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The Interpretation of Security Council Resolutions, Revisited

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Abstract

This article first considers whether there is any general theory of interpretation in international law. After revisiting the way in which Security Council resolutions are drafted, it reviews developments in regard to the interpretation of Security Council resolutions, including controversies, case-law, and writings. Also considered is the relevance to the subject of the Dutch and United Kingdom Iraq inquiries. The conclusions re-examine, and largely confirm, the approach taken in an article published in 1998.

Keywords

Security Council – Interpretation – Resolutions – Vienna Convention – Kosovo Opinion – Iraq

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While the rules on treaty interpretation embodied in Articles 31 to 33 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a process that is very different from that used for the conclusion of a treaty.¹

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¹ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403 at 442, para. 94.

I Introduction

In a celebrated opinion of the UK Privy Council, from the 1930s, their Lordships were ‘almost tempted to say that a little common sense is a valuable quality in the interpretation of international law.’² This is certainly the case with Security Council resolutions. But, at least when matters come under the scrutiny of a court, or a detailed public inquiry, common sense cannot be the end of the story. Something more rigorous is needed if the process is to be convincing.

This article seeks to update a piece on the interpretation of Security Council resolutions that appeared in this Yearbook nearly twenty years ago.³ Developments since then include the ICJ’s *Kosovo* Advisory Opinion of 22 July 2010, and decisions of other courts and tribunals, such as the 16 February 2011 Interlocutory Decision of the Appeals Chamber of the Special Tribunal for Lebanon, and various decisions of the European Court of Human Rights, including the *Al-Dulimi* judgment of 21 June 2016. There have also been many controversies over the interpretation of particular resolutions, including those over resolution 1441 (2002) and the invasion of Iraq; the scope of resolution 1973 (2011) on Libya; and the effect of resolution 2249 (2015) on the use of force against Da’esh.

The 1998 article highlighted the need, when interpreting Security Council resolutions, for an understanding of the role of the Security Council under the UN Charter, as well as its working methods and the way resolutions are drafted. It also emphasized the need to have particular regard to the background of a Security Council resolution, both the overall political landscape and related Council action. The following ‘tentative’ conclusions were suggested:

- (a) The aim of interpretation should be [...] to give effect to the intention of the Council as expressed by the words used by the Council in the light of the surrounding circumstances.
- (b) The interpreter will, even if this is not expressly stated, seek to apply the general principles of interpretation as they have been elaborated in relation to treaties [...].
- (c) But caution is required. SCRs are not treaties: indeed the differences are very great. Nor are SCRs necessarily all of the same nature. SCRs must be interpreted in the context of the United Nations Charter. It becomes

² *Re Piracy Jure Gentium* [1934] AC 586; JCPC [1934] UKPC 54 (26 July 1934) at 6.

³ M. Wood, ‘The Interpretation of Security Council Resolutions’ in J.A. Frowein and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law* vol. 2 (Kluwer Law International 1998) 73.

highly artificial, and indeed to some extent is simply not possible, to seek to apply all the Vienna Convention rules *mutatis mutandis* to SCRs.

(d) In the case of SCRs, given their essentially political nature and the way they are drafted, the circumstances of the adoption of the resolution and such preparatory work as exists may often be of greater significance than in the case of treaties. The Vienna Convention distinction between the general rule and supplementary means has even less significance than in the case of treaties. In general, less importance should attach to the minutiae of language. And there is considerable scope for authentic interpretation by the Council itself.⁴

The structure of the present article is as follows. *Section I* asks whether there is any general theory of interpretation in international law. *Section II* revisits the way in which Security Council resolutions are drafted. *Section III* reviews some developments in regard to the interpretation of Security Council resolutions, including certain controversies, recent case-law, and writings. *Section IV* considers the relevance to the subject of the Dutch and United Kingdom Iraq inquiries. *Section v* largely confirms the approach in the 1998 article.

Security Council resolutions continue to play an important part in international affairs. Increasing attention is paid to the many important legal and political issues raised by the action (and inaction) of the Security Council.⁵ These include questions of legality and 'legitimacy';⁶ the place of resolutions among the sources of international law;⁷ the powers of the Security Council, in particular its power to take binding decisions, and how to know when it has

4 Wood, 'The Interpretation of Security Council Resolutions' 95.

5 See D.M. Malone (ed.), *The UN Security Council: From Cold War to the 21st Century* (Lynne Rienner Publishers 2004); L. Sievers and S. Daws, *The Procedure of the UN Security Council* (OUP 2014), and the updates at <http://www.scprocedure.org> (accessed 9 April 2017); S. von Einsiedel, D.M. Malone and B. Stagno Ugarte (eds), *The UN Security Council in the 21st Century* (Lynne Rienner Publishers 2016).

6 Legitimacy and legality are sometimes (deliberately) blurred. They should not be. See the exchange between Sir Lawrence Freedman and Elizabeth Wilmshurst at the UK Iraq Inquiry: Iraq Inquiry, Transcript Wilmshurst (26 January 2010) 12 (line 5) – 13 (line 13), at <http://www.iraqinquiry.org.uk/media/95214/2010-01-26-Transcript-Wilmshurst-S3.pdf> (accessed 9 April 2017). See also A.E. Roberts, 'Legitimacy vs Legality: Can Uses of Force be Illegal but Justified?' in P. Alston and E. MacDonald (eds), *Human Rights, Intervention, and the Use of Force* (OUP 2008) 179.

7 H. Thirlway, *The Sources of International Law* (OUP 2014) 21–23; A. Pellet, 'Art. 38' in A. Zimmermann et al., *The Statute of the International Court of Justice. A Commentary* (OUP 2012) 767.

done so;⁸ the scope of the term ‘threat to the peace’ in Art. 39 of the Charter; the ‘quasi-judicial’ and ‘legislative’ roles that some believe the Council has asserted; possible limits on the powers of the Council; the hierarchy between Council decisions and other rules of international law, including the effect of Art. 103 of the Charter and *ius cogens*; and the question of the possible judicial review of Council decisions. Many of these issues are related to interpretation, but have been dealt with elsewhere.⁹ The present article, like its predecessor, is confined to the identification of rules for the interpretation of Security Council resolutions.

II Is There a General Approach to Interpretation in International Law?

Questions of interpretation of Security Council resolutions arise increasingly frequently, and in important contexts. The legal controversy over the invasion of Iraq in March 2003 turned essentially on the interpretation of a series of Security Council resolutions, culminating in resolution 1441 (2002). The interpretation of resolution 1244 (1999) played a central role in the *Kosovo Advisory Opinion*.¹⁰ These are high-profile examples, but nowadays international lawyers and others, including domestic courts in many jurisdictions, are routinely called upon to interpret and apply resolutions of the Security Council, for example when considering the application of the many United Nations, European Union and national sanctions regimes.

The importance of interpretation for the practising lawyer is clear.¹¹ A great deal of time is devoted to interpreting treaties, diplomatic correspondence,

8 Sievers and Daws, *The Procedure of the UN Security Council* at 380–393.

9 M. Wood, ‘The UN Security Council and International Law’ (2006), available at <http://www.lcil.cam.ac.uk/events/lauterpacht-lectures-2006-united-nations-security-council-and-international-law-sir-michael-w> (accessed 9 April 2017). It is intended to publish an updated version of these lectures in the Hersch Lauterpacht Memorial Lectures Series (CUP).

10 S. Murphy, ‘Reflections on the ICJ Opinion on Kosovo: Interpreting Security Council Resolution 1244 (1999)’ in M. Milanović and M. Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP 2015) 134.

11 As Elihu Lauterpacht has put it, ‘interpretation is perhaps the central process in the application of international law. As such, it is not limited to the interpretation of treaties by judicial bodies. It extends, as regards actors, to States in the determination of their individual positions and to organs of international organizations; it extends, as regards subject matter, to resolutions adopted in international organizations and unilateral

government statements, and resolutions of international organizations and conferences. Practitioners may do so consciously, particularly when a provision or statement is obscure, or when a matter comes before a court or tribunal. More often, especially when things are urgent or seem obvious, they are hardly conscious of the process of interpretation.

The question is sometimes asked whether there are generally applicable rules of interpretation in international law, and if so what they are.¹² It seems likely that there are not, beyond the basic injunction that interpretation must be carried out in good faith. What that implies in any particular case is not always easy to say. But, at a minimum, the interpreter should approach the task honestly, and not distort the interpretation to reach a predetermined result.

Addressing Security Council resolutions, the ICJ made clear, in the *Kosovo Advisory Opinion*, that the rules on treaty interpretation embodied in the Vienna Conventions on the Law of Treaties¹³ may provide guidance, but that other factors have to be taken into account.¹⁴ The rules in the Vienna

declarations of States. It embraces also the attribution of specific content in particular situations to such general concepts as equity, fairness, proportionality and so on.' 'Foreword' in A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) ix.

12 S. Sur, *L'interprétation en droit international public* (Librairie générale de droit et de jurisprudence 1974); R. Kolb, *Interprétation et création du droit international* (Bruylant 2006); 'Dossier: Les techniques interprétatives de la norme internationale' (2011) 115 RGDI 291.

13 The rules set forth in Arts. 31 and 32 of the Vienna Convention on the Law of Treaties (concluded 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 20 March 1986, not yet entered into force) (1986) 25 ILM 543 (the Vienna Convention rules) are widely acknowledged to be rules of customary international law. See R. Gardiner, *Treaty Interpretation* (OUP 2015) at 12–17. The ICJ has so held on many occasions, as have other international courts and tribunals. See also Draft Conclusion 2 [1], para. 1 (with commentary) of the Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, as adopted on first reading by the International Law Commission, UN ILC 'Report of the International Law Commission: 68th Session' (2 May–10 June and 4 July–12 August 2016) GAOR 71st Session, para. 76.

14 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* [2010] ICJ Rep 403, at 442, para. 94. Cf. M. Wood, 'Iraq Inquiry, [First] Statement by Sir Michael Wood' (15 January 2010) para. 18 (<http://www.iraqinquiry.org.uk/media/43477/wood-statement.pdf> (accessed 9 April 2017)): 'While international law has developed rules for the interpretation of treaties (codified in the Vienna Convention on the Law of Treaties of 1969), there are no similarly authoritative rules for the

Convention do not apply directly to the interpretation of other non-treaty instruments, and they cannot all be applied by analogy. Indeed, even in the case of treaties, special rules of interpretation may apply to different categories of treaties, such as the constituent instruments of international organizations.

Other instruments where different approaches to interpretation may be appropriate include declarations accepting the compulsory jurisdiction of the ICJ (under the Optional Clause), as the ICJ explained in the *Fisheries Jurisdiction* case;¹⁵ other unilateral acts, a matter dealt with by the ILC in 2006;¹⁶ the interpretation of reservations to treaties, considered by the ILC in its Guide to Practice of 2011;¹⁷ the interpretation of judicial, arbitral and other third-party decisions;¹⁸ the interpretation of the internal law of international organizations, such as rules of procedure, staff regulations and rules, and financial regulations; and the interpretation of resolutions adopted by the organs of universal and regional international organizations.¹⁹ There are great

interpretation of SCRs. Some guidance may be found in the Vienna Convention rules, but account needs to be taken of the differences between SCRs and treaties. Given the way SCRs emerge, and that for the most part they are intended to be political documents, one should not expect them to be drafted with the same attention to legal detail and consistency as is usual in the case of a treaty or Act of Parliament.'

- 15 *Fisheries Jurisdiction (Spain v. Canada) (Jurisdiction of the Court)* [1998] ICJ Rep 432, at 452–456, paras. 42–56. 'The regime relating to the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties [...]. The Court observes that the provisions of that Convention may only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction' (ibid. 453, para. 46).
- 16 UN ILC 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations' Yearbook of the International Law Commission [2006] vol. II Part II, 164, Principle 7 (with commentary).
- 17 'Guide to Practice on Reservations to Treaties' guideline 4.2.6 (with commentary) in UN ILC 'Report of the International Law Commission: 63rd Session' (26 April–3 June and 4 July–12 August 2011) GAOR 66th Session, Supp 10, Addendum UN Doc. A/66/10, Add.1, 467–472. Guideline 4.2.6 reads: 'A reservation is to be interpreted in good faith, taking into account the intention of its author as reflected primarily in the text of the reservation, as well as the object and purpose of the treaty and the circumstances in which the reservation was formulated.'
- 18 K.H. Kaikobad, *Interpretation and Revision of International Boundary Decisions* (CUP 2007) at 175.
- 19 See H.G. Schermers and N.M. Blokker, *International Institutional Law* (Nijhoff 2011) paras. 1346–1350A.

variations among this last category. One can hardly compare the way in which secondary legislation of the European Union is interpreted by the Court of Justice of the European Union to the approach of the ICJ to resolutions of the General Assembly or Security Council.

In its 2011 Advisory Opinion, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea was called upon to interpret regulations adopted by the Council of the International Seabed Authority (the 'Mining Code'). The Chamber stated that:

The fact that these instruments are binding texts negotiated by States and adopted through a procedure similar to that used in multilateral conferences permits the Chamber to consider that the interpretation rules set out in the Vienna Convention may, by analogy, provide guidance as to their interpretation.²⁰

Thus the Seabed Disputes Chamber, like the ICJ in the *Kosovo* Advisory Opinion, stated that the provisions of the Vienna Convention may 'provide guidance.' It did not suggest that they were applicable as such. However, the Chamber further noted that:

In the specific case before the Chamber, the analogy is strengthened because of the close connection between these texts and the Convention.²¹

The ILC, in its 2006 Guiding Principles Applicable to Unilateral Declarations, said that

[i]n the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated.²²

²⁰ *Responsibilities and Obligations of States with Respect to Activities in the Area (Advisory Opinion)* (1 February 2011) (2011) ITLOS Reports 10, 29, para. 60.

²¹ Ibid.

²² Principle 7 of the UN ILC 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations' Yearbook of the International Law Commission [2006] vol. 11 Part 11 164.

The commentary to this Principle²³ cites the case-law of the ICJ, including *Nuclear Tests*,²⁴ *DRC v. Rwanda*,²⁵ *Burkina Faso v. Mali*,²⁶ and *Fisheries Jurisdiction (Spain v. Canada)*.²⁷ This is a very different approach from that set out in Arts. 31 to 33 of the Vienna Convention on the Law of Treaties.

So, as a first conclusion, it would seem unhelpful to seek to place the interpretation of Security Council resolutions within the context of some overarching theory of interpretation in international law, though guidance may be found in interpretation in other contexts, including treaty interpretation.

It may even be that one should not look for a single approach to interpretation for all Security Council resolutions, given their variety. They range from the purely political (and indeed ephemeral), such as the condemnation of a particular terrorist attack, through rather solemn but sometimes vacuous 'declarations' on thematic issues (akin to certain General Assembly declarations); through essentially operational instruments, such as those authorizing the use of force, dealing with the mandates of peace-keeping operations, or imposing economic and other measures in particular situations or more generally; to what look very much like treaties, such as the Statutes of the *ad hoc* criminal tribunals. In its Decision of 8 November 2001 in the *Milošević* case, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia indeed affirmed that 'the Statute of the International Tribunal is interpreted as a treaty.'²⁸ The Statute (like that of the Rwanda Tribunal) is an unusual kind of text to find incorporated directly or by reference into a Security Council resolution, to which the treaty approach might be appropriate. This may go some way to explaining the approach of the Special Tribunal for Lebanon referred to below. So any general approach to the interpretation of Security Council resolutions will have to give way to particular considerations (but then the same is

23 Paragraph (2) of the commentary to Principle 7 of the UN ILC 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations' Yearbook of the International Law Commission [2006] vol. II Part II 165. See C. Eckart, *Promises of States under International Law* (Hart 2012) at 211–228.

24 *Nuclear Tests (Australia v. France)* [1974] ICJ Rep 253, 267, para. 44; *Nuclear Tests (New Zealand v. France)* [1974] ICJ Rep 457, 472–473, para. 47.

25 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (*Jurisdiction of the Court and Admissibility of the Application*) [2006] ICJ Rep 6, 26–27, paras. 50 and 52.

26 *Frontier Dispute (Burkina Faso/Republic of Mali)* [1986] ICJ Rep 554, 574, para. 39.

27 *Fisheries Jurisdiction (Spain v. Canada)* (*Merits, Judgment of 4 December 1998*) [1998] ICJ Rep 432, 453, para. 46.

28 *Prosecutor v. Slobodan Milošević (Decision on Preliminary Motions)* IT-02-54 (8 November 2001) para. 47.

true in respect of the interpretation of treaties in accordance with Arts. 31 to 33 of the Vienna Conventions.)²⁹

III The Drafting of Security Council Resolutions

It is likewise difficult to generalize about the drafting of Security Council resolutions. While most are drafted by Permanent Missions in New York (with close involvement of at least some capitals), some are prepared under quite different circumstances.³⁰ For example,

the negotiation of SCR 1441 was wholly exceptional, with Washington firmly in the lead and key negotiations taking place directly between foreign ministers, and often on the telephone. The negotiating process was quite different from that for other SCRs, such as SCRs 1154, 1205, the 'second' resolution in early 2003, and subsequent resolutions on Iraq adopted in 2003/04.³¹

In 2010, the Security Council described some measures concerning the preparation of its resolutions (and Presidential statements) in a Note by the President of the Council ('Note 507').³² This stated, *inter alia*, that 'all members of the Security Council should be allowed to participate fully in the preparation of [...] all resolutions, presidential statements and press statements of the Council' and 'reaffirm[ed] that the drafting of all documents such as resolutions and presidential statements as well as press statements should be carried out in a manner that will allow adequate participation of all members of the

²⁹ See, for example, Art. 5 of the Vienna Convention on the Law of Treaties.

³⁰ Sievers and Daws, *The Procedure of the UN Security Council* at 393–397.

³¹ M. Wood, 'Iraq Inquiry: Third Written Statement by Sir Michael Wood' (15 March 2011) 1, available at <http://www.iraqinquiry.org.uk/media/96182/2011-03-15-Statement-Wood-3.pdf> (accessed 9 April 2017). On the negotiation of UNSC resolution 1441 (2002) see the Chilcot Report, Section 3.5 'Development of UK Strategy and Options, September to November 2002 – the Negotiation of Resolution 1441,' available at http://www.iraqinquiry.org.uk/media/248176/the-report-of-the-iraq-inquiry_section-35.pdf (accessed 9 April 2017). For one New York insider's view of the negotiation, see J. Greenstock, *Iraq. The Cost of War* (William Heinemann 2016) Chapter 7 (at 121–122, 'the trickiest textual negotiation of my time in New York').

³² UNSC 'Note by the President of the Security Council' (26 July 2010) UN Doc. S/2010/507, reproduced in *The Security Council. Working Methods Handbook* (United Nations 2012).

Council.’³³ Note 507 goes on to say that the members of the Council ‘intend to informally consult with the broader United Nations membership [...], as well as with regional organizations and Groups of Friends, when drafting, inter alia, resolutions, presidential statements and press statements.’³⁴ How far these measures apply in practice is open to question.

There is no equivalent, within the United Nations, of the legislative draftsmen to be found in national systems; nor is there any legal-linguistic review such as happens within the institutions of the European Union. Lawyers from the United Nations Secretariat are rarely involved in the drafting. Legal input is left to the members of the Council, in particular those with lawyers on their delegations, to do the best they can, often under severe time and political pressure. Security Council resolutions may be drafted in a matter of hours, without going through lengthy scrutiny like most treaties and national legislation. And on those occasions when they are subject to detailed consideration (and that can last weeks or even months), this may lead to the ambiguities inherent in political compromise and consensus, not to clarity.

Given the haste with which resolutions are ultimately adopted (even where negotiations may stretch over weeks), it can happen that the language versions do not correspond. If, as is often the case, the text is negotiated primarily in English, who prepares the other five language versions? Is it the UN translators, or the delegations speaking the language concerned? And does anyone check the translations? It was suggested in the 1998 article that ‘it would be even more unrealistic in the case of a SCR than in the case of a treaty to ignore the fact that some versions are mere translations [...] of the version or versions in which the draft was negotiated.’³⁵ Significant discrepancies are not infrequent. For example, the crucial term ‘material breach’ in resolution 1441 (2002), a term of art taken from Art. 60 of the Vienna Convention on the Law of Treaties, appears as ‘*violation patente*’ in the French text, which is not the term in the French text of the Vienna Convention (‘*violation substantielle*’).

The drafting of Security Council resolutions is often a highly politicized process,³⁶ with a desire for consensus being more important than legal precision. Clarity may not be possible on every occasion, but every effort

33 Ibid., para. 42.

34 Ibid., para. 43.

35 Wood, ‘The Interpretation of Security Council Resolutions’ 88.

36 For personal accounts of the drafting of UNSC resolution 1441 (2002), see J. Straw, *Last Man Standing: Memoirs of a Political Survivor* (Pan 2012) at 377–381; J. Greenstock, *Iraq. The Cost of War* (William Heinemann 2016) at Chapter 7. UNSC resolution 1244 (1999) (on Kosovo) was negotiated largely among eight foreign ministers at a two-day contact group meeting in Bonn and Cologne.

should be made to avoid ambiguities that may prolong the problem rather than solve it.

There is rarely any direct evidence of the drafting process on the public record, though occasionally the records of Security Council meetings may shed important light on individual drafting points. The memoirs of those involved can be interesting (though, as with any recollections of negotiators, they may give a partial view). In his 2008 book, *New Disorder*, David Hannay, UK Permanent Representative in New York from 1990 to 1995, describes the negotiation of Security Council resolution 672 (1990). This was adopted unanimously in the aftermath of the 8 October 1990 shootings at the Haram Al-Sharif in Jerusalem. In paragraph 2 of the resolution, the Security Council '[c]ondemns especially the acts of violence committed by the Israeli security forces resulting in injuries and loss of human life.' In the next paragraph, the Council referred to the Fourth Geneva Convention, 'which is applicable to all the territories occupied by Israel since 1967.' Hannay, who was Council President at the time, recounts how the Americans insisted that the Council should also condemn Palestinian use of violence, but eventually settled for the word 'especially' in paragraph 2 of the resolution. And he further describes American opposition to referring expressly to East Jerusalem as part of the occupied Palestinian territories. The solution here was not to refer to East Jerusalem in the text of the resolution, but for Hannay, as Council President, to respond, at the meeting of the Council at which the resolution was adopted, to a question by stating that it was indeed the Council's view that East Jerusalem was part of the territories occupied by Israel in 1967. This example illustrates the importance of understanding the negotiating dynamics leading to the text of a particular resolution, and of statements made during Council meetings.

There are no agreed rules or practices for the drafting of Security Council resolutions. While some general drafting practices are apparent, they are not adhered to with absolute uniformity, and may change over time, not least because the individuals involved change. An important example is how, if at all, the Council states the legal basis for its action. In recent years it has sometimes reverted to the earlier practice of indicating the article or articles of the Charter under which it is acting. More often there is a general reference to Chapter VII. And frequently (though not usually when acting under Chapter VII) nothing is said at all.

Whether provisions of a Security Council resolution are legally binding on Member States is one of the more important questions of interpretation that arises in practice.³⁷ Until the *Kosovo* Opinion this was the only question of

37 Sievers and Daws, *The Procedure of the UN Security Council* at 382–393.

interpretation of Security Council resolutions for which the ICJ had provided any real guidance.

It should be relatively simple to work out whether a provision in a Security Council resolution is legally-binding. But that is not always the case, largely because of political considerations that impact on the negotiating process. It has been suggested that one has to look for three elements in order to determine whether a resolution is binding under Chapter VII of the Charter.³⁸ *First*, a *determination* by the Council, under Art. 39 of the Charter, of the existence of a threat to the peace, breach of the peace, or act of aggression. *Second*, evidence that the Council is indeed *acting under Chapter VII*. And *third*, evidence that the Council has taken a *decision* within the meaning of Art. 25 of the Charter.

Yet, at the end of the day, there are no hard and fast rules. There are only elements that provide greater or lesser clarity. But clarity is important, especially when legal obligations are at issue, and when courts may be involved. Building up a consistent and transparent practice is desirable in principle, even if absolute consistency may well be unrealistic in practice. As a 2008 study by Security Council Report concluded:

As a matter of policy, the clearer the language adopted, the better the prospects for effectiveness and credibility of Council decisions.³⁹

IV Developments in Regard to the Interpretation of Security Council Resolutions

There are no rules in the UN Charter on the interpretation of Security Council resolutions. The rules in the 1969 and 1986 Vienna Conventions on the Law of Treaties in terms apply only to treaties between States, between States and international organizations or between international organizations. The ICJ was clear in the *Kosovo* Opinion that the Vienna Convention rules could not be applied to Security Council resolutions *tout court*.⁴⁰

38 Wood, 'The UN Security Council and International Law' (2006). I leave aside, as beyond the scope of this article, the controversial question whether the Security Council may adopt binding decisions other than under Chapter VII, on which see the *Namibia* Advisory Opinion and the reactions of States thereto: Sievers and Daws, *The Procedure of the UN Security Council* at 383–385.

39 Security Council Report 'Special Research Report: Security Council Action under Chapter VII: Myths and Realities' (23 June 2008) 36.

40 See below.

Many of the differences of view that emerge over the interpretation of Security Council resolutions are resolved behind closed doors, and so are not easy to study.⁴¹ Anecdotal evidence is hardly reliable. The UN Legal Office may occasionally give advice on the subject, but this too is rarely published. States seldom explain, publicly or in depth, their approach to the interpretation of Security Council resolutions, though the debate over the meaning of resolution 1441 (2002), including in the course of the Dutch and UK Inquiries, was something of an exception. Case-law is potentially a more fruitful field. The judgments of both domestic and international courts shed useful light on the matter, but are rarely explicit in the methods employed. Not much is to be gleaned from writings.

This section begins with a couple of selected differences of view on the interpretation of particular resolutions: resolution 1509 (2003) on Liberia; and resolution 2249 (2015) on the use of force against Da'esh in Syria.

In resolution 1509 (2003) the Security Council seems to have intended to authorize the UN Mission in Liberia to use force in carrying out its mandate, but did not include the term 'all necessary means/measures.' The UN Office of Legal Affairs advised that it did not follow from the fact that no such express wording appears in the resolution that the Security Council has not exercised that power and granted such authorization. Whether it had done so depended upon the interpretation of the resolution, specifically, on the ordinary and natural meaning which is to be given to its terms when read in the context of the resolution as a whole and in the light of its object and purpose, and against the background of the discussions leading to, and the circumstances of, its adoption, in particular the report that the Secretary-General submitted pursuant to resolution 1497 (2003).⁴²

Resolution 2249 (2015) was adopted unanimously on 20 November 2015, and was followed closely by the decisions of the United Kingdom and

41 For a public difference of view, between France and Russia, over the application of the arms embargo on Libya imposed by paragraph 9 of UNSC resolution 1970 (2011) in light of the 'all necessary measures' authorization in paragraph 4 of UNSC resolution 1973 (2011), see P. Weckel, 'Libye, la question de la légalité de la livraison directe d'armes par la France à la résistance' (2011) *Bulletin Hebdomadaire Sentinelle* No. 273.

42 'United Nations Mission in Liberia (UNMIL) – Authorization by the Security Council to Use Armed Force in Situations Other than Self-Defence – Interpretation of Security Council Resolution 1509 (2003) of 19 September 2003 – Ordinary and Natural Meaning Given to Terms When They Are Read in the Context of a Resolution as a Whole and in Light of Its Object and Purpose – History and Circumstances of the Adoption of a Resolution' (2003) *United Nations Juridical Yearbook* 538–539.

Germany – and others, including Denmark, Norway and Belgium – to step up their military activities in relation to Da'esh in Syria.⁴³

The resolution was the subject of much instant comment in legal blogs and articles (and by politicians), which described it as ambiguous, a hybrid, confusing etc. It has even been suggested that it 'might also portend a new blurring of the long-standing bright line between Chapter VII resolutions that authorize force and those that do not.'⁴⁴ On the other hand, it has been viewed as a welcome development in Security Council practice.⁴⁵

Resolution 2249 (2015) was a French-driven text adopted seven days after the atrocities in Paris on the evening of 13 November 2015. It was adopted unanimously. In it, the Security Council reaffirmed 'that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security.' It determined that Da'esh 'constitutes a global and unprecedented threat to international peace and security.' It noted letters from the Iraqi authorities 'which state that Da'esh has established a safe haven outside Iraq's borders that is a direct threat to the security of the Iraqi people and territory.' It unequivocally condemned the terrorist attacks perpetrated by ISIS in Sousse, in Ankara, over Sinaï, in Beirut and in Paris, among others, and said it has the capability and intention to carry out further attacks. In its key provision, paragraph 5, the Security Council:

Calls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, [...], on the territory under the control of [...] Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed

43 M. Wood, 'The Use of Force in 2015 with Particular Reference to Syria' (5 January 2016) Hebrew University of Jerusalem Legal Studies Research Paper Series No. 16–05, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2714064 (accessed 9 April 2017); M. Wood, 'The Use of Force against Da'esh and the *Jus ad bellum*' (2017) 1 Asian Yearbook of Human Rights and Humanitarian Law.

44 A. Deeks, 'Threading the Needle in Security Council Resolution 2249' (25 November 2015) Lawfare, available at <https://www.lawfareblog.com/threading-needle-security-council-resolution-2249> (accessed 9 April 2017); P. Hilpold, 'The Fight against Terrorism and SC Resolution 2249 (2015): towards a More Hobbesian or a More Kantian International Society?' (2015) 55 Indian Journal of International Law 535; P. Hilpold, 'The Evolving Right of Counter-Terrorism: an Analysis of SC Resolution 2249 (2015) in View of Some Basic Contributions in International Law Literature' (2016) 24 Questions of International Law (QIL) Zoom-out 15.

45 M. Wood, 'The Use of Force against Da'esh and the *Jus ad bellum*' (2017) 1 Asian Yearbook of Human Rights and Humanitarian Law.

specifically by [...] Da'esh as well as [others], and to eradicate the safe haven they have established over significant parts of Iraq and Syria.

It will be seen that the Security Council did not authorize the use of force with resolution 2249. It did not purport to do so. Instead, it *'call[ed] upon'* States to take 'all necessary measures' (which include the use of force) 'in compliance with international law' on the territory under the control of Da'esh in Syria and Iraq, to prevent and suppress terrorist acts and, most importantly to eradicate ISIS's safe haven.⁴⁶ This call was reiterated one month later in Security Council resolution 2254 (2015),⁴⁷ and yet again a year later in Security Council resolution 2332 (2016).⁴⁸

The adoption of resolution 2249 led to some rather transparent 'straw-man' arguments. It has been asserted that the resolution was not adopted under Chapter VII of the Charter, and that consequently it did not authorize the use of force. But no State suggested that it did. It has been pointed out that although resolution 2249 uses 'Chapter VII language' the Council did not state

46 For the French view of UNSC resolution 2249 (2015), see F Alabrune, 'Fondements juridiques de l' intervention militaire française contre Daech en Irak et en Syrie' (2016) 120 *Revue générale de droit international public* (2016) 41: 'La résolution n'est cependant pas placée explicitement sous chapitre VII de la Charte. Par ailleurs, le Conseil 'demande' aux Etats de prendre les mesures nécessaires. La résolution ne précise pas que le Conseil 'autorise' ces mesures, ni n'en 'décide,' selon les formules traditionnellement employées par le Conseil de sécurité pour autoriser le recours à la force. Il n'en demeure pas moins que, par la résolution 2249, le Conseil formule, de manière unanime, une demande claire portant sur le recours à la force contre Daech sur le territoire contrôlé par cette organisation en Irak et en Syrie. Ceci manifeste le soutien du Conseil de sécurité aux actions entreprises, y compris par la France, sans pour autant écarter leur base juridique antérieurement invoquée' (note omitted).

47 Paragraph 8 of UNSC resolution 2254 (2015) 'Middle East (Syria)' (18 December 2015) reiterated the call in UNSC resolution 2249 (2015) 'Threats to International Peace and Security Caused by Terrorist Acts' (20 November 2015).

48 In the sixth preambular paragraph of UNSC resolution 2332 (2016) 'The Situation in the Middle East (Syria)' (21 December 2016), the Security Council, while noting 'the progress made during 2016 in taking back areas of Syria from the Islamic State in Iraq and the Levant (ISIL, also known as Daesh), and Al-Nusrah Front (ANF),' expressed its grave concern 'that areas remain under their control and about the negative impact of their presence, violent extremist ideology and actions on stability in Syria and the region, including the devastating humanitarian impact on the civilian populations which has led to the displacement of hundreds of thousands of people' and called for 'the full implementation of Security Council resolutions 2170 (2014), 2178 (2014), 2199 (2015), 2249 (2015) and 2253 (2015).'

that it was 'acting under Chapter VII.' Yet to say that resolution 2249 was not adopted under Chapter VII is probably wrong. There was, for example, a clear determination of a threat to international peace and security, as required by Art. 39. But the question whether it was adopted under Chapter VII is a false issue. 'Call upon' (although it is the language in Art. 42 of the Charter) is not generally intended to indicate a legally binding decision. It has more the sense of strongly urging. There is no hint in resolution 2249 of an authorization by the Council. On the contrary, the call is to act in conformity with international law. All this is no doubt rather clear to Governments, and is presumably what was intended. It was certainly clear to the UK Government. The UK Permanent Representative's statement upon the adoption of resolution 2249 underlined that the resolution was a powerful international recognition of the threat Da'esh poses and a call for lawful action and all necessary measures to counter Da'esh.⁴⁹

There was a 'quasi-judicial' consideration of the interpretation of Security Council resolutions in a matter that came before the Human Rights Committee in 2008. In its views on the Communication *Sayadi v. Belgium*, given on 22 October 2008, the Committee considered a challenge on human rights grounds to Belgium's domestic implementation of sanctions imposed by Security Council resolution 1267 (1999). The British member of the Committee, Sir Nigel Rodley, made some interesting remarks about the interpretation of Security Council resolutions in the light of human rights. These remarks were *obiter* and apparently *lex ferenda*. Rodley accepted that if there were a conflict between a State's obligations under the International Covenant on Civil and Political Rights and its obligation to give effect to decisions of the Security Council under Art. 25 of the Charter, Art. 103 of the Charter would deal with the conflict in favour of the Security Council decisions.⁵⁰ But he went on to suggest four criteria that should be applied for interpreting Security Council resolutions to determine whether indeed there was a conflict. While not going so far as to say that the Council 'cannot act in a way that requires disrespect for [human rights and fundamental freedoms],' Rodley did say that the Charter wording strongly suggests 'that the first interpretation criterion is that there

49 UNSC 'Threats to International Peace and Security Caused by Terrorist Acts' (20 November 2015) UN Doc. S/PV.7565, 9.

50 Art. 103 of the UN Charter reads: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail.'

should be a presumption that the Security Council did not intend that actions taken pursuant to its resolutions should violate human rights.' A second criterion was that there should be a presumption that, in any event, there was no intention that a norm of *ius cogens* should be violated. Third, there should be a presumption that the Council does not intend to violate rights that are not derogable under human rights treaties in times of grave emergency. And fourth, even in the case of derogable rights any departures should be conditioned by the principles of necessity and proportionality.

This was an original attempt to reconcile the need for an effective collective security system (as recognised, for example, by the European Court of Human Rights in its *Behrami and Saramati* decision⁵¹) and the importance of upholding human rights even in times of grave public emergency. But not all of Rodley's presumptions are entirely convincing. And he gave no indication as to what it would take to rebut his presumptions. The first criterion, in particular, 'that there should be a presumption that the Security Council did not intend that actions taken pursuant to its resolutions should violate human rights' goes too far. It ignores the fact that, by definition, the Council is acting in an emergency situation, where there is a threat to the peace, a breach of the peace, or an act of aggression. And, depending what it takes to rebut it, this first presumption could deprive Art. 103, a cornerstone of the Charter, of virtually all practical effect in this context.

51 *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (Decision on Admissibility) (2 July 2007) (ECtHR) App No. 71412/02 and 78166/01, para. 149: 'Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim.'

In the *Kosovo* Advisory Opinion,⁵² it fell to the ICJ to interpret Security Council resolution 1244 (1999), which had established the international civil and security presences in Kosovo following the NATO intervention in 1999. The Court affirmed in the clearest terms its competence to interpret Security Council resolutions.⁵³ In addition to shedding light on the addressees of binding Security Council resolutions, the Court offered guidance on the general question of their interpretation. A key passage of the Opinion reads:

Before continuing further, the Court must recall several factors relevant in the interpretation of resolutions of the Security Council. While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require[s] that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 54, para. 116*), irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.

52 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* [2010] ICJ Rep 403. Much has been written about the Opinion; see, for example, M. Milanović and M. Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP 2015), with bibliography.

53 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* [2010] ICJ Rep 403, at 422, para. 46 ('While the interpretation and application of a decision of one of the political organs of the United Nations is, in the first place, the responsibility of the organ which took that decision, the Court, as the principal judicial organ of the United Nations, has also frequently been required to consider the interpretation and legal effects of such decisions').

The Court first turned its attention to ‘certain questions concerning the lawfulness of declarations of independence under general international law, against the background of which the question posed falls to be considered, and Security Council resolution 1244 (1999) is to be understood and applied.’ It proceeded with the passage just cited, and then went on to examine resolution 1244 (1999) in some detail.⁵⁴ It first noted that the resolution had to be read in conjunction with the general principles set out in its annexes 1 and 2 (principles and elements seeking to defuse the Kosovo crisis, and envisaging a longer-term solution). It also noted that the tenth preambular paragraph recalled the sovereignty and political independence of the Federal Republic of Yugoslavia. It then sought to discern the object and purpose of the resolution, noting its relevant features and concluding ‘that the object and purpose of resolution 1244 (1999) was to establish a temporary, exceptional legal regime which, save to the extent that it expressly preserved it, suspended the Serbian legal order and which aimed at the stabilization of Kosovo, and that it was designed to do so on an interim basis.’

The Court next turned to the question whether the resolution, or the measures adopted thereunder, introduced ‘a specific prohibition on issuing a declaration of independence, applicable to those who adopted the declaration of independence.’ The Court first considered whether the declaration of independence was an act of the ‘Assembly of Kosovo,’ one of the Provisional Institutions of Self-Government, or whether those who adopted the declaration were acting in a different capacity, and concluded that the authors of the declaration ‘did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.’

The Court then considered whether the promulgation of the declaration by the authors of the declaration was contrary to any prohibition contained in the resolution or the Constitutional Framework, and after a ‘careful reading’ of the

54 P. Pachetti, ‘L’interprétation des résolutions du Conseil de sécurité à la lumière de l’avis de la Cour internationale de Justice sur le Kosovo’ in M. Arcari and L. Balmond (eds), *Questions de droit international autour de l’avis consultatif de la Cour internationale de justice sur le Kosovo* (Giuffrè Editore 2011) at 155; S. Murphy, ‘Reflections on the ICJ Advisory Opinion on Kosovo: Interpreting Security Council Resolution 1244’ in M. Milanović and M. Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP 2015) at 134; for a critique of the ICJ’s approach to the interpretation of UNSC resolution 1244 (1999), see R. Tricot, B. Sander, ‘Recent Developments: The Broader Consequences of the International Court of Justice’s Advisory Opinion on the Unilateral Declaration of Independence in Respect of Kosovo’ (2011) 49 (2) *Columbia Journal of Transnational Law* at 321.

resolution, concluded that it was not. It first noted that the resolution 'was essentially designed to create an interim regime for Kosovo, with a view to channeling the long-term political process to establish its final status,' and 'did not contain any provision dealing with the final status of Kosovo or with the conditions for its achievement.' In reaching this conclusion the Court compared resolution 1244 (1999) with 'contemporaneous practice of the Security Council,' for example, that relating to Cyprus, saying that 'by contrast [...] the Security Council did not reserve for itself the final determination of the situation in Kosovo.' Second, it concluded that '[t]here is no indication, in the text [of the resolution], that the Security Council intended to impose [...] a specific obligation to act, or a prohibition from acting, addressed to such other actors.' After once again considering the Council's practice, the Court said that, '[w]hen interpreting Security Council resolutions, the Court must establish, on a case-by-case basis, considering all relevant circumstances, for whom the Security Council intended to create binding obligations.' It considered relevant, citing the *Namibia* Opinion, its approach with regard to the binding effect of Security Council resolutions in general.

The *Interlocutory Decision* of the Appeals Chamber of the Special Tribunal for Lebanon of 16 February 2011 contains an extended section entitled 'Principles on the Interpretation of the Provisions of the Statute.' The Chamber, citing what it said was the practice of other international criminal tribunals, essentially said it would apply 'international law on the interpretation of treaties'⁵⁵ (that is, the rules set forth in the Vienna Convention on the Law of Treaties). In its view these rules applied 'whether the Statute is held to be part of an international agreement between Lebanon and the United Nations or is regarded instead as part of a binding resolution adopted by the Security Council under Chapter VIII of the UN Charter.' This approach was to some degree mitigated by the Chamber's citation and application of the passage from the *Kosovo* Advisory Opinion set out above,⁵⁶ which according to the Chamber suggested a 'caveat' to the application of what it referred to as 'the general principle of construction enshrined in Article 31 (1) of the Vienna Convention.'⁵⁷

In its *Al-Jedda* judgment of 7 July 2011, the European Court of Human Rights set out its approach to the interpretation of Security Council resolutions as follows:

55 Special Tribunal for Lebanon, Appeals Chamber, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* STL-11-01/1 (16 February 2011), para. 26.

56 *Ibid.*, paras. 27–28

57 *Ibid.*, para. 28.

76. When examining whether the applicant's detention was attributable to the United Kingdom or, as the Government submit, the United Nations, it is necessary to examine the particular facts of the case. These include the terms of the United Nations Security Council resolutions which formed the framework for the security regime in Iraq during the period in question. In performing this exercise, the Court is mindful of the fact that it is not its role to seek to define authoritatively the meaning of provisions of the Charter of the United Nations and other international instruments. It must nevertheless examine whether there was a plausible basis in such instruments for the matters impugned before it (see *Behrami and Saramati*, cited above, § 122). The principles underlying the Convention cannot be interpreted and applied in a vacuum and the Court must take into account relevant rules of international law (*ibid.*). It relies for guidance in this exercise on the statement of the International Court of Justice in paragraph 114 of its Advisory Opinion *Legal Consequences for States of the Continued Presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 (1970)* (hereinafter '*Namibia*') (see paragraph 49 above), indicating that a United Nations Security Council resolution should be interpreted in the light not only of the language used but also the context in which it was adopted.⁵⁸

The Court then proceeded to lay down what has been described as 'a very, very strong'⁵⁹ interpretative presumption:

102. In its approach to the interpretation of Resolution 1546, the Court has reference to the considerations set out in paragraph 76 above. In addition, the Court must have regard to the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, set out in the first subparagraph of Article 1 of the United Nations Charter, the third subparagraph provides that the United Nations was established to 'achieve international cooperation in [...] promoting and encouraging respect for human rights and fundamental freedoms.' Article 24 (2) of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to 'act in accordance with the Purposes and Principles of the United Nations.' Against this

⁵⁸ *Al-Jedda v. the United Kingdom (Judgment)* (7 July 2011) (ECtHR) App No. 27021/08, para. 76.

⁵⁹ M. Milanovic, '*Al-Skeini and Al-Jedda in Strasbourg*' (2012) 23 EJIL 121.

background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.⁶⁰

The Court followed similar reasoning in the recent *Al-Dulimi* case, adding that 'where a Security Council resolution does not contain any clear or explicit wording excluding or limiting respect for human rights in the context of the implementation of sanctions against individuals or entities at national level, the Court must always presume that those measures are compatible with the Convention.'⁶¹ The Court concluded that:

As a result, in view of the seriousness of the consequences for the Convention rights of those persons, where a resolution such as that in the present case, namely Resolution 1483, does not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided.⁶²

In 2014, a Pre-Trial Chamber of the International Criminal Court (ICC) was called upon to decide whether the Democratic Republic of the Congo had failed to cooperate with the ICC by upholding the immunity of and refusing to arrest and surrender Omar Al Bashir, the Head of State of Sudan. To decide on the case, the Chamber had to interpret Security Council resolution 1593 (2005), where the Council decided, inter alia, that the 'Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the

60 *Al-Jedda v. the United Kingdom*, para. 102.

61 *Al-Dulimi and Montana Management Inc. v. Switzerland (Judgment)* (21 July 2016) (ECtHR) App No. 5809/08, paras. 139–140.

62 *Ibid.*, para. 146.

Prosecutor pursuant to this resolution.’ The Chamber interpreted the resolution as follows:

Since immunities attached to Omar Al Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in said resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. Any other interpretation would render the SC decision requiring that Sudan ‘cooperate fully’ and ‘provide any necessary assistance to the Court’ senseless. Accordingly, the ‘*cooperation* of that third State [Sudan] for the waiver of the immunity,’ as required under the last sentence of article 98 (1) of the Statute, was already ensured by the language used in paragraph 2 of SC Resolution 1593 (2005). By virtue of said paragraph, the SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State. Consequently, there also exists no impediment at the horizontal level between the DRC and Sudan as regards the execution of the 2009 and 2010 Requests.⁶³

In defending the position adopted by the Chamber, Boschiero has suggested that:

It follows that to give a purposive interpretation to Resolution 1593, the better view is to interpret the intent of the SC as already having lifted any immunity in respect of Sudan. It is generally undisputed that the SC, in the exercise of its power under Chapter VII of the UN Charter, has the power to remove explicitly or implicitly immunity *ratione personae* if it deems it necessary for the maintenance of peace and security [...].

[T]here is no need for an express removal of Al-Bashir’s immunity in the text of the Resolution. Since the Court must proceed within its own Statute, as a whole, including Article 27 (2), an express provision in the text of Resolution 1593 that Article 27 (2) was to be considered applicable to the Court’s exercise of jurisdiction in respect of Sudan would have been redundant [...].

It seems thus easy to infer from Resolution 1593 that the inherent intent of the Council, consistent with the object and purpose of the Resolution,

63 *The Prosecutor v. Omar Hassan Ahmad Al Bashir (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court)* ICC-02/05-01/09-195 (9 April 2014), para. 29 (footnotes omitted). See now ICC Trial Chamber II’s decision of 6 July 2017 (including Judge Marc Perrin de Brichambaut’s separate opinion), which came too late to be taken into account in this article.

was to integrate the exercise of the SC's power into the pre-established system of the ICC.⁶⁴

In the 2008 Study referred to earlier, Security Council Report said:

The key point is that the analysis of the nature of Council resolutions often needs to take into account not just the text or the general circumstances at the adoption, but also the possibility that this assessment may be conclusively determined only from subsequent Council deliberations. In some cases, then, the possibility of the evolution in the Council's understanding of its own decisions is critical.⁶⁵

Alain Pellet has summed up the position well:

Bien que les règles applicables à l'interprétation des traités ne soient pas en tous les points transposables à celle des actes unilatéraux, y compris lorsqu'ils émanent d'organisations internationales, il paraît légitime de se fonder sur le sens ordinaire à attribuer aux termes d'une résolution envisagés dans leur contexte – y compris son préambule – pour en déterminer le sens, les travaux préparatoires et la pratique subséquente pouvant venir renforcer ou compléter cette opération.⁶⁶

In a book based on his 2008 Sir Hersch Lauterpacht Memorial Lectures, Ralph Zacklin, former Deputy Legal Counsel to the United Nations, addressing the interpretation of the safe area provisions of Security Council resolution 836 (1993), referred to 'employing interpretative techniques borrowed from treaty law' for the interpretation of Security Council resolutions; and suggested that 'the teleological method of interpretation' can be an invaluable tool for resolving issues of creative ambiguity.⁶⁷

64 N. Boschiero, 'The ICC Judicial Finding on Non-cooperation against the DRC and No. Immunity for Al-Bashir Based on UNSC Resolution 1593' (2015) 13 *Journal of International Criminal Justice* 625, at 642–644.

65 Security Council Report 'Special Research Report: Security Council Action under Chapter VII: Myths and Realities' (23 June 2008) 36.

66 A. Pellet, '668 (1991): Iraq' in M. Albaret et al. (eds), *Les grandes résolutions du Conseil de sécurité des Nations unies* (Daloz 2012) 137, at 140.

67 R. Zacklin, *The United Nations Secretariat and the Use of Force in a Unipolar World: Power v. Principle* (CUP 2010) at 61.

There are many other writings touching on the interpretation of resolutions.⁶⁸

v The Dutch and United Kingdom Iraq Inquiries

The use of force against Iraq in 2003 was an occasion where the interpretation of Security Council resolutions assumed great importance, and was examined in some detail; it was also a rare occasion when the documents relating to the drafting of a resolution were made public. Among others, the UK, US and Australian Governments,⁶⁹ as well as the Russian Government,⁷⁰ published their official views on the legal position arising from the Security Council resolutions. In the case of the UK, detailed internal legal advice later became public. The fullest statement was the British Attorney General's advice of 7 March

68 Such writings include R Sonnenfeld, *Resolutions of the United Nations Security Council* (Nijhoff 1988) at 127–129, which suggests a rather open-textured 'contextual' approach; J.A. Frowein, 'Unilateral Interpretation of Security Council Resolutions: a Threat to Collective Security' in V. Götz et al. (eds), *Liber amicorum Günther Jaenicke – zum 85. Geburtstag* (Springer 1998) 97; S. Kadelbach, 'Interpretation' in B. Simma et al. (eds), *The Charter of the United Nations. A Commentary* (OUP 2012) 91, at 96, MN 66; N. Krisch, 'Introduction to Chapter VII: The General Framework' in B. Simma et al. (eds), *The Charter of the United Nations. A Commentary* (OUP 2012) 1237, at 1264–1266; A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*; M. Forteau, 'Organisations internationales et sources du droit' in E. Lagrange et al. (eds), *Droit des Organisations Internationales* (LGDJ 2013) at para. 525. For an analysis of a number of Security Council resolutions, see M. Albaret et al. (eds), *Les grandes résolutions du Conseil de sécurité des Nations unies* (Daloz 2012).

69 See the UK, US and Australian letters to the President of the Security Council: UNSC 'Letter Dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council' UN Doc. S/2003/350; UNSC 'Letter Dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council' UN Doc. S/2003/351; and UNSC 'Letter Dated 20 March 2003 from the Permanent Representative of Australia to the United Nations Addressed to the Secretary-General' UN Doc. S/2003/352. For the Spanish Legal Advisor's position, see J.A. Yáñez-Barnuevo, 'A Chronicle of Frustration and Final Vindication: International Legal Advice in Spain and the Iraq War (2002–2003)', in *Spanish Yearbook of International Law*, N° 19, 2015, pp. 297–303.

70 The Legal Department of the Ministry of Foreign Affairs of the Russian Federation, 'Legal Assessment of the Use of Force against Iraq' (2003) 52 (4) *International and Comparative Law Quarterly* 1059.

2003,⁷¹ though this was revised a week or so later.⁷² The US Government's position was given in an authoritative article published by the then Legal Adviser to the State Department.⁷³ The Australian position was also published.⁷⁴

The legality or otherwise of the invasion of Iraq in 2003 turned on the interpretation of a series of Security Council resolutions, culminating in resolution 1441 (2002), adopted unanimously on 8 November 2002.⁷⁵

A great deal has been written about the questions of interpretation that arose.⁷⁶ But I will focus on the Dutch and United Kingdom Iraq Inquiries. These two inquiries, and in particular the United Kingdom one, heard much about the interpretation of Security Council resolutions.

The Report of the Dutch Committee to Investigate Decision-making concerning Iraq (the 'Davids' Inquiry)⁷⁷ was submitted to the Dutch Prime Minister

71 The advice was classified 'Secret' but in the end was published in full by the British Government: 'Attorney General's Advice on the Iraq War: Iraq: Resolution 1441' (2005) 54 (3) *International and Comparative Law Quarterly* 767; (2006) 77 *British Year Book of International Law* 819.

72 'Attorney General's Written Answer to a Parliamentary Question' (17 March 2003) Hansard, 646 HL Debs., WA 2; FCO Paper 'Iraq: Legal Basis for the Use of Force' (2003) 74 *British Yearbook of International Law* 792; (2003) 52 *International and Comparative Law Quarterly* 811.

73 W. Taft and T. Buchwald, 'Preemption, Iraq, and International Law' (2003) 97 *American Journal of International Law* 557 (without the usual disclaimer). See also M. Scharf and P. Williams, *Shaping Foreign Policy in Times of Crisis. The Role of International Law and the State Department Legal Adviser* (CUP 2010) at 127–134.

74 The advice in Australia was tabled in the Australian Parliament (House Votes and Proceedings, 18 March 2003, Iraq): 'Memorandum of Advice to the Commonwealth Government on the Use of Force against Iraq, 18 March 2003' (2003) 4 *Melbourne Journal of International Law* 178.

75 One might recall in this connection the words of Sir Robert Jennings who, over 50 years ago, wrote that '[t]he lawfulness or otherwise of the use of force may depend upon such matters as the interpretation of ambiguous Resolutions of organs of the United Nations.' R.Y. Jennings, *The Acquisition of Territory in International Law* (Manchester University Press 1963) at 56.

76 See for a full and balanced account of the issues, S. Murphy, 'Assessing the Legality of Invading Iraq' (2004) 92 *Georgetown Law Journal* 173.

77 Report of the Dutch Committee of Inquiry on the War in Iraq (12 January 2010), available at <https://www.rijksoverheid.nl/documenten/rapporten/2010/01/12/rapport-commissie-davids> (accessed 9 April 2017). The report is some 550 pages long. It includes an English translation of the Introduction and Conclusions. For an English translation of Chapter 8 of the Report ('The Basis in International Law for the Military Intervention in Iraq'), with an introduction by the Board of Editors, see (2010) 57 *Netherlands International Law Review* 81–137. See also A. Nollkaemper, 'Na de Commissie Davids: Nederland, Irak en het Volkenrecht' (2010) 85 (3) *Nederlands Juristenblad* 144; T.E. Aalberts, 'Forging

and Parliament on 12 January 2010, just ten months after the Committee was established by the Prime Minister. Section 8.6 of the Report examines the interpretation of resolution 1441 (2002).⁷⁸ It has many interesting things to say, including on the subject of ambiguity:

It is not unusual in both politics and diplomacy to choose carefully considered ambiguous formulations in order to satisfy as many directly involved parties as possible and keep them on board. This and several other ambiguities in the resolution (such as explicitly recalling resolution 678 in the preamble) do not, however, delegate to individual states the authority of the Security Council to make an assessment of any violation nor to take any subsequent action. An objective interpretation of the text of resolution 1441 in the context of the Iraq debate in the autumn of 2002 and in the light of its object and purpose can only lead to the conclusion that this resolution did not give any authority to individual member states to use force without further deliberation by the Council.⁷⁹

The 'final conclusion' on the law is as follows:

Although it can be stated that the Security Council dealt quite ambiguously on several points with the question of the use of force against Iraq, particularly in resolution 1441, the only conclusion possible is that there was no adequate international law mandate for the unilateral military force used against Iraq by the US and UK. Despite the lack of a solid legal basis in international law, the Dutch government repeatedly argued that 'a second resolution was politically desirable but legally not necessary.' In the judgement of the Committee, the Cabinet did itself no favours by basing its policy on an international law standpoint that could hardly be defended, particularly not after the adoption of resolution 1441 by the Security Council on 8 November 2002.⁸⁰

Conclusions 18 to 22 concern legal matters.⁸¹ Conclusion 18 reads:

International Order: Inquiring the Dutch Support of the Iraq Invasion' (2011) 42 *Netherlands Yearbook of International Law* 139.

78 (2010) 57 *Netherlands International Law Review* at 103–106.

79 *Ibid.*, 105.

80 *Ibid.*, 136–137 (footnotes omitted).

81 Report of the Dutch Committee of Inquiry on the War in Iraq (12 January 2010) at 530–531 (in English).

The Security Council resolutions on Iraq passed during the 1990s did not constitute a mandate for the US–British military intervention in 2003. Despite the existence of certain ambiguities, the wording of Resolution 1441 cannot reasonably be interpreted (as the government did) as authorizing individual Member States to use military force to compel Iraq to comply with the Security Council resolutions, without authorization from the Security Council.

The Report of the (UK) Iraq Inquiry (July 2009–July 2016, the ‘Chilcot Report’) was published on 6 July 2016,⁸² some seven years after the establishment of the Inquiry. In addition to the report, the Chairman of the Inquiry, Sir John Chilcot, made a public statement immediately prior to publication,⁸³ and was questioned about the report by the Liaison Committee of the House of Commons on 2 November 2016.⁸⁴ There was a debate in the House of Lords on 12 July 2016⁸⁵ and a two-day debate in the House of Commons on 13 and 14 July 2016.⁸⁶ There has so far been limited public discussion on the legal aspects of the Report, which sheds little direct light on the interpretation of Security Council resolutions.⁸⁷

82 Report of the Iraq Inquiry (6 July 2016) (HC 689), available at <http://www.iraqinquiry.org.uk/the-report> (accessed 9 April 2017). For full documentation see www.iraqinquiry.org.uk.

83 Available at <http://www.iraqinquiry.org.uk/the-inquiry/sir-john-chilcots-public-statement> (accessed 9 April 2017).

84 Sir John Chilcot’s oral evidence to the Liaison Committee: Follow up to the Chilcot Report (2 November 2016), at <http://www.parliament.uk/documents/commons-committees/liaison/John-Chilcot-oral-evidence.pdf> (accessed 9 April 2017).

85 See <https://hansard.parliament.uk/lords/2016-07-12/debates/16071260000386/IraqInquiry> (accessed 9 April 2017).

86 See <https://hansard.parliament.uk/commons/2016-07-13/debates/16071330000001/ReportOfTheIraqInquiry> and <https://hansard.parliament.uk/commons/2016-07-14/debates/16071433000002/ReportOfTheIraqInquiry> (accessed 9 April 2017).

87 For discussion before publication of the Report, see, among others, M. Weller, *Iraq and the Use of Force in International Law* (OUP 2010); C. Peevers, *The Politics of Justifying Force. The Suez Crisis, the Iraq War, and International Law* (OUP 2013). For a discussion of both the Davids and Chilcot Inquiries, see K.M. Matsusama, ‘Between a Rock and a Hard Place: Providing Legal Advice on Military Action against Iraq’ (2011) 42 *Netherlands Yearbook of International Law* 95. For discussion of the Report of the Chilcot Inquiry as published, see among others E. Wilmshurst, ‘Comment’ (7 July 2016) *The Guardian*; P. Sands, ‘A Grand and Disastrous Deceit’ (2016) 38 (5) *London Review of Books* 9, available at <http://www.lrb.co.uk/v38/n15/philippe-sands/a-grand-and-disastrous-deceit> (accessed 9 April 2017); S. Bouwhuis, ‘What the Inquiry by the United Kingdom into Its Decision to Intervene in Iraq Tells Us about International Legal Advice and Decision Making in Times of Crisis,’

Unlike the Dutch Report, in the end the UK Report did not expand on the interpretation of the Security Council resolutions concerned, including resolution 1441 (2002). It did not reach a conclusion on the lawfulness or otherwise of the invasion of Iraq in 2003. Instead it focused on the manner in which advice was given. Nevertheless, there is much in the UK Report that is of interest to lawyers, and some of the assessments contain pretty clear pointers on legal issues.

The Inquiry has published a great deal in its Report and on its website. Those witnesses who dealt with the interpretation of Security Council resolutions included the present author and Elizabeth Wilmshurst. In addition, the Inquiry issued an open invitation to international lawyers to submit their views. Some 30 did, and their views are available on the website.⁸⁸

The Report includes a number of references, by Foreign Secretary Straw and Prime Minister Blair, to the 'Kosovo route.'⁸⁹ They seem to have had in mind the absence of Security Council authorization in the case of the attack on Serbia in 1999; given the virtual certainty of a Russian veto, no authorizing resolution had been put forward. Such references to the 'Kosovo route' have no legal significance. The casting or anticipated casting of an 'unreasonable veto' prevents the adoption of a resolution, nothing more, nothing less. The legal justification given for the Kosovo attack was not Security Council authorization but an exceptional right to intervene to avert an overwhelming humanitarian catastrophe. It was not seriously argued that the invasion of Iraq in 2003 was based on any right of humanitarian intervention. The sole basis given was Security Council authorization.⁹⁰ In his public statement of 6 July 2016, Sir John Chilcot said:

ESIL Conference Paper No. 7/2016, ESIL Annual Conference, Riga, 8–10 September 2016, available at <https://ssrn.com/abstract=2911979> (accessed 9 April 2017).

88 The following made 'International Law Submissions,' available at <http://www.iraqinquiry.org.uk/other-material/submissions-international-law> (accessed 9 April 2017): M. Abdel-Moneim; D. Akande, M. Milanović and others; N. Al-Dosari; P. Allot; A. Aust; R. Barnidge; F. Berman; M. Bowman; H. Brollowski; The Campaign to Make Wars History; T. Gazzini; Grief and others; C. Henderson; M. Janki; JUSTICE; Y. Khair; P. Klein; D. Kritsiotis; P-Y. Lo; V. Lowe; M. Mendelson; A. Mills and K. Trapp; R. O'Keefe; A. Orakhelashvili; Oxford Pro Bono Publico; Public Interest Lawyers; N. Rodley; P. Sands; G. Simpson; Solicitors' International Human Rights Group; Surrey International Law Centre; C. Warbrick; M. Weller; A. Westhead; N. White; P. Willetts; R. Zacklin.

89 See, for example, Executive Summary, para. 243.

90 The US made a passing reference to self-defence in its Art. 51 letter to the Security Council (UNSC 'Letter Dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security

Without evidence of major new Iraqi violations or reports from the inspectors that Iraq was failing to co-operate and they could not carry out their tasks, most members of the Security Council could not be convinced that peaceful options to disarm Iraq had been exhausted and that military action was therefore justified.

Mr Blair and Mr Straw blamed France for the 'impasse' in the UN and claimed that the UK Government was acting on behalf of the international community 'to uphold the authority of the Security Council.'

In the absence of a majority in support of military action, we consider that the UK was, in fact, undermining the Security Council's authority.

[T]he Inquiry has not expressed a view on whether military action was legal. [...]

The military and the civil service both asked for more clarity on whether force would be legal. Lord Goldsmith then advised that the 'better view' was that there was, on balance, a secure legal basis for military action without a further Security Council resolution. On 14 March, he asked Mr Blair to confirm that Iraq had committed further material breaches as specified in resolution 1441. Mr Blair did so the next day.

However, the precise basis on which Mr Blair made that decision is not clear.

Given the gravity of the decision, Lord Goldsmith should have been asked to provide written advice explaining how, in the absence of a majority in the Security Council, Mr Blair could take that decision.⁹¹

Sir John Chilcot's oral evidence to the Liaison Committee also contains interesting passages. In response to Question 72 (Q72) he said:

We wrestled, if I may say so, quite long and hard with the legal aspects of Iraq. You will, I am sure, be familiar with the conclusion that we were forced to come to. Because we were not a judge-led inquiry, let alone an internationally recognised court of law, we could not give a determinative conclusion about legality, or the rightness or not of the legal advice from the Attorney General. What we did do was analyse in depth and in detail how that advice evolved – that is a polite way of putting it; another word would be 'changed' – and was eventually taken into account, operated

Council' UN Doc. S/2003/351 (21 March 2003)), but this does not seem to have been a serious point.

⁹¹ Available at <http://www.iraqinquiry.org.uk/the-inquiry/sir-john-chilcots-public-statement> (accessed 9 April 2017).

and communicated to Parliament. We thought that all of that was open to very serious, critical questioning.

When asked (at Q78), whether, in his own view, the invasion of Iraq was legal under international law, Sir John responded in the following terms:

We crafted a carefully thought through form of words about that. The process by which the view was reached by the British Government and its principal legal adviser, the Attorney General, we thought was unsatisfactory and deficient in more than a few respects. That did not enable us to come to the conclusion that the war was not lawful; but neither did we say that we endorsed that advice or the way in which it was evolved and shared with Government. That is as far as I can take it.⁹²

When asked how she saw the position adopted by the Attorney General in his advice of 7 March 2003, Elizabeth Wilmschurst said that there were two things that struck her:

First, that he had relied, and he said he had relied, on the views of the negotiators of the resolution to change the provisional view that he had previously had, and the issue really is: how do you interpret a resolution or a treaty in international law and is it sufficient to go to individual negotiators, but not all negotiators, and ask them for their perceptions of private conversations, or does an international resolution or treaty have to be accessible to everyone so that you can take an objective view from the wording itself and from published records of the preparatory work? I mean, it must be the second. The means of interpretation has to be accessible to all. But the Attorney had relied on private conversations of what the UK negotiators or the US had said that the French had said. Of course, he hadn't asked the French of their perception of those conversations.

That was one point that I thought actually was unfortunate in the way that he had reached his decision, and the other point that struck me was that he did say that the safest route was to ask for a second resolution. We were talking about the massive invasion of another country, changing the

92 Liaison Committee 'Oral Evidence: Follow up to the Chilcot Report; Witness: Sir John Chilcot, Chair, Iraq War Inquiry' (2 November 2016), available at <http://www.parliament.uk/documents/commons-committees/liaison/John-Chilcot-oral-evidence.pdf> (accessed 9 April 2017).

government and the occupation of that country, and, in those circumstances, it did seem to me that we ought to follow the safest route.⁹³

VI Conclusion

The 1998 article⁹⁴ referred to a number of differences between Security Council resolutions and treaties. These included the following:

- a. Given the way that Security Council resolutions are drafted, less reliance can be placed upon the preambular language of resolutions as a tool for the interpretation of the operative part.
- b. Security Council resolutions are often not self-contained, but refer to, and incorporate by reference, other documents (reports of the Secretary-General, for example).
- c. Security Council resolutions are often part of a series, and can only be understood as such.
- d. There are no 'parties' to a resolution, only the Council, and the various references in the Vienna rules to the 'parties' to a treaty are not easy to apply in the context of a Security Council resolution.
- e. Given the way they emerge, and that for the most part Security Council resolutions are intended to be political documents, one should not expect them to be drafted with the same attention to legal detail and consistency as is usual in the case of a treaty.
- f. Under the Vienna Convention rules, there shall be taken into account, together with the context, any relevant rules of international law applicable in the relations between the parties. Quite apart from the fact that there are no parties to Security Council resolutions, the impact of other rules of international law is likely to be less in light of Art. 103 of the Charter.
- g. The Vienna Convention's distinction between the general rule in Art. 31 and supplementary means of interpretation in Art. 32 is likely to be even less significant in practice in the case of SCRs than in the case of treaties, given the importance of the historical background for the interpretation

93 Iraq Inquiry, Transcript Wilmshurst (26 January 2010) 17 (line 15) – 18 (line 15), at <http://www.iraqinquiry.org.uk/media/95214/2010-01-26-Transcript-Wilmshurst-S3.pdf> (accessed 9 April 2017); M. Wood, 'The International Law on the Use of Force. What Happens in Practice?' (2013) 53 *Indian Journal of International Law* 345, at 348–349.

94 Wood, 'The Interpretation of Security Council Resolutions.'

of Security Council resolutions. Any serious effort at interpreting a resolution will need to have regard to all the available *travaux préparatoires*, as well as the circumstances of the resolution's adoption.⁹⁵

With a very active yet often divided Security Council, questions of interpretation have become more important and more frequent. There is perhaps a greater awareness of the need to bear in mind, when interpreting Security Council resolutions, the differences between treaties and resolutions, and indeed the differences between various kinds of resolutions. As has been shown above, there is considerably more authority, especially case-law and writings, than in 1998. In 1998 there was still no authoritative statement of the applicable rules of interpretation. Now we have important guidance from the ICJ in the *Kosovo* Opinion. Particularly in light of that Opinion, I would now be prepared to remove the word 'tentative' from my 1998 conclusions.

95 '[I]t is impossible properly to understand the text of any Security Council resolution without reference to the debates which preceded it', C. Greenwood, 'New World Order or Old? The Invasion of Iraq and the Rule of Law' (1992) 55 *Modern Law Review* 153, reproduced in C. Greenwood, *Essays on War in International Law* (Cameron May 2006) 517, at 536. In a footnote, Greenwood says: 'This is particularly the case with a complex resolution like 242,' referring to S. Bailey, *The Making of Resolution 242* (Nijhoff 1985). At the same time, caution is needed as little is published; individual reports of informal consultations may be subjective or even self-serving.