. As a consequence, various CNEs regularly vitally affect the operation of the international system and matters of international concern. States have frequently been unable to respond to or to exercise the requisite level of control over the conduct of these entities, and the traditional interstate mechanisms have often proved ineffective.<sup>227</sup>

The Security Council has adapted the Charter regime in response to shifts in the social structures underlying matters of international peace and security. The end of the Cold War brought with it new security threats and a focus on nonstate entities, as non-international armed conflicts became prevalent; cross-border operations of armed groups and terrorist organizations intensified; and widespread nonstate violence against humanitarian agencies took place.<sup>228</sup> At the same time, the era also witnessed greater participation of CNEs in deliver-

225. *See generally*, Delbrück, *supra* note 215 (examining the ability of today’s state to act “as the main regulatory actor in the world economy” and comparing the role of states in a globalized environment with that of classic territorial states).

226. SASKIA SASSEN, *LOSING CONTROL?: SOVEREIGNTY IN AN AGE OF GLOBALIZATION* 1–32 (1996). *See also* Enrico Milano, *The Deterritorialization of International Law*, 2 *ESIL REFLECTIONS*, no. 3, at 2 (discussing “the extent to which international law has been affected by and has contributed to new forms of power exercise detached from territory”).

227. For discussion, see Jacob Katz Cogan, *The Regulatory Turn in International law*, 52 *HARV. INT’L. L. J.* 322, 344 (2011); De Jonge, *supra* note 198, at 73; Delbrück, *supra* note 215, at 61, 68; Jost Delbrück, *Prospects for a “World (Internal) Law”?: Legal Developments in a Changing International System*, 9 *IND. J. GLOBAL LEGAL STUD.* 401, 410 (2002); BOYLE & CHINKIN, *supra* note 23, at 21; Michael Reisman, *Designing and Managing the Future of the State*, 8 *EUR. J. INT’L L.* 409 (2007); Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International-Law?*, 4 *EUR. J. INT’L L.* 447 (1993).

228. Wellens, *supra* note 38.

ing humanitarian assistance worldwide.<sup>229</sup> These factors were accompanied by a number of theoretical shifts, including the redefinition of the notions of peace and security, a less strict interpretation of the principle of noninterference in internal affairs, prioritization of humanitarian and communitarian values, overall normative opening of international law to non-state phenomena, and a belief in international law as a tool for international peace and security. The period also broadly coincided with a new intensity in globalization.

The changes in the social structures underpinning matters of international peace and security have redefined the relevant conduct and relationships that the Charter regime seeks to regulate. These transformations have consequently created tension between the norms and structures of international law and the newly significant conduct of CNEs. The functional threshold has arisen in state practice as a response to this tension; it operates as a normative vehicle to process shifts in international society and adapt international law to its underlying social reality.<sup>230</sup> The Security Council has adapted the previous exclusively state-addressed regime to incorporate and regulate CNEs significantly involved in matters of international peace and security within the binding normative framework. The concept of the functional threshold encapsulates this adaptation.

By imposing at least some constraints and regularity on CNEs' conduct, states seek to stabilize interactions and relationships within the international domain. At the same time, direct regulation enables international law to retain its value as a tool for the normative structuring of such interactions and relationships. As Niklas Luhmann explained in his theory of autopoiesis, social conduct does not exist in law unless a legal

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229. Pamela Aall, *Nongovernmental Organizations and Peacemaking*, in *MANAGING GLOBAL CHAOS: SOURCES OF AND RESPONSES TO INTERNATIONAL CONFLICT* 433–34 (Chester Crocker, Fen Osler Hampson, & Pamela Aall eds., 1996).

230. For discussion, see Van der Ploeg, *supra* note 209, at 48–57. *See also* Bianchi, *supra* note 31, at 394 (discussing the unsatisfactory theoretical account of the role played by nonstate actors in contemporary international law and arguing that an acknowledgement of the changing social structure of the international community and new conceptual tools are required).

norm confers legal meaning on such conduct.<sup>231</sup> The normative inclusion of CNEs among addressees of binding international law confers legal meaning on the conduct of entities falling within the scope of the pertinent rules, making such conduct legally cognizable within international law. The adaptation of international law through the functional threshold to place CNEs directly within international law's purview thus enables international law to continue to structure key conduct and relationships in the international domain.

#### V. CONCLUSION: IMPLICATIONS OF THE FUNCTIONAL THRESHOLD

Although international lawyers have long reported on the diversification of entities in the international domain and the related new normative phenomena, international legal doctrine has remained uncomfortable with the proposition that CNEs may possess rights and obligations directly under international law without the interposition of any state. The general impression continues to be that the "legal status" of such entities in international law is "less clear and less extensive."<sup>232</sup> The International Law Association's Study Group on Non-State Actors, active from 2007 to 2016, has not brought much clarity. The Study Group was tasked to "examine the position of non-state actors in international law in terms of their rights and obligations."<sup>233</sup> Although the Study Group generated four

231. Niklas Luhmann, *The Autopoiesis of Social Systems*, in *SOCIOCYBERNETIC PARADOXES: OBSERVATION, CONTROL, AND EVOLUTION OF SELF-STEERING SYSTEMS* 172, 172–92 (Felix Greyer & Johannes van der Zouwen eds., 1986); Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 *CARDOZO L. REV.* 1419–41 (1992). See also Vera Gowlland-Debbas, *The Security Council and Issues of Responsibility under International Law*, 353 *RECUEIL DES COURS* 185, 204–05 (2012) (applying Luhmann's theory to international law); Robert Jennings, *Nullity and Effectiveness in International Law*, in 2 *COLLECTED WRITINGS OF SIR ROBERT JENNINGS* 694 (1998) (discussing legally "nonexistent" acts from the perspective of nullity).

232. JAN KLABBERS, *INTERNATIONAL LAW* 95–96 (2d ed., 2017).

233. Int'l. L. Ass'n., Proposal to establish an ILA Committee for the Study of the Rights and Obligations of Non-State Actors Under International Law (2007), <https://perma.cc/9UXZ-GZJA>. The Study Group's definition of "non-state actors" is similar, though not identical to that of CNEs, as it expressly excluded "illegal bodies" such as Al Qaeda. *First Report of the Committee—Non-State Actors in International Law: Aims, Approach and Scope of Project and Legal Issues*, *supra* note 11, at 6–7.

official reports<sup>234</sup> and a substantial publication output,<sup>235</sup> its actual results were rather mixed.<sup>236</sup>

The foregoing analysis demonstrates how international law has responded to changes in the global social order, including changed power structures and the resulting prominence of various CNEs. Specifically, the article traces how the Security Council has developed the UN Charter regime of international peace and security to confer rights and impose obligations directly upon CNEs, thereby including such entities within its purview and regulating their conduct—including their relationships with states—directly. Moreover, the law of international peace and security and U.N. Security Council practice is but one example of increasingly widespread normative inclusion and regulation of CNEs under binding international law. CNEs operate within contemporary international law in a manner that clashes with the role assigned to them under classical international law; the exclusionary doctrinal narrative does not correspond to actual practice.

The concept of the functional threshold captures the particular dynamic involved in the treatment of CNEs as addressees of binding international law and the centrality of the function of a legal regime as a normative framework. The Security Council has adapted the Charter regime to incorporate CNEs directly within binding international law to ensure that the regime continues to maintain international peace and security.

234. See *First Report of the Committee—Non-State Actors in International Law: Aims, Approach and Scope of Project and Legal Issues*, *supra* note 233; International Law Association: The Sofia Conference (2012), *Second Report of the Committee—Non-State Actors in International Law: Lawmaking and Participation Rights*; *Third Report Prepared by the Co-Rapporteurs, Cedric Ryngaert and Jean d'Aspremont* *supra* note 9; International Law Association: The Johannesburg Conference (2016), *Final Report*.

235. See *generally* NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW: FROM LAW-TAKERS TO LAW-MAKERS (Math Noortmann & Cedric Ryngaert eds., 2010); RESPONSIBILITIES OF THE NON-STATE ACTOR IN ARMED CONFLICT AND THE MARKET PLACE: THEORETICAL CONSIDERATIONS AND EMPIRICAL FINDINGS (Noemi Gal-Or, Cedric Ryngaert & Math Noortmann eds., 2015).

236. The ILA adopted a resolution which, although formulated in a positive manner, effectively admits the Committee's inability to draw substantive conclusions from its work. Int'l. L. Ass'n. Res. 6/2016 (2016) ("Acknowledging the fact that the Committee has adopted a broad working definition of non-state actors, and that it is not possible to draw general or particular conclusions . . . without more specific analysis of individual types of non-state actor . . .").

Evolving understandings of what constitutes a security threat or a matter of international peace and security have changed what social conduct and relationships are considered significant for the maintenance of international peace and security, leading the Security Council to treat CNEs as addressees of binding international law.

The parameters that characterize the phenomenon of CNEs' direct rights and obligations in the Security Council's practice refute some of the commonly held beliefs about the supposed "risks" involved in direct regulation of CNEs through binding international law. The analysis may consequently inform the use of direct regulation of collective non-state entities as a regulatory tool in other areas of international law. For example, the observed differentiation of rights and obligations of states and CNEs rebuts the concern that addressing rights and obligations to CNEs would equate such entities with states, both in status and in the scope of the rights and obligations. This, as a matter of principle and practice, is not the case, as the rights and obligations of states and CNEs are not identical, and states and CNEs are treated—and may be treated as a matter of international law—in a differentiated manner. Arguments that the formulation of obligations for CNEs would weaken analogous obligations of states are also unfounded. Security Council resolutions explicitly stipulate obligations of CNEs alongside those of states, clarifying that such obligations are separate and that states and CNEs owe performance under the obligations independently. Therefore, a policy decision to impose particular international legal obligations, such as human rights obligations, only on states cannot be defended on legal grounds, as parallel rights and obligations of states and CNEs provide independent, self-standing, and substantively complementary means to deal with matters of international concern.

The transformation of the U.N. Charter regime of international peace and security and analogous developments in other areas of international law demonstrate that the conventional view that international law does not regulate the conduct of CNEs in a legally binding manner no longer holds. The direct regulation of CNEs and the operation of the functional threshold call into question many basic tenets and doctrines of international law, including, most prominently, the doctrine of subjects and the default presumption that binding



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international law does not apply to CNEs. Even if the full implications of the normative inclusion are only beginning to emerge, one conclusion is clear: the mainstream doctrine on CNEs in binding international law must change.

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