

## **Binding or Not? Determining the Legal Status in International Law of UN Security Council Resolutions**

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### **Abstract**

The United Nations Security Council resolutions, when binding, establish international obligations for States. However, ambiguity often surrounds their binding nature, leading to uncertainty. In its *Namibia Advisory Opinion*, the International Court of Justice proposed a test for interpreting Security Council resolutions to determine their binding effect. This test remains controversial due to varying competencies among UN organs and unclear criteria. This article explores the complexities of Security Council resolutions' binding nature, advocating for a systematic interpretation based on language, invoked provisions, and subsequent practice. By analyzing the legal framework established by the International Court of Justice and recent Security Council practices, this study clarifies when and how resolutions impose binding obligations on both member and non-member states. It aims to provide a precise guide for understanding their legal impact within the international community.

**Keywords:** Resolutions; Security Council; United Nations

### **Introduction**

At the end of 2023, hostilities broke out between Hamas and Israel, leaving the international community dismayed and prompting several countries to seek solutions. Among these efforts is the procedure initiated by South Africa against Israel before the International Court of Justice (ICJ, the Court). Additionally, on March 25, 2024, the Security Council (SC, the Council) adopted Resolution 2728 concerning the conflict. This resolution reflects the conflict's global implications, although it remains a local armed conflict with significant international repercussions. The resolution:

*Demands an immediate ceasefire for the month of Ramadan respected by all parties, leading to a durable and sustainable ceasefire, and demands the immediate and unconditional release of all hostages, as well as ensuring humanitarian access to meet their medical and other humanitarian needs, and further demands that the parties comply with their obligations under international law in relation to all persons they detain.*<sup>1</sup>

The resolution was adopted with 14 members voting in favor and the United States abstaining.

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<sup>1</sup> United Nations, Security Council, Resolution 2728 (2024).

Following the adoption of the resolution, several delegates have taken positions on whether it is binding. Among these positions, the United States referred to the resolution as “non-binding,” whereas countries like China maintain that “Security Council resolutions are binding.” Similarly, Mozambique stated that “under the Charter, all Security Council resolutions are binding, and all Member States are obliged to implement them,” while Sierra Leone asserted that it is binding. The UN Secretary-General's office also took a position on the matter. At a press briefing, Deputy Spokesman Farhan Haq said, “All Security Council resolutions are international law. So, in that sense, they are as binding as international law is.” Other countries, such as the United Kingdom, Egypt, France, and Jordan, while noting the importance of compliance, have not taken a clear position on the binding power of the resolution.<sup>2</sup>

The differing positions of country representatives have generated debate on how to determine whether a Security Council resolution is binding. This debate has been ongoing for several years, notably discussed by the ICJ in Advisory Opinions such as those on *Namibia* and the *Kosovo* declaration of independence. However, clarity remains elusive regarding the parameters that determine a resolution's binding nature. The ambiguity in Security Council resolutions regarding their binding effect reintroduces the question of when a resolution is binding. Are only those taken under Chapter VII binding? This article describes the judicial practice that has established a set of principles guiding the determination of a resolution's binding nature and proposes a structured analysis for this assessment.

The analysis is guided by the assumption that the Security Council itself holds the ultimate authority to determine the binding nature of its resolutions, without reliance on national representatives or other United Nations organs. While the ICJ lacks explicit authority to evaluate or interpret these resolutions, its jurisprudence provides a highly influential legal perspective within the international system. This article seeks to clarify how this jurisprudence can serve as a valuable guide for interpreting the binding nature of Security Council resolutions, offering a framework to address the uncertainty faced by States in this context.

## A. The United Nations Security Council

The Security Council, one of the six principal organs of the United Nations, functions primarily as a political body with limited competence.<sup>3</sup> Unlike judicial or legislative organs, the Security Council operates more as an executive authority,<sup>4</sup> with its main role being the maintenance of international peace and security. A significant achievement of the United Nations Charter is the power it grants the Council to take coercive measures, setting it apart from the non-binding decisions of the League of Nations' Council.<sup>5</sup> This authority is derived from the binding obligation established in Article 25 of the UN Charter,<sup>6</sup> which member States have agreed to uphold. Thus, the Council's power is rooted in a legal obligation, affirming its authority within the international legal framework. As an organ of the United Nations—an international organization with its own

<sup>2</sup> Eirik Bjorge, “Resolution 2728 (2024) Is a Binding Council Resolution” EJIL: Talk!, last modified April 26, 2024, <https://www.ejiltalk.org/resolution-2728-2024-is-a-binding-council-resolution/>

<sup>3</sup> Christopher C Joyner (ed), *The United Nations and International Law* (Cambridge University Press, 1997).

<sup>4</sup> Ian Johnstone, “Security Council Deliberations: The Power of the Better Argument,” *European Journal of International Law* 14, no. 3 (2003) <https://doi.org/10.1093/ejil/14.3.437>.

<sup>5</sup> League of Nations, Article 16 of the Covenant of the League of Nations, 1919.

<sup>6</sup> UN Charter, article 25: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.' (UNTS Vol 1, No 1, 24 October 1945).

legal personality—the Security Council's authority commands obedience in which the subjects retain their freedom.<sup>7</sup> This power and authority are evident in the Council's special missions,<sup>8</sup> which underscores its critical role in upholding global peace and security.

### 1) Concept and Functions

The Security Council, as outlined in the Charter of the United Nations, operates under three specific chapters and is composed of fifteen members. Initially, the Council had eleven members, but it has since expanded to include five permanent members—the United Kingdom, the United States, France, Russia, and China—and ten non-permanent members elected by the General Assembly.

Article 25 of the UN Charter grants the Security Council the authority to make decisions that are binding on all United Nations members. These decisions can be made under the provisions of Chapters VI and VII of the Charter. However, the binding nature of these resolutions is not always clear. While some resolutions are explicitly binding, others are open to interpretation, leading to ambiguities regarding the obligations they impose on member States.<sup>9</sup>

This issue is exemplified by Resolution 2334 (2016),<sup>10</sup> which condemned the establishment of Israeli settlements in the occupied Palestinian territories since 1967, including East Jerusalem, and demanded an immediate cessation of these settlement activities. The resolution sparked significant debate, particularly regarding its binding nature. Scholars, such as Dan Joyner,<sup>11</sup> have questioned whether such resolutions are binding, irrespective of the chapter under which the actions were taken. This example highlights the challenges in determining the obligatory nature of certain Security Council resolutions for member States.

This debate is crucial because Security Council resolutions are the only obligations that can supersede treaties and customary international law. These obligations are dynamic, evolving over time rather than remaining static. To ensure legal certainty, it is essential for States to be able to determine whether a resolution is binding in order to fulfill their international obligations.<sup>12</sup>

Chapter VI, governed by Articles 33 to 38, allows the Security Council to take actions for the peaceful settlement of disputes between States. These actions may include investigation and methods of dispute settlement, such as negotiation, conciliation, or referral of the dispute to the ICJ. A relevant example is Resolution 22 (1947),<sup>13</sup> in which the Security Council operated under

<sup>7</sup> Hannah Arendt, *The Plurality of the World*, (Taurus 2019).

<sup>8</sup> This power and authority are evident in the Council's special missions, which reflect its critical role in upholding global peace and security. For example, United Nations Security Council Resolution 2664 (2022) clarifies that payments and provision of goods necessary for humanitarian assistance are permitted and do not violate asset freeze measures imposed by the Council. This demonstrates how the Security Council can make binding decisions for member states based on the powers granted by the UN Charter, ensuring compliance while addressing humanitarian needs. *See* United Nations Security Council Resolution 2664 (2022).

<sup>9</sup> Ronald A Brand, "Security Council Resolutions: When Do They Give Rise to Enforceable Legal Rights—The United Nations Charter, the Byrd Amendment and a Self-Executing Treaty Analysis," *Cornell International Law Journal* 9, (1976).

<sup>10</sup> United Nations, Security Council Resolution 2334 (2016).

<sup>11</sup> Dan Joyner, "Legal Bindingness of Security Council Resolutions Generally, and Resolution 2334 on the Israeli Settlements in Particular," (9 January 2017) EJIL: Talk! <https://www.ejiltalk.org/legal-bindingness-of-security-council-resolutions-generally-and-resolution-2334-on-the-israeli-settlements-in-particular/> accessed 27 August 2024.

<sup>12</sup> Institute for International Law and Justice, *The Role of the Security Council in Strengthening a Rules-based International System: Final Report and Recommendations from the Austrian Initiative* (New York University School of Law 2008).

<sup>13</sup> United Nations, Security Council, Resolution 22 (1947).

the powers granted by Chapter VI of the Charter of the United Nations. In this case, the Council recommended that the United Kingdom and Albania resolve their dispute concerning the Corfu Channel incident before the ICJ, where two British ships had been damaged by mines.

Conversely, Chapter VII addresses the actions the Council may take in response to a threat to or breach of international peace. Initially, the Council may implement non-coercive measures under Article 41, including the interruption of economic relations, communication channels, and the severance of diplomatic relations. If these measures prove insufficient, the Council may resort to coercive actions in accordance with Article 42, which may include the use of force.

A prominent example is the Security Council's response to the 1990 invasion of Kuwait. Following Iraq's invasion and occupation of Kuwait on August 2, 1990, the Security Council adopted Resolution 660 (1990) the same day,<sup>14</sup> condemning the invasion and demanding the immediate and unconditional withdrawal of Iraqi forces. This case illustrates the Security Council's authority under Chapter VII to employ coercive measures, including the use of force, to restore and maintain international peace and security.

## 2) Scope of Its Competence

The Security Council is empowered to issue binding decisions for both member and non-member states of the United Nations. However, this does not imply that it can legislate general and abstract rules for the entire UN system;<sup>15</sup> its authority is limited to issuing resolutions addressing specific disputes. In other words, it cannot impose obligations on the entire international community. Nevertheless, in exceptional cases related to the maintenance of international peace and security,<sup>16</sup> the Council can make decisions that do not pertain to a specific dispute, such as actions related to combating terrorism.<sup>17</sup>

The power to impose binding obligations on the international community derives from Article 25 of the United Nations Charter. While states are the primary subjects of international law with the authority to create direct obligations—commonly referred to as "hard binding law"<sup>18</sup>—the Security Council can establish indirect obligations. However, the scope of these powers is narrowly confined to actions aimed at maintaining international peace and security and must align with the principles of the United Nations.

Nonetheless, the interpretation of what constitutes the maintenance of international peace and security allows for a broad range of actions. The Council has, for instance, established international criminal tribunals and terrorist lists, measures which some scholars argue exceed its authority (*ultra vires*).<sup>19</sup> This debate is prominent in legal scholarship, with authors like Devon Whittle pointing to Article 24(2) of the UN Charter as a vague but crucial limitation on the

<sup>14</sup> United Nations, Security Council, Resolution 660 (1990).

<sup>15</sup> Paul C. Szasz, "The Security Council Starts Legislating," *American Journal of International Law* 96, no. 4, (2002) <https://doi.org/10.2307/3070686>.

<sup>16</sup> M.C. Wood and Eran Stoecker, *The UN Security Council and International Law* (Cambridge University Press, 2023).

<sup>17</sup> United Nations, Security Council, Resolutions 1757 (2007), 1373 (2001), and 1624 (2005).

<sup>18</sup> Jan Klabbbers, "The Cheshire Cat That Is International Law," *European Journal of International Law* 31, no 1 (2020) <https://doi.org/10.1093/ejil/chaa018>.

<sup>19</sup> Guy S Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford University Press 1999) <https://doi.org/10.1093/acprof:oso/9780198268376.001.0001>.

Council's power.<sup>20</sup> Others, such as Alexander Orakhelashvili,<sup>21</sup> contend that the Council's actions must respect *jus cogens* norms, while Mohammad Alipour underscores the restrictions imposed by general international law.<sup>22</sup> Wolfgang Weiß emphasizes that the Council's mandate is constitutionally restricted to the maintenance of international peace and security,<sup>23</sup> as outlined in Article 24 of the Charter.

## B. Security Council Resolutions

The primary mode of communication between the Security Council and the member countries of the United Nations is through its resolutions.<sup>24</sup> These resolutions should not be regarded as treaties or unilateral declarations but rather as unique instruments of the United Nations that establish indirect international obligations.<sup>25</sup>

Resolutions adopted by the Council should be viewed as formal expressions of its opinion or will.<sup>26</sup> According to Dr. María Ángeles Cano,<sup>27</sup> these instruments can be categorized into four types based on their addresses: (1) internal resolutions for the United Nations, (2) internal resolutions for the Security Council, (3) general substantive resolutions, and (4) resolutions specific to situations or disputes.

An example of an internal resolution directed towards the United Nations is Resolution 1540 (2004),<sup>28</sup> which addresses the proliferation of nuclear, chemical, and biological weapons. This resolution is classified as internal because it mandates the creation of a specialized committee within the UN, aimed at modifying and directing internal mechanisms of the organization. Although it has external implications—such as obliging States to implement certain measures—its primary objective is to reinforce the internal structure and operational capacities of the United Nations itself.

To determine the binding nature of these resolutions, they are further classified into decisions, which are legally binding, and recommendations, which are not.<sup>29</sup> This additional layer of classification is essential for understanding the legal force and practical implications of each resolution.

<sup>20</sup> Devon Whittle, "The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action," *European Journal of International Law* 26, no. 3 (2015) <https://doi.org/10.1093/ejil/chv042>.

<sup>21</sup> Alexander Orakhelashvili, "The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions," *European Journal of International Law* 16, no. 1 (2005) <https://doi.org/10.1093/ejil/chi103>.

<sup>22</sup> Mohammad Alipour, "The Competence of the Security Council over Situations or Disputes Arising from Human Rights Violations by a State under Chapter VI of the United Nations Charter," *Hungarian Journal of Legal Studies* 64, no. 2 (2023) <https://doi.org/10.1556/2052.2023.00451>.

<sup>23</sup> Wolfgang Weiß, "Security Council Powers and the Exigencies of Justice after War," in *Max Planck Yearbook of United Nations Law*, eds. Rüdiger von Bogdandy and Rüdiger Wolfrum, (Koninklijke Brill 2008).

<sup>24</sup> Marko Divac Öberg, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ," *European Journal of International Law* 16, no. 5 (2005) <https://doi.org/10.1093/ejil/chi151>.

<sup>25</sup> Anna Spain, "The U.N. Security Council's Duty to Decide" *Harvard National Security Journal* 4, (2013) <https://scholar.law.colorado.edu/faculty-articles/99>.

<sup>26</sup> Justin S. Gruenberg, "An Analysis of United Nations Security Council Resolutions: Are All Countries Treated Equally?" *Case Western Reserve Journal of International Law* 41, (2009).

<sup>27</sup> M. Angeles Cano Linares, *La actividad del Consejo de Seguridad de Naciones Unidas en caso de amenaza a la paz* (1<sup>a</sup> ed, Tirant lo Blanch 2011).

<sup>28</sup> United Nations, Security Council, Resolution 660 (1990).

<sup>29</sup> Rüdiger Wolfrum and Christiane Philipp (eds), *United Nations: Law, Policies, and Practice* (New, rev English edn, M Nijhoff; C.H. Beck 1995).

The normative framework of SC resolutions is primarily anchored in four articles of the UN Charter. First, resolutions hold a higher normative hierarchy than certain other obligations, as stipulated by Article 103 of the UN Charter.<sup>30</sup> Secondly, the SC's fundamental responsibility is to maintain international peace and security, with States delegating decision-making authority to it under Article 24.

Thirdly, all States are obligated to adhere to SC resolutions: member States under Article 25 and non-member States under Article 2(5). While the general principle of international law holds that non-signatory States are not bound by the obligations imposed by treaties, as established in Article 34 of the Vienna Convention on the Law of Treaties and the principle of *pacta tertiis nec nocent nec prosunt*, the UN Charter presents a different scenario. Unlike standard treaties, the UN Charter holds a unique status, as recognized by the International Court of Justice.<sup>31</sup>

The Charter is not merely a traditional treaty, but a foundational document aimed at maintaining international peace and security. This broader purpose justifies the imposition of obligations on non-member States under certain conditions. The principle of *stipulatio tertii* applies here, given that the Charter's objectives are to benefit the international community as a whole. For the Charter's goals to be achieved effectively, it is essential that not only member States but also non-member States comply with its principles.<sup>32</sup>

Furthermore, Article 39 of the Charter empowers the SC to determine the existence of acts of aggression or other threats to peace, regardless of whether the aggressor is a UN member or not. This provision underscores that enforcement measures decided by the Security Council can extend to non-member States, as demonstrated in conflicts such as those in Korea and Libya.<sup>33</sup> These examples illustrate that, in specific cases, the SC's measures against non-member States are crucial for upholding the Charter's objectives.

Moreover, the relationship between SC resolutions and the principal sources of international law, as outlined in Article 38 of the Statute of the ICJ, is characterized by their indirect nature. While not explicitly enumerated in the primary sources, they can be construed as indirect sources. Security Council resolutions stem from States' obligation to comply with them in accordance with Article 25.

However, the Council does not always specify the basis under which it acts when issuing resolutions.<sup>34</sup> In the early years of the United Nations, there was a widespread perception within the international community that only decisions falling under Chapter VII of the UN Charter were

<sup>30</sup> UN Charter, article 103: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail' (UNTS Vol 1, No 1, 24 October 1945).

<sup>31</sup> Andreas Paulus and Anne Dienelt, "Lockerbie Cases (Libyan Arab Jamahiriya v United Kingdom and United States of America)," in *Max Planck Encyclopedia of Public International Law* (Max Planck Institute for Comparative Public Law and International Law 2010).

<sup>32</sup> Alfred Verdross, "General International Law and the United Nations Charter," 30 *International Affairs* 342 (1954).

<sup>33</sup> Resolution 82 (1950) imposed obligations on North Korea, despite it not being a UN member at the time, by declaring its attack on South Korea as a breach of peace and calling for its cessation. And Resolution 883 (1993) aimed to combat terrorism and explicitly called on all states, including non-members, to comply with its provisions. This illustrates that the Security Council can extend its resolutions to non-member states in certain circumstances, reinforcing global adherence to its mandates despite the lack of formal membership. United Nations, Security Council, Resolutions 82 (1959) and 883 (1993).

<sup>34</sup> Dapo Akande and Marko Milanovic, "The Constructive Ambiguity of the Security Council's ISIS Resolution," *EJIL: Talk!* (blog), 2015, <https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/> accessed 9 February 2024.

binding, rendering resolutions under Chapter VI non-binding.<sup>35</sup> Subsequent sections will delve into contemporary understandings of the binding nature of SC resolutions, particularly when faced with ambiguity.<sup>36</sup>

### C. Development of Judicial Doctrine

The ICJ, as the principal judicial organ of the United Nations, plays a crucial role in interpreting Security Council resolutions within the framework of international law. While the ICJ is not mandated to provide binding interpretations, its Advisory Opinions are highly influential due to the Court's esteemed position in international law. The ICJ's Advisory Opinion on *Namibia* is particularly relevant in this context, as it was requested directly by the Security Council itself, underscoring the Court's role in shaping and clarifying legal standards. Although Advisory Opinions are not legally binding in their own right, they offer a systematic and authoritative legal framework that aids in understanding and applying Security Council resolutions.

Thus, the ICJ's contributions, along with scholarly doctrinal work, provide valuable guidance for interpreting and implementing these resolutions in international law. While other international tribunals have also addressed Security Council resolutions,<sup>37</sup> this discussion will focus on the most pertinent ICJ cases, emphasizing their significance within the broader context of international law.

#### 1) Corfu Channel Case

In 1948, the first significant dispute arose regarding the binding nature of a Security Council resolution.<sup>38</sup> The case involved a conflict between the United Kingdom and Albania, triggered by two British destroyers hitting Libyan mines in the Corfu Channel. The UK sought compensation before the Court without Albania's consent, citing a Security Council resolution directing both parties to refer their dispute to the Court.<sup>39</sup> The central issue revolved around whether the Security Council resolution was binding.

Even today, the significance of this case persists, not only because of the determination of the resolution's binding nature but also due to the *ius standi* it potentially conferred, bypassing the requirement of consent.<sup>40</sup> Contemporary theories justify this possibility, provided it aligns with Article 41 of the Charter (which falls under Chapter VII).<sup>41</sup>

However, the case's resolution hinged on Albania's eventual consent through the legal institution of *forum prorogatum*. Despite initially contesting the resolution's binding nature, Albania ultimately complied with the Council's directive and consented to the Court's jurisdiction.

<sup>35</sup> Torunn L. Tryggestad, "Trick or Treat? The UN and Implementation of Security Council Resolution 1325 on Women, Peace, and Security," *Global Governance* 15, no. 4 (2009): 539–557.

<sup>36</sup> Marko Milanovic, "Can UNSC Presidential Statements Be Legally Binding?" EJIL: Talk! (blog), 2009, <https://www.ejiltalk.org/can-uns-c-presidential-statements-be-legally-binding/> accessed 19 February 2024.

<sup>37</sup> Such as in the *Kadi v. Switzerland and Tadić* cases. *Kadi v Switzerland* (App No 60694/00) ECHR (2008). *Prosecutor v Tadić* (IT-94-1-A) Appeals Chamber, International Criminal Tribunal for the former Yugoslavia (15 July 1999).

<sup>38</sup> *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v Albania) (1948) ICJ Rep 15.

<sup>39</sup> United Nations, Security Council, Resolution 22 (1947).

<sup>40</sup> Ksenia Polonskaya, "International Court of Justice: The Role of Consent in the Context of Judicial Propriety Deconstructed in Light of Chagos Archipelago," *The Law & Practice of International Courts and Tribunals* 18, (2019) <https://doi.org/10.1163/15718034-12341400>.

<sup>41</sup> Wood and Stoecker, *The UN Security Council and International Law*.

Consequently, while the case did not yield a definitive ruling on the binding nature of the resolution, it catalyzed significant debate within the international legal community.

## 2) Advisory Opinion on Certain Expenses of the United Nations

In 1952, the Court again considered the effects and functions of the Security Council.<sup>42</sup> The question before the Court was whether the operations authorized by the United Nations General Assembly in the Congo and the Middle East constituted expenses of the organization under Article 17 of the Charter of the United Nations. Consequently, the General Assembly requested the Court's assistance in clarifying the functions and powers of the United Nations organs. The controversy in this case centered on whether the expenditure for these operations, aimed at maintaining international peace and security, fell exclusively under the Security Council's purview as stipulated in Article 43 of the UN Charter. Thus, the General Assembly's decision could be seen as an *ultra vires* act.<sup>43</sup>

First, the Court confirmed that the Vienna Convention on the Law of Treaties is a crucial instrument for interpreting the Charter of the United Nations, given that the Charter shares characteristics with a multilateral treaty, albeit with unique particularities.<sup>44</sup> Regarding the Security Council, the Court noted that having primary responsibility for the maintenance of international peace and security does not imply exclusivity. Other organs may have similar functions, and the Security Council's scope of action cannot be limited solely to its primary function, as this would exclude the possibility of the Security Council acting under other articles of the Charter.<sup>45</sup>

Although the Court addressed the competences of United Nations organs, several issues remained unresolved,<sup>46</sup> including the binding nature of Security Council resolutions. The Court noted that the Security Council has the authority to impose explicit obligations of compliance, such as issuing orders or commands to an aggressor under Chapter VII. Furthermore, it emphasized that the binding nature of resolutions is related to actions taken by the Council in response to threats to international peace and security. Actions cannot refer to recommendations, such as those made under Article 38.

While there is no definitive answer regarding the nature of Security Council resolutions, it is clear that the Court provided an interpretation of these resolutions. From this case, we derive a preliminary guide to the key factors in interpreting Security Council resolutions. First, special attention should be paid to the debate leading to the adoption of the Council resolution. Secondly, the significance of subsequent resolutions is highlighted; the Court emphasized that ratifying earlier decisions, especially when their binding nature is unclear, serves to reaffirm the binding nature of the resolution. Thus, the clear and reiterated authority of the Security Council constitutes obligations for the United Nations.<sup>47</sup>

<sup>42</sup> Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter); Advisory Opinion (1962) No ICJ Reports 1962 (International Court of Justice, 20 July 1962).

<sup>43</sup> Cedric Ryngaert and others (eds), *Judicial Decisions on the Law of International Organizations* (Oxford University Press, 2016) <https://doi.org/10.1093/law/9780198743620.001.0001>.

<sup>44</sup> Covey Oliver, "Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)," *American Journal of International Law* 56, no. 4 (1962) <https://doi.org/10.2307/2195944>.

<sup>45</sup> Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter); Advisory Opinion.

<sup>46</sup> K R Simmonds, "The UN Assessments Advisory Opinion," *International and Comparative Law Quarterly* 13, no. 3 (1964) <https://doi.org/10.1093/iclqaj/13.3.854>.

<sup>47</sup> Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter); Advisory Opinion.



### 3) Advisory Opinion on Namibia

This is perhaps the most important case regarding Security Council resolutions.<sup>48</sup> For the first time, the Security Council requested an Advisory Opinion from the ICJ on the effects of a Security Council resolution,<sup>49</sup> understanding it as an obligation under international law. The case raised the question of the Court's power to interpret Security Council resolutions. The Court responded that it was not interpreting *per se* but was addressing a request from the Council, and that the resolution would only be useful in considering the actions taken by the Council with respect to Namibia.

The situation in Namibia, or Southwest Africa, has been a recurrent issue for the Court, particularly the discussion on South Africa's mandate over the territory of Namibia, granted by the League of Nations. Given the significance of this case, it is evident that there are a variety of issues to study; among them, for example, is the Court's clarification that abstentions by permanent members of the Security Council do not constitute a veto in its resolutions.

The Advisory Opinion on *Namibia* begins with a General Assembly resolution declaring the end of South Africa's mandate in Namibia.<sup>50</sup> This resolution aligned with the Court's stance since 1950, which held that the Union Government's authority over the Territory was based on the Mandate. If the Mandate lapsed, so would the Union Government's authority.<sup>51</sup> However, recognizing its limitations in making binding decisions, the General Assembly requested the Security Council's support.

After South Africa's non-compliance with several subsequent Security Council resolutions,<sup>52</sup> the Council invoked Article 25 of the Charter, demanding South Africa's express compliance with this obligation.<sup>53</sup> The Court then had to determine whether these resolutions were binding, even though they were not adopted under Chapter VII of the Charter of the United Nations. Thus, a first test of how to interpret Security Council resolutions was created; in this case, the Court interpreted not a single resolution, but three.

First, in paragraph 109 of the Advisory Opinion, the Court emphasized the importance of resolutions being an exercise of the Security Council's primary obligation: the maintenance of international peace and security. In other words, Security Council resolutions are binding when the Council acts in accordance with Article 24 of the Charter, which empowers it to make binding decisions aimed at maintaining international peace and security. Secondly, the Court clarified that the chapter under which a resolution was adopted should not determine its binding nature. Thirdly, it highlighted the importance of the language used in a resolution. This is reflected in the famous paragraph 114, which States:

*Having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution.*<sup>54</sup>

<sup>48</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970); Advisory Opinion, No. ICJ Reports 1971 (The International Court of Justice June 21, 1971).

<sup>49</sup> United Nations, Security Council, Resolution 284 (1970).

<sup>50</sup> United Nations, General Assembly, Resolution 2145 (XXI).

<sup>51</sup> International Status of South West Africa; Advisory Opinion, No. ICJ Reports 1950 (The International Court of Justice July 11, 1950).

<sup>52</sup> United Nations, Security Council, Resolutions 264 (1969) and 269 (1969).

<sup>53</sup> United Nations, Security Council, Resolution 376 (1970).

<sup>54</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970); Advisory Opinion.

Thus, the Court detaches the powers of Article 25 from any specific chapter of the Charter and gives the resolutions an overriding and binding character with *erga omnes* effects. In other words, the obligations of a resolution apply not only to United Nations members but also to non-member countries.

#### 4) Lockerbie Case

In 1992, Libya presented its case before the ICJ,<sup>55</sup> arguing that it had not failed to comply with a Security Council resolution ordering its cooperation against terrorism and requesting the extradition of two individuals implicated in the aerial incident over Lockerbie, Scotland, on December 21, 1988. Libya claimed that the resolution contradicted the provisions of the Montreal Convention and additionally argued that its obligations under the Convention were hierarchically superior to its obligations arising from the Security Council resolution.

Previously, a Grand Jury of the District Court for the District of Columbia indicted two Libyan nationals in connection with the destruction of Pan Am Flight 103. Subsequently, the United States and the United Kingdom issued a joint statement requesting the extradition of the two Libyans for trial. Following this statement, the Security Council requested a response from the Libyan government to the U.K. and U.S. requests.<sup>56</sup>

In response, Libya requested provisional measures from the ICJ. However, three days later, the Security Council adopted another resolution under Chapter VII, demanding Libya's compliance and the support of the entire international community in this matter.<sup>57</sup> From the ICJ's resolution, two conclusions emerge.

Firstly, the question arises of what happens when the ICJ and the Security Council have the same case on their agendas. The ICJ noted that *prima facie* there was no hierarchy between these two organs, as they have different competences. Therefore, when the Security Council adopts a clear resolution, especially under Chapter VII where the binding nature is unequivocally expressed, there is no need for the ICJ to act: no object would be served by provisional measures.<sup>58</sup> Secondly, this case clarifies that the legal nature of Security Council resolutions is an indirect binding source of international law with a normative value superior to other sources of law, in accordance with Article 103 of the Charter of the United Nations.

#### 5) East Timor case

This dispute dates to 1960 when the General Assembly adopted a resolution in which it considered that the territories being administered by Portugal were considered non-self-governing territories, including East Timor.<sup>59</sup> Subsequently, Indonesia intervened in East Timor and in 1975 the Portuguese authorities withdrew from the region. As a result, the people of East Timor requested

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<sup>55</sup> Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Judgment, No. ICJ Reports 1992 (The International Court of Justice April 14, 1992).

<sup>56</sup> United Nations, Security Council, Resolution 731 (1992).

<sup>57</sup> United Nations, Security Council, Resolution 748 (1992).

<sup>58</sup> Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Judgment.

<sup>59</sup> East Timor (Portugal v. Australia), Judgment, No. ICJ Reports 1995 (The International Court of Justice June 30, 1995).

Indonesia to integrate them as part of the republic. In response, two Security Council resolutions and eight General Assembly resolutions were issued.<sup>60</sup>

The Security Council resolutions requested Indonesia to withdraw from the territory and respect East Timor's self-determination. However, Indonesia incorporated East Timor in 1978, and this act was *de facto* recognized by Australia. Portugal thus brought the case before the Court against Australia for infringing the right of self-determination of the East Timorese.

Australia's argument that it had not breached international obligations was that the Security Council resolutions were not binding because they were not adopted under Chapter VII and had no mandatory terms. Of the arguments put forward by Portugal in support of the Court's jurisdiction, it was mentioned that Portugal was an administering power of East Timor, in accordance with the Security Council resolutions, which constituted an international obligation. Furthermore, the Court would not judge Indonesia's actions because the Security Council had already done so in its resolution. However, the Court pointed out that the Council could not be interpreted as giving Portugal these powers and, therefore, no international obligation existed. The Court gave special emphasis to the fact that the representative of Portugal asked for clarity in the case of East Timor, before the United Nations, with the case entitled Question of East Timor, but neither the Council nor the Assembly acted.

Therefore, we can conclude that the Court has not interpreted the resolutions in isolation but has given special emphasis to the subsequent activity of the Security Council. And this is how it was pointed out that there was no basis for its jurisdiction in this case.

## 6) Advisory Opinion on the Kosovo Declaration of Independence

The ICJ's most recent decision regarding Security Council resolutions is the Advisory Opinion on the Declaration of Independence of Kosovo.<sup>61</sup> This Advisory Opinion stemmed from a request by the General Assembly.<sup>62</sup> The case concerns one of the quasi-states lacking full recognition by the international community as a State—Kosovo, a territory formerly part of Serbia. The situation in Kosovo has been a recurrent theme in the Security Council, resulting in various resolutions.<sup>63</sup>

The first issue addressed in this Advisory Opinion regarding Security Council resolutions pertains to the consequences when both the Security Council and the General Assembly adopt resolutions on the same subject concurrently. The Court emphasized that the competences of the Security Council are not exclusive and noted that simultaneous adoption of resolutions by both organs holds no legal effect. This practice, though, has become increasingly common over the years. Additionally, the Court clarified that interpreting resolutions falls within the purview of the issuing organs rather than the Court itself, although the Court, as the principal organ of the United Nations, is frequently called upon to interpret certain resolutions.

Regarding substantive matters, the Court examined SC Resolution 1244 (1999), adopted under Chapter VII, which addressed the humanitarian crisis and concluded the conflict in Kosovo by authorizing the establishment of an international civil presence overseen by the Secretary-

<sup>60</sup> United Nations, Security Council, Resolutions 384(1975) and 389(1976); United Nations, General Assembly, Resolutions 3485(XXX), 31/53, 32/34, 33/39, 34/40, 33/39, 34/40, 35/27, 36/50, 37/30.

<sup>61</sup> Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion, No. ICJ Reports 2010 (The International Court of Justice July 22, 2010).

<sup>62</sup> United Nations, General Assembly, Resolution 63/3.

<sup>63</sup> United Nations, Security Council, Resolutions 1160 (1998), 1199 (1998), 1203 (1998), 1239 (1999), 1244 (1999), 1367 (2001), and 1160 (1998).

General to administer Kosovo temporarily. Subsequently, on February 17, 2008, Kosovo declared independence. The Court was tasked with determining whether this declaration violated international law, with a focus on interpreting Resolution 1244.

Significantly, Resolution 1244 was explicitly adopted under Chapter VII of the UN Charter, implying a clear international legal obligation. Keeping this in mind, the Court commenced its interpretation of the resolution. In this Advisory Opinion, a new criterion emerged, whereby resolutions must be interpreted as acts of a collective body rather than agreements among States.

Firstly, the Court highlighted that Articles 31 and 32 of the Vienna Convention on the Law of Treaties serve as primary guides for interpretation, while considering other factors due to the resolution's distinct creation process as an organ decision subject to Article 27 of the UN Charter. Secondly, contextual analysis is essential, including statements made by state representatives before the Security Council during the resolution's adoption and the motives behind its adoption. Thirdly, contemporary practice, including the Council's resolutions on similar subjects, other UN organs' actions, and affected States' practices, must be examined. Fourth, the resolution's object and purpose should inform the analysis of the measures adopted.

Fifth, attention to the ordinary meaning of the words used is crucial, where clear and unambiguous terms denote binding nature, while ambiguity requires consideration of other interpretive elements. Sixth, language used in the declaration, as seen in the *Namibia* Advisory Opinion, is also important. After applying this test, the Court concluded that the Kosovo declaration of independence did not violate international law,<sup>64</sup> expanding the criteria used in the *Namibia* Advisory Opinion. Today, multiple factors must be considered when analyzing Security Council resolutions.

## 7) Recent Security Council Practice

One of the most significant recent international resolutions adopted by the Security Council pertains to the proliferation of nuclear weapons by North Korea.<sup>65</sup> Since 2006, the Security Council has passed nine resolutions in response to North Korea's nuclear and missile activities.<sup>66</sup> Each resolution condemns North Korea's nuclear and ballistic missile tests and demands that the country cease its illicit activities, which contravene previous Security Council resolutions. All nine resolutions were adopted unanimously, with the exception of Resolution 2087 (January 2013), and all but one include references to actions under Chapter VII, Article 41 of the United Nations Charter.<sup>67</sup>

These resolutions are particularly important as they illustrate the Security Council's adherence to a clear formula for ensuring the binding nature of its resolutions. The Council's use

<sup>64</sup> Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion.

<sup>65</sup> Andrea Berger, "A Familiar Story: The New UN Report on North Korean Sanctions Implementation," (38 North, US-Korea Institute at Johns Hopkins University's Paul H Nitze School of Advanced International Studies, 16 March 2017) <https://www.38north.org/2017/03/aberger031617/> accessed 28 August 2024.

<sup>66</sup> United Nations, Security Council, Resolutions 1718 (2006), 1874 (2009), 2087 (2013), 2094 (2013), 2270 (2016), 2321 (2016), 2371 (2017), 2375 (2017), and 2379 (2017). *See also* The Telegraph, "Haggling delays N Korea sanctions vote" Daily Telegraph," (15 October 2006) <https://web.archive.org/web/20070311054556/http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/10/15/wnk0r15.xml>, accessed 28 August 2024.

<sup>67</sup> Arms Control Association, "UN Security Council Resolutions on North Korea," (Fact Sheets & Briefs, January 2022) <https://www.armscontrol.org/factsheets/un-security-council-resolutions-north-korea> accessed 18 August 2024.

of explicit references to Chapter VII of the Charter demonstrates a deliberate intention to impose legally binding obligations on member States. This approach underscores the Security Council's commitment to maintaining international peace and security through clear and direct action, establishing a precedent for how binding measures are articulated and enforced.

This series of resolutions not only highlights the significance of the issue within the UN system and the international community but also emphasizes the Security Council's methodical approach to clarifying the binding nature of its decisions. The clarity in drafting is crucial for ensuring that the resolutions effectively maintain international peace and security by utilizing the mechanism for determining a threat to peace under Chapter VII and acting upon it explicitly.

Another notable resolution by the Security Council addresses the illegal trade of cultural objects extracted from Iraq and Syria, aiming to ensure the safe return of stolen cultural property.<sup>68</sup> Unlike its usual practice of targeting specific States, the Security Council, in this instance, imposed obligations *erga omnes*,<sup>69</sup> meaning obligations enforceable against all members of the international community. This action demonstrates the Council's role as a quasi-legislative body, using the pretext of combating terrorism through the illegal trade of cultural heritage.

The critical importance of this case lies in two aspects. First, the resolution is binding on all States, including those that are not members of the United Nations. Second, the Council explicitly states its intention for the resolution to be binding by acting under Chapter VII of the UN Charter. This resolution sets a precedent for the Security Council to take similar measures to protect cultural heritage in other conflict and post-conflict situations, underscoring the importance of systematic international cooperation and collective responsibility in safeguarding cultural heritage for the benefit of humanity.<sup>70</sup>

The most recent resolution by the Security Council, in which it clearly intends for its provisions to be binding, pertains to the situation in Haiti. In October 2022, the Haitian government formally requested international assistance for a military intervention in the country.<sup>71</sup> This request arose from years of enduring an economic and political crisis, further aggravated by an unprecedented escalation in violence. Responding to Haiti's appeal, the Security Council, on October 2, 2023, adopted a resolution authorizing a multinational security mission in Haiti, with Kenya designated to lead the effort.<sup>72</sup> This resolution explicitly authorized the use of force, thereby signaling that it was adopted under Chapter VII of the UN Charter.

The clarity of this resolution marks a shift away from the ambiguous resolutions seen over the past decade, signaling a return to the traditional model of Security Council resolutions.<sup>73</sup> This decisive action demonstrates that when the Security Council intends for a resolution to have binding authority, it articulates this intention explicitly within the resolution or through subsequent

<sup>68</sup> United Nations, Security Council, Resolution 2199 (2015).

<sup>69</sup> Namibia Advisory Opinion.

<sup>70</sup> Vincent Négri, 'Legal Study on the Protection of Cultural Heritage Through the Resolutions of the Security Council of the United Nations - Cultural Heritage Through the Prism of Resolution 2199 (2015) of the Security Council' [(2015) UNESCO #Unite4Heritage 13].

<sup>71</sup> Dánica Coto, "Haiti's Leader Requests Foreign Armed Forces to Quell Chaos," (7 October 2022) AP News <https://apnews.com/article/caribbean-united-nations-port-au-prince-haiti-antony-blinken-057bf6462ca2b00fe667e93b5289d319> accessed 12 March 2024.

<sup>72</sup> United Nations, Security Council, Resolution 2699 (2023).

<sup>73</sup> Marko Svicevic, "Resolution 2699's (2023) Authorization of the Use of Force: A Cautious Return to the Security Council's Chapter VII Authorization Model?" (5 February 2024) EJIL: Talk! <https://www.ejiltalk.org/resolution-2699s-2023-authorisation-of-the-use-of-force-a-cautious-return-to-the-security-councils-chapter-vii-authorisation-model/> accessed 12 January 2024.

practice. In other words, the Council has adhered to its common practice, showing that its consistent interpretation remains that, when it seeks for a resolution to be binding, it does so in clear and unequivocal terms, leaving no room for alternative interpretations.

These three examples of Security Council resolutions provide a legal framework and guidance on how the Council operates when it intends for a resolution to be binding. They are significant due to their international impact, addressing critical issues such as nuclear proliferation, terrorism, and cultural heritage protection. The consistent approach of determining a threat to peace and security under Article 39 and invoking Chapter VII of the UN Charter underscores the formula used by the Council to establish binding obligations. The most recent example reaffirms that the Security Council continues to employ this formula when it intends to explicitly establish the binding nature of its resolutions.

#### **D. The Binding Nature of Resolutions**

As highlighted in the preceding cases, the primary challenge concerning Security Council resolutions lies in determining their binding nature on States. In this context, two significant points emerge: the normative principles governing Security Council resolutions and the criteria for interpreting these resolutions.

##### **1) Normative principles of Security Council Resolutions**

Given that Security Council resolutions, particularly those deemed binding, require compliance by States at the international level, it is imperative to establish regulatory principles governing them. These principles can be summarized as follows:

###### **a. Source of Law**

Security Council resolutions with binding authority do not independently create obligations but are mandated for compliance under Article 25 of the UN Charter. They serve as an indirect source of law. Additionally, as underscored in the *Lockerbie* case, such resolutions hold a higher normative hierarchy than other formal legal sources, as outlined in Article 103 of the Charter. For instance, when a resolution conflicts with a treaty, the resolution prevails over the treaty.

###### **b. Use of Words**

Following the *Namibia* Advisory Opinion, considerable emphasis has been placed on the language employed in resolutions. The choice of words is not arbitrary but represents a consensus reached by a collective body. John Bellinger, a U.S. representative involved in resolution adoption, highlights the meticulous negotiation and selection of words by country representatives to accurately reflect the resolution's objectives and purposes.

###### **c. Respect for sovereignty and independence of States**

Respect for State sovereignty and independence is a fundamental principle of the UN, as articulated in Article 2(4) of the Charter. Restrictions on sovereignty and independence are permissible only in exceptional circumstances, when they are explicit, specific, and clear.<sup>74</sup>

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<sup>74</sup> Samuel Makinda, "Sovereignty and International Security: Challenges for the United Nations," *Global Governance* 2, (1996): 149–68 <https://doi.org/991005542836907891>.

Consequently, when the Security Council aims to enact a binding resolution, it must ensure clarity in the resolution text, avoiding ambiguity that may conflict with these principles.<sup>75</sup>

## 2) The ICJ Test

The test derived from the jurisprudence of the ICJ is of significant legal value within the international system, considering the Court's status as the principal judicial organ of the United Nations. The ICJ's opinions carry substantial weight internationally, particularly when interpreting the actions of UN bodies. This test primarily stems from the Advisory Opinion on *Namibia*, which originated from a request by the Security Council itself. Therefore, the test is highly relevant for interpreting Security Council resolutions, reflecting the Council's own intent.

The initial test for analyzing Security Council resolutions, established in the *Namibia* Advisory Opinion, involved several key elements: a) Disregarding the Chapter under which the resolution was adopted to determine its nature, b) Examining the language used in the resolution, and c) Considering the discussions surrounding the resolution along with any other relevant circumstances that might determine its legal consequences. This framework provided a comprehensive approach to understanding the binding or non-binding nature of a resolution.

However, this test was refined by the ICJ in the Kosovo Declaration of Independence case, establishing a new standard that remains in force today. This updated test relies primarily on Articles 31 and 32 of the Vienna Convention on the Law of Treaties for interpretive purposes while incorporating additional considerations due to the unique nature of resolutions compared to treaties. These considerations include: a) Analyzing the context in which the resolution was adopted, b) Paying particular attention to the declarations of States' representatives, c) Examining contemporary practice, d) Considering the object and purpose of the resolution in analyzing the measures adopted, e) Focusing on the ordinary meaning of the terms employed, and f) Reviewing the overall language used in the resolution.

Thus, with this more recent decision by the Court, a more robust and nuanced interpretive framework has been established. While this test is not binding on either the Security Council or the Court itself, it serves as a valuable guide for future cases concerning the interpretation of Security Council resolutions.

## 3) When are Resolutions Binding?

Although a definitive rule for determining when Security Council resolutions are binding has not been established, it is evident that the Security Council follows a consistent formula in cases where it aims for clarity. This formula typically involves declaring a threat to international peace and security under Article 39 of the UN Charter, referencing Chapter VII, and including operative provisions that detail the actions required. The common method for indicating that a resolution is *prima facie* binding is the reference to Chapter VII. However, since the *Namibia* Advisory Opinion, there have been increased doubts about the binding nature of Security Council resolutions, particularly because the Court rejected the notion that Chapter VII is exclusively for binding resolutions.

## 4) Interpretation of Resolutions

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<sup>75</sup> David McDowall, "Clarity or Ambiguity? The Withdrawal Clause of UN Security Council Resolution 242," *International Affairs* 90, (2014): 1367–81, <https://doi.org/10.1111/1468-2346.12174>.

In cases where resolutions are ambiguous and their binding nature is unclear, interpretation becomes necessary. The question arises: who has the authority to interpret Security Council resolutions? The Security Council itself holds the exclusive authority to interpret its own resolutions. This principle is supported by the *Jaworzina* Advisory Opinion, where the Permanent Court of International Justice stated that "*le droit d'interpréter authentiquement*" belongs solely to the entity with the power to modify or suppress it.<sup>76</sup> Therefore, only the Security Council can clarify any doubts through subsequent resolutions.

However, there are exceptions to this rule. For example, the Yugoslavian and Rwandan Criminal Tribunals have interpreted their statutes, which are essentially Security Council resolutions. Additionally, the ICJ has, in some cases, been tasked with providing interpretation. In these instances, the ICJ applies its own criteria to determine the binding nature of a resolution.

Although the Security Council is the primary body for interpreting its resolutions, the ICJ has developed a broader legal framework. The ICJ addresses the interaction between Security Council resolutions and other international norms within its contentious jurisdiction. This approach reconciles the Security Council's exclusive authority with the broader legal context provided by the ICJ's jurisprudence.

The ICJ provides Advisory Opinions on request from the Security Council, which offer a legal framework rather than direct interpretations of resolutions. These opinions reflect the Council's will when seeking the Court's guidance but do not constitute direct interpretations of the resolutions themselves. International doctrine, as proposed by scholars such as former Judge Higgins, suggests that the real debate is not about interpreting individual resolutions but about interpreting the UN Charter itself. According to the Vienna Convention on the Law of Treaties, the focus should be on Article 25 of the Charter, which establishes the conventional obligation and indirectly creates the binding nature of resolutions. This approach focuses on the underlying legal framework rather than the specific interpretation of each resolution.

### **E. Interpretation of Article 25**

While the determination of whether a Security Council resolution is binding is frequently addressed through the interpretation of the resolutions themselves, an alternative approach warrants consideration. It has been emphasized that the obligation established by Article 25 of the UN Charter, which confers binding authority on resolutions, is not confined to actions taken solely under Chapter VII. In other words, a resolution can possess binding force irrespective of whether it explicitly references Chapter VII.

This perspective is reinforced by the General Assembly's position, which suggests that a broader set of criteria is necessary to ascertain a resolution's mandatory nature beyond the mere invocation of Chapter VII.<sup>77</sup> Relying exclusively on the interpretation of resolutions is thus a limited approach. This method requires the Security Council to address each case on an individual basis, which may not always provide a comprehensive understanding of the binding nature of resolutions.

By expanding the criteria used to determine the binding nature of resolutions, a more nuanced approach can be developed. This approach considers not only the explicit references in

<sup>76</sup> Question of *Jaworzina*, Advisory Opinion, No. ICJ Rep 403, para. 37 (Permanent Court of International Justice December 6, 1923).

<sup>77</sup> United Nations General Assembly, Resolution 686 (VII), 1952.



the resolution but also the context, purpose, and overall framework of the resolution, as well as its interaction with other norms of international law. This broader perspective allows for a more holistic understanding of the binding authority of Security Council resolutions.

### 1) Interpretation of the Charter

Judge Higgins, in her analysis of determining whether a Security Council resolution is binding,<sup>78</sup> emphasized the importance of interpreting the Charter itself rather than focusing solely on the resolutions. She employed two interpretative tools: a harmonic analysis of the Charter and consideration of its historical context.<sup>79</sup> In this regard, she based her legal reasoning on Articles 31 and 32 of the Vienna Convention on the Law of Treaties, specifically Articles 31 (2) and 32.<sup>80</sup>

The first question is whether this Convention is applicable to the interpretation of the Charter. In this sense, the answer is affirmative, primarily for two reasons. First, the ICJ has affirmed that the Charter can be interpreted as a treaty, “since it has recognized that the Charter is a multilateral treaty, albeit a treaty having certain special characteristics.”<sup>81</sup> Second, even though the Vienna Convention is subsequent to the Charter, its provisions on interpretation are still applicable due to their customary nature.<sup>82</sup>

In her interpretation, Judge Higgins suggests that Article 25 of the Charter, not being confined to any particular chapter, cannot be understood as limited to actions under Chapter VII. Furthermore, she noted that no attempt was made during the preparatory work to integrate Article 25 into Chapter VII. This interpretation expands the understanding of Article 25 beyond the confines of any single chapter, thereby reinforcing the binding nature of Security Council resolutions beyond Chapter VII actions.

Higgins’ approach to addressing the issue through Charter interpretation, rather than relying exclusively on resolutions, is commendable. However, it is necessary to consider whether the tools she employs represent the primary rules of interpretation. It may be advisable to apply additional rules to ensure a comprehensive analysis.

Firstly, one should interpret the literal words of Article 24, which States:

*In order to ensure prompt and effective action by the United Nations, its Members confer upon the Security Council primary responsibility for the maintenance of international peace and security and recognize that the Security Council acts on their behalf in carrying out the duties imposed upon it by that responsibility.*

From this, it is clear that member countries grant the Council powers to act on behalf of all and that its decisions must align with its primary responsibility of maintaining international peace and security.

<sup>78</sup> Rosalyn Higgins, “The Advisory Opinion on Namibia: Which UN Resolutions Are Binding under Article 25 of the Charter?” *International and Comparative Law Quarterly* 21, no. 2 (1972): 270–86 <https://doi.org/10.1093/iclqaj/21.2.270>.

<sup>79</sup> Steven R Ratner, “International Law Rules on Treaty Interpretation,” in *The Law and Practice of the Ireland-Northern Ireland Protocol*, ed. Christopher McCrudden, (Cambridge University Press 2022), 80–91 <https://doi.org/10.1017/9781009109840.008>.

<sup>80</sup> Article 31(1): “The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes; Article 32: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion”. Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, Art 31(1)-(2); Art 32.

<sup>81</sup> “Certain Expenses of the United Nations: Advisory Opinion,” *Duke Law Journal*, no. 2 (1963): 304–306 <https://doi.org/10.2307/1370903>.

<sup>82</sup> Sotirios-Ioannis Lekkas, “The Interpretative Practice of the International Court of Justice,” *Max Planck Yearbook of United Nations Law* 26, (2023): 316–357 [https://doi.org/10.1163/18757413\\_02601015](https://doi.org/10.1163/18757413_02601015).

Considering these aspects, it can be inferred that the Council's authority to issue binding decisions is limited to matters concerning the maintenance of international peace and security. Additionally, Article 39 stipulates that a threat must be declared to initiate action under Chapter VII, thereby emphasizing the necessity of such declaration to align with the powers conferred by Articles 24 and 25.

## 2) Practice of the Security Council

Another interpretative tool not mentioned by Judge Higgins is the subsequent practice of the norm.<sup>83</sup> Since 1970, the Security Council has consistently followed a clear trend: when resolutions are intended to be binding, Chapter VII is invoked.<sup>84</sup> Consequently, it can be inferred that the Security Council has been explicit in signaling when it intends resolutions to be binding, rather than engaging in discussions about their character.

The provisions of a resolution intended to be binding can be analyzed from two perspectives. The first perspective is when the binding nature is explicitly stated, and Chapter VII is invoked. The second, and arguably more significant, perspective involves the scenario where the resolution is less clear. In such cases, the Security Council's subsequent resolutions play a crucial role in affirming the binding nature of the initial resolution. This practice of issuing subsequent resolutions represents an exercise of self-interpretation by the Security Council and highlights the centrality of "subsequent practice" in understanding binding provisions. It is this nuanced approach, emphasizing the role of subsequent resolutions, that is pivotal to the analysis of the binding nature of Security Council resolutions.

## 3) Acting in accordance with Article 41

With these two interpretative tools, a different conclusion from the one proposed by Higgins can be reached. It appears to align with recent doctrinal discussions regarding the binding nature of resolutions. Sir Michael Wood, in his joint book with Eran Stohoege on the Security Council, suggests that Article 41 is the solution to the problem because it does not limit any specific action.<sup>85</sup> In other words, this article in Chapter VII serves as a legal catch-all for adopting binding resolutions. Chapters VI and VII should not be understood as classifications of binding and non-binding actions but rather as guides for clarity.

Consequently, the entire range of actions permitted by Chapter VI of the Charter can be carried out under Chapter VII if adopted under Article 41. Thus, there is no longer a debate about which chapter a resolution is adopted under and its relationship with Article 25, but a straightforward limitation of powers and a procedure to confer binding character to a resolution. While Article 41 lists possible actions, these are not limiting. Furthermore, as the Security Council's practice has indicated, it is possible to conclude this legal reality around resolutions.

However, the issue of ambiguous resolutions—particularly those that do not invoke Chapter VII—remains unresolved. As previously discussed, the answer lies in the Security Council's exercise of self-interpretation. Through subsequent resolutions, the Council can explicitly clarify

<sup>83</sup> Article 31(3)(b) of Vienna Convention on the Law of Treaties, which states that the context for the interpretation of a treaty includes 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.'

<sup>84</sup> Michael C. Wood, "The Interpretation of Security Council Resolutions," *Max Planck Yearbook of United Nations Law Online* 2, (1998): 73-95 <https://doi.org/10.1163/187574198X00046>.

<sup>85</sup> Wood and Stohoege, *The UN Security Council and International Law*.

the binding nature of an initial ambiguous resolution by invoking either Chapter VII or Article 25. Thus, the primary rule is to examine the resolution and its provisions, especially when there is explicit clarity regarding its binding character. In cases of ambiguity, it is the subsequent practice that should guide interpretation. This approach is crucial because the Security Council is uniquely positioned to clarify the binding nature of its resolutions, and through its subsequent practice, its intentions can be discerned more clearly.

Contrary to what Higgins proposes, which emphasizes the use of the preparatory work as an interpretative tool provided by Article 32 of the Vienna Convention on the Law of Treaties, this article argues that recourse should not be made to Article 32, which is, in fact, a subsidiary means of interpretation. Instead, the primary tools outlined in Article 31 should be directly applied, particularly concerning subsequent practice. The Council, in matters of significance, often maintains an agenda involving multiple resolutions. When its intention is not immediately clear, it reiterates through subsequent resolutions.

## Conclusion

In the aftermath of the atrocities of World War II, and as a means to prevent conflicts of a similar magnitude, States established an alliance that materialized in the form of a multilateral treaty among countries. However, this was not just any treaty; it held a hierarchical superiority over other norms of international law and imposed *erga omnes* obligations on all States in the international community. The United Nations Charter is unique in that it is a "living" source of obligations, capable of creating new binding commitments. These emerging obligations stem from two organs: the ICJ, through its binding judgments, and the Security Council, through its binding resolutions.

Security Council resolutions can create binding obligations at the international level. However, not all resolutions are binding. The Security Council, therefore, has the power to create obligations for States, which results in a lack of legal certainty regarding whether States are indeed bound by a given obligation or not. The binding nature of these resolutions derives from Article 25 of the United Nations Charter, wherein States agree to carry out the decisions of the Security Council.

Moreover, the binding nature of Security Council resolutions possesses two other significant characteristics in international law. Firstly, they are not only binding on member States of the United Nations but also on non-member States, in accordance with Article 2(5) of the Charter. Secondly, these obligations take hierarchical precedence over other treaties and customary international law under Article 103 of the United Nations Charter. Given this framework of indirect obligations, it is essential to provide legal clarity for States regarding whether they must comply with such resolutions or whether they are merely recommendations.

Although the Security Council is the only body authorized to interpret its own resolutions, constantly requiring the Council to clarify whether each resolution was intended to be binding would lead to chaos. Therefore, the proposal in this article seeks a solution by establishing a method or approach for interpreting resolutions to determine their binding nature. This is particularly achieved through the jurisprudence of the ICJ, which, in its contentious cases, has provided a legal framework for interpreting the interplay between Security Council resolutions and other sources of international law. Furthermore, in its Advisory Opinions, the Court has addressed the substance of how a resolution should be interpreted, not because it has the authority to

interpret resolutions, but because the Council itself has requested a legal interpretation of its resolutions.

In more recent Security Council resolutions, when legal bindingness is intended, resolutions have been adopted using a traditionally established formula: first declaring a threat to international peace and security under Article 39 of the Charter, followed by a reference to Chapter VII. Since the *Namibia* Advisory Opinion, which dealt with the legal analysis of Security Council resolutions, Article 25 has been dissociated from specific chapters of the Charter. This has created the need to interpret resolutions to determine if they are binding when the decisions are not immediately clear.

Regarding the need to provide States with guidance on whether a resolution is binding, it is likely that each resolution will need to be interpreted individually. Judge Higgins' proposal, which suggests that little attention should be paid to whether Chapter VI or VII is invoked, argues that interpreting the United Nations Charter by referring to the preparatory work under Article 32 of the Vienna Convention on the Law of Treaties could determine whether the intention was to make a resolution binding, irrespective of the chapter invoked. However, this approach is not a clear solution, as it does not effectively resolve the question of whether a Security Council resolution is binding by merely examining the chapter under which it was adopted.

Conversely, as recently highlighted by Michael Wood and Eran Sthoeger, all actions permitted under Chapter VI of the Charter can be taken under Chapter VII, given that Article 41 allows for such flexibility. This theory aligns with the Council's practice in recent decades. When the Council intends to be clear about the binding nature of a resolution, it consistently invokes Chapter VII of the Charter. However, rather than providing clarity, Wood and Sthoeger's suggestion grants the Security Council a broader margin of discretion. It is essentially an invitation to the Council members to be more explicit in their resolutions, emphasizing that Chapter VII, as well as Article 39, require a declaration of a breach of peace and international security. Only resolutions enacted under such a declaration, within the limited scope of the Council's powers, can definitively be deemed binding.

Having harmonized the idea that the solution does not lie in interpreting each resolution case-by-case but rather in a systematic interpretation of the Charter—following Higgins' proposition—and in the notion of having a clear formula that provides clarity, as proposed by Wood and Sthoeger, the approach advocated here is twofold.

First, in line with the legal framework provided by the ICJ, the resolution itself must be carefully evaluated, paying attention to the language used, but more critically, to the invoked provisions and the Council's intention. Second, a special emphasis must be placed on subsequent practice, as it is solely the Council that can interpret its resolutions. This is evident in recent examples: when the Council intends a resolution to be binding from the outset, it has employed the formula of acting after a declaration of a breach of peace and security under Article 39 and subsequently invoking Chapter VII, as was the case in Resolution 2699 (2023) concerning Haiti. Alternatively, when the binding nature of an initial resolution is unclear, the Council has adopted subsequent resolutions reiterating its intention for them to be binding, as seen in cases involving Korea and the fight against terrorism.

Therefore, based on the Security Council's practice, it can be concluded that when it desires a resolution to be binding, it invokes Chapter VII—not because Article 25 is necessarily limited to this chapter, but because the powers granted under Article 24 are confined to fulfilling its primary responsibility, a matter specifically addressed in Chapter VII through Article 39. Furthermore,

when a resolution's intent is ambiguous, the Council may always self-interpret and subsequently affirm its binding character in a following resolution.

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