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The Contemporary Legal Nature of UN Security Council Ceasefire Resolutions

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Abstract

This article sets out to examine the legal nature of ceasefire resolutions issued by the United Nations Security Council. While it has become common practice for the Council to issue calls or demands for ceasefires, their legal nature – and in particular whether they are legally binding – remains unclear. Furthermore, given the ubiquity of non-international armed conflict, there is an additional challenge with regard to the legal effect of such resolutions upon non-state armed groups. The article provides an analysis of these issues and concludes with a potential way forward.

Key words

armed groups; ceasefires; international peace and security; Security Council; UN resolutions

1. INTRODUCTION

Ceasefires are by no means a new concept within the international community and were traditionally used to denote an agreed temporary halt to armed hostilities so that each of the belligerent parties suspended their aggressive actions.[1] Yet although the term 'ceasefire' was employed in the pre-UN Charter era, during this period it 'had no legal meaning, and was instead a military order given by a superior to troops under his command to stop shooting'.[2] However, since its founding in 1945, the United Nations Security Council (UNSC) has adopted dozens of resolutions with the aim of bringing about an immediate cessation of armed hostilities between two, or occasionally more, belligerent parties and in both international and non-international armed conflicts.[3] While this particular function of the UNSC is not mentioned expressly within the Charter itself, its competence to adopt measures of such a nature has often been asserted and can arguably be seen as one that has

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1 D. M. Morris, 'From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations', (1996) 36 Virg. JIL 801, at 897.

2 Ibid., at 809.

3 These conflicts include those between the Netherlands and Indonesia (1947–48) and Iran and Iraq (1980–88) as well as conflicts in Korea (1950–53), Congo (1960–66), Angola (1975–2002), Somalia (1991–), Rwanda (1990–94), Kosovo (1998–99), Sudan (Darfur) (2003–), Côte d'Ivoire (2002–07), Libya (2011), and Syria (2011–). The UNSC has also adopted ceasefire resolutions in various conflicts in connection with the long-running situation in the Middle East, including the Arab–Israeli Wars (1947–48, 1956–57, 1967, 1973), the Israel–Lebanon conflict (2006), and the Israel–Gaza conflict (2009).

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developed through the practice of the Council.[4] As a consequence of this development it has been said that 'warring parties no longer exercise exclusive competence over matters that affect international peace and security. Since the U.N. Charter came into force in October 1945, they are no longer fully *sui juris*, answerable only to themselves'.[5] Today, as the situation regarding Syria in 2011 demonstrates,[6] the expectation is clearly for this body, as opposed to any other organ of the UN or regional organization, to take action in order to bring about a ceasefire.[7]

Although such a function is arguably within the jurisdiction of the UNSC as part of its responsibility for the maintenance of international peace and security,[8] its positioning within the UN Charter and the legal nature of the resolutions in which the ceasefires are contained have remained to a large extent unclear. This lack of clarity has manifested itself mainly in the issue whether the adoption of a ceasefire by the UNSC represents a mere hortatory call for such a cessation or whether it imposes a legally binding obligation upon one or both of the belligerent parties.[9] The UN Charter does not directly aid the answering of this question, merely providing – without further explanation – that 'decisions' of the Council are binding.[10] Yet, if one is to look outside the textual confines of this document and more broadly at the text of the Council's ceasefire resolutions themselves – and, for example, whether they merely 'call upon' the parties to cease their fire or whether they 'demand' that they do – as well as at the pronouncements of relevant actors as an aid in interpreting its provisions on this issue,[11] it becomes clear that there has been a large degree of disagreement and confusion, especially amongst states and scholars.

Of course, it might be tempting to ignore this confusion and simply be grateful that the only universal body with responsibility for international peace and security has come to what could perhaps be seen as a political agreement with the aim of ceasing armed hostilities.[12] Yet, with the possibility at least for the adoption of such a legally binding resolution, important questions are raised, not only in regard to the particular conflict and determining what the legal obligations upon the belligerent

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4 Other functions which have not been expressly included in the Charter but which have developed through the practice of the Council include the authorization of forcible measures and peacekeeping operations.

5 Morris, *supra* note 1, at 803.

6 See, for example, 'Syria: UN Security Council Backs Ceasefire Deadline', *The Telegraph*, 5 April 2012.

7 For the purposes of this article the term 'ceasefire' does not necessarily specifically need to be expressly mentioned in the particular resolution for it to be classed as a 'ceasefire resolution'. Furthermore, the resolution does not need to have the provision regarding the ceasefire as its primary purpose, i.e., included in the first operative paragraph of the resolution. It may equally be included later in the resolution. In addition, some ceasefire resolutions require that the parties abide by a particular ceasefire that has already been agreed to by the parties, whereas others might include a general urge for the parties to lay down their arms. Lastly, the UNSC employs different ways of expressing that it requires a ceasefire; most commonly it 'calls for' or 'calls upon' the parties concerned to cease their fire, but it also 'urges', 'appeals', and 'demands' for such a ceasefire to be implemented. The important characteristic, however, is that there is a clear message by the UNSC that the warring parties should indeed cease their fire.

8 1945 Charter of the United Nations, 1 UNTS XVI, Art. 24(1).

9 See S. D. Bailey, 'Cease-Fires, Truces and Armistices in the Practice of the UN Security Council', (1977) 71 AJIL 461, at 463–9.

10 UN Charter, *supra* note 8, Art. 25.

11 As Bailey and Daws admit, the Charter alone is an insufficient basis for determining which resolutions are binding. See S. D. Bailey and S. Daws, *The Procedure of the UN Security Council* (1998), 263.

12 It must be remembered that the UNSC is a political body, albeit one with the power to adopt legally binding decisions in resolutions.

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parties concerned are, but also for the legal nature, relevance, and continuing authority of resolutions of the UNSC which are adopted with the aim of achieving peace. Indeed, given that the UNSC is ordained with primary responsibility for the maintenance of international peace and security, the need for clarity as to the nature of resolutions emanating from this important organ – and, in particular, the meaning of the language employed within them – would appear vital to the international rule of law and, ultimately, to the maintenance of international peace and security.

While most scholarly comment on the lack of clarity of the Council's ceasefire resolutions came during the Cold War, or very soon after the end of it,[13] given that in the post-Cold War era this body is now able to operate to a much greater extent it is perhaps a pertinent time for a fresh assessment of the legal nature of UNSC ceasefire resolutions in contemporary international society.[14] Furthermore, when we talk of their 'contemporary' nature possibly the most distinguishing feature is that more often than not these parties are not two states, but instead a state and a non-state actor. For example, in Resolution 1860 (2009) the parties under focus were Israel and the non-state entity Hamas, and, more recently, in Resolution 2042 (2012) the parties concerned were the Syrian authorities and the opposition fighters. In all such examples a non-state entity has to comply to make the ceasefire effective; to claim otherwise would be a *reductio ad absurdum*. Yet *urging* them to comply and *obliging* them to comply are two different objectives (although while the intended effects may be different, the actual effects may not be).

This article seeks in section 2 to examine the contemporary methodologies for determining the legal nature of UNSC ceasefire resolutions. In particular, it examines what could be described as the three main approaches to interpretation in this respect; the 'Charter' approach, the 'general textual' approach, and the 'fully contextual' approach. Section 3 then moves on to examine their legal nature in the context of non-state actors, in particular the contemporary prevalence of non-international armed conflicts and the legal basis for the UNSC to issue binding obligations in regard to such actors. Section 4 draws some conclusions, not only in light of the above two sections, but also through an assessment of whether one can observe a correlation between the nature of the ceasefire issued and any enforcement measures ultimately imposed by the Council. In the absence of such a correlation, however, the need for clarity is highlighted with suggested means as to how to achieve it.

2. Problems in determining the 'legal' nature of UNSC ceasefire resolutions

Determining the legal nature and effect of any UNSC resolution is primarily an exercise in interpretation.[15] Prior to setting about this task one needs to know the

[13] See, e.g., Morris, *supra* note1; Bailey, *supra* note 9.

[14] Various recent works have omitted to address and clarify this issue. See, in particular, V. Lowe et al. (eds.), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (2008). For a limited treatment of the issue see A. Orakhelashvili, *Collective Security* (2011), 32–9.

[15] B. Conforti, *The Law and Practice of the United Nations* (2005), 194–5; Orakhelashvili, *supra* note 14, at 34, 39–45. Of course, determining the legal nature and effect of a UNSC resolution is but one aspect of its interpretation.

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applicable rules and tools available.[16] However, there is no treaty which provides a framework of analysis or points of guidance in interpreting UNSC resolutions, like the role that the Vienna Convention on the Law of Treaties (1969) (VCLT) plays in connection with interpreting treaties.[17] No such framework or points of guidance have been agreed upon by the UNSC itself[18] and the International Court of Justice (ICJ) has not provided anything substantial in the way of jurisprudence in this respect.[19] Furthermore, there is little direct work from the scholarly community regarding the determination of the binding nature of UNSC resolutions.[20] There is, therefore, no definitive way of determining their legal nature and little of direct textual relevance to assist us in more specifically determining the legal nature of UNSC *ceasefire* resolutions.

Given the lacuna in directly relevant sources to offer guidance – and in an attempt to discern some sort of doctrinaire consistency – Articles 31–3 of the VCLT have been utilized by some scholars as a guide in interpreting UNSC resolutions.[21] Additionally, and perhaps of most relevance in determining whether a UNSC resolution is legally binding, the ICJ, in a well-known passage from its *Namibia* advisory opinion, stated that:

> The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers of Article 25, the question is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provision invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.[22]

While there are various reasons why these two sources may not be directly employed in interpreting UNSC ceasefire resolutions,[23] they do lend support to what could be

16 M. C. Wood, 'The Interpretation of Security Council Resolutions', (1998) 2 MPYUNL 73, at 74.

17 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969). See, generally, M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009).

18 This might, for example, come in the form of a statement by the president of the UNSC.

19 The *Namibia* advisory opinion of 1971 is perhaps the most relevant here, as discussed below. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 16. More recently, and providing the most significant contribution by the ICJ since *Namibia*, the issue was broached in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep. 403. See, generally, M. D. Oberg, 'The Legal Effects of United Nations Resolutions in the Kosovo Advisory Opinion', (2011) 105 AJIL 81. While UNSC resolutions have been considered in other cases before the ICJ and other international courts and tribunals, none of these fully engage with, or contribute to, the issue of their interpretation.

20 Although for scholarly work which has touched upon this issue see, for example, R. Higgins, 'The Advisory Opinion on Namibia: Which UN Resolutions are Binding under Article 25 of the Charter?', (1972) 21 ICQL 270; S. A. Tiewal, 'Binding Decisions of the Security Council within the Meaning of Article 25 of the UN Charter', (1975) 15 *Indian Journal of International Law* 195. Christine Gray has described the issue of the binding nature of UNSC resolutions as a 'complex question'. See C. Gray, *International Law and the Use of Force* (2008), 18. See also note 68, *infra*.

21 See, generally, Wood, *supra* note 16; E. Papastavridis, 'Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis', (2007) 56 ICLQ 83; Orakhelashvili, *supra* note 14, at 40–3.

22 See *Namibia* Advisory Opinion, *supra* note. 19, at 53. In the *Kosovo* advisory opinion the ICJ also held that the intent of the UNSC was important in determining not only the binding effect of a resolution but also who is bound. See *Kosovo* Advisory Opinion, *supra* note 19, at paras. 115, 117.

23 For example, in the context of the application of the VCLT, although they are rules of interpretation, they were developed in the context of treaties which differ in many key respects to UNSC resolutions. For

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described as the three main approaches to the determination of the issue under focus: the 'Charter' approach, the 'general textual' approach, and the 'fully contextual' approach.

2.1. The 'Charter' approach to interpretation

In utilizing the 'Charter' approach in determining the legal nature of UNSC ceasefires we are to revert back to the UN Charter as the instrument in which the Council gains its authority to act.[24] In this respect, the Charter says surprisingly little on this particular organ's powers to adopt legally binding measures; only that under Article 25 '[t]he Members of the United Nations agree to accept and carry out the *decisions* of the Security Council in accordance with the present Charter'.[25] But this raises the somewhat perennial question as to when it can be said that the UNSC has adopted such a 'decision'. There is no elaboration or further guidance in either Article 25 or the UN Charter as a whole, and neither do the *travaux préparatoires* provide any conclusive illumination.[26]

In terms of form, there is nothing in the Charter to distinguish resolutions from presidential statements, or indeed any other method of the UNSC publishing its collective voice. In fact, the UN Charter does not mention resolutions at all, with reference being made just to 'decisions' on 'procedural' and 'other' matters.[27] Nonetheless, subsequent practice of the UNSC has given rise to an operational understanding that it is formally adopted resolutions of the Council which may be of a directly legally binding nature. If in light of a presidential statement requesting a ceasefire a state party declares that it will implement it, as was witnessed with the Assad regime in respect of the Annan peace plan in the Syrian conflict,[28] this may potentially have binding force upon the party concerned, but this would be as a result of the binding force of any unilateral statement made by the state concerned as opposed to through the presidential statement itself.[29]

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example, although it is true that they are both agreements between states, a treaty represents the interests of individual states while a UNSC resolution represents the collective will of the Council with ostensibly the shared overriding aim of the maintenance of international peace and security. Furthermore, treaties are negotiated, drafted, and accepted between the parties upon whom they will apply and be legally binding while the majority of states whom UNSC resolutions are binding upon do not have an input in their drafting. UNSC resolutions are also not always intended to have binding legal effects. In this respect, it is not clear that Orakhelashvili is correct when he asserts that 'given that there is no alternative set of interpretive rules [they] must be deemed to apply to resolutions'. See Orakhelashvili, *supra* note 14, at 40. The *Namibia* advisory opinion, on the other hand, did not address the specific question of the legal nature of UNSC ceasefire resolutions.

[24] As Wood has commented, '[t]he United Nations Charter is, of course, of fundamental importance, both for the rules of law it contains and its Purposes and Principles and because it is the basis for all the Security Council's activities'. See Wood, *supra* note 16, at 93.

[25] UN Charter, *supra* note 8, Art. 25 (emphasis added).

[26] See, generally, J. Delbrück, 'Article 25', in B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary* (2002), 452–64.

[27] See UN Charter, *supra* note 8, Art. 27(2) and (3). As Orakhelashvili has noted, 'Article 25 confers binding force on Security Council decisions not on its resolutions per se.' See Orakhelashvili, *supra* note 14, at 33.

[28] For the presidential statement endorsing the Kofi Annan peace plan for Syria which contains a ceasefire see UN Doc. SC/10583 (2012). For the Assad regime's acceptance of it see BBC News, 'Syrian Government Accepts Annan Peace Plan', 27 March 2012, available at http://www.bbc.co.uk/news/world-middle-east-17522398.

[29] On the creation of legal obligations through unilateral statements see the *Nuclear Test Cases (Australia v. France, New Zealand v. France)*, Judgment of 20 December 1974, [1974] ICJ Rep. 253.

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However, in terms of substance, in determining whether, and if so which, UNSC ceasefire resolutions are legally binding upon the belligerent parties to a conflict, the issue of whether a particular chapter or provision of the Charter has been invoked in the particular resolution would appear to be the first port of call under the Charter approach to interpretation. Indeed, this element in determining the legally binding nature of UNSC resolutions was expressly mentioned in the *Namibia* advisory opinion, where, as noted above, it was stated by the ICJ that the question was to be determined by having regard to, inter alia, 'the Charter provision to be invoked'.[30] As such, if we are to accept that the adoption of a ceasefire falls within the powers of the UNSC under its primary responsibility for the maintenance of international peace and security, we could say that if a ceasefire was contained in a resolution that was expressly stated to be a 'decision' under 'Article 25' then this would prima facie be legally binding. However, this is a rather hypothetical proposition as such an express invocation of Article 25 is extremely rare.[31] Instead, the main debate under the Charter approach has been whether binding decisions in the sense of Article 25 are restricted to resolutions which have been adopted under a particular chapter of the Charter, in particular Chapter VI or VII.[32]

2.1.1. Chapter VI or Chapter VII?

No mention is made of Article 25, which is located in Chapter V of the Charter, in either Chapter VI or Chapter VII, and neither is Chapter VI or VII mentioned in Article 25. Of course, it might be a fair assumption that if Article 25 exclusively applies to those resolutions adopted under a particular chapter it would be located in the chapter itself or,[33] alternatively, for this exclusive applicability to be specifically stated in Article 25. However, a distinction is often made between resolutions adopted under Chapter VI of the Charter regarding the 'Pacific Settlement of Disputes', which are generally considered to be non-binding,[34] and those adopted under Chapter VII in regard to 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression', which are considered to be binding. This stems predominantly from the fact that the language of Chapter VI is not generally of a decisive nature, but is rather primarily about situations in which the UNSC might 'call upon the parties to settle their dispute' through peaceful means or,[35] failing that, to recommend appropriate measures to bring about such a result.[36]

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30 See *Namibia* Advisory Opinion, *supra* note 19.

31 See, as an example, UNSC Res. 269 (1969), preamble, in which the UNSC was '[m]indful of its responsibility to take necessary action to secure strict compliance with the obligations entered into by States Members of the United Nations under the provisions of Article 25 of the Charter of the United Nations'.

32 See Delbrück, *supra* note 26, at 455; Orakhelashvili, *supra* note 14, at 33–9.

33 Higgins, *supra* note 20, at 278; Delbrück, *supra* note 26, at 456.

34 See M. Shaw, *International Law* (2008), 1236; A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (2011), 67.

35 UN Charter, *supra* note 8, Art. 33(2).

36 In this respect Shaw notes that under Chapter VI 'there is no power as such to make binding decisions with regard to member states'. Shaw, *supra* note 34, at 1268. Similarly, Morris states that a ceasefire resolution adopted under Chapter VI is 'not binding upon the parties' while '[a] Chapter VII-based cease-fire order or decision of the Security Council is . . . exactly that: a binding order establishing a legal duty to comply.' Morris, *supra* note 1, at 812–13.

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However, this exclusive applicability has been dismissed by many.[37] Indeed, it could be argued that whether a decision of the UNSC is binding depends not upon whether it has been adopted under Chapter VI or under Chapter VII – or indeed any other chapter or provision of the Charter – but rather upon whether the decision is necessary for the UNSC to take under its general responsibility for the maintenance of international peace and security.[38] Yet, while in theory it is conceivable that a binding decision as to a ceasefire could be adopted under Chapter VI, this particular chapter is in any case concerned with the settling of disputes that are yet to constitute a threat to the peace and, as such, under which any adoption of a ceasefire would seem misplaced, not to mention premature.[39] Indeed, given that ceasefires are issued in the midst of an armed conflict the threshold for Chapter VII to be invoked will have implicitly been met, making Chapter VI redundant. This is arguably why Chapter VI has never been invoked, at least expressly, by the Council in a ceasefire resolution. By contrast, while the UNSC has not evinced a consistent practice in this respect, Chapter VII has often, and particularly recently, been expressly invoked as the chapter under which a ceasefire resolution has been adopted.[40]

However, even if a ceasefire resolution is expressly adopted under Chapter VII this is not conclusive as to its binding nature. Indeed, Article 39, as the 'gateway' to Chapter VII, provides that:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make *recommendations, or decide* what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security [emphasis added].

If we are to read this provision directly in light of Article 25 then it is logical to conclude that only the 'decisions' referred to have binding effect. Indeed, the clear distinction between a 'recommendation' and a 'decision' would appear to indicate that resolutions adopted under Chapter VII containing any sort of recommendation are *not* decisions and thus not binding, providing fuel to the argument that not all Chapter VII resolutions are necessarily legally binding. It is therefore logical to conclude that if the UNSC merely 'recommends' a ceasefire, whether adopted under Chapter VI or VII, this is *not* legally binding upon the parties.[41]

It remains the case, however, that on the basis of Article 39 binding 'decisions' appear to be those adopted under Article 41 or 42. Yet the question consequently

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37 White and Saul note that the contention that it is only under Chapter VII that binding decisions can be made is a 'predominant[ly] (western) view'. See N. D. White and M. Saul, 'Legal Means of Dispute Settlement in the Field of Collective Security: The Quasi-Judicial Powers of the Security Council', in D. French, M. Saul, and N. D. White (eds.), *International Law and Dispute Settlement: New Problems and Techniques* (2010), 203; Orakhelashvili, *supra* note 14, at 34.

38 An argument put forward in Orakhelashvili, *supra* note 14, at 33–9.

39 Indeed, Art. 33(1) of Chapter VI talks of 'any dispute, the continuance of which is likely to endanger the maintenance of international peace and security'.

40 See, e.g., UNSC Res. 1572 (2004) (Côte d'Ivoire); UNSC Res. 1973 (2011) (Libya). Cf Orakhelashvili, *supra* note 14, at 36 ('It is possible for the Council to adopt decisions, binding or operative, without resorting to Chapter VII.') In addition, a determination by the UNSC that a situation has created a threat to the peace implicitly invokes Chapter VII. See N. D. White and R. Cryer, 'Unilateral Enforcement of Resolution 687: A Threat Too Far?', (1998–99) 29 *California Western International Law Journal* 243.

41 The express 'recommendation' of a ceasefire is not something that the UNSC has adopted.

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arises whether either of these provisions would be an appropriate basis for the adoption of a ceasefire resolution.

2.1.2. Articles 41 and 42

Article 41 of the UN Charter provides that '[t]he Security Council may *decide* what measures not involving the use of armed force are to be employed to give effect to its *decisions*, and it may *call upon* the Members of the United Nations to apply such measures' (emphasis added). To put this differently, after the UNSC has both decided that non-forceful measures under Article 41 are necessary and what form these are to take, rather than taking the action itself it instead requires them to be enacted by member states.[42] Indeed, the type of measure expressly envisioned as being taken in Article 41 'may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'. By definition, the implementation of these measures, for example the severance of diplomatic relations, will need to be undertaken by the member states. To put this into context, the adoption of a ceasefire fits within the paradigm of this provision with respect to the implementation of the measures envisaged as, while it is the UNSC that takes the decision that a ceasefire is necessary, it is the parties to the conflict that must ultimately implement it.

Although at first it may appear that the adoption of a ceasefire is not in line with the type of measures expressly envisioned in Article 41, the inclusion within this provision of the qualification 'may include' of course leaves it somewhat open what measures may be taken under it. However, it could be questioned whether a call for a ceasefire can plausibly fit within the realm of intended action under this provision. First, these measures are apparently punitive in nature, while the adoption of a ceasefire does not often lay blame on a particular party. Furthermore, Article 41 appears to envisage imposing legal obligations upon the general membership of the organization by 'call[ing] upon *the Members of the United Nations*' to apply the measures (emphasis added). By contrast, ceasefire resolutions are directed towards the parties involved in the conflict, not the UN's membership at large.

Nevertheless, given that under this provision the Council may 'decide' upon the measures to be taken and then 'call upon' the members of the UN to apply them, we must conclude that a 'call' made in this context is legally binding upon the members of the UN. This is particularly significant when it is considered that this is the language very often employed by the UNSC in its ceasefire resolutions.[43] For example, although not expressly adopted under Article 41, both Resolutions 1860 (2009) and 2042 (2012) witness the UNSC 'calling upon' the respective parties to cease their fire.[44] However, and rather confusingly, Resolution 1970 (2011), which was adopted in connection with the conflict in Libya, *was* expressly adopted under Article 41 but then proceeded to use more decisive language in 'demanding' a

[42] J. Frowein and N. Krisch, 'Article 41', in Simma et al., *supra* note 26, at 746.
[43] See *infra* subsection 2.2 on the 'general textual' approach to interpretation.
[44] See UNSC Res. 1860 (2009), para. 1 and UNSC Res. 2042 (2012), para. 4.

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ceasefire, giving rise to accusations that the Council is inconsistent in both its use of the Charter provisions and language.[45]

Article 42 of the Charter, on the other hand, does not employ the language of 'decide' or 'call upon'. However, this provision is not suitable for the adoption of a ceasefire resolution as it is concerned with the taking of positive forcible action.[46] Furthermore, Chapter VII largely envisages the UNSC possessing a sort of standing army of its own to call upon if necessary,[47] so when Article 42 states that '*it* may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security' (emphasis added) it is the UNSC that it is referring to. As such, under this provision, and in contrast to Article 41, it is the UNSC that decides that forcible measures are necessary and it is the organ itself which is to take them. Consequently, the UNSC has, in adopting its ceasefire resolutions, never expressly claimed to be acting under Article 42, although it may be of some relevance to the question in this article as the measures envisioned may be resorted to if the belligerent parties do not cease their armed hostilities when requested to do so, something which will be returned to below.[48]

2.1.3. Article 40

At least up until relatively recently, when the Council invoked a particular Chapter VII provision to act under when adopting a ceasefire resolution it often chose Article 40 to do so.[49] In a search for the legal nature of UNSC ceasefire resolutions this is of some significance as this provision is concerned with the adoption of 'provisional measures' to be taken as a *prelude* to the adoption of any 'decisions' under Article 39 which, as discussed above, are specifically tied to action under Articles 41 and 42. Indeed, Article 40 provides:

> In order to prevent an aggravation of the situation, the Security Council may, *before* making the recommendations or deciding upon the measures provided for in Article 39, *call upon the parties concerned* to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures [emphasis added].

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45 See UNSC Res. 1970 (2011), para. 1. As another example, although not a ceasefire resolution but rather adopted in response to North Korea's nuclear test of 9 October 2006, UNSC Res. 1718 (2006) expressly stated that the Council was acting under Art. 41 of Chapter VII but then proceeded to 'Demand', 'Decide' and 'Call upon' throughout. On the significance on the use of 'demands' see *infra* subsection 2.2 on the 'general' textual approach.

46 Under Art. 42 of the UN Charter (1945) the UNSC 'may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations'. For more on the UNSC's forcible powers see C. Henderson, 'The Centrality of the United Nations Security Council in the Legal Regime Governing the Use of Force', in N. D. White and C. Henderson (eds.), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello, and Jus post Bellum* (forthcoming 2013).

47 Although with the emergence of the practice in the post-Cold War era of the Council authorising states to use force this standing army has never materialized. See ibid.

48 For more on the issue of ceasefires and the enforcement of them see *infra* subsections 2.1.3 and 2.1.4.

49 See, e.g., UNSC Res. 54 (1948), para. 2, on the conflict in the Middle East; UNSC Res. 598 (1987), para. 1, on the conflict in the Gulf between Iran and Iraq.

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As such, unless we are to consider the 'decisions' of Article 25 to be different to the 'decisions' of Article 39, then under the Charter approach to interpretation ceasefires adopted under Article 40 would not appear to be binding. Nevertheless, if we are to look at things from a *ratione personae* perspective then this is perhaps the most relevant provision in Chapter VII in connection with ceasefires as it concerns calls for compliance that are expressly aimed at the belligerent parties themselves. Indeed, in connection with ceasefires this provision does, in a sense, indicate that before the UNSC draws in other member states to carry out particular measures in connection with the specific situation, it will first 'call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable'. These could, of course, include a ceasefire.[50] Furthermore, the fact that this provision notes that these measures 'shall be without prejudice to the rights, claims, or position of the parties concerned' is particularly compatible with the adoption of ceasefires, which simply aim to cease hostilities as opposed to apportioning blame.

It is interesting to note that in terms of whether ceasefire resolutions adopted under this provision are legally binding Morris – rather equivocally – states that '[t]he Security Council may take a *more decisive* step by calling for a cease-fire as a provisional measure under Article 40, which although part of Chapter VII, *may* not be binding'.[51] In this respect, it may be of significance that on the occasions when Article 40 has been invoked the expression of the ceasefire has taken an obligatory tone by the UNSC 'ordering' or 'demanding' one, instead of using the more hortatory language of Article 40 in 'calling upon' the parties to cease their fire. Indeed, although the ceasefires in Resolutions 54 (1948) and 598 (1987), in connection with the conflicts in the Middle East and the Gulf respectively, were expressly adopted under Article 40, they were also expressly stated to be 'orders' and 'demands',[52] perhaps giving rise to the argument that they were intended by the Council to be legally binding upon the parties concerned.[53]

Even if one is not inclined to accept the argument that ceasefire resolutions adopted under this provision are legally binding, it is perhaps of significance that the provision expressly states that the UNSC will 'duly take account of failure to comply with such provisional measures'. White and Saul have made the argument in the context of Chapter VI resolutions that even if only a recommendation is adopted the UNSC can then enforce it under Chapter VII, thereby making it, in effect, legally binding.[54] This argument can be made even more plausibly in the context of the enforcement of measures adopted under Article 40 given the positioning of the provision in Chapter VII, thus preventing the need for any 'obscure transitions' by the Council between Chapters VI and VII.[55]

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50 See J. Frowein and N. Krisch, 'Article 40', in Simma et al., *supra* note 26, at 732.
51 Morris, *supra* note 1, at 812 (emphasis added).
52 See UNSC Res. 54 (1948), para. 2; and UNSC Res. 598 (1987), para. 1.
53 For the significance of such language see *infra* subsection 2.2.
54 White and Saul, *supra* note 37, at 212.
55 Tzanakopoulos, *supra* note 34, at 67–8.

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2.1.4. *The 'implied powers' of the Security Council*

While the above sections have sought to locate a specific chapter or provision within the UN Charter within which to place ceasefire resolutions in an attempt to discern their legal nature and hence whether they are, or potentially can be, legally binding, there is also the possibility that the UNSC acts on certain occasions upon the basis of 'implied powers', or, as Schachter has put it, 'on a liberal construction of its authority derived from its general powers to maintain and restore international peace and security'.[56]

The taking of action by the UNSC under the 'implied powers' doctrine has notable judicial and scholarly support and is perhaps a particularly relevant basis if – as is so often the case – the UNSC does not allude to a specific provision of the Charter upon the adoption of a ceasefire resolution.[57] In fact, it has been argued that in a broader context the Council 'has virtually never found it necessary to specify a "legal base" for its decisions' but instead 'situates itself within an international tradition in which the scope and allocation of powers are achieved with a broader brush'.[58] In this respect, the ICJ in the *Reparations* advisory opinion was clear that the Charter should be given an 'effective' interpretation so that 'the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential for the performance of its duties'.[59]

However, the reference here by the ICJ to powers being inferred by '*necessary* implication' alludes to a central limit upon the scope of any implied powers in that they should respect both the breadth and scope of the powers of the respective organ as well as that of other organs.[60] While the Charter does not expressly provide the UNSC with the power to adopt ceasefires, whether or not of a legally binding nature, given the Council's primary responsibility for the maintenance of international peace and security it is perhaps uncontroversial that such a power is to be implied and, furthermore, that resolutions containing such a perceived necessary measure are 'decisions' for the purposes of Article 25 of the Charter.

Yet a criticism of this basis might be that the wider membership of the UN 'is unlikely to accept the Council's decisions unless they can ultimately be defended

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56 O. Schachter, 'United Nations Law in the Gulf Conflict', (1991) 85 AJIL 452, at 461.

57 See *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, [1962] ICJ Rep. 151, at para. 167. For those who support this doctrine in the context of the implied power of the UNSC to authorize states to use armed force see, for example, N. Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"', (2000) 11 *European Journal of International Law* 541, at 542; C. Greenwood, 'New World Order or Old? The Invasion of Kuwait and the Rule of Law', (1992) 55 *Modern Law Review* 153, at 153; F. Kirgis, 'The Security Council's First Fifty Years', (1995) 89 AJIL 506, at 521.

58 F. Berman, 'The Authorization Model', in D. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (2004), 153 at 156.

59 *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174, at para. 182. Orakhelashvili notes that,

> [t]he implied powers doctrine is reinforced by the principle of effective interpretation of the Charter as a treaty. The rationale of effective interpretation is that, if the organ in question is to discharge its responsibilities under the Charter effectively, then it should be able to adopt such decisions as are necessary for and antecedent to that.

Orakhelashvili, *supra* note 14, at 51.

60 A. I. L. Campbell, 'The Limits on the Powers of International Organizations', (1983) 32 ICLQ 523, at 528.

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by reference to powers delegated to it'.[61] For those unsatisfied with what may be seen as a legal basis detached from the Charter more flesh of a specific nature has on occasion been added to its often perceived bare bones. For example, the ICJ in the *Namibia* advisory opinion expressly held that the implicit legal basis for UNSC Resolution 276 (1970) was Article 24 of the Charter as the aims of the resolution fell within the UNSC's general responsibility for the maintenance of international peace and security.[62] Indeed,

> Article 24 of the Charter vests in the Security Council the necessary authority to take action such as that taken in the present case. The reference in paragraph 2 of this Article to specific powers of the Security Council under certain chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1 . . . the Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security.[63]

Furthermore, and of importance in discerning whether resolutions adopted upon this basis can be legally binding per se upon the states concerned, this was held by the Court to be a decision in the context of Article 25.[64]

Building upon this, Article 48(1) of the UN Charter provides that:

> The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

This provision is perhaps of significance in the context of the 'implied powers' doctrine for two reasons. First, and in connection with what was discussed in the above section, it determines that such action can be carried out by 'some' as opposed to 'all' of the members of the UN. As such, this is compatible with the nature of ceasefires as being legally binding only upon the belligerent parties. Second, and most importantly, rather than tying 'decisions' of the UNSC directly to Articles 41 and 42, it instead ties them to the UNSC's primary responsibility 'for the maintenance of international peace and security' more generally. As a consequence, rather than having to be adopted under either Article 41 or 42 to be considered a decision, a legally binding ceasefire could be implicitly adopted through the general implied powers of the UNSC in the realm of the maintenance of international peace and security.

2.1.5. Conclusion

The discussion in this section on the Charter approach to determining the legal nature of UNSC ceasefire resolutions in a sense confuses two issues, as while these are bases within the Charter for the UNSC to adopt ceasefire resolutions – and

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61 Orakhelashvili, *supra* note 14, at 51.

62 See *Namibia* Advisory Opinion, *supra* note 19, at 52.

63 Ibid.

64 Ibid. See also Higgins, *supra* note 20, at 284–6. The significance of this judgment is potentially heightened in the context of the discussion in subsection 2.2 of the current article on the 'general textual' approach to interpretation given that the UNSC in Resolution 276 (1970) merely '[*c*]*all*[*ed*] *upon* all States . . . to refrain from any dealings with the Government of South Africa'. UNSC Res. 276 (1970), para. 5.

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furthermore those that are potentially 'decisions' and as such legally binding – it does presuppose that the UNSC is clear in stating the particular provision under which it is acting and/or that it is adopting a 'decision'. As has become clear throughout this section, however, the UNSC is far from consistent in invoking the chapter or provision under which it is acting or in expressly claiming to be taking a 'decision' when adopting ceasefires.[65] Consequently, we have a double problem which renders the Charter approach fine in theory but unreliable in practice; the Charter is not clear under which chapter or provision a legally binding resolution can be adopted, and when issuing ceasefires the UNSC is also often silent, or at best inconsistent, as to which chapter or provision it is acting under. A further problem is that even when invoking Chapter VII in a resolution, it is not always invoked in the same place: sometimes it is at the start, prefacing all the other operational paragraphs and thus clearly applicable to the whole resolution; at other times it is invoked only within a specific operational paragraph.[66] In this respect, if Chapter VII is mentioned only in a paragraph on sanctions can we also assume that the ceasefire paragraph in the resolution is also adopted under Chapter VII?

If we are to assess the legal nature and effect of a UNSC ceasefire resolution through the Charter provisions invoked, this frequent silence and lack of consistency is problematic. As such, while this section has attempted to survey the Charter for a location under which a UNSC ceasefire resolution might fall, and thus determine the outcome of whether it is legally binding, given the silence and confusion on the behalf of the Council, very little can be said with any certainty. Instead, on a textual level, perhaps more can be discerned about the legal nature of a UNSC ceasefire resolution by looking at the particular terminology employed, and how 'decisive' it appears to be, rather than under which provision of the Charter it was invoked.

2.2. The 'general textual' approach to interpretation

Given the unclear result provided by the 'Charter' approach, and in drawing upon the 'general rule' of interpretation in the VCLT and the *Namibia* advisory opinion's primary assertion that '[t]he language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect',[67] some specifically use the *language* employed in UNSC resolutions in determining their legal nature, something already alluded to in the above section.[68] It may, as such, be of greatest significance in determining whether a ceasefire is legally binding upon the belligerent parties whether the Council has employed authoritative or

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65 Although this is not without exception. See UNSC Res. 338 (1973), at para. 1, where the UNSC '[c]alled upon all parties to the present fighting to cease all firing and terminate all military activity immediately, no later than 12 hours after the moment of the adopting of this decision, in the positions they now occupy'.

66 Although, as noted above, this does not preclude it from being described as a ceasefire resolution. See note 3, *supra*.

67 *Namibia* Advisory Opinion, *supra* note 19, at 52.

68 See, for example, Y. Dinstein, *War, Aggression and Self-Defence* (2011), 54–8; Orakhelashvili, *supra* note 14, at 37–8. Article 31 of the VCLT provides firstly a 'general rule' of interpretation so that '[a] treaty shall be interpreted in good faith *in accordance with the ordinary meaning to be given to the terms of the treaty*' (emphasis added).

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mandatory language in addressing them. This emphasis is stated in unequivocal terms by Yoram Dinstein, who asserts that:

> As long as the Council is *merely calling for* a cease-fire, its resolution has the hallmark of a non-binding recommendation. The parties are then given an opportunity to craft a cease-fire agreement of their choosing. But if they fail to reach an agreement, the Council may be driven in time to ordain a cease-fire.[69]

Indeed, the UNSC may ultimately use 'unequivocal language' to 'order belligerents to cease fire'.[70] Alternatively, according to Dinstein, if the reference to a cease-fire in a resolution of the UNSC is a 'non-mandatory exhortation', perhaps as the UNSC included in Resolution 2042 (2012) when it merely 'called for a ceasefire in Syria', then 'the resolution may be ignored with impunity'.[71] Therefore, while a 'call for' action by the UNSC can be seen as equivocal language, an 'order' would be seen as unequivocally legally binding.[72] The sequence of resolutions adopted by the Council during the Iran–Iraq war of the 1980s provides a particularly good example of this. Indeed the ordinary meaning of the words employed in the sequence of these resolutions gives rise to the impression that the parties were not obliged to adhere to the 'call' in Resolutions 479 (1980), 514 (1982), 522 (1982), and 582 (1986), but as soon as the UNSC subsequently 'demanded' an immediate one in Resolution 598 (1987) they were obliged to do just that, although fighting only came to an end over a year later in August 1988.

Yet, such a straightforward ordinary reading of terms, while attractive in its simplicity, is also somewhat deceptive, as the UNSC is a political organ and, as such, unlike with treaties, most of the language used in UNSC resolutions is not necessarily intended to create rights and obligations binding on states but is instead of a political nature.[73] In addition, 'there is no institutional mechanism to ensure that resolutions are well drafted',[74] which means that '[i]nconsistencies in the use of terms and ungrammatical constructions are not uncommon',[75] resulting in UNSC resolutions that 'are frequently not clear, simple, concise or unambiguous'.[76] However, as Michael Wood, former chief legal adviser to the UK's Foreign and Commonwealth Office, points out, this is perhaps of no surprise as '[t]hey are often drafted by non-lawyers,

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69 Dinstein, *supra* note 68, at 52.

70 Ibid.

71 Ibid., at 53–4. However, although Dinstein makes the distinction between 'calls' and 'orders' for ceasefires in terms of their binding effect, he does not support this contention with any empirical evidence as to how those within the UNSC or the subjects of the ceasefire resolutions have interpreted them. Indeed, his distinction appears to be based more on doctrine than on empirical evidence and supported with little in the way of practice on this point, although others, while claiming the importance of the language used, are ambiguous in the use of it themselves. For example, Morris notes with some frequency the notions of the UNSC 'calling for' and 'demanding' a ceasefire and of 'U.N.-sponsored or imposed ceasefire agreements' without distinguishing between them in any legal sense. See, for example, Morris, *supra* note 1, at 802 and 809.

72 Orakhelashvili notes that '[t]he words "call upon" can convey a recommendation or a binding decision, depending on whether the resolution suggests that a particular step or action called upon is a necessary one'. Orakhelashvili, *supra* note 14, at 37. See also his argument at text accompanying note 38, *supra*.

73 Wood, *supra* note 16, at 81.

74 Ibid., at 80.

75 Ibid., at 89.

76 Ibid., at 81.

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in haste, under considerable political pressure, and with a view to securing unanimity within the Council'.[77] Indeed, this 'often leads to deliberate ambiguity and the addition of superfluous material (presumably thought at the time to be harmless)'.[78] Therefore, '[i]n general, less importance should attach to the minutiae of language'.[79]

Furthermore, the UNSC has shown something of a propensity – in order to secure the necessary consensus for the adoption of a text[80] – to provide an operational meaning to what are otherwise straightforward terms. This can be seen most clearly in the Council's practice of 'authorising' states to use 'all necessary means',[81] a formula which is now fully understood to equate to the granting of permission to the authorized states to use armed force.[82] The possibility for the provision of such a 'special meaning' is clearly provided for in the VCLT. Indeed, Article 31(4) states that '[a] special meaning shall be given to a term if it is established that the parties so intended'.[83] Such a special meaning could, of course, be provided at the time of the treaty's – or in this case UNSC resolutions – adoption, or subsequently, either through a 'subsequent agreement between the parties regarding the interpretation of [it] or the application of its provisions'[84] or alternatively – and perhaps more likely – through 'subsequent practice in the application of [it] which establishes the agreement of the parties regarding its interpretation'.[85] Upon this basis, either a mere 'call' or a more weighty 'demand' for a ceasefire in a resolution of the UNSC could give rise to binding legal obligations if either discussions leading to the adoption of the particular resolution, past practice regarding the chosen language, or subsequent practice under the wording of the particular resolution demonstrates that this is the collective intention of the Council.

However, while such an understanding regarding the phrase 'all necessary means' has been clearly established in the practice of the Council, no such understanding is apparent in connection with the terminology used in ceasefire resolutions. Instead, the practice of the UNSC seems to give rise to something of a 'semantic tangle'.[86] This tangle is evident both from a textual reading but also, and perhaps most importantly, from the expressed intention of the parties upon the adoption of a resolution containing particular terminology. For example, in the very first ceasefire resolution in the practice of the Council in connection with the conflict between the Netherlands and Indonesia during 1947–50,[87] the Council issued a 'call' for a ceasefire which was in subsequent resolutions confusingly described as both an

77 Ibid., at 82.
78 Ibid.
79 Ibid., at 95.
80 That is, nine out of the 15 members including the concurring votes of the five permanent members.
81 See C. Henderson, *The Persistent Advocate and the Use of Force: The Impact of the United States upon the* Jus ad Bellum *in the Post-Cold War Era* (2010), 37–62.
82 Ibid., at 43.
83 Although see our qualification as to the direct application of the VCLT to the interpretation of UNSC resolutions in note 23 *supra*. However, there is no reason why the rules drawn upon here are not similarly applicable to the interpretation of UNSC resolutions.
84 VCLT (1969), *supra* note 17, Art. 31(3)(a).
85 Ibid., Art. 31(3)(b).
86 Morris, *supra* note 1, at 809.
87 UNSC Res. 27 (1974).

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'order' and a 'recommendation'.[88] Although not necessarily as a consequence of this ambiguity, the conflict nevertheless continued for over three years after this initial 'call'.

As another example of this tangle, the UNSC 'called upon' the parties fighting in the Arab–Israeli War of 1973 to cease their fire in Resolution 338 (1973).[89] Interestingly, the Council made clear that this was to take effect 'no later than 12 hours after the moment of the adoption of this *decision*' (emphasis added). The Council then went on to 'confirm . . . its *decision* on an immediate cessation of all kinds of firing and of all military action' in the very next resolution.[90] So the simple 'call' was stated at the time of its adoption and subsequently to be a decision, regardless of the fact that it was not expressly adopted under any provision of the UN Charter[91] and only used the more hortatory 'call upon' language. As such, it could be argued that given the continuation of hostilities the parties were in breach of their obligations under Article 25 of the UN Charter. Indeed, the UNSC then in Resolution 340 (1973) 'noted with regret the reported repeated violations of the cease-fire in non-compliance with Resolutions 338 (1973) and 339 (1973)'[92] and went on to '*demand* that an immediate and complete ceasefire be observed',[93] with fighting eventually coming to an end two days later. While, as noted above, this ambiguity could be put down to poor drafting the ultimate result was that the legal obligations flowing from these resolutions were not clear.

Of perhaps greater significance is that disagreement has been clearly visible in the statements of states upon the adoption of a particular resolution. While discerning the intention of the parties as to the correct meaning of included terminology through preparatory materials is merely a 'supplementary means of interpretation' in the VCLT,[94] it is of vital importance in the context of UNSC resolutions given the often (intentional) ambiguity in the choice of terminology or for the use of special meanings or operational understandings of terms.[95] However, examining the meeting reports of the UNSC at the time of the adoption of the UNSC resolutions only appears to add to the ambiguity on the meaning of chosen language in ceasefire resolutions. This can be seen, for example, in the disagreement in the chamber of the UNSC over the binding nature of the 'call for' a ceasefire that was issued in Resolution 1860 (2009) in the context of the Gaza conflict of 2008–9. During the meeting where the resolution was adopted there was agreement on the fact that there must ultimately be a cessation of the violence occurring in Gaza. The US, for example, stated that 'our goals must be the stabilization and normalization

88 See UNSC Res. 32 (1947), para. 1 ('order') and para. 2 ('recommendation').
89 UNSC Res. 338 (1973), para.1.
90 UNSC Res. 339 (1973) (emphasis added).
91 See subsection 2.1, *supra*, on the Charter approach to interpretation.
92 UNSC Res. 340 (1973), preamble.
93 Ibid., at para. 1 (emphasis added).
94 VCLT (1969), *supra* note 17, Arts. 31(2)(a) and 32(a) and (b).
95 UNSC Res. 1441 (2002), which was adopted in the build-up to the war in Iraq in 2003, is another example of such 'intentional ambiguity'. See, generally, M. Byers, 'Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity', (2004) 10 *Global Governance* 165; Henderson, *supra* note 81, at 37–97.

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of Gaza through the implementation of a durable and fully respected ceasefire'.[96] However, the issue of how immediate the cessation of armed hostilities should be was more unclear. Whilst many thought that it should be 'immediate' there were also those who thought that that resolution was merely a 'step',[97] 'contribution',[98] 'promotion',[99] or 'encouragement'[100] towards this and that it would 'pave the way'[101] to a ceasefire being realized.

Furthermore, the ceasefire was described in many different ways. For example, some called it a 'decision',[102] others called it a 'formal decision',[103] while some described it as a 'formal call'[104] and others a 'strong appeal'.[105] Regardless of how it was depicted by the Council members, none of the member states expressly claimed that it was *not* legally binding or that it was merely a recommendation, although the transcripts of the meeting give rise to the impression that there was a feeling amongst many that this was the case. Indeed, some bemoaned the fact that stronger wording was not used, which is perhaps indicative of the feeling by these states that on this occasion the adopted resolution was not legally binding.[106]

Nevertheless, certain members of the UNSC were adamant that it *was* legally binding with serious consequences to follow if it was not adhered to. Indeed, the representative for Costa Rica stressed that

> It is appropriate now to underscore the *legally binding nature* of this resolution. Compliance by all parties to the conflict is *mandatory*. The parties must understand clearly that failure to comply could, and should, entail serious consequences.[107]

In a fairly contradictory manner, however, Costa Rica also went on to say that '[t]oday, after much apprehension and travail, the Council has adopted a resolution which, while not having received all the necessary political support, has tremendous *moral force*'.[108] Palestine, perhaps not surprisingly, also was of the view that what was to be adopted by the UNSC was a 'binding-resolution calling for an immediate ceasefire'.[109]

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96 UNSC 6063rd meeting, 8 January 2009, UN Doc. S/PV.6063, at 4 (United States).
97 Ibid.
98 Ibid., at 7 (Japan) and 9 (Burkina Faso).
99 Ibid., at 7 (Mexico).
100 Ibid., at 2 (President).
101 Ibid., at 10 (Saudi Arabia).
102 Ibid., at 3 (UN Secretary-General) and 7 (Costa Rica).
103 Ibid., at 7 (Japan).
104 Ibid., at 9 (Austria).
105 Ibid., at 6 (Turkey).
106 Vietnam, e.g., stated that '[m]y delegation would like to have seen a resolution with more clear-cut language, providing for an immediate ceasefire and an immediate withdrawal of Israeli forces from Gaza' (ibid., at 8), whilst Burkina Faso stated that '[w]e feel that the message could have been more clearly articulated, but we also know that the sense of urgency required compromise. Now, we need to do our utmost to ensure effective implementation of this important resolution' (ibid., at 9). See also Libya, ibid., at 5; and Turkey, ibid., at 6. The UK, on the other hand, believed that 'the United Nations has served its purpose of speaking loudly, clearly, authoritatively, and unequivocally' (ibid., at 4).
107 Ibid., at 6 (Costa Rica) (emphasis added). In terms of what these 'serious consequences' might be, Costa Rica only stated that it 'harbour[ed] the hope that the Council will also be consistent with the decision it has taken today and that it will use its authority in order to ensure respect for that decision'; see discussion *infra* in section 4 on the link between ceasefire resolutions and sanctions or other consequences.
108 Ibid. (emphasis added).
109 Ibid., at 10 (Palestine).

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While not commenting directly upon its binding nature, Mexico nonetheless was adamant that the resolution 'was negotiated through intensive consultations in the expectation that its provisions would be applied immediately on the ground'.[110] Some states stressed that it must be heeded and respected,[111] others simply urged respect for it,[112] whilst some simply expressed a hope that the parties would abide by it and that the resolution would be implemented.[113] Nevertheless, other states, including Israel itself, were not of the opinion that it contained legally binding obligations, including on Hamas, a non-state actor.[114]

2.3. The 'fully contextual' approach to interpretation

Given that the law remains unclear over the issue as to the legal nature and effect of UNSC ceasefire resolutions and that the UNSC has persisted with its ambiguous use of Charter provisions and language, it perhaps remains that in determining the legal nature of UNSC ceasefire resolutions we are left with what Rosalyn Higgins has described as the 'fully contextual approach'.[115] That is, there is not a single approach which provides a definitive conclusion as to a ceasefire resolution's legal nature, but rather that there are a host of relevant factors that must be considered, and these – and the emphasis placed upon them – will vary depending upon the context of the particular crisis. These factors might include, for example, the Charter positioning of the resolution (i.e., whether or not it was placed in Chapter VII); the general text of the resolution and whether it employs 'calls' or 'demands'; whether enforcement measures have been imposed or threatened, and in this respect the prior involvement of the UNSC or the UN more generally in the particular conflict and any determinations as to a threat to or breach of the peace; the aims and purposes of the resolution expressed within its preamble; and ultimately any signs that the resolution, and in this case the ceasefire contained within it, was intended to be legally binding and, if so, upon whom. Along these lines Michael Wood has pointed out that 'the great majority [of UNSC resolutions] deal with a particular situation or dispute'.[116] In such cases, and as a result of their political grounding, in interpreting the resolution 'it is necessary to have as full a knowledge as possible of the political background and of the whole of the Council's involvement, both prior to and after the adoption of the resolution under consideration'.[117] This, of course, broadens the scope of the enquiry away from solely examining the text of a resolution.

However, simply claiming that the legal nature of a UNSC ceasefire resolution depends upon the results of the interpreter's engagement in a fully contextual inquiry again leads to an unsatisfactory result. Indeed, without a definitive point of reference, this not only fully contextual but also fully subjective approach leaves

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110 Ibid., at 7 (Mexico).
111 Ibid., at 7 (Japan) and 10 (Palestine). See also ibid., at 3 (UN Secretary-General).
112 Ibid., at 8 (China and Uganda).
113 Ibid., at 10 (Egypt and Saudi Arabia).
114 The issue as to whether obligations could in any case be binding on such non-state actors is discussed *infra* in section 3 of this article.
115 Higgins, *supra* note 20, at 283.
116 Wood, *supra* note 16, at 79.
117 Ibid.

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it open for each individual interpreter, whether that be a member of the UNSC, a judge, an international lawyer, or, of course, a party involved in an armed conflict, to focus upon the element of the context of the adoption of the resolution which most favourably advances its position. For example, while there was near universal support for Resolution 1860 (2009) it was also clear from the statements made by the member states of the UNSC upon its adoption that different states focused upon different parts of the context in supporting it.

Costa Rica, which as noted above was adamant that the resolution was of a 'legally binding nature',[118] appeared to make such a claim on the basis that 'failure to comply could, and should, entail serious consequences'[119] and expressed a 'hope that the Council will also be consistent with the decision it has taken today and that it will use its authority in order to ensure respect for that decision'.[120] On the other hand, Vietnam appeared to question the legally binding nature of the resolution by expressing its disappointment that the resolution was not adopted 'with more clear-cut language, providing for an immediate ceasefire and an immediate withdrawal of Israeli forces from Gaza'.[121] Similarly, Burkina Faso felt 'that the message could have been more clearly articulated'.[122]

This approach also enables different interpreters to focus on the activities of a particular party to the conflict in determining upon whom it is binding. While the United States was clear that the goal must be 'the implementation of a durable and fully respected ceasefire and an end to all terrorist activities', Resolution 1860 (2009) was nonetheless only considered to be 'a step towards' achieving this goal, with emphasis placed upon Hamas for beginning the crisis and with express recognition of Israel's right of self-defence. There was thus clear recognition that the ceasefire was intended as being directed towards Hamas and would not be binding upon Israel should it be provoked again.[123] By direct contrast, it appeared from Libya's statement that 'Israeli aggression' was what the resolution was a response to so that 'the important and urgent thing now is to implement the provisions of the present resolution in such a way as to put an end to the Israeli massacre in Gaza and to halt the Israeli destruction machine'.[124] Similarly, while Palestine was adamant that the resolution was 'binding' so that Israel must put an end to its 'aggression',[125] Israel was equally adamant that it had 'no choice but to act in self-defence' given the 'eight years of continuous rocket attacks by the Hamas terrorist organization, Hamas' refusal to extend the period of calm and its smuggling of weapons during that period'.[126] Indeed, responsibility for the hostilities – and thus the intended target for the ceasefire – was claimed to lie squarely with Hamas given its terrorist activities. The problem this position raises, of course, is whether non-state actors

118 UNSC 6063rd Meeting, *supra* note 96, at 6 (Costa Rica).
119 Ibid.
120 Ibid., at 7.
121 Ibid., at 8 (Vietnam).
122 Ibid., at 9 (Burkina Faso).
123 Ibid., at 4–5 (United States).
124 Ibid., at 5 (Libya).
125 Ibid., at 10 (Palestine).
126 Ibid., at 11 (Israel).

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can be bound in the first place by ceasefire resolutions, an issue which is addressed next.

3. UN Security Council ceasefires and non-state actors

3.1. The UNSC, ceasefire resolutions, and the contemporary prevalence of non-international armed conflicts

All the problems discussed earlier take on an extra layer of complexity when applied to non-international armed conflicts, and specifically with regard to the actions of armed groups. Decades of devastating conflicts involving armed groups across the African continent, as well as conflicts in Latin America and elsewhere, and more recently during some of the 'Arab Spring', only serve to reflect what has become increasingly obvious over recent decades – we cannot speak of international security without addressing the ever-increasing effect of non-state actors on domestic and international affairs.[127]

It almost goes without saying that public international law, and especially the areas of law concerned with armed conflict and use of force, were originally envisaged as covering the sphere of international affairs and use of force between states, rather than internal violence. It is equally clear that in reality, however, non-international armed conflicts have, at times, been far more prevalent and devastating than those between states.

The practice of the UNSC demonstrates that it has not been oblivious to this state of affairs, and it has frequently been home to debates and resolutions on non-international conflicts. The conflicts addressed by the Council range from the Congo[128] and Angola[129] conflicts in the 1960s, through to the former Yugoslavia,[130] Rwanda,[131] Angola again,[132] and Somalia[133] in the 1990s, and, since the turn of the century, Burundi,[134] Sudan,[135] Côte d'Ivoire,[136] Libya,[137] and most recently Syria.[138] Notably, the Council has also taken the step of determining internal armed conflicts as threats to *international* peace and security.[139] For example, Resolution 864 (1993) finds the Council '[*d*]*etermining* that, as a result of UNITA's military actions, the

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127 See analysis of current and emerging trends in the nature of armed conflicts in A. Blin, 'Armed Groups and Intra-State Conflicts: The Dawn of a New Era?', (2011) 882 IRRC 287.
128 UNSC Res. 145 (1960); UNSC Res. 161 (1961).
129 UNSC Res. 163 (1961).
130 UNSC Res. 713 (1991); UNSC Res. 743 (1992); UNSC Res. 819 (1993); UNSC Res. 1199 (1998).
131 UNSC Res. 918 (1994).
132 UNSC Res. 851 (1993); UNSC Res. 1127 (1997).
133 UNSC Res. 733 (1992); UNSC Res. 746 (1992); UNSC Res. 886 (1993).
134 UNSC Res. 1375 (2001).
135 UNSC Res. 1556 (2004); UNSC Res. 1593 (2005).
136 UNSC Res. 1572 (2004); UNSC Res. 1633 (2005).
137 UNSC Res. 1970 (2011); UNSC Res. 1973 (2011).
138 UNSC Res. 2042 (2012).
139 UNSC Res. 163 and UNSC Res. 864; UNSC Res. 418; UNSC Res. 713; UNSC Res. 733: 'there is a common understanding, manifested by the "subsequent practice" of the membership of the United Nations at large, that the "threat to the peace" of Article 39 may include, as one of its species, internal armed conflicts'. *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94–1, Appeals Chamber, 2 October 1995, para. 30.

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situation in Angola constitutes a threat to international peace and security'.[140] Such a determination consequently allows for the Council in the same resolution to proceed to act under Chapter VII of the UN Charter.[141] There is solid ground for viewing such situations as threats to international peace and security considering the often inevitable harmful effect, at the very least on neighbouring countries, caused by such conflicts.[142] Many – if not most – of the above-mentioned conflicts did at one point spill across borders and affect other states through the movement of armed groups or the flow of substantial numbers of refugees. Instability can be contagious, and this is recognized by the UNSC's attention to internal situations. One could also argue that the involvement of the Council in internal conflicts, even if these have no overt effect on other states, is supported by the UN commitment to protection of human rights and, potentially, by the elusive but endlessly discussed 'responsibility to protect'.[143] For the current purpose it is, however, sufficient to demonstrate that the UNSC has, for many decades now, considered internal situations in light of Article 39, and thus as falling within the parameters discussed above for potentially binding ceasefire resolutions.

Ceasefires are, naturally, a frequent component in UNSC resolutions on situations of conflict, and this is equally true for non-international conflicts. Non-state actors occupy a peculiar position in the international legal framework on the use of force. Armed groups do not benefit from the rules granting states a legitimate claim to resort to force;[144] conversely, states are not as restricted in their resort to force against armed groups domestically, as they are with regard to force against other states.[145] One matter does, however, appear certain: whether or not they can ever resort to force, and regardless of the state's actions during internal conflicts, the UNSC clearly takes it upon itself to attempt to make the armed groups lay down their weapons. There is no shortage of examples of ceasefire resolutions which address not only states but also non-state actors.[146] As with the difficulties of interpretation presented earlier, here too the language is mixed: 'appealing' for a ceasefire in the Congo;[147] 'strongly urging' one in Somalia;[148] and 'demanding' ceasefires in Rwanda,[149] Kosovo,[150] Côte d'Ivoire[151] and Libya.[152] Equally, while some of the resolutions explicitly invoked

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[140] UNSC Res. 864 (1993).
[141] Ibid.
[142] On the evolvement of the concept of 'threat to the peace' see S. Talmon, 'The Security Council as World Legislature', (2005) 99 AJIL 175, at 180–1.
[143] *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (published by the International Development Research Centre, 2001); *A More Secure World: Our Shared Responsibility*, Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (2004).
[144] With the debatable exception of narrow forms of self-determination.
[145] Although international human rights law will provide an element of regulation in certain circumstances.
[146] See many of the conflicts mentioned earlier, *supra* notes 127–37, including: Congo in 1964, Somalia in 1992, Rwanda in 1994, Kosovo in 1998 and 1999, and on to Libya in 2011 and Syria in 2012.
[147] UNSC Res. 199 (1964).
[148] UNSC Res. 733 (1992).
[149] UNSC Res. 918 (1994).
[150] UNSC Res. 1199 (1998).
[151] UNSC Res. 1572 (2004).
[152] UNSC Res. 1973 (2011).

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Chapter VII of the Charter, this was far from a uniform approach, and it is not always easy to discern whether there is an implicit recognition of the underlying Charter provisions.[153] In that respect, all the debates and potential approaches for a solution as discussed earlier will apply to these resolutions. For now, however, let us assume that the earlier problems have been clarified, and we know how to recognize which resolutions are binding upon member states. The difficulty is that despite any such clarification, non-international armed conflicts will present us with further complexities. By definition, non-international armed conflicts will contain at least one party which is a non-state actor. The question then arises as to the legal powers and effects of UNSC ceasefire resolutions aimed at conflicts involving armed groups.

While the UN is not concerned exclusively with its members – a matter which will be returned to shortly – its primary remit is with regard to member states. But armed groups are not, of course, member states. In fact, there is a double problem: they are not members, and neither are they states.[154] Accordingly, it is not an entirely obvious assumption that UNSC resolutions can legally bind armed groups in complying with a ceasefire. The Council does, nonetheless, appear to consider its resolutions as binding upon armed groups and concurrently addresses both the states and non-state actors engaged in conflict.[155] Indeed, it would be hard to imagine otherwise: If the UNSC resolutions were only addressing states, then calls for a ceasefire in a non-international armed conflict would be an exercise in futility. It would also be blatantly one-sided and biased against states, by requiring the state forces to cease fighting, while not addressing the violence from the non-state actor. The principle of effectiveness (*ut res magis valeat quam pereat*) leads to the common-sense conclusion that resolutions on non-international armed conflict are designed to cover the armed groups as well as the state involved.

As an example of the practice of the Council clearly demonstrating a belief that it is capable of issuing obligations binding upon non-state actors, Resolution 918 (1994) '[*d*]*emand*[*ed*] that all parties to the conflict immediately cease hostilities, agree to a cease-fire, and bring an end to the mindless violence and carnage engulfing Rwanda'.[156] In Resolution 1244 (1999), the Council '[*d*]*emand*[*ed*] that the KLA and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization'.[157] Likewise, in Resolution 1633 (2005) on Côte d'Ivoire, the Council '*demand*[*ed*] that all Ivorian parties refrain from any use of force and violence'.[158] The formulation of language used by the Council leaves little room for doubt that it directs its language not only at states, but also at the armed groups themselves. Moreover, the Council appears to be acting under the

[153] See discussion, *supra* in section 2 of this article.
[154] They would also likely have trouble fulfilling the 'peace-loving' requirement in Article 4 of the UN Charter: 'Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.'
[155] See further discussion below.
[156] UNSC Res. 918 (1994).
[157] UNSC Res. 1244 (1999).
[158] UNSC Res. 1633 (2005).

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assumption that it is issuing binding obligations and expects them to be complied with.[159]

3.2. The legal basis for issuing binding resolutions to non-state actors

The space occupied by non-state actors within international law is a topic of much debate. Whether they might have international legal personality, and what form of it, are not entirely settled questions. There is, for example, a question over the possibility of non-state actors having obligations under international human rights law.[160] Nonetheless, one of the areas of law in which there is the strongest case for demonstrating a form of international legal personality (even if limited), is in the law of armed conflict (international humanitarian law). This body of law contains clear obligations and duties addressed to all parties to a conflict, international and non-international; since at least one of the parties in a non-international armed conflict will be a non-state actor, it is clear that international law is capable of directly addressing armed groups.[161] The notion of armed-group obligations under international humanitarian law has received specific attention, and various legal theories have been advanced over the years for the binding quality of these rules on non-state actors.[162] One of the arguments used to explain the legal binding of rebels is that they are bound as a result of being nationals of a state that is party to the instrument.[163] This line of reasoning was used to explain the basis for binding rebels with regard to Common Article 3 as well as Additional Protocol II of the Geneva Conventions. This approach has been criticized, since, in the words of Cassese, it is 'based on a misconception of the relationship between international and domestic law', leaving the armed group bound by the domestic law, while 'what is at stake in the present case is not whether rebels are subjects of domestic law, but their legal standing in *international* law – their status vis-à-vis both the lawful Government and third States and the international community at large'.[164] This criticism has been

[159] This is further apparent in the use of sanctions against non-state actors, as will be returned to in the conclusion; see also *infra* note 180; in addition, the debates surrounding the formulation of resolutions demonstrate that states consider the resolutions to obligate non-state actors. See the debates for Res. 1860 (2009) and statements by Brazil (5, S/PV.6061 Resumption 1), Costa Rica (6, S/PV. 6063), and Pakistan (10, S/PV.6061 Resumption 1).

[160] On the question of human rights obligations for non-state actors, see A. Clapham, *Human Rights Obligations of Non-State Actors* (2006); see also J. Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/8/5 (2008); For an examination of international legal personality see, generally, R. Portmann, *Legal Personality in International Law* (2010).

[161] Common Article 3 to the 1949 Geneva Conventions states that 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions'. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, entered into force Dec. 7, 1978.

[162] See A. Cassese, 'Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts', (1981) 30 ICLQ 416; A. Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations', (2006) 863 IRRC 491; S. Sivakumaran, 'Binding Armed Opposition Groups', (2006) 55 ICLQ 381; J. Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups', (2011) 882 IRRC 443.

[163] Sivakumaran, *supra* note 162, at 381–93; Clapham, *supra* note 162, at 498; Kleffner, *supra* note 162, at 445–9.

[164] Cassese, *supra* note 162, at 429 (original emphasis). Another difficulty that may arise in more recent times will be with regard to armed groups with an international profile, operating not in a single domestic legal

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responded to,[165] but perhaps the greater obstacle relates to the practical utility of this approach, as it requires eliciting a favourable response from rebel groups by informing them that they are bound by the obligations and laws taken on by the same government whom they are trying to overthrow.[166] Customary international law may be an additional avenue for binding non-state actors, although the use of customary international law to bind non-state actors who have no part in the formation of the law raises certain challenges.[167] It should also be noted that while the law may place obligations on individuals (e.g., prohibition of and criminal responsibility for war crimes), there is a separate need to demonstrate that it may bind the group as such.[168] In the context of UNSC ceasefire resolutions, this would present a similar challenge, as it is assumed that the language of the resolutions is directed at the parties to the conflict – the states and groups themselves – rather than individual participants.

These ongoing debates in the area of international humanitarian law provide for theories which might be applied to obligations imposed by the UNSC under the UN Charter, but their approach under the Charter would also present many of the same weaknesses and challenges. Moreover, these arguments cannot be symmetrically transposed to the sphere of UNSC resolutions, as they centre around questions of obligations created through both treaty law and customary international law, while the UNSC resolutions themselves (as opposed to the UN Charter and obligations therein) are a precise fit for the description of neither treaty obligations nor customary law.

In the earlier analysis the focus was upon the determination of the binding (or not) nature of a resolution for the states concerned. This was predicated on the assumption – well-grounded in the Charter[169] – that the UNSC has the power to obligate member states, and thus the primary question was how to determine whether it was doing so in a particular resolution.[170] That same presumption may, however, need to be questioned when faced with resolutions aimed at obligating non-state actors. In other words, before we arrive at the junction of determining whether

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arena, but across multiple territories of different states with different legal obligations, and thus not subject to a single uniform system of domestic law.

[165] Sivakumaran, *supra* note 162, at 384–5; Kleffner, *supra* note 162, at 447–8.

[166] An indicative situation was encountered when the National Liberation Movement of South Vietnam made it clear that they did not consider themselves bound by the obligations taken on by a government whose authority they did not respect (though they did maintain that their detainees were treated humanely). D. Forsythe, 'Legal Management of Internal War', (1978) 72 AJIL 272, at 292; However, this concern might be alleviated if the armed group sees adherence with the law as contributing to the legitimacy of their struggle. See discussion in Sivakumaran, *supra* note 162, at 386–8; Kleffner, *supra* note 162, at 446.

[167] A 'convincing theory is that [armed groups] are bound as a matter of international customary law to observe the obligations declared by Common Article 3'. *Prosecutor v. Kallon and Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals Chamber, Special Court for Sierra Leone, SCSL-2004–15-AR72(E), SCSL-2004–16-AR72(E), 13 March 2004, para. 47. See discussion of the customary-law approach in Sivakumaran, *supra* note 162, at 373–5; Kleffner, *supra* note 162, at 454–5; on the role of armed groups in the formation of international law, and suggestions for new approaches, see A. Roberts and S. Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law', (2012) 37 Yale JIL 107.

[168] Kleffner, *supra* note 162, at 449–51.

[169] UN Charter, *supra* note 8, Art. 25.

[170] See discussion in section 2 of this article, *supra*.

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a particular resolution creates a binding obligation, we must first be assured that the Council has the power to issue binding obligations directed at non-state actors. This brings us back to the earlier observation that in addition to the 'non-stateness' of the armed groups, there is also the fact that they are non-members of the UN. Assuming that armed groups can have some form of international legal personality, this question then encompasses some of the same challenges arising with respect to the creation of binding obligations for non-member states.[171] The issue at hand is whether the UN Charter empowers the UNSC to create obligations for non-members. The practice of the Council includes examples of addressing obligations towards *all* states, not only members.[172] The power to do so has been the subject of debate, for example, in the analysis of the ICJ in the *Namibia* advisory opinion.[173] While opinion on this matter is divided with regard to non-member states,[174] if accepting that the UNSC can create obligations for non-member states even absent state consent, there should be little reason not to use the same approach in order to assert the possibility of binding obligations directed at armed groups.

Under the law of treaties, when examining treaty obligations for third parties there is usually a need to establish the intention of the drafters to create such obligations, and that the third parties expressly accept the obligations and in writing.[175] The intention for the Charter, and through it the UNSC, to create obligations for non-members might be drawn from Article 2(6) of the Charter: 'The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.' This provision opens the door for the possibility of the UN attempting to control the behaviour of non-members, although it does not in fact speak of direct obligations upon the non-members themselves.[176] One possibility in this regard is to consider these same principles mentioned in Article 2(6) as reflecting customary international law, in which case they would already be binding upon non-member states.[177] Notwithstanding such an interpretation, it must be recalled that it relies on customary international law prohibitions on the resort to force, which are formulated in the context of inter-state force and not designed for regulating force by non-state actors, which was, at least at the time, envisaged as a matter of domestic law. If these are not pre-existing obligations, then returning to the approach

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[171] But see *infra* for differences that may be crucial.

[172] See the use of the phrase 'Decides that all States shall' in a number of resolutions, including: UNSC Res. 418 (South-Africa); UNSC Res. 661 (Iraq/Kuwait); UNSC Res. 1127 and 1173 (Angola); UNSC Res. 1540 (WMD); UNSC Res. 1989 (terrorism). In the last of these, operative paragraph 1 clearly addresses 'all States', while other paragraphs (e.g., 9–15) mention 'Member States', thus highlighting the difference and making clear that para. 1 is directed not only at members.

[173] *Namibia* Advisory Opinion, *supra* note 19, at para. 126.

[174] See discussion in K. Widdows, 'Security Council Resolutions and Non-Members of the United Nations', (1978) 27 ICLQ 459, at 460–2; M. Oberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ', (2006) 16 EJIL 879, at 885; S. Bohr, 'Sanctions by the United Nations Security Council and the European Community', (1993) 4 EJIL 256, at 262.

[175] VCLT, *supra* note 17, Arts. 34, 35. It is debatable whether these rules have customary status and whether they apply to non-state actors. See Cassese, *supra* note 162, at 423; Sivakumaran, *supra* note 162, at 377–9.

[176] But see Widdows, *supra* note 174, at 460–1.

[177] Shaw, *supra* note 34, at 929; I. Brownlie, *Principles of Public International Law* (2008), 628; but see Widdows, *supra* note 174, at 460; see also discussion of binding nature in Tzanakopoulos, *supra* note 34, at 78.

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mentioned earlier of searching for intent and consent, we may also find ourselves facing an obstacle of not having the element of consent by the non-state actors to be bound by such obligations. The answer to this may be found in the acceptance that, despite the oft-assumed presumption of its necessity, international law has evolved in such a way as to allow for creation of obligations even without consent. While consent traditionally plays a key role, certain approaches to the formation of customary international law, the existence of *jus cogens* rules, obligations for new states, as well as powers given to the UN to act against the wishes of individual states, all contribute to the argument that obligations can, in certain circumstances, arise without consent being given.[178] If this is the case with regard to states, then it should be all the more so when it comes to non-state actors who possess a more limited form of international legal personality, and whereby the concerns of infringing upon state sovereignty are absent.[179]

In any case, and as is the practical outcome with regard to obligations under international humanitarian law, there seems to be an assumption by international bodies ranging from the UNSC and over to international tribunals, that armed groups are bound by these obligations.[180] The ICJ appears to take the view that UNSC resolutions can be intended to create binding obligations on armed groups.[181] Despite the lack of a unanimously convincing theory, it is clear that international bodies proceed to act on the basis of armed groups being bound by international law, and the UNSC is no exception.[182] The imposition of obligations in this context might be most plausibly explained by the implied powers doctrine.[183] In virtually all matters raised above, while legal theories exist to support such obligations, none are free of controversy. They do all share, however, the possibility of corresponding interpretations that would allow for the UNSC to issue binding ceasefire obligations directed at non-state actors. Insofar as it is necessary in order to maintain international peace and security, the power to make demands upon – and indeed obligate – non-state

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[178] For detailed analysis, see D. Murray, 'Critiques Relating to the Third Party Consent Theory', PhD chapter in 'The Attribution of International Law to Armed Opposition Groups' (work in progress, on file with the authors); see discussion of consent in Shaw, *supra* note 34, at 9–11; see also J. Charney, 'Universal International Law', (2003) 87 AJIL 530.

[179] Murray, *supra* note 178.

[180] There may, however, be other reasons why there remains a need to answer the theoretical questions, at least in the area of IHL which can lead to individual criminal responsibility. See Sivakumaran, *supra* note 162, at 370–1; Kleffner, *supra* note 162, at 444–5.

[181] In the context of ruling out one form of obligation in a specific case, the ICJ appears to have accepted that obligations can be intended. Note the use of 'beyond that' in the following:

> The only point at which resolution 1244 (1999) expressly mentions other actors relates to the Security Council's demand, on the one hand, 'that the KLA and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization' (para. 15) and, on the other hand, for the 'full cooperation by all concerned, including the international security presence, with the International Tribunal for the Former Yugoslavia' (para. 14). There is no indication, in the text of Security Council resolution 1244 (1999), that the Security Council intended to impose, *beyond that*, a specific obligation to act or a prohibition from acting, addressed to such other actors.

Kosovo Advisory Opinion, *supra* note 19, para. 115 (emphasis added); but see also discussion of legal effect in Oberg, *supra* note 19, at 85–6.

[182] See examples, *supra* notes 156–9.

[183] See discussion, *supra* in subsection 2.1.4.

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actors party to an armed conflict is vital for the UNSC to effectively fulfil its primary function. So long as they are not clearly *ultra vires*, the favoured interpretation should be that which allows the Council to advance the principles for which it was created.[184]

4. Conclusion

There is clearly a considerable challenge to finding a single and agreed approach able to provide a solution for determining the legal nature of UNSC ceasefire resolutions. A final effort to overcome this obstacle might perhaps be aided via the practice of the UNSC in relation to the effect of non-compliance with a ceasefire, something which is of greatest practical concern both to international lawyers and especially to the parties themselves. As mentioned above, immediate cessation of hostilities does not appear to be a common response to a ceasefire resolution. In fact, even non-immediate responses – but within a reasonable period of time – are likely to be an exception. It is impossible to ascertain a determinative correlation between the perceived 'strength' of the ceasefire resolution, and the response of the parties. Although in some cases stronger language might be perceived as having brought about a reaction from the parties to the conflict, which earlier resolutions did not,[185] ceasefires have also followed resolutions that both 'called upon' and 'demanded'.[186] Often, it was clearer that ceasefires did not immediately follow the resolution, regardless of the language used.[187] Faced with continued hostilities, the Council has considerable powers to impose coercive measures such as sanctions or even the use of force.[188] This raises the possibility of trying to infer some tentative conclusions on the binding nature of ceasefire resolutions by assessing the correlation between the language of the ceasefire resolutions, the reference (or not) to Chapter VII of the Charter, and the imposition of enforcement measures on either or both of the belligerent parties as a result of non-compliance. Indeed, if it is those ceasefire resolutions that appear, according to the earlier analysis, to possess a binding nature that

[184] See, in another context, *Certain Expenses* Advisory Opinion, *supra* note 57 at paras. 167–168. On the need to interpret resolutions in light of the intention of the Council and the context of the UN Charter, see Wood, *supra* note 16; on the intended flexibility of the Security Council's powers, see M. Wood, 'The UN Security Council's Powers and Their Limits', in *The UN Security Council and International Law: Hersch Lauterpacht Memorial Lectures* (November 2006), para. 6.

[185] In the 1973 Arab–Israeli conflict, UNSC Res. 338 used 'calls upon', but a ceasefire only followed in UNSC Res. 340, which used the language of 'demands'. However, this in itself does not prove the ceasefire came about due to the resolution language as opposed to, for example, the result of the military battles on the ground and the political dynamics. See also earlier discussion of these resolutions, in notes 89–93, *supra*, and accompanying text.

[186] For example, Res. 203 (1965) concerning the Dominican Republic 'called for' a ceasefire and resulted in suspension of hostilities; while in Res. 1089 (1996) on Tajikistan the 'demand' resulted in a ceasefire.

[187] For example, see the resolutions on Cyprus–Turkey: Res. 353 (calls upon), Res. 354 (demands compliance with ceasefire element of 353), Res. 357 (demands), Res. 358 (insists); the resolutions on Iran–Iraq: Res. 479 (calls upon), Res. 514 (calls for), Res. 522 (urgently calls again for), Res. 582 (calls upon), Res. 588 (calls upon to implement 582), Res. 598 (1987, Chap VII (ref. is to Arts 39 and 40), demands; but still no reaction).

[188] See subsection 2.1.2, *supra*.

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are also those that are accompanied by enforcement measures for non-compliance, this could be seen as further support for their binding nature.[189]

It is of little surprise, however, that an examination of the UNSC's use of such powers in response to non-compliance with ceasefires does not paint a picture of perfect consistency. Indeed, the response of the Council in the many conflicts referenced throughout this analysis[190] ranges from no sanctions, to different types of sanctions and embargoes, and on to the authorization of force, with an apparent difference also in the Council's actions in this regard when comparing international and non-international armed conflicts.[191] Furthermore, while in some cases it may appear that the sanctions are imposed, at least in part, as a result of non-compliance,[192] sanctions have also been imposed early on, without waiting for the results of a ceasefire demand.[193]

Consequently, one should be wary of concluding that enforcement measures are necessarily imposed as a result of non-compliance with the ceasefire. Indeed, as things stand, any correlation cannot be taken as proving that the latter is a result of the former or even proving its binding nature. As a result, it is probably more correct to say that both the formulation of the ceasefire resolutions and the imposition of enforcement measures are independent results of the overall circumstances and context of the case, including the nature of the violence and the political alignment in the Council.

The practice of the Council with regard to enforcement measures linked to ceasefires does not therefore present a solution to the interpretative challenges as presented earlier. As things stand, whether employing the 'Charter', 'textual', or 'fully contextual' approaches, there will always be a struggle to discern a consistent pattern or unearth an interpretative method to provide clarity as to the binding nature of UNSC ceasefire resolutions. This result should not, however, render the initial question irrelevant. First, whether or not a ceasefire creates a binding obligation is a matter which may carry weight in other forums, such as the ICJ, in determinations as to whether international law has been violated. Second, and most importantly, the inconsistency in the linkage between ceasefire resolutions and enforcement measures might be seen as another reason to work towards greater clarity, rather than disregard the debate altogether. Indeed, clarity in meaning of UNSC ceasefire resolutions is important in the context of the rule of law and the maintenance of international peace and security, both generally and in specific cases.

While it is easy to be over-critical of the UNSC on its lack of clarity, given the decentralized and auto-interpretive nature of the international legal system in general, the lack of any universally agreed or understood methodology in this respect is not unique, or entirely unexpected. Indeed, considering the political nature of the UNSC

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189 An approach suggested by Kelsen. See H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1950), 293; Cf. Delbrück, *supra* note 26, at 456.

190 Including Angola, Sudan, Israel, Libya, Rwanda, former Yugoslavia, Somalia, Syria, and more.

191 Comparing the relative number of cases in which sanctions were imposed over the years, it appears that they are more likely in non-international armed conflicts than in international armed conflicts.

192 UNSC Res. 1556 (Sudan); UNSC Res. 864 (Angola); UNSC Res. 912, UNSC Res. 918 (Rwanda).

193 UNSC Res. 733 (Somalia).

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and its mode of operation, some may despair of expecting clarity and consistency in its practice. Yet, if members of the UNSC desire their ceasefire resolutions to have greater impact, such clarity must be sought by all those who engage in the process and hope for an effective outcome. Although perhaps an unlikely event, such clarity could be achieved first and foremost by the Council expressly clarifying the situation, for example, in a presidential statement. Furthermore, while we can witness this ambiguity also in other areas of UNSC practice, the establishment of common understandings in the practice of the UNSC, as highlighted above, *is* possible.[194] The development of an operational understanding founded on an element of consistency in practice and self-clarification by the Council could perhaps serve as the most feasible solution. Indeed, the practice of employing the language of 'demand', for example, could be developed into such an understanding. However, given the urgency of ceasefires in nearly all of the situations in which they are adopted, as well as the effects that this would have on developing a common understanding, it is not just clear meanings which should be seen as an urgently needed development, but also clear consequences if not adhered to. In this respect, and given that the primary concern for the belligerent parties is arguably the possibility or prevention of sanctions or other coercive measures, if greater consistency can be developed in the linkage between ostensibly binding ceasefire resolutions and the imposition of enforcement measures, for example, there would not only be greater clarity on the law, but also greater prospects that warring parties would heed the call to lay down their arms. Until that time, and as highlighted in the case of Syria, any sort of peace will be more a result of the will of the parties than of the will of the Council.

[194] Cf Orakhelashvili, *supra* note 14, at 38.

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