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LEGAL TECHNIQUES FOR RESOLVING ARMED CONFLICTS WITH NON-STATE ACTORS

This panel was convened at 9:00 a.m., Friday, March 29, 2019, by its moderator Randa Slim of the Middle East Institute, who introduced the panelists: Kristen Boon of Seton Hall Law School; Margaux Day, of the Public International Law and Policy Group; Gregory Fox of Wayne State Law School; and Vikram Raghavan of the World Bank Group.

The UN Security Council and Non-state Actors

*By Kristen Boon**

Introduction

Since the end of the Cold War it has become clear that non-state actors (NSA)[1] can have a substantial impact on situations affecting international peace and security.[2] Although the authority of the Security Council to directly address NSA is not uncontroversial, it is clear that as a practical matter the Council does exercise this authority regularly.[3] My remarks will address this practice and explain its legal significance.

Addressing Armed Non-state Actors

The majority of Security Council Resolutions are directed toward states. Nonetheless, there are many resolutions that address or place obligations on non-state actors. It is important to note at the outset that sometimes the Council addresses non-state actors through states: for example, in a typical sanctions resolution under Article 41 of the UN Charter, the Council will place obligations on the state to regulate non-state actors by way of travel bans, asset freezes, or arms embargos. By far the most interesting practice, however, and the focus of my remarks today, is where the Security Council engages directly with non-state actors without the mediation of a state. This occurs most often in situations where the state has lost its authority or control over territory, such as during regime changes or internal conflicts.

An early example of this practice is illustrated by Security Council Resolution 1540. In the preamble to this famous omnibus resolution on the Non-proliferation on Weapons of Mass

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[1] By non-state actor, I refer to armed non-state actors, although the definition is open to some debate.

[2] Greg Fox, Kristen Boon & Isaac Jenkins, *The Contributions of United Nations Security Council Resolutions to the Law of Non-international Armed Conflict: New Evidence of Customary International Law*, 67 Am. U. L. Rev. 649 (2018). *See also* Jessica S. Burniske, Naz K. Modirzadeh & Dustin A. Lewis, *Armed Non-state Actors and International Human Rights Law: An Analysis of the Practice of the U.N. Security Council and U.N. General Assembly* (Harv. L. Sch. Program on Int'l L. & Armed Conflict ed., 2017), *available at* http://blogs.harvard.edu/pilac/files/2017/06/HLS-PILAC—ANSAs-and-IHRL—June-2017.pdf.

[3] Some permanent members of the Security Council have tried to limit the Council's interaction with non-state actors, and on some resolutions, such as 2395, there have been concerted efforts to limit interaction and input from non-state actors. This push back on references to non-state actors presumably seeks to emphasize state sovereignty. *See* SC Res. 2395 (Dec. 21, 2017).

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Destruction, the Council expressed grave concern over "the threat of terrorism and the risk that non-State actors … [m]ay acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery."[4] Importantly, the Council then went on to define "non-state actor" as an individual or entity, not acting under the lawful authority of any state in conducting activities which come within the scope of this resolution.[5]

In later practice, the Security Council has regularly called out particular armed non-state actors directly, and used its Chapter VII authority to directly regulate them. In Resolution 2067, for example, the Council criticized Al Shabaab for its role in atrocities in the region. In this Resolution, the Council stated that it "[s]trongly condemn[ed] the grave and systematic violations and human rights abuses perpetrated by many parties and *in particular by Al-Shabaab* and its affiliates, against the civilian population, including violence against children, journalists, and human rights defenders, and sexual violence against women and children" and called for its immediate cessation.[6]

A very recent example of the Council's engagement with armed groups is Resolution 2459, passed on March 15, 2019 involving The Sudan. In this Resolution, the Council addressed both state and non-state actors directly when it used the term "all parties," "demand[ing] that all parties immediately cease all forms of violence, human rights violations and abuses, and violations of international humanitarian law, including rape and other forms of sexual and gender-based violence, and hold those responsible accountable, in order to break the prevailing cycle of impunity."[7] A similar approach was adopted by the Council with regards to the damage and destruction of cultural heritage. Resolution 2056 urged "all parties to immediately take appropriate steps to ensure the protection of Mali's world heritage sites."[8]

Language is very important in understanding the Council's approach. The use of the term "all parties" is used to encompass both state and non-state actors. In addition, the Council has used the term "abuses" when it refers to non-state actors and human rights, whereas it uses the term violations when it refers to state transgressions of human rights. This is because, not all Council members support the proposition that NSA are bound by human rights. In contrast, in the case of international humanitarian law (IHL), the Council uses violations for both states as well as for non-state actors, signaling a high level of consensus that NSA and states are bound by IHL.[9]

The principle of last resort can be derived from this practice. First, where the Council can address a state it will: its practice indicates obligations are generally addressed to non-state actors where the state has lost effective control over territory. Thus, members of the UN Security Council prefer to operate at the state level, and generally only impose obligations or indicates duties on non-state actors as a last resort.[10]

[4] SC Res. 1540, pmbl. para. 8 (Apr. 28, 2004).

[5] *Id*.

[6] SC Res. 2067, para. 18 (Sept. 18, 2012) (emphasis added).

[7] SC Res. 2459 (Mar. 15, 2019).

[8] SC Res. 2056 (July 5, 2012); *see also* SC Res. 2100 (Apr. 25, 2013). *See generally* Marina Lostal, Kristin Hausler & Pascal Bongard, *Culture Under Fire: Armed Non-state Actors and Cultural Heritage in Wartime*, GENEVA CALL (David McDonald ed., 2018), *available at* https://www.biicl.org/documents/10_cultural_heritage_study_final_highres.pdf.

[9] Katharine Fortin, *Armed Non-state Actors and International Human Rights Law: An Analysis of the UN Security Council and UN General Assembly*, U CALL (Oct. 13, 2017), *at* http://blog.ucall.nl/index.php/2017/10/armed-non-state-actors-and-international-human-rights-law-an-analysis-of-the-un-security-council-and-un-general-assembly/#more-927.

[10] Our study found: Fox, Boon & Jenkins, *supra* note 2, at 701 n. 265 ("*See* S.C. Res. 1975, ¶ 1 (Mar. 30, 2011) (Côte d'Ivoire); S.C. Res. 1132, at 1 (Oct. 8, 1997) (Sierra Leone); S.C. Res. 841, at 2 (June 16, 1993) (Haiti); S.C. Res. 804, at 2 (Jan. 29, 1993) (Angola)"). *Id.* at 701 n. 266 ("*See, e.g.*, S.C. Res. 2113, at 4 (July 30, 2013) (condemning the human rights and humanitarian law violations occurring in Sudan); S.C. Res. 2098, at 2 (Mar. 28, 2013) (expressing concern over the transgressions of human rights and humanitarian law in DR Congo); S.C. Res. 1964, at 2 (Dec. 22, 2010) (condemning human rights violations occurring in Somalia); S.C. Res. 1935, ¶ 9 (July 30, 2010) (demanding that all groups in Sudan

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There are several legally significant conclusions one can draw from this practice. First, by directly addressing non-state actors, the Security Council suggests they are "subjects" of international law.[11] Subjects are capable of possessing, exercising, and enforcing rights and duties under international law. Subjects may also contribute to the creation of international law.[12] The Council's practice, therefore, can be interpreted as giving non-state actors a status and a role that is not obvious in the inherently state centric system. In fact, even the term non-state actor suggests something that is peripheral to the state.

In the 1949 *Reparations for Injuries* case, the International Court of Justice (ICJ) certainly suggested states are not the only subjects of international law,[13] and it has all but acknowledged the Council's authority to impose legal obligations directly on non-state entities. In the Kosovo Advisory Opinion, the ICJ observed that "it has not been uncommon for the Security Council to make demands on actors other than United Nation Member States and inter-governmental organizations."[14] The corpus of Council resolutions, therefore, that directly address non-state actors expands the range of relevant actors, and suggests, albeit with nuances, that they may have rights and duties under international law.

Another factor that is legally significant is that there is substantial consistency, both over time and geography, in the obligations imposed by the UN Security Council in non-international armed conflicts involving armed non-state actors. Though the Council is often perceived to act in an ad hoc manner, there are patterns in the way the Security Council operates in these situations. Here I draw on an article that I, Greg Fox, and Isaac Jenkins recently published in the *American University Law Review*. Our data shows that:

(1) that the council regularly (across different conflicts) imposes binding obligations that deviate from accepted international law;
(2) that, when the council chooses to pass a resolution in these situations, it does not involve itself lightly;[15]
(3) that, geographically, the Council has been most heavily involved relative to the number of conflicts in the former Yugoslavia and Africa;[16]
(4) that the council becomes most heavily involved in cases in which not all parties to the conflict are cooperative; and

comply with their international human rights and humanitarian law obligations); S.C. Res. 1577, at 2, ¶ 5 (Dec. 1, 2004) (considering appropriate measures for armed organization responsible for human rights violations in Burundi); S.C. Res. 1509, ¶ 4 (Sept. 19, 2003) (demanding parties in Liberia fulfill their obligations under the peace and ceasefire agreements).". *Id.* at 701 n. 267 ("S.C. Res. 752, ¶ 1 (May 15, 1992) (demanding "that all parties and others concerned in Bosnia and Herzegovina stop the fighting immediately, [and] respect immediately and fully the cease-fire signed on 12 April1992.")"). *Id.* at 701 n. 268 ("S.C. Res. 792, ¶ 8 (Nov. 30, 1992) (demanding "that the PDK fulfil immediately its obligations under the Paris Agreements")"). *Id* at 701 n. 269 ("S.C. Res. 1214, ¶ 12 (Dec. 8, 1998) (demanding that "Afghan factions put an end to discrimination against girls and women and other violations of human rights").").

[11] Jan Klabbers, *(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-state Actors*, *in* NORDIC COSMOPOLITANISM: ESSAYS IN INT'L L. FOR MARTTI KOSKENNIENMI 351, 354–55 (Jarna Petman & Jan Klabbers eds., 2003) (arguing that there must be a justification for placing international obligations on non-state actors).

[12] *See* Greg Fox, Kristen Boon & Isaac Jenkins, *The Contributions of United Nations Security Council Resolutions to the Law of Non-international Armed Conflict: New Evidence of Customary International Law*, 67 AM. U. L. REV. 649, 669 n. 82 (2018).

[13] Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 ICJ Rep. 174 (Apr. 11).

[14] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 ICJ Rep. 403, 470, para. 116 (July 22).

[15] For conflicts contained within our period of study, the average duration was 9.8 years, with a median of fourteen resolutions per conflict and an average of 27.6. *See id.* at 663.

[16] The Council has invoked Chapter VII in 48% of conflicts, and usage of Chapter VII corresponds to the conflicts with the highest number of resolutions (such as Bosnia), confirming (4). Fox, Boon & Jenkins, *supra* note 2, at 664.

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(5) finally, the Security Council has passed at least one resolution in 80 percent of non-international armed conflicts since 1980, indicating that the Council increasingly sees its role in these situations as pivotal.

In this article, we make the argument that these resolutions may also be evidence of customary international law. As non-international armed conflicts are relatively unregulated areas, the Council's involvement has been significant. Nonetheless, while General Assembly resolutions have long been cited as relevant to the formation of customary international law; there is less consensus that Security Council resolutions should play a similar role. In fact, the International Law Commission, in its Draft Conclusions on customary international law in 2018, made only brief references to the resolutions of international organizations.[17]

Notably however, international organizations have the legal personality necessary to perform a wide variety of functions, some of which were previously reserved for states. Thus, their very nature suggests that the practice of international organizations can, and does, contribute to the formation of customary international law. This view is supported by the ICJ.[18]

Commentators have expressed concern about whether the elements of customary international law can be satisfied by the composition and practice of the Security Council. As it is an agent of states,[19] we argue that the practice element is easily met. Nonetheless, Security Council resolutions may be seen as lacking in *opinio juris* because it is less clear whether states vote for and implement resolutions because they think the norms are binding. Nonetheless, statements within the Council's resolutions mentioning existing bodies of international law can be used to show that the Council is aware of the legal context in these obligations. Furthermore, the resolutions addressing Somali piracy expressly state that Council statements *not* contribute to the formation of international law.[20] As such, they indicate that the Security Council does intend for other resolutions to play some sort of role in international legal development. The International Law Association also asserts that *opinio juris* can be derived from practice, taking the position that it is only *sometimes* necessary to establish the separate existence of a subjective element.[21]

[17] *See generally* Draft Conclusions on Identification of Customary Int'l L., Conclusions 4, 12, 2018 2 Y.B. INT'L COMM'N 122, UN Doc. A/73/10 (Aug. 10, 2018).

[18] North Sea Continental Shelf (Ger. v. Den; Ger. v. Neth.), Judgment, 1969 ICJ Rep. 3, 43, para. 74 (Feb. 20) (emphasis added).

[19] UN Charter Art. 14.

[20] SC Res. 2383, para. 15 (Nov. 7, 2017) ("*Affirms* that the authorizations renewed in this resolution apply only with respect to the situation in Somalia and shall not affect the rights, obligations, or responsibilities of Member States under international law, including any rights or obligations under The Convention, with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law.").

[21] INT'L L. ASS'N, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW, at pt. III (2000).

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