INTERPRETATION OF SECURITY COUNCIL RESOLUTIONS UNDER CHAPTER VII IN THE AFTERMATH OF THE IRAQI CRISIS.

EFTHYMIOS PAPASTAVRIDIS*

Abstract The 'Operation Iraqi Freedom' in 2003 raised many international legal questions, which all have been more or less addressed in the academic literature since then. However, the thrust of the relevant legal etiology pertained to the implementation of a series of UN Security Council Resolutions, whose hermeneutics, ie the rules of interpretation, in contrast to other issues, have been scarcely explored and elucidated. Accordingly, the purpose of this article is to address the latter question of the hermeneutics of Security Council Resolutions, and propound a coherent thesis in this respect, which would be applicable not only in the Iraqi conflict but even beyond. It will examine, first, whether the provisions of Articles 31–33 of VCLT are applicable either *ipso jure* or *mutatis mutandis* in this respect and then having deprecated both of these options, it will turn its focus to the question of which theoretical framework in relation to the hermeneutics in international law could better serve its purposes. Drawing insights from, amongst others, Stanley Fish, Ian Johnstone and Aharon Barak, it will be possible to propound the thesis that any relevant *regulatio interpretationis* should pay due regard to the institutional setting of the 'community' of the Council, which in turn qualifies the 'intersubjective' approach or the collective will of the Council in light of the object and purpose of the Charter, ie the maintenance of peace and security, as the most pertinent hermeneutic paradigm. Premised upon the latter, the article proceeds and articulates a rubric of interpretive principles and presumptions to be applied in this regard, which, at the end, will be tested in the case of 'Operation Iraqi Freedom'.

I. INTRODUCTION

Legal hermeneutics[1] or the *jus interpetandi* has always been at the heart of jurisprudence since the classical and roman period and legal scholars have

* PhD Candidate, University College London (UCL). Email <e.papastavridis@ucl.ac.uk>. The author would like to express his gratitude, first and foremost, to Professor Catherine Redgwell (UCL) for her valuable assistance, encouragement and fruitful comments throughout the preparation of the present article. Furthermore, thanks are due to Dr A Skordas (Bristol), Associate Professor L-A Sicilianos (Athens), Mr R Gardiner (UCL), Ms J Wong (UCL) and Mr P Merkouris (QMUL) for their comments on earlier drafts of the present work, and also to Professor A Bredimas (Athens) for his overall support and guidance. Needless to say the responsibility for any faults or omissions lies exclusively with the author.

[1] Legal interpretation is part of the science of hermeneutics, whose historical roots date back to great thinkers such as Maimonides and Spinoza and has developed mostly around the interpretation of literary and historical texts. The literature on hermeneutics is extensive. See, inter alia, G Bruns, *Hermeneutics Ancient and Modern* (Yale University Press, Yale, 1992); G Shapiro and

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devoted considerable attention to this particular issue, endeavouring to address the perennial question of how a legal text is given meaning and analyse the triangular relationship between the author of the text, the text and its reader.[2] In international law, the predominant emphasis has been placed on the interpretation of treaties.[3] However, treaties are not the only international legal instruments in need of a coherent interpretive framework. This was evident in the context of the latest Iraqi conflict, where the thrust of the relevant legal justification pertained to the implementation of a series of UN Security Council Resolutions, whose hermeneutics, in contrast to treaties, had been scarcely explored and elucidated. Hence, the international legal community was before a 'hard case', in the sense that the normative background against which the Iraqi crisis was to be assessed was short of the decisive evaluative criteria for such a case, namely a coherent rubric of interpretive rules and principles concerning the aforementioned Resolutions.[4]

A Sica (eds), *Hermeneutics: Questions and Prospects* (University of Massachusetts Press, Amherst, 1994); J Bleicher, *Contemporary Hermeneutics: Hermeneutics as Method, Philosophy and Critique* (Routledge, London, 1980). Modern hermeneutics has developed with the theories of Schleiermacher and Betti (theoretical hermeneutics), Heidegger and Gadamer (philosophical hermeneutics), Habermas and Hirsch (critical hermeneutics), Ricoeur (phenomenological hermeneutics), Baratta and Lévi-Strauss (structural hermeneutics) and Derrida (deconstruction).

[2] General hermeneutic theories are relevant to legal interpretation, since they create a number of options among which the interpreter must choose, at his or her discretion, but not without restriction. Nonetheless, legal hermeneutics are distinctive, because of the nature of law and rules of legal interpretation should not give the reader the freedom to understand the text according to his or her subjective perception; see: R Posner, *Law and Literature* (rev edn, Harvard University Press, Cambridge, Mass, 1998) 211 and A Barak (n 69) 58.

[3] There is arguably a basic dichotomy in the literature around treaty interpretation arising from a choice between conflicting political objectives. On the one hand, there is the 'conventional' or mechanical approach to the enterprise of interpretation, based on firm canons of interpretation, which is supposed to resolve the interpretive issue with minimum human intervention between the text and its operational content. The actual text and its grammatical hermeneutics, ie its natural and ordinary meaning, have primacy over all other interpretive principles. Apart from the above approach, which can also be designated as the 'objective school', there are those who assert that the aim is to ascertain the intention of the parties ('the subjective school') and secondly, there are those who think that the interpreter must first ascertain the object and purpose of the treaty and then give effect to that ('teleological school'). For all these schools see inter alia: CF Amerasinghe, 'Interpretation of Texts in Open International Organisations' (1994) 65 British Yearbook of International Law 188 and G Fitzmaurice, 'Treaty Interpretation and Certain Other Treaty Points' (1951) 28 British Yearbook of International Law 1 et seq. On the other hand, there is a varied group of authors, advocates *par excellence* of legal realism, maintaining that in the framework of treaty interpretation, more than in any other areas of the law, the end may determine the means adopted and policies may govern the procedure followed; see inter alia: J Stone, 'Fictional Elements in Treaty Interpretation-A Study in the International Judicial Process' (1954) 1 Sydney Law Review 334. Another source of criticism of the predominant textualism stems from the New Haven Approach, which discards sheer textualism and instead lays emphasis on 'contextualism'; see: M McDougal, H Lasswell, and J Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* (Yale University Press, New Haven, 1967) and RA Falk, 'On Treaty Interpretation and the New Haven Approach: Achievements and Prospects' (1968) 8 Virginia Journal of International Law 332.

[4] As Justice Oliver Wendell Holmes famously observed a century ago, the hard cases are frequently the great ones and '[g]reat cases like hard cases make bad law', see *Nothern Sec Co v US*, 193 US, 197, 400 (1904).

It is beyond the compass of this paper to canvass every legal aspect of the 'Operation Iraqi Freedom', since it entailed a wealth of shadowy points of *corpus juris gentium* pertaining both to *jus ad bellum* and *jus in bello*.[5] Moreover, much ink has already been spilt over the above-mentioned issues, especially in regard to the legality per se of the Operation. The latter serves more as the principal inspiration for the present enquiry rather than its object. Rather, the purpose of this article is to address the broader question of the hermeneutics of Security Council Resolutions, and propound a coherent thesis in this respect, which would be applicable not only in the Iraqi conflict but even beyond. However, it would be pertinent, before embarking upon this project, to outline the relevant legal context, as it emerged from the 'Operation Iraqi Freedom'.

It is a truism that the rationale behind the resort to war was the need for the disarmament of Iraq and concomitantly the fall of Sadam Hussein and Iraq's regime change. However, it was the implementation of the relevant Resolutions of the UN Security Council, namely Resolutions 687 (1991)[6] and 1441 (2002)[7] that served as the focal point of the legal debate triggered in the context of the Security Council and more importantly as the formal legal justification provided for the intervention in question. While, at the outset and before the commencement of hostilities, it was obvious that 'Operation Iraqi Freedom' provided the ideal test-drive for the version of pre-emptive self-defence that President Bush had hinted at as far back as the proclamation of the National Security Strategy in September 2002,[8] the emphasis on the legal argumentation of the States involved had gradually shifted from the aforementioned right, to the implementation of the said Security Council Resolutions.

[5] LF Damrosch and BH Oxman avered in the Editor's Introduction in the *Agora* of the *American Journal of International Law* dedicated to Iraq conflict that: '[t]he military action against Iraq in spring 2003 is one of the few events of the UN Charter period holding the potential for fundamental transformation, or possibly even destruction, of the system of law governing the use of force that had evolved during the twentieth century', see 'Editors' Introduction' (2003) 97 American Journal of International Law 553.

[6] SC Res 687 (3 Apr 1991) in [1991] 30 ILM 846.

[7] SC Res 1441 (8 Nov 2002) in [2003] 42 ILM 250. For scholarly commentary see inter alia: C Gray, *International Law and the Use of Force* (2nd edn, OUP, Oxford, 2004) 271 et seq, FL Kirgis, 'Security Council Resolution 1441 on Iraq's Final Opportunity to Comply with Disarmament Obligations' (Nov 2002) in *ASIL Insights* available at <http://asil.org>, P McLain, 'Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force' (2003) 13 Duke Journal of Comparative and International Law 233–91.

[8] It is true that Operation Iraqi Freedom had possessed the right factual matrices associated with claims of preemptive self-defence: no armed attack had been launched by Iraq against the United States; Iraq had fired no shot against the United States before the operation in question and so forth. For the National Security Strategy see 'The National Security Strategy of the United States of America' (17 Sept 2002), available at <http://www.whitehouse.gov/nsc.nss.pdf>, reprinted in [2002] 41 ILM 1478 and with regard to Bush Doctrine on Pre-emptive Self-Defence, see inter alia: per AD Sofaer, 'On the Necessity of Pre-emption' (2003) 14 European Journal of International Law 19 et seq. Contra M Bothe, 'Terrorism and the Legality of Pre-emptive Force' (2003) 14 European Journal of International Law 19 et seq; R Kolb, 'Self-Defence and Preventive War at the Beginning of Millenium' (2004) 59 Zeitschrift für öffentliches Recht 111 et seq.

Indeed, the communications of the above States to the Security Council on the very day that the hostilities commenced against Iraq dissipated any doubt as to the legal basis of their action. The United States claimed that 'Operation Iraqi Freedom' was authorized under the existing [Security] Council Resolutions, including its Resolutions 678 (1990) and 687 (1991),

> that Iraq had decided not to avail itself of the final opportunity under Resolution 1441 (2002) and had clearly committed additional violations [and that] in view of Iraq's material breaches, the basis of the ceasefire [in Resolution 687] had been removed and the use of force was authorised under Resolution 678.[9]

In a less detailed formulation to the Council, but to equivalent effect, the United Kingdom maintained that Iraq

> has failed, in clear violation of its obligations [under Resolution 687 (1991)] to disarm and that in consequence Iraq is in material breach of the conditions for the cease-fire at the end of hostilities in 1991 laid down by the Council in its Resolution 687 (1991).[10]

It follows from the foregoing that the vexed question in the above legal construction was whether the aforementioned Security Council Resolutions could be construed in such a way to allow the use of force against the recalcitrant state of Iraq. A sound reply, however, to that question would presuppose the existence of a hermeneutic framework in this regard, ie a matrix of principles or rules for the interpretation of Security Council Resolutions. Taking as given that there is no such framework, at least, in the sense of Articles 31–3 of the Vienna Convention on the Law of Treaties (VCLT) with regard to treaty interpretation,[11] the matter in question is open to various intellectual

[9] UN Doc S/2003/351 (21 Mar 2003) 1. See also the views of the US Legal Adviser and Deputy Legal Adviser published in WH Taft IV and TF Buchwald, 'Preemption, Iraq and International Law, Agora: Future Implications of the Iraq Conflict' (2003) 97 American Journal of International Law 557–63.

[10] UN Doc S/2003/350 (21 Mar 2003). See also 'Attorney-General Clarifies Legal Basis for the Use of Force against Iraq', available at <http://www.fco.gov.uk> (18 Mar 2003); and Foreign and Commonwealth Office, 'Iraq: Legal Basis for the Use of Force' (17 Mar 2003), reproduced by C Warbrick, 'The Use of Force against Iraq' (2003) 52 International & Comparative Law Quarterly 811–14. The highly controversial and slightly different 'Attorney General's Advice on the Iraq War: Resolution 1441' (7 Mar 2003) is published in [2005] 54 International and Comparative Law Quarterly 767–78. Australia, also, followed the same line of reasoning in its communication to the Security Council, see UN Doc S/2003/352 (20 Mar 2003) and 'Attorney-General's Memorandum of Advice on the Use of Force against Iraq' (18 Mar 2003) in [2005] 24 Australian Journal of International Law 413–18.

[11] See Arts 31–3 of Vienna Convention on the Law of Treaties (1969) (opened for signature 23 May 1969), 1155 UNTS 331 [hereinafter referred to as VCLT]. According to Art 31 of VCLT, apart from the bona fides obligation, which permeates the whole fabric of VCLT, the primary rule of natural meaning is to be applied in the light of the context, the object and purposes of the treaty and the six other considerations set out in the ensuing paragraphs of the said Article, which implies that an abstract natural meaning may be modified by any of these. Noteworthy is that the intention of the parties as such as well as the *travaux préparatoires,* which reveal the latter are diminished significantly under the scheme of VCLT (Art 32); see inter alia: M Fitzmaurice, 'The Practical Working of the Law of Treaties' in M Evans (ed), *International Law* (2nd edn, OUP, Oxford, 2006) 187 et seq.

approaches and alternatives. First, Security Council Resolutions could be assimilated to treaties, an option implied by the use of term 'material breach' in Resolution 1441 (2002). It is essential to stress here that the above-mentioned term is part and parcel of the *sedes materiae* of the law of treaties, namely it entitles a party affected by the material breach of the treaty in question to initiate the relevant proceedings for the termination or the suspension of the operation of the infringed treaty.[12] This would lead to the inescapable conclusion that the canons of interpretation in Articles 31–3 of VCLT are also to be applied *ipso jure* to the Resolutions in question.

Nevertheless, a close scrutiny of the legal nature of the latter reveals the contrary, ie that they are not to be identified with treaties.[13] More analytically, on the one hand, the recommendations of Security Council lack the binding force of a treaty and on the other, the decisions and the authorizations, like *in casu*, display the following essential drawback: as all Security Council Resolutions, they are not the product of the assent of the Member States. In one sense, they do represent, like a treaty does, a meeting of wills, a coming together of the (possibly opposing) aspirations of the States whose representatives have negotiated their drafting.[14] In another sense, however, they provide for obligations, which are incumbent upon the Member States of the Organization independently of their consent by virtue of Article 25 of the Charter and in stark contrast with the principle *pacta tertiis nec nocent nec prosunt* of the law of treaties.[15] Therefore, they resemble more legislative acts or, to be more precise, executive acts, bearing in mind the primary police function of the Security Council under Chapter VII. In fact, they could be more

[12] In para 3 of Art 60 of VCLT, the 'material breach' is defined as: '(a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.' Regarding Art 60 of VCLT and the principle of *exceptio non (rite) adimpleti contractus*, see inter alia: B Simma, 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its Background in General International Law' (1970) 20 Österreichisches Zeitschrift für Öffentliches Recht 18; MM Gomma, *Suspension or Termination of Treaties on Grounds of Breach* (Martinus Nijhoff, The Hague, 1996).

[13] As regards the Security Council, it is well attested that it has the power under the Charter to adopt three types of Resolutions. First, internal recommendations or decisions, eg recommendations to the General Assembly or decisions regarding the establishment of subsidiary organs under Art 29 of the Charter; secondly, recommendations to the Member States (eg Art 40) and last but not least, decisions for the Member States (eg Arts 41–2). Moreover, it would be apposite to add also the *sui generis* institution of authorization-delegation by the Security Council of enforcement powers under Chapter VII to Member States (eg SC Resolution 678/1990) as well as the generic or legislative Resolutions, which impose general and abstract obligations on Member States (eg 1373/2001), 1540/2004). See inter alia: SD Bailey and S Daws, *The Procedure of the United Nations Security Council* (3rd edn, Clarendon Press, Oxford, 1998) 18–20; B Conforti, *The Law and Practice of the United Nations* (3rd edn, Kluwer Law International, The Hague, 2005) 291 et seq; S Talmon, 'The Security Council as World Legislature' (2005) 99 American Journal of International Law 175; E Rosand, 'The Security Council as Global Legislator: *Ultra Vires* or Ultra Innovative?' (2005) 28 Fordham International Law Journal 542–90.

[14] See H Thirlway, 'The Law and Procedure of the International Court of Justice' (1969) 67 British Yearbook of International Law 29 et seq.

[15] See the general provision of Art 34 of VCLT (1969) regarding third States: '[a] treaty does not create either obligations or rights for a third State without its consent.'

aptly designated as unilateral 'institutional' acts with binding force *erga omnes partes* by dint of its constituent instrument, ie Article 25 of the UN Charter.

As a result, these Resolutions should not be subject to the same legal regime as treaties and *a fortiori* any transplantation of rules from the *sedes materiae* of the law of treaties to the ambit of the above-mentioned Resolutions, such as the provisions of Articles 31–33 of VCLT, should be deprecated in principle. If not to be assimilated to treaties, there is room for two further alternatives. On the one hand, it could be argued that the aforementioned provisions can be applicable *mutatis mutandis* to the Resolutions in question or, on the other, that the nature of the Resolutions dictates a different approach, which will be based upon a new analytical framework more akin to the nature of these instruments and will synthesise various well-established interpretive methods with a new hermeneutic paradigm.

The relationship between treaties and Security Council Resolutions and more specifically the interpretation of the latter, has failed to attract extensive scholarly interest,[16] even though this was not the first time that the interpretation of Security Council Resolutions *qua* treaty texts was put forward. *In concreto*, the same line of argument was either explicitly invoked or implied in the context of two other instances of violence against Iraq for the same reason, ie its disarmament, the one in January 1993[17] and the other in December 1998, in the context of Operation 'Desert Fox'.[18] Hence, the delineation of the contours of the interpretation in question would serve not only as the yardstick for the legality of the above cases or Operation Iraqi Freedom, which by and large has been answered in the negative,[19] but also as a guiding

[16] See M Wood, 'The Interpretation of Security Council Resolutions' (1998) 2 Max Planck Yearbook of United Nations Law 73–95; J A Frowein, 'Unilateral Interpretations of Security Council Resolutions: a Threat to Collective Security' in V Götz, P Selmer, and R Wolfrum (eds), *Liber Amicorum Günter Jaenicke-zum 85. Geburstag* (Springer, Berlin, 1998) 97–112; CF Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, CUP, Cambridge, 2005) 61 et seq; M Bos, 'The Interpretation of Decisions of International Organisations' (1981) 28 Netherlands International Law Review 1–13; M Byers, 'The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq' (2002) 13 European Journal of International Law 21–41, 23 et seq.

[17] In response to the refusal of Iraq to cooperate with the inspectors of UNSCOM and IAEA, United States, United Kingdom and France launched a limited air and missile campaign against Iraq, see [1993] 39 Keesings 39231 and 'UK Materials on International Law' (1993) 65 British Yearbook of International Law 736.

[18] See from the vast amount of literature in this regard, inter alia: J Lobel and M Ratner, 'Bypassing the Security Council: Ambiguous Authorizations to Use Force, Ceasefires and the Iraqi Inspection Regime' (1999) 93 American Journal of International Law 124 et seq; JM Thouvenin, 'Le jour le plus triste pour les Nations Unies-Les Frappes anglo-américaines de décembre sur l'Iraq' (1998) 44 Annuaire Français de Droit International 209–31; R Wedgwood, 'The Enforcement of Security Council Resolution 687: The Threat of Force against Iraq's Weapons of Mass Destructions' (1998) 92 American Journal of International Law 724–8.

[19] For the operations in 1993 and 1998 see ibid. As regards Operation Iraqi Freedom, the preponderant view is that it was beyond the bounds of international law. From the plethora of relevant scholarly opinions see inter alia, *per* the legality of the war: WH Taft IV and TF Buchwald (n 9) 557 et seq; C Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida and Iraq' (2003) 4 San Diego International Law Journal 7 et seq; and contra: ND White

principle for the future interpretation of Security Council Resolutions under Chapter VII. This enquiry attains even more importance nowadays, when it seems that the Security Council has finally recovered from the schism over Iraq[20] and it is under a probable reform, which may reinvigorate the system of collective security.[21]

The present article will explore the hermeneutics of Security Council Resolutions and ascertain the applicable interpretive principles and presumptions. It will postulate that the relevant hermeneutics should be more attuned to the nature of the Resolutions in question and in particular to the institutional 'interpretive community' of the Security Council. Drawing from insights supplied by S Fish, I Johnstone and A Barak it will delineate the pertinent analytical framework for the interpretive enterprise in question and will accordingly propose a set of guiding interpretive principles and presumptions in this respect. To conclude, the latter will be applied to our case study, ie Operation 'Iraqi Freedom' and to its pertinent Resolutions. In so doing, the present essay will address exclusively the question of the interpretation of Security Council Resolutions under Chapter VII and more particularly of Resolutions delegating enforcement powers to Member States without entering into the hermeneutics of other decisions of UN organs or international organizations, such as the UN General Assembly.

II. THE HERMENEUTICS OF SECURITY COUNCIL RESOLUTIONS: ARTICLES 31–33 OF VCLT?

A. An analytical framework for the interpretation of Security Council Resolutions in light of the relevant jurisprudence and theory

It is time to address the crux of the matter in the present enquiry, ie whether the rules of interpretation of VCLT could be applicable *mutatis mutandis* to

and EPJ Myjer, 'Editorial: Use of Force against Iraq' (2003) 8 Journal of Conflict and Security Law 1–14; V Lowe, 'The Iraq Crisis: What Now?' (2003) 52 ICLQ 866; TH Franck, 'What Happens Now? The United Nations After Iraq The Agora: Future Implications of the Iraq Conflict' (2003) 97 American Journal of International Law 607 et seq; O Corten, 'Opération Iraqi Freedom: Peut-on Admettre l'Argument de l' Autorisation Implicite du Conseil de Securité?' (2003) 36 Revue Belge de Droit International 205–47.

[20] The Security Council has been involved in numerous crises after the Iraqi conflict and has authorized correspondingly many operations under Chapter VII. See inter alia: SC Res 1484 (2003), 1565 (2004), 1597 (2005) over DR Congo, SC Res 1528 (2004) over Côte d'Ivoire (cf and 1464/2003), SC Res. 1575 (2004) for Bosnia-Herzegovina, SC Res 1545 (2004) over Burundi, SC Res 1562 (2004) over Sierra Leone, SC Res 1529 (2004) over Haiti and of course SC Res 1511 (2003) and 1546 (2004) concerning Iraq.

[21] See the reform proposals of the Secretary-General of the United Nations enunciated in his Report 'In Larger Freedom: towards development, security and human rights for all' (21 Mar 2005) UNGA A/59/2005 available at <http://www.un.org/largerfreedom/report-largerfreedom.pdf>. See also with regard to the High-Level Panel Report: KM Manusama, 'The High Level Panel Report on Threats, Challenges and Change and the Future Role of the UN Security Council' (2005) 18 Leiden Journal of International Law 605–20.

the case of Security Council Resolutions or another alternative should be sought. This will be accomplished principally with the analysis of the relevant jurisprudence of the international judiciary in conjuction with pertinent insights provided by legal theory. However, it should be noted from the outset that the ensuing discussion will focus mainly on the Resolutions-Authorizations of the Security Council,[22] since an examination of all the types of Security Council Resolutions would be beyond the bounds of the present essay.[23] Moreover, it will address firstly the question of who is to interpret them and *a fortiori* who is to give an authentic interpretation of these Resolutions before dissecting, in turn, the decisions of the international judiciary in this respect and pondering which philosophical and legal theories provide us with the appropriate analytical framework for the hermeneutics in question.

1. The question of the 'authentic interpreter'

Security Council Resolutions fall to be interpreted by a wide range of authorities and individuals. Above all, the Security Council and its subsidiary organs (eg the Sanctions Committees) normally interpret and apply such Resolutions. Moreover, the other organs of the United Nations, for instance, the Secretary-General having a certain mandate by the Council or the ICJ, in its indirect and incidental exercise of judicial review[24] and, of course, the Member States, to

[22] On the issue of authorization of Chapter VII powers, the benchmark work is of D Sarooshi, *The United Nations and the Development of Collective Security* (OUP, Oxford, 1999) 13. See also N Blokker, 'Is the Authorization Authorized? Powers and Practices of the UN Security Council to Authorize the Use of Force by Coalitions of the Willing' (2000) 11 European Journal of International Law 541 and L-A Sicilianos, *Authorisation by the UN Security Council to Use Force* (Ant N Sakkoulas, Athens, 2003) [in Greek] and a summary of his work in French, in id, 'L'autorisation par le Conceil de sécurité de recourir à la force' (2002) 106 RGDIP 5–50.

[23] Significant in this regard is the jurisprudence of the European Court of Justice and the Court of First Instance concerning cases arising from the implementation of sanctions imposed by decisions of Security Council under Art 41 of the UN Charter. See, eg, the recent Judgment of the Court of First Instance of 21 Sept 2005, Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*; for scholarly opinion see: I Canor, 'Can Two Walk Together, Except they be Agreed? The Relationship between International Law and European Law: The Incorporation of United Nations Sanctions Against Yugoslavia into European Community Law through the Perspective of the European Court of Justice' (1998) 35 Common Market Law Review 137–87.

[24] Of cardinal importance to the international legal order is the question *quis custodiet ipsos custodes* ('who will guard the guards themselves?') in the framework of Security Council or, in other words, the matter of the judicial review of its Resolutions. As the Appeals Chamber of the ICTY held in the *Tadić* case: 'neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)'. The fact that the international system does not allow for any automatic review of the Council's decision does not rule out the possibility that, in practice, matters of ultra vires will be dealt with juridically, either indirectly or incidentally. See in this regard V Gowlland-Debbas, 'The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case' (1994) 88 American Journal of International Law 643 et seq. See also E de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, Oxford, 2004) and D Schweingman, *The Authority of the Security Council under Chapter VII of the UN Charter. Legal Limits and the Role of the International Court of Justice* (Kluwer Law International, The Hague, 2001).

which the Resolutions are addressed, are very often involved in such interpretative process. However, only the Security Council and arguably an organ authorized to do so by the Council, may give an 'authentic' interpretation, not in the same sense as treaties, where an authentic interpretation presupposes the consent of all the parties and a relevant act to that effect, but more in the sense of an 'authoritative' interpretation, ie a subsequent Resolution reaffirming the interpretation given to the terms of a prior Resolution in this respect. As the PCIJ said, 'it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it'.[25] Pertinent also are the remarks of the ICJ in the *Expenses* case that 'each organ must in first place at least determine its own jurisdiction'.[26] *A fortiori*, the said organ would be primarily responsible for rendering an 'authoritative' interpretation of its competences as well as, consequently, its Resolutions.[27] To conclude, only the Security Council possesses such a right and it is contested whether the same holds true for the other bodies authorized to do so by the Council. Taking into account the aforesaid *dictum* of the PCIJ, as well as the need for a *stricto sensu* interpretation of the delegation of powers in the framework of Chapter VII,[28] the assertion is warranted that the organs being delegated a Mandate by the Council, such as the Secretary-General, may interpret 'authoritatively' the Resolutions in question only on condition that it will be affirmed or adopted subsequently by another Resolution of the Council.[29]

[25] See *Jaworzina* Advisory Opinion of 6 Dec 1923, PCIJ Rep Series B, No 8, p 37.

[26] See *Certain Expenses of the United Nations* case, [1962] ICJ Rep, p 297.

[27] This was also the contemplation of the relevant sub-committee at the San Francisco negotiatons of the UN Charter, which recommended that the interpretation of the Charter should be left, at least initially, to the institutional organs, see 'Report of the Rapporteur of Committee IV/2, as approved by the Committee' UN Doc 933 IV/2/42 (2) (1945). See also in this regard: J Alvarez, 'Constitutional Interpretation in International Organizations' in J-M Coicaud and V Heiskanen, *The Legitimacy of International Organizations* (United Nations University Press, Tokyo, 2001) 104 et seq.

[28] According to Sarooshi, the principle *delegatus non potest delegare* (see in this respect: *Meroni v High Authority* Case 9156, [1958] ECJ 133), which applies to the delegation of powers by the Security Council, entails that there must be imposed certain limitations on the exersise of the power on the delegate, as well as that the terms of the delegation are to be construed narrowly. See D Sarooshi (n 22) 36 et seq.

[29] An array of examples of such interpretations is furnished by Sir Michael Wood in his seminal article on the present topic, see (n 16) 83 et seq. See also in this regard D Sarooshi (n 22) 57 et seq. However, it is difficult to countenance the thesis propounded by Sarooshi, namely that 'until the Security Council makes a decision of which contrary to the Secretary-General's interpretation then it is binding on UN Member States'. This contention is erroneously based upon the premise that the Secretary-General is a different delegate than the Member States; on the contary, since it is warranted that the latter's interpretations cannot be binding *erga omnes partes*, as corollary to the application of the aforementioned non-delegation principle, the same should apply to the Secretary-General.

2. The interpretation of Security Council Resolution under the scrutiny of the international judiciary

Turning now to the thorny question of the rules of interpretation to be applied in this regard, it should be reiterated that this issue has not attracted any extensive scholarly interest,[30] nor has it been the subject of many decisions of international adjudicative bodies.[31] The principal judicial authority on the interpretation of Security Council Resolutions is a brief passage in the Advisory Opinion of the ICJ in the celebrated *Namibia* case. The Court there stresses four points of reference to be taken into account in the interpretive process, namely, 'the terms of the Resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of Security Council'.[32] It should be noted, however, that *in casu* the Court was not necessarily making a general statement about the interpretation of these Resolutions, but rather was dealing with the question whether particular Resolutions had binding force under Article 25 of the Charter.[33]

There has also been a case where the *interpretandum*, ie the object of interpretation, was not a Resolution of the Security Council but a Resolution of its predecessor, namely the Council of the League of Nations. More precisely, it was before the PCIJ in its Advisory Opinion of 15 May 1931 in the *Access to German Minority Schools in Upper Silesia*.[34] The task of the Court there was to determine the character, force and scope of an arrangement adopted by the Council in its Resolution of 12 March 1927. The Court set out to identify the Council's intention, proof of which was found mainly in a Council's later relevant Resolution.[35] Hence, the examination of the intention of the parties with the aid of subsequent practice was the interpretive priority according to the *ratio decidendi* of the Court in the aforementioned case.[36]

Leaving the quarters of the World Court, of particular interest is the Decision of the ICTY in the well-known *Tadić* case, where the Appeals Chamber had to construe *in extenso* the Statute of the Tribunal, which was adopted by a Security Council Resolution. The Appeals Chamber, like the ICJ

[30] See (n 16) and corresponding text.

[31] It should be mentioned here that the present enquiry has confined itself solely to the assessment of the relevant decisions of international bodies and not of national courts, since the former bear much more evaluative weight for its purposes than the latter.

[32] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep, p 53 [hereinafter *Namibia*] and also the pertinent remarks by R Higgins, 'The Advisory Opinion on Namibia: Which UN Resolutions Are Binding under Article 25 of the Charter?' (1972) 21 ICLQ 270 et seq.

[33] See M Wood (n 16) 75.

[34] See Advisory Opinion of 15 May 1931 *Access to German Minority Schools in Upper Silesia* PCIJ Series A/B, No 40, p 16.

[35] See ibid 18.

[36] See also the analysis in M Bos (n 16) 6.

in the *Namibia* case, made no reference to the VCLT, which is more than telling in this regard. However, it considered at some length its general approach to interpretation of the jurisdictional provisions of its Statute. More analytically, after considering briefly the 'literal interpretation' of the Statute, it stressed that 'in order better to ascertain the meaning and scope of these provisions, it will therefore consider the object and purpose behind the enactment of the Statute'. It found the object and purpose in the terms of the Resolution adopting the Statute but also in the statements and Resolutions leading up to the establishment of the Court as well as in the Report of the Secretary-General containing the Statute and the statements of Security Council members regarding their interpretation of the Statute (paragraph 75). Moreover, it had recourse to 'the intent of the Security Council and the logical and systematic interpretation of Article 3 (of the Statute), as well as customary international law' in order to conclude that it had jurisdiction under Article 3 over the acts alleged in the indictment.[37] Interestingly enough, in the *Slobodan Milošević* case, the ICTY seemed to countenance the thesis that the Resolutions in question should be interpreted like treaties.[38] However, the context of that *dictum* indicates that the equation of the Statute with a treaty was made solely for the purpose of applying the provision of Article 27 of VCLT, namely that 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty,' to the Statute, in particular Rule 58 and the Federal Republic of Yugoslavia (FRY).[39] Therefore, no broader deductions with respect to the the interpretation per se of such instruments should be drawn from the above pronouncement of the Tribunal.

In a broader context and in relation to the interpretation of Resolutions of international organizations in general, noteworthy also is an *obiter dictum* in the case of *Laguna del Desierto* between Chile and Argentina. There, the Arbitral Tribunal held that there are rules of international law, which can be applied for the interpretation of any legal act, whether this is a treaty, or a unilateral act, or arbitral award, or resolutions of an international organization. These are the rules that derive from the natural and ordinary meaning of the terms and from the reference to the context and the principle of effectiveness.[40] Moreover, it should be mentioned that in one of its earliest judgments and before the adoption of

[37] See *Tadić* IT-94-1-AP72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 Oct 1995), [1996] 35 International Legal Materials 32–74. See also the methods of interpretation employed by the same Tribunal in the later Judgment of the Appeals Chamber in *Tadić case* (judgment of 15 July 1999) paras 282–6 and 287–302. It is worth underlying that the Tribunal commenced its interpretive process with the following words: '[n]otwithstanding the fact that the ICTY Statute is legally a very different instrument from an international treaty . . .', see para 282.

[38] In its words 'the Statute of the International Tribunal is interpreted as a treaty', see *Slobodan Milošević* (Decision on Preliminary Motions), ICTY Trial Chamber III, Decision of 8 Nov 2001 (case no IT-99-37-PT) para 47.

[39] See ibid paras 45–7.

[40] See Arbitral Award of 21 Oct 1994. *Dispute concerning the course of the frontier between BP 62 and Mount Fitzroy* (Argentine/Chile), in RGDIP (1996) 552.

VCLT, the United Nations Administrative Tribunal indicated that it would adopt the ICJ's approach to treaty interpretation in its interpretation of staff regulations and rules, but in substance what it did was to set out an array of interpretive methods, without a hierarchical and coherent structure.[41]

The perusal of the aforementioned case-law, in light also of the theoretical dichotomy of the two legal categories propounded earlier, warrants the conclusion that the provisions of the VCLT with regard to treaty interpretation are not to be applied *mutatis mutandis* to Security Council Resolutions.[42] This is supported by the lack of any allusion *expressis verbis* or indirectly in the above cases to the said provisions, with the sole exception of the *Milošević* case, as well as by the fact that the relevant choice of the interpretive methods was without any implicit adherence to the hermeneutic rubric of the VCLT. Moreover, the proposition for a *mutatis mutandis* application oversimplifies the institutional dimension of the said instruments, which necessitates a different approach in this regard.[43]

This should not mean, however, that there is a *vacuum juris*, in the sense that the issue at hand is not susceptible to legal regulation. On the contrary, the Resolutions in question are and should be construed in accordance with a coherent set of guiding interpretive principles, which, in turn, should pay due respect to the legal nature of the Resolutions, their institutional setting and their overarching purpose in the international arena. Having these in mind, it is suggested to have recourse to a different analytical approach to the question of interpretation that would be more apposite to them in order to build on a coherent hermeneutic paradigm in this respect.

3. The most coherent analytical framework for the hermeneutics of the Resolutions of Security Council

Drawing insights from Stanley Fish and Ian Johnstone, it seems feasible to propound the thesis that the interpretive enterprise in question should be guided and concomitantly constrained by the assumptions, practices and conventions inherent in the institutional 'interpretive' community of the Security Council. The central notion to the above-mentioned thesis is the idea

[41] It enunciated the following requirements: 'the interpretation must be a logical one; it must be based upon an attempt to understand both the letter and spirit of the rule under construction and the interpretation must be in conformity with the context of the body of rules and regulations to which it belongs and must seek to give the maximum effect to these rules and regulations'; see *Howrani and Four Others*, UNAT Judgment No 4 (1951), *Judgments of the United Nations Administrative Tribunal* (JUNAT) Nos 1–70, p 8, cited in Wood (n 16) 86.

[42] See per ibid 77 and Thirlway (n 14) 29; contra: Amerasinghe, who claims that 'in the interpretation of decisions of organs which are clearly of a delegated nature, the principles of interpretation used will be similar to those used in the interpretation of constituted texts, though there may have to be a change in emphasis and priorities', see (n 16) 61.

[43] cf, eg, the relevant *dictum* of the *Namibia* case, which alludes specifically to the provisions of the Charter invoked as criterion of the interpretation to be given respectively, see (n 32) and corresponding text.

of 'interpretive communities'.[44] The concept was developed by Stanley Fish, a literary theorist, who claimed that it has explanatory power both in his field and in the field of legal interpretation.[45] He never defined the concept but rather explained it in terms of function. Designed to avoid the shortcomings of both pure objectivity (meaning resides in the text) and pure subjectivity (meaning resides in the reader),[46] it is best understood as a way of speaking about the power of institutional settings, within which assumptions and beliefs become a matter of common sense.[47] The interpretive community constrains interpretation by providing the assumptions and categories of understanding that are embedded in the relevant practice or enterprise. Furthermore, a given text is always encountered in a situation or field of practice and therefore can only be understood in light of the position it occupies in that enterprise. Hence, interpretation is constrained neither by the language of the text nor its context, but by the cultural assumptions within which both texts and contexts take shape for situated agents.[48] Meaning is produced by neither the text nor the reader but by the interpretive community in which both are situated.[49]

[44] Note in this regard that the interpretive communities have much in common with 'epistemic communities', though their main difference is that the interpretive community offers not only knowledge and policy advice but more importantly passes judgment. See for 'epistemic communities', PM Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 International Organization 1.

[45] See S Fish, *Is There a Text in the Class? The Authority of Interpretive Communities* (Harvard University Press, Cambridge, Mass, 1980).

[46] Fish explains the concept as follows: '[t]he notion of interpretive communities was originally introduced as an answer to a question that had long seemed crucial to literal studies. What is the source of interpretative authority: the text or the reader? […] What was required was an explanation that could account for both . . . and that explanation was found in the idea of an interpretive community, not so much as a group of individuals who shared a point of view, but a point of view or way of organizing experience that shared individuals in the sense that its assumed distinctions, categories of understandings and stipulation of relevance and irrelevance were the content of the consciousness of the community members who were therefore no longer individuals but, in so far as they were embedded in the community's enterprise, community property', see id, *Doing what Comes Naturally* (Clarendon Press, Oxford, 1989) 141–2.

[47] These assumptions and beliefs are, for the community associated with the particular institutional setting, 'facts', which are not immutable but provide objectivity within a community of interpretation where they need not to be questioned. See K Abraham, 'Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair' in S Levinson and S Mailloux (eds), *Interpreting Law and Literature: A Hermeneutic Reader* (Northwestern University Press, Evanston, Ill., 1988) 115 et seq, 122–4.

[48] See I Johnstone, 'Security Council Deliberations: The Power of the Better Argument' (2003) 14 European Journal of International Law 437–80, 444–5.

[49] Johnstone imagines the interpretive community composed of two concentric circles. The inner circle (or what he christened in his earlier writings as 'narrow interpretive') consists of all individuals directly or indirectly responsible for the formulation, negotiation, conclusion, implementation and application of a particular legal norm. It is surrounded by an outer circle of lawyers and other experts engaged in professional activities associated with the practice or issue area regulated by the norm. This broader community is analogous to what Oscar Schachter has called the invisible college of lawyers—a group of professionals dispersed throughout the world who are dedicated to a common intellectual enterprise and engage in a continuous process of communication and collaboration. See ibid 450. Also, see O Schachter, 'The Invisible College of International Lawyers' (1977) 72 Northwestern Law 217 et seq.

Fish's theory can be juxtaposed with Ronald Dworkin's theory of law.[50] On the one hand, both of them share the view that law is an interpretive practice[51] and all interpretation is enterprise-specific, in the sense that different standards and techniques of interpretation apply in different enterprises.[52] They also agree that legal interpretation is constrained in some way.[53] On the other, they disagree about the source of constraint as well as the importance of 'intention' in this enterprise.[54] In a broader context, the truth is that, despite these shared starting points, each writer treats the other's view with derision.[55] Fish sees interpretation as an intersubjective enterprise—all meaning derives from the interpretive community—, while he criticizes all those, not merely Dworkin, who suppose that there can be a 'theory' 'attached to no particular field of activity, but of a sufficient generality to be thought of as constraint on (and explanation of) all fields of activity'.[56] Dworkin's ideal judge 'Hercules', on the other hand, is engaged metaphorically in a more private exercise, taking into account both the dimension of 'fit' and the moral subjective dimension concening issues of political morality before reaching the right answer in any case before him.[57]

[50] Dworkin's point of departure is that law is based on integrity. In explaining this view, he notes that 'according to law as integrity, propositions of law are true if they figure in or follow from principles of justice, fairness and procedural due process that provide the best constructive interpretation of the community's legal practice'; see: id, *Law's Empire* (Hart Publishing, Oxford, 1986) 225. Thus, he calls his theory of interpretation 'constructive', which in its simplest formulation is the following: 'constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which is taken to belong', ibid 52.

[51] According to Dworkin, '[l]egal practice is an exercise in interpretation not just when lawyers interpret documents or statutes but also generally. Propositions of law […] are interpretive of legal history, which combines elements of both description and evaluation, but is different from both', id, 'Law as Interpretation' (1982) 60 Texas Law Review 529.

[52] See Johnstone (n 48) 447.

[53] Dworkin claims that constraints are inherent in that enterprise. According to him, 'the history of shape of a practice or object constrains the available interpretations of it'; see (n 50) 63.

[54] See in this regard their dialogue in S Fish, 'Working on the Chain Gang: Interpretation in Law and Literature' (1981–2) 60 Texas Law Review 551; and R Dworkin, 'My Reply to Stanley Fish' in W Mitchell (ed), *The Politics of Interpretation* (University of Chicago Press, Chicago/London, 1982) 287 et seq.

[55] See JW Harris, *Legal Philosophies* (2nd edn Butterworths, London, 1997) 193 et seq. S Fish, for example, accuses Dworkin of 'rather than avoiding the Scylla of legal realism ("making it up wholesale") and the Charybdis of strict constructionism ("finding the law just there"), commiting himself both to them', while he condemns him by the aphorism that 'Dworkin's failure to see this [Fish's source of interpretive constraints] is an instance of a general failure to understand the nature of law' ibid 555 and 562. Conversely, Dworkin argues that the constraints imposed by the practices of the professional literary community are so weak that, despite Fish's protest to the contrary, interpretation is effectively rendered wholly subjective by his theory see ibid 294.

[56] See S Fish (n 45) 14.

[57] See JW Harris (n 55) 197. According to Dworkin, '[h]ard cases arise, for any judge, when his threshold test does not discriminate between two or more interpretations of some statute or line of cases. Then to decide which of those interpretations is "right" (in Dworkin's theory, there is only one right answer), his ideal Judge Hercules must ask which shows the community's structure and institutions and decisions—its public standards as a whole—in a better light from the standpoint of political morality', see R Dworkin (n 50) 255–6. See also C Sustein's criticism on that point in *The Partial Constitution* (Harvard University Press, Cambridge, Mass, 1993) 113.

Moving now from a broader jurisprudential point of view to the more concrete yet obscure issue of interpretation in international law, Ian Johnstone, drawing principal inspiration from the above-mentioned thesis, posits that 'interpretation of international law is the search for an intersubjective understanding of the norm at issue: the interpretive task is to ascertain what the law means to the parties to a treaty or subjects of the law collectively rather than to any one of them individually. It is an interactive process, the parameters of which are set by an interpretive community".[58]

Moreover, he poses the question whether there is an interpretive community associated with the Security Council, within which justificatory discourse is plausible.[59] Building also upon Habermas's theory of communicative action, as applied by Thomas Risse in the ambit of world politics,[60] he tentatively concludes that 'in the enterprise of Security Council decision-making, there is some evidence of a normative and procedural framework that makes legal discourse both possible and potentially meaningful'.[61] Although it is acknowledged that in the case of the Security Council, there is no such thing as a 'common lifeworld'[62]—a precondition for effective communicative action—or shared culture and common values informing deliberations in the Security Council, the emphasis is shifted from the foregoing to *arguendo* 'overlapping lifeworlds'[63] and 'common meanings and understandings' in place therein.[64] The latter taken in conjuction with the normative framework of the Council in accordance with the Charter suffice, according to Johnstone, to substantiate the argument in favour of an interpretive community associated with the above organ. However, it is recognized that the impact of the interpretive community is contigent more or less upon the degree of unity within it, having in mind primarily the decentralized structure of the international sytem.[65]

[58] See I Johnstone, 'Treaty Interpretation: The Authority of Interpretive Communities' (1991) 12 Michigan Journal of International Law 382 and (n 48) 449–50. Concurring is ND White (n 19) 656.

[59] See discussion in ibid 452 et seq.

[60] See J Habermas, *Theory of Communicative Action* (Beacon Press, London, 1981). In the words of Risse, '[t]he theory of communicative action holds that there are at least three kinds of communicative behaviour: bargaining based on fixed preferences; strategic argumentation, in which arguments are used to justify positions and persuade others to change their minds; and true reasoning, in which actors seek a reasoned consensus on the basis of shared understandings, where each actor not only tries to persuade but also is prepared to be persuaded', see id, 'Let's Argue!: Communicative Action in World Politics' (2000) 54 International Organization 7–9.

[61] See Johnstone (n 48) 464.

[62] 'A common lifeworld consists of shared experiences and assumptions: a supply of collective interpretations of the world and of themselves, as provided by language, common history or culture', Risse (n 60) 10–11.

[63] See Johnstone (n 48) 460.

[64] In this regard, he argues that '[a]ll that is necessary is a sense of being in a relationship of some duration from which common meanings and expectations have emerged and of being engaged in an enterprise the general purpose of which all understand in roughly the same way.' ibid 456.

[65] ibid 475.

While it is beyond the ambit of the present article to assess the propriety of the notion of 'interpretive communities' as the dominant hermeneutic paradigm,[66] there is, however, much cogency in the preceding articulation of the argument in favour of such a community around the Security Council. Moreover, it is useful for our purposes, as it sheds light on the hermeneutic intricacies of the said organ in the following sense: firstly, there is truth in the allegation that in the 'inner circle' of the Council do operate 'overlapping life-worlds', in the sense that on the one hand, there are the Permanent Members (P5), who, indeed, have become an exclusive club with a shared history and set of experiences. They have learned from each other in working together and have developed shared understandings. On the other hand, there is the rotating group of Non-Permanent Members, which, even though it is by definition varied and heterogeneous, it still enters into an enterprise with fixed terms and conditions, without causing problems to its coherent function. The lack of the power of veto, the short period of their term in the Council, as well as the predetermined affiliation of the Non-Permanent Members to certain groups, such as the European Union, the Non-Aligned Movement, moulds and instructs their 'life' in the Council, conducing to the maintainance of institutional balance and the well-established conventions and practices therein. Secondly, due regard should be paid to the overall objective of the institution in question, ie the maintenance of international peace and security, which underpins and holds together the whole enterprise of the Security Council. As in the context of treaties, where States comply with the latter primarily because they have an interest in reciprocal compliance by the other party or parties,[67] thus in the framework of the Security Council, States collaborate with each other, even if not always in efficiency, because they have a common interest in the maintenance of the *status quo ante*, ie the international system as it is.[68]

This realization leads to the next contemplation that *arguendo* if there is an 'interpretive community' of the Security Council, that is not founded so much upon the shared meanings, values or assumptions of its Members as such, but on the institutional setting in which it operates, namely the United Nations. To be more precise, the community in question, at least the narrow one, comprises of more institutional elements rather than 'interpretive', in the sense of an established normative framework, namely the Charter, and as a corollary, there are more normative constraints inherent in its enterprise. Therefore, it would be more apposite to conceive the Council as an 'institutional (interpretive) community', with a coherent normative and procedural framework,

[66] See, eg, the critique by Dworkin (n 54) and A Marmor, *Interpretation and Legal Theory* (Hart Publishing, Oxford, 2005) 64 et seq.

[67] See I Johnstone (n 58) 382.

[68] More specifically, the P5 have a common interest in the upholding of the balance of power therein, which emanates from their privileges, and the Non-Permanent Members usually are interested in not disturbing the above balance and losing, consequently, other contingent benefits.

common practices and understandings and an overarching principle holding together its centrifugal forces. Priority in the interpretation of its decisions should concomitantly be given to the following three tenets: (i) what the community collectively had decided, (ii) in accordance with its institutional framework and (iii) in light of its fundamental purpose, ie the maintenance of peace and security. These three interpretive tenets or 'pillars' comprise, in the writer's view, the basic paradigm of the hermeneutics in this regard, the principal guiding rule in each and every interpretive enterprise of Security Council Resolutions-Authorizations.

This hermeneutic paradigm seems to have, at least to some extent, strong correlation with a new theory of purposive interpretation in law. According to its architect, Aharon Barak, purposive interpretation is a general system of interpretation to be used for all legal texts, recognizing, however, the uniqueness of each kind of text and the interpretive emphases characteristic of it. The interpretation is purposive because its goal is to achieve the purpose that the legal text is designed to achieve. It is based on three components: language, purpose and discretion. As far as the second is concerned, the purpose is the values, goals, interests, policies and aims that the text is designed to actualize. It is a normative concept that has two foundations: subjective and objective purpose. The first is the authorial intent, the goals that the author of the text sought to actualize, while the second is more aptly characterized as the 'intention' or will of the system, in the sense that at the supreme level it actualizes the fundamental values of the legal system.[69]

Applying this theory to the above-mentioned paradigm, it is evident that the 'subjective purpose' or the 'authorial intent' is actually the collective intent of the members of the Security Council, while the 'objective purpose' reflects the fundamental purpose of the Council in the framework of Chapter VII, ie the maintenance of international peace and security. It follows from the foregoing that the purposive component of the above theory corresponds to the two of the three basic tenets of our hermeneutic approach, giving thus to the latter a 'purposive' dimension alongside the predominant institutional one. The priority, of course, in the interpretation of the Security Council Resolutions will be on the side of the intersubjective intent of the Council, or the 'subjective purpose' as articulated previously. This, however, will not run counter to the theory of purposive interpretation, since the latter also recognizes such priority for analogous texts, ie which have a more unilateral legal nature, like wills for example.[70] Moreover, a unique feature of purposive interpretation is that the interpreter encounters the different data in the form of rebuttable presumptions. The latter play, also, an essential role in the hermeneutics of Security Council Resolutions, as it will be revealed later on. In conclusion, while the

[69] See A Barak, *Purposive Interpretation in Law* (Princeton University Press, Princeton and Oxford, 2005) 88 et seq. Noteworthy is also that the purposive theory shares many fundamentals with Dworkin's 'constructive' system of interpretation, see ibid 296.

[70] See ibid 307 et seq.

purposive theory is not as such the foundation of the above-mentioned hermeneutic paradigm for Security Council Resolutions, due to the latter's unique legal nature; it does offer cogent theoretical insights to comprehend holistically the interpretive enterprise in question. In any case, it should be considered as constructive to the fact that the above paradigm builds on various jurisprudential foundations, combining the most suitable elements of each of them, yet at the same time respecting the uniqueness of the interpretive enterprise in question and articulating eventually the best possible interpretive proposition.

To recapitulate, it is suggested that the application *ipso jure* or even *mutatis mutandis* of the provisions of Articles 31–3 of VCLT to Security Council Resolutions should not be endorsed. Instead, the thesis put forward primarily by Stanley Fish and then by Ian Johnstone with regard to the existence of interpretive communities delineating the enterprise of hermeneutics in several matrices, in conjuction with the theory of purposive interpretation analysed above, entrench the most appropriate analytical framework for the interpretation of Security Council Resolutions. They link undoubtedly the relevant process to the institutional setting of the Council, while simultaneously recognizing the importance of the collective intent of the members of the Council as well as its ultimate purpose in the *regulatio interpretandi,* ie the rules of interpretation of the said Resolutions.

B. Principles and presumptions for the interpretation of Security Council Resolutions: a proposal

The above analytical framework, as well as the aforementioned judicial pronouncements, frames sufficiently the theoretical setting for the ensuing discussion, which, however, will not take place in *vacuo jure,* but in juxtaposition with the established canons of treaty interpretation. Thus, the rubric of the VCLT, even though it is not espoused as the pertinent normative framework, will serve as a metholodigical tool in this regard, providing the counter-paradigm against which the relevant principles and presumptions will be assessed.[71]

It is the text of the Resolution and concomitantly its grammatical interpretion which will serve as the point of departure of the relevant process. Taken as granted in every interpretive enterprise, the rebuttable presumption in this regard is that the text conveys the will and intentions of its drafters.[72] This is

[71] This methodology, namely the perusal of the interpretation of Security Council Resolution against the background of the rules of VCLT, was followed primarily by Sir M Wood in his relevant analysis, see id (n 16) 85 et seq.

[72] Sir Gerald Fitzmaurice argued in this respect that the '[i]nterpretation starts as it must with a careful consideration of the text to be interpreted. This is so because the text is the expression of the will and intentions of the parties. To elucidate its meaning, therefore, is, *ex hypothesis*, to give effect to that will and intention,' see id, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpetation and Other Treaty Points' (1957) 33 British Yearbook of International Law 207.

corroborated also *in casu* bearing in mind the priority afforded to the 'terms of the Resolution' by the aforementioned judicial decisions.[73] Moreover, by virtue of Article 31 of VCLT, the text is to be construed in accordance with its natural and ordinary meaning.[74]

In light of the foregoing, the interpreter of a Security Council Resolution will logically commence from the interpretation of the terms of the Resolution according to their ordinary meaning. However, his/her primary aim would be to ascertain what the Members of the Security Council collectively decided to include in the text of the Resolution.[75] To interpret the words of a Resolution in a way that is directly contrary to the consensus (which, nevertheless, may be an agreement to disagree) underlying the Resolution would undermine the Council as a forum for achieving compromise[76] and *a fortiori* would run counter to the intersubjective enterprise of the institutional community of the Security Council. Furthermore, as argued above, there are certain common practices and shared understandings embedded in the workings of the said community, which undoubtedly will have an effect on the meaning of the terms to be construed. The example par excellence of that could not be other than the ritual incantation of the magic formula 'to use all necessary means' from Resolution 678 (1990) onwards in every case of authorization to use force.[77] The above phrase was accepted to have a different meaning than the ordinary and to denote the authority to use force, illustrating thus the common will of the Council to that effect. The existence of this formula in a Resolution is perhaps the most decisive factor as to whether the latter has authorized the use of force.

The next step in the treaty interpretation would be to take into account the context of the treaty, which embraces any instrument of relevance to the conclusion of a treaty, as well as the treaty's preamble and annexes under Article 31(2) of VCLT. This interpretive rule has equal application to the milieu of the Security Council Resolutions, albeit under a different conceptual dimension. Whereas the context per se of a Resolution serves indubitably as relevant interpretive material, as the Decicion of the Appeals Chamber in the *Tadić* case well attests, the thrust of the above concept should however be the following: the 'context' of a Resolution comprises primarily of the aggregate of all the prior or subsequent Resolutions, which the Council has adopted in relation to the subject-matter of the Resolution in question, as well as any

[73] See in this regard the *Namibia* and *Tadić* cases (n 32) and (n 37) correspondingly.

[74] See (n 11).

[75] We should recall at this point the definition of Johnstone, namely that 'the interpretive task is to ascertain what the text means to the parties collectively rather than to each individually', see (n 58).

[76] See also White (n 19) 657.

[77] Resolution 678 (1990) authorized Member States cooperating with the government of Kuwait 'to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions . . .' in the context of the Second Gulf War, see SC Res 678 (29 Nov 1990) para 2, [1990] 29 ILM 1565.

other text which is adopted or referred to by that Resolution, like, for instance, the Reports of the Secretary-General.[78] Moreover, the subsequent Resolutions would furnish the interpreter with evidence of the subsequent practice of the Council in line with Article 31(3)(b) of VCLT, which is equally important in the present context. This was corroborated in the Advisory Opinion of the PCIJ in the *German Minority Schools* case discussed above, where the intention of the Council was ascertained with the aid of a subsequent Resolution of the Council of the League of Nations.[79]

Turning now to the 'object and purpose' of the Resolution as a possible criterion of the hermeneutic enterprise, it is important to mention at the outset the following: first of all, at least in the realm of treaty interpretation, the 'object and purpose' criterion (Aricle 31(1) *in fine*) is intertwined with the principle of effectiveness, and more specifically with 'la régle de l'efficacité', ie the rule that the instrument as a whole, and each of its provisions, must be taken to have been intended to achieve some end and that an interpretation which would make the text ineffective to achieve the object in view is prima facie suspect.[80] Secondly, it is widely acknowledged that the 'teleological' approach to treaty interpretation is more akin—to import an old terminology—to the 'traités-loi' rather than to 'traités-contrats', in other words it is a method of interpretation more especially connected with the general multilateral convention of the 'normative', and, particularly, of the sociological or humanitarian type.[81]

Moreover, it attains incremental importance in the context of the interpretation of constituent instruments of international organizations[82] and, of course, in the realm of our enquiry, with regard to the interpretation of 'legislative' or 'generic' Resolutions of the Security Council, ie Resolutions 1373 (2001) and 1540 (2004).[83] In the same vein, it was specifically referred to in the *Tadić* case, where the issue in hand was the interpretation of the Statute of ICTY, which could be assimilated to a Resolution of that kind, in the sense that it encapsulated general norms of international law. However, in the latter case, the 'teleological' approach was taken in conjuction with the perusal of the

[78] See, eg, the Resolution 837 (1994) in regard to Somalia, whereby the Security Council authorized the first real 'peace-enforcement' operation of UN (UNOSOM II), following the Proposals of Secretary-General in his Report, which the Council adopted *expressis verbis*. The latter should be considered as relevant interpretive material under the veil of the 'context' of the Resolution. See also Sarooshi (n 22) 217.

[79] See (n 34) and corresponding text.

[80] It is this aspect of that principle, not its counterpart ('la règle de l'effet utile') that pertains to effectiveness and involves giving the object and purpose an important place in the interpretive technique (the celebrated maxim *ut res magis valeat quam pereat*). See in this regard G Berlia, 'Contribution à l'interprétation des traités' 114 Recueil des Cours de l'Académie de Droit International (1965-I) 306 et seq.

[81] See Sir G Fitzmaurice (n 72) 207 et seq.

[82] See the pertinent remarks in CF Amerasinghe (n 3) 182 et seq.

[83] See also Talmon (n 13) 190.

travaux and the Report of the Secretary-General, *qua* 'context',[84] implying the close connection between the object and purpose of a particular instrument and the relevant intention of its drafters, as it is revealed by the preparatory works and the other circumstances.[85]

To take this point further, it is suggested that Resolutions under Chapter VII are inherently different from the above instruments and even from the type of the 'generic' Resolutions just mentioned. The Resolutions-Authorizations, in particular, on which emphasis is placed here, have more or less a restricted horizon, in the sense that they are supposed to delegate certain powers to Member States to restore international peace and security in a specific area. For this reason, the mandate should by definition have a limited scope *ratione temporis*, since it is intertwined with the resolution of a particular crisis in a particular area, at least a more limited scope than the generic Resolutions, which set out abstract and general provisions. In contemplation of that, the parameters of a teleological approach of the above-mentioned kind should be more restrictively delineated than in the case of multilateral treaties, and in any case emphasis should be placed more on the intersubjective intention of the Members of the 'community' with regard to how they have decided to tackle a particular crisis. This is also more akin to the true legal nature of Security Council resolutions as 'executive acts' of an organ of international organization and corresponds more aptly to the idea of subjective purpose as a component of an overall purposive interpretation.[86] The intent of the members of the Security Council, ie the goals, values, policies that they sought to actualize by the Resolution in question, is the predominant purpose (the *telos*) at the core of the text. Consequently, the intersubjective intent of the community of the Council and the *ratio juris*, the purpose of the Resolution, are inexorably linked with each other.

On the other hand, however, there is a place for a different notion of teleological approach in this regard. As was put forward in our proposed hermeneutic paradigm, the interpretation of the Resolutions should always bear in mind the fundamental purpose of the 'community' of the Security Council (reference is made always to the 'inner circle' of that alleged community), namely the maintenance or restoration of international peace and security. In other words, it should also be taken into account the 'objective purpose', namely, the fundamental values of the legal system, *in casu* the ultimate purpose of the maintenance of international peace and security.[87] That means that in the

[84] See *Tadić* case (n 37) and especially the Judgment of the Appeals Chamber (1999) para 282.

[85] Sir Gerald Fitzmaurice makes the following remarks with regard to the relationship between these two schools of thought: 'while the teleologist himself has little direct regard for intentions as such, the intentionist finds himself quite at home among the teleologists: there is always a tendency for an inquiry as to what the framers of a treaty intended to develop into one as to what object they had in view and from this to conclude that the treaty has a certain purpose, in the light of which all its clauses must be interpreted' (n 72) 209.

[86] See (n 70) and corresponding text.

[87] ibid.

interpretive enterprise there should always be consideration not only of what that instrument purpoted *in concreto*, but also, more generally, of how can the Resolution in hand be construed better, so as the fundamental purpose of peace maintenance is always accomplished, on the basis, of course, of the 'corporate will' of the Council. Hence, there should always be a dialogue between the subjective and the objective components, in order to synthesize in better light the ultimate purpose.[88] To paraphrase Dworkin in this regard, 'constructive interpretation is a matter of imposing purpose on a Resolution in order to make of it the best possible example of the form or genre to which is taken to belong, namely of a Security Council Resolution under Chapter VII of the Charter'.[89]

It is one thing to argue that interpretive weight should be also added to the ultimate goal of each Resolution, ie the maintenance of international peace and another to countenance a 'broadly-gauged purposive approach, which is put forward by the United States and an increasing number of United States authors'.[90] A fervent advocate of this thesis has explained the selection of an interpretive approach as involving a choice between a textually oriented 'classical view' and a more malleable approach which he labelled 'legal realism'. The latter regards 'explicit and implicit agreements, formal texts and State behaviour as being in a condition of effervescent interaction, unceasingly creating, modifying and replacing norms'.[91] This assertion, which is close to the non-interpretive doctrine of filling in a gap in a legal text,[92] disregards totally the normative and procedural framework of the institutional community of the Security Council and its collective will conveyed by the means of the Resolution. Moreover, it is inextricably linked with the notion of 'implied authorisation', which should be refuted *de lege lata* and *de lege ferenda* as impinging upon the foundation of the institutional edifice of the Security Council, ie the monopoly of the collective security afforded to it.[93]

Contrary to the role ascribed to it under the VCLT, where the intention of the parties and subsequently the use of the *travaux* as its evidence were put in a second position,[94] the 'subjective' school seems to take its revenge and to be upgraded in the context of Security Council Resolutions. Indeed, as it was posited before, it is due to the nature of the said Resolutions that the latter are

[88] See Barak (n 69) 91. In his words, 'purposive interpretation is a kind of dialogue between the intention of the reasonable author and of the system and the intention of the actual author. Interpreters play a dual role in this dialogue. On the one hand, they live in the present, and their understanding is a product of the legal system's contemporary values. On the other hand, interpreters try to understand a text that was created in the past . . .' ibid 112.

[89] See Dworkin (n 50).

[90] See in this regard Byers (n 16) 25 et seq.

[91] See T Farer, 'An Inquiry into Legitimacy of Humanitarian Intervention' in L Damrosch and D Scheffer (eds), *Law and Force in the International Order* (Westview Press, Boulder, 1991) 185 et seq, and ibid 23.

[92] See Barak (n 69) 66 et seq.

[93] ibid 24. Contra 'implied authorization': L-A Sicilianos (n 22) 42 et seq, Lobel and Ratner (n 18).

[94] See (n 11).

more prone to an interpretation based on the intersubjective approach. Consequently, the elucidation of the collective intent of the community attains an important place in the interpretive enterprise. This assertion is, however, open to a twofold criticism: due to the conflicting interests of the Member States, there are many instances of a de facto 'non-decision', in the sense that the Members having failled to reach a consensus among them will pass a neutral and inconsequental Resolution. Moreover, these Resolutions would reflect the common will only of the majority of the members of the Council and not its entirety.[95] Nevertheless, it is the will of the Council per se, as a distinct legal body, and not the aggregate of the separate will of the Member States of the Council which reflects the intent of the community. Even in the above-mentioned cases, there would actually be an 'agreement to disagree'. The Resolution would depict both the points of convergence and divergence within the community, which, albeit the disagreement, did eventually come to a decision in the form of the Resolution. In any case, disagreement is an inherent feature of the communicative discourse taking place within the Council and should not be considered bereft of normative value.

A further argument in favour of an '(inter)subjective' approach to the interpretation in question would be that the above method is the most pertinent to the interpretation generally of unilateral acts in international law, to which Security Council Resolutions are very close in nature.[96] To substantiate that further, the International Law Commission in its proposal for the draft articles on the interpretation of the above acts makes the suggestion to substitute the phrase of Article 31(1) of VCLT 'in light of the object and purpose' with the following: 'in light of the intention of the author State.'[97] This is in accord with the relevant jurisprudence of the ICJ,[98] as well as with common sense, since the formulation of these acts is under the absolute discretion of the author State, and thus the latter's intention is more crucial.

As a corollary to the advanced status of the intersubjective approach in the framework of the interpretation of Security Council Resolutions, the role of the *travaux préparatoires* in the elucidation of the collective intent of the Council attains the same status correspondingly. Although in the context of the

[95] See on the last point the remarks of Frowein (n 16) 99.

[96] See with regard to 'unilateral acts': E Suy, *Les Actes Juridiques Unilatéraux en Droit International Public* (LGDJ, Paris, 1962); W Fiedler, 'Unilateral Acts in International Law' in R Bernhard (ed), *Encyclopedia of Public International Law* (Max Planck Institute, Heidelberg, 1984) 522 et seq. See also the definition adopted by the ILC Special Rapporteur, VR Cedeño, in the pertinent study undertaken by ILC: 'unilateral act of a State means an unequivocal expression of the will which is formulated by a State with the intention of producing legal effects in relation to one or more other States or international organizations and which is known to that State or international organization' in *Third Report on Unilateral Acts of States* (2000), A/CN.4/505, p 13.

[97] See VR Cedeño, *Fourth Report on Unilateral Acts* International Law Commission (2001) A/CN.4/519, p 36.

[98] See ibid 22 et seq and M Fitzmaurice, 'The Optional Clause System and the Law of Treaties: Issues of Interpretation in Recent Jurisprudence of the International Court of Justice' (1999) 20 Australian Yearbook of International Law 127–59.

law of treaties preparatory works were deemed as supplementary means of interpretation (Article 32 VCLT),[99] *in casu* they constitute the primary *sedes materiae* of the intention of the Member States. It is telling in this regard, that in both the *Namibia* case and more robustly and practically in the *Tadić* case, there were references to the *travaux* as evidence of the proper interpretation to be given to the Resolution in question. It is true that much of the preparatory work takes place behind the scenes, in informal consultations of some or all Council Members,[100] but in general the debates are not entirely private and confidential. The outcomes of many Security Council debates are public and usually accompanied by explanation of votes. Moreover, the Security Council seems to have responded lately more affirmatively to demands for wider participation[101] and at least in hard cases such as Iraq, the debates taking place therein were public enough to allow their assessment *qua travaux préparatoires*.

More generally, all Security Council documents referred to in the Resolution or referred to at the beginning of the meeting or series of meetings at which the Resolution is adopted would need to be considered as part of the *travaux*, though they may also be useful in ascertaining the relevant 'context'.[102] Of particular importance in this regard are the statements of the Representatives of the Member States who were the drafters of the Resolution to be adopted. According to the common practices and the shared understandings of the community in place, these statements and subsequently the interpretations that the above States ascribe to the draft Resolution influence the other States, who they might base their concurring vote on them, and thus they have an advanced normative value in the relevant interpretive process. Lastly, it should be noted that the principle of contemporaneity, advanced by Sir Gerald Fitzmaurice,[103] may have equal importance in the context of our enquiry, in the sense that the terms of a Resolution should be construed in accordance with the meaning they possess at the time of the adoption of the

[99] Pursuant to Art 32 of VCLT, recourse to them should be made either to confirm the meaning resulting from the application of Art 31, or when the meaning is still obscure or 'leads to a result manifestly absurd'. For a contrary opinion see inter alia S Schwebel, 'May Preparatory Work be Used to Correct rather than Confirm the "Clear" Meaning of a Treaty Provision' in J Makarczyk (ed), *Theory of International Law at the Threshold of 21st Century* (Kluwer Law International, The Hague, 1996) 541–7. See also J Klabbers, 'International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?' (2003) 50 Netherlands International Law Review 267–88.

[100] See inter alia SD Bailey and S Daws (n 13) and M Wood, 'Security Council Working Methods and Procedure: Recent Developments' (1996) 45 International and Comparative Law Quarterly 150 et seq.

[101] See I Johnstone (n 58) 462 et seq and J Prantl, *The UN Security Council and Informal Groups of States: Complementing or Competing for Governance?* (OUP, Oxford, 2006).

[102] See Sir M Wood (n 16) 93 et seq.

[103] As a Rapporteur of ILC on the Law of Treaties (1951), Sir Gerald Fitzmaurice drew up a comprehensive set of principles of interpretation. Amongst them was 'Principle VI: contemporaneity-that the terms of a treaty must be interpreted in the light of linguistic usage current at the time when the treaty was concluded', see id (n 72) 203. See also a discussion of them in light of the recent jurisprudence of ICJ in H Thirlway, 'The Law and Procedure of the International Court of Justice, 1960–1989 (Part Three)' (1991) 62 British Yearbook of International Law 16 et seq.

Resolution, since they are rebuttably presumed to convey the collective will of the community at that particular time.

From the outset, it was put forward that the hermeneutics in the case of the Security Council should take into account and concomitantly be entrenched by the normative framework of the said organ. The Security Council is not *legibus solutus*, in the words of the ICTY, it was not created in *vacuo jure*, but on the contrary it is founded on the basis of international law and operates within certain constraints posed by the edifice of the Charter itself and by the peremptory norms of international law.[104] Moreover, it was propounded that the institutional framework of the Council and *a fortiori* the United Nations delineates the parameters of both the workings and the interpretive enterprise of Security Council Resolutions.

It follows from the foregoing analysis that there are certain principles or more accurately certain presumptions, which are applicable in the case of these Resolutions. First of all, there is a limitation, which emanates from its own procedure of authorization or more pertinently from the delegation of powers' doctrine, constraining significantly the interpretive freedom in the above kind of Resolutions. The framework of the delegation of powers in international organizations has as a consequence that the terms of a Resolution which delegates Chapter VII powers are to be interpreted narrowly.[105] The same interpretive proposition, ie for a narrow interpretation of authorizations under Chapter VII, stems also from another source, namely from the application of the Latin maxim *exceptiones sunt strictissimae interpretationes* (exceptions to a rule should always be construed narrowly). It is a commonplace that, on the one hand, the right of self-defence enshrined in Article 51 of the Charter and on the other, the system of collective security under Chapter VII constitute the sole exceptions to the cornerstone of the Charter, ie the prohibition of the use of force (Article 2(4) of the Charter). Therefore, the Resolutions-Authorizations in the context of collective security should impinge upon the foundamental norm of Article 2(4) as little as possible and thus any interpretation of them should be entrenched accordingly, ie *in stricto sensu*. Conversely, authorizations for the use of force are not lightly to be presumed by the wording of a Security Council Resolution.

The above proposition with regard to the need for strict interpretation of these Resolutions attains even more vigour, if the normative quality of the fundamental tenet of Article 2(4) is considered. In accordance with the preponderant view to which the present author accedes, the above proscription, at least in its core, ie prohibition of aggression, constitutes a jus cogens rule par excellence.[106] Peremptory norms exist to protect the values and inter-

[104] See in this regard (n 24).

[105] See (n 28).

[106] See the relevant *dictum* in *Nicaragua* case, which implies that the above norm is considered as such by the whole international community. See [1986] ICJ Rep, p 100 and more generally for jus cogens: inter alia, R Kolb, *Theorie du Ius Cogens International* (Presses Universitaires de France, Paris, 2001) and A Orakhelasvili, *Peremptory Norms in International Law* (OUP, Oxford, 2006).

ests that are fundamentally important to the international community as a whole.[107] As Judge Lauterpacht emphasized in the *Bosnia* case, jus cogens unconditionally binds the Security Council[108] and this was implied also in the *Tadić* case.[109] Moreover, it was very recently corroborated in the *Kadi* case before the Court of First Instance of European Communities, where the Court ruled that it was 'empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to jus cogens, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible'.[110] In line with the last ruling is also the doctrine as far as the conceptual basis of this approach is concerned: the Security Council must respect peremptory norms because the core values protected by jus cogens are not derogable or waivable in the sense of *jus dipositivum*.[111] Moreover, it should be acknowledged that, as when concluding a treaty, States cannot be presumed to authorize acts contrary to jus cogens, *a fortiori* when they establish an international organization, they cannot avoid their operation either.[112] This is affirmed also by the principle that States cannot delegate to it more powers than they themselves can exercise (*nemo plus juris transfere quam ipse habet*). Acts *contra juris gestionis* are beyond the powers of an institution, *in casu* the Security Council and therefore the provisions of the UN Charter on the latter's powers have to be interpreted and executed in a way that is compatible with peremptory norms.[113] In addition, it is argued that not only are the Council's Resolutions part of a secondary law

[107] See *Furundzija* (Trial Chamber, ICTY) [1999] 38 ILM 349.

[108] Judge Lauterpacht in his Separate Opinion in the *Genocide* case between Bosnia-Herzegovina and FRY referred to jus cogens and Security Council Resolutions maintaining that: 'the relief which Article 103 may give to the Security Council in case of one of its decisions and an operative treaty cannot-as a matter of simply hierarchy of norms- extend to a conflict between a Security Council resolution and *jus cogens*', Separate Opinion [1993] ICJ Rep, p 440.

[109] The Chamber held that 'it is open to Security Council- subject to peremptory norms of international law (*jus cogens*)—to adopt definitions of crimes in the Statute which deviate from customary international law' (n 37) para 296.

[110] See *Kadi* case (n 23) para 226. Moreover, the Court referred to the consequences in case of a breach of jus cogens, stressing that: '[i]nternational law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community', ibid para 230.

[111] See A Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) 95 American Journal of International Law 858, 859.

[112] This was recognized also by the International Law Commision when it was drafting the Vienna Convention on Law of Treaties between States and International Organizations (1986), see II *UNCLT Official Records* (1986) 39.

[113] See for this issue, inter alia A Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16 European Journal of International Law 59–88, 69 et seq. Nicholas Angelet 'International Law Limits to the Security Council' in V Gowlland-Debbas (ed), *United Nations Sanctions and International Law* (Kluwer Law International, The Hague, 2001) 76 et seq.

subjected to the Charter, but also part of a system, which in its entirety is subordinated to jus cogens. As a result, the terms of a Resolution, if vague, must be construed as requiring an outcome that is consistent with jus cogens.[114] The peremptory norms that would be relevant to the interpretive enterprise of the Council's Resolutions would be, apart from the prohibition of the use of force, the respect of fundamental human rights and the basic rules of humanitarian law, whereas it is contested whether the principle of self-determination is included.[115] In the writer's view, the normative core of the latter is peremptory, namely the 'external' aspect of the right of self-determination of peoples under colonial or foreign suppression, but in so far as the 'internal' aspect and other instances, such as the right to democratic governance or the permanent sovereignty over natural resources are concerned, it is doubtful whether they enjoy the same normative status as its 'external' counterpart, ie of a jus cogens norm.

These substantive limits of Security Council's action and concomitantly guidelines for the interpretation of the relevant Resolutions posed by a higher hierarchically source, ie the peremptory norms of international community, are in close interplay with the procedural framework of the Security Council's action which is delineated mostly by Article 24 of the Charter. It has consistently been argued that the Charter stipulates both the procedural (eg voting procedures of Article 27) and substantive limits on the Council's action (Articles 24(2) and 25), namely the organization's Purposes and Principles.[116] The latter, which should be considered to comprise the normative framework of the Security Council per se, ie the one hailing directly from the Charter, are overlapping to some extent in scope with peremptory norms. Besides the prohibition of the use of force (Article 2(4)), the principle of self-determination and fundamental human rights are part of the Purposes and Principles of the organization in accordance with the Preamble and Article 1 of the Charter as well as, arguably, of course, part of jus cogens.

It follows from the foregoing that there is a coherent normative and procedural framework delineating the Council's powers, which sets some interpretive

[114] See HP Gasser, 'Collective Economic Sanctions and International Humanitarian Law' (1997) 57 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 883; A Orakhelashvili (n 113) 80. The latter's very structured analysis, however, steps on a slippery slope when he goes to examine the means of challenging Resolutions infringing peremptory norms, where among others, he avers that the States can defy compliance with that Resolution, ibid 85–6; contra: K Doehring, 'Unlawful Resolutions of the Security Council' (1997) 1 Max Planck Yearbook of United Nations Law 98 et seq.

[115] See relevant discussion in ibid.

[116] See in this regard inter alia: S Lamb, 'Legal Limits to United Nations Security Council Powers' in G Goodwin-Gill and Stefan Talmon (eds), *The Reality in International Law: Essays in Honour of Ian Brownlie* (OUP, Oxford, 1999) 361–88, V Gowlland-Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance' (2000) 11 European Journal of International Law 361–83. For a slightly different opinion, namely that the Purposes and Principles of the Charter 'establish guidelines rather than concrete limits for SC action', see J Frowein and V Krisch, Introduction to Chapter VII, in B Simma (ed), *The United Nations Charter. A Commentary* (2nd edn, OUP, Oxford, 2002) 710–11.

guidelines or presumptions for the relevant interpretive process. Generally, the use of presumptions is in conformity also with the purposive theory of interpretation, which replaces rigid interpretive rules with flexible interpretive presumptions. The latter reflect the author's intent and the intent of the legal system and the main task of interpretation is thus to balance the different presumptions when they conflict.[117] Not to mention, of course, that the use of flexible presumptions in the milieu of strict rules reflects more the political nature of the Security Council, this dimension of which should be always borne in mind even in the legal process of hermeneutics.

Accordingly, the presumptions applicable to the interpretation of Security Council Resolutions, apart, of course, from construing the latter *in stricto sensu* and in a manner compatible with peremptory norms and the above-mentioned overlapping principles of the Charter are the following: firstly, as the Legal Counsel of the UN held in relation to interpretation of Article 19 to the Secreteriat, in case of doubt, the Charter provisions should be interpreted so as to impose as little burden to the States as possible.[118] This presumption could apply *a fortiori* in the Security Council Resolutions, by virtue of the principle of State sovereignty (Article 2(1),(7) of the Charter),[119] in the sense that that there should be no additional burdens presumed for sovereign States except for these explicitly stated in the pertinent Resolution. Another presumption applicable is that decisions of organs and *in concreto* of the Security Council must be interpreted so as to conform to the constituent instrument, ie the UN Charter, and not to conflict with it.[120] Moreover, there should be a presumption in favour of the peaceful settlement of disputes, stemming from Article 2(3) of the Charter, which would entail that in any case the terms of the resolution, should be construed so as to substantiate this principle in the best possible way. Last but not least should be mentioned the principles of proportionality and necessity, which not only form part of the positive law of the Charter—for instance Articles 40 and 42 allude to 'necessary' means—but also are intrinsic to the regulation of the use of force in international law in general. These principles must also be taken into account when interpreting Resolutions under Chapter VII, and in particular those that authorize the use of

[117] See Barak (n 69) 90 et seq.

[118] See in this regard Amerasinghe (n 3) 182. This is premised upon an old rule of interpretation of treaties, frequently invoked before the VCLT, according to which treaties must be interpreted as respecting the sovereignty of States as far as possible, cf *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder* PCIJ Series A, No 23, p 26. See also S Sur, *L'intérpretation en droit international public* (Librairie générale de droit et de jurisprudence, Paris, 1974) 121 et seq.

[119] Concurring are Frowein and Krisch '[f]or Security Council resolutions under Chapter VII, it seems therefore warranted to have recourse to the old rule of interpretation according to which limitations of sovereignty may not be lightly presumed' (n 116) 713 and Frowein (n 16) 112.

[120] See the interpretation of Rule 27 of the General Assembly's Rules of Procedure by the UN Legal Counsel in 1970, where it was concluded that efficiently suspension of membership was not permitted by the rejection of credentials because the rule of procedure could not be interpreted to have a result in conflict with the Charter of the UN. See *UN Juridical Yearbook* (United Nations, New York, 1970) 169, cited in Amerasinghe (n 16) 64.

force. The function of the aforementioned presumptions is to place a heavy onus upon those, who would seek to interpret a Resolution in a manner contrary to them, thus setting firm outer parameters to the relevant interpretive enterprise.

To conclude, it should once again be mentioned that the purpose of the proposed hermeneutic paradigm was to depict the institutional dimension of the ('interpretive') community of the Council, to identify the inherent constraints built in its procedural and normative framework and to put forward a coherent set of interpretive principles or presumptions, in light also of the purposive aspect of its enterprise, which would make the Security Council Resolutions the 'best possible example of the form or genre to which is taken to belong.[121]

C. The case of Operation Iraqi Freedom in light of the proposed regulatio interpretandi

The above analysed hermeneutic paradigm for Security Council Resolutions should not be considered only as a theoretical contemplation devoid of any practical meaning. To the contrary, it provides a coherent interpretive framework for any case of Resolution-Authorization of the Council. To substantiate this, it is suggested to revert to the Operation Iraqi Freedom, which was *ab initio* the principal inspiration for the present enquiry. It is not our purpose, however, to undertake a detailed examination of all the arguments put forward with equal fervor in favour and against the legality of the Operation, but to draw attention to certain ambivalent points of the pertinent Resolutions, which are revisited in light of the above *regulatio interpretandi*.[122]

To reiterate, in a nutshell, the United States and the United Kingdom based their authority to use force predominantly on the combined effect of Resolutions 678 (1990), 687 (1991) and 1441 (2002). They claimed that Resolution 687 (1991) suspended but did not terminate the authorization under paragraph 2 of Resolution 678 (1990), which could be revived by a material breach of Resolution 687, such as the one determined by Resolution 1441 (2002) (para 1).[123]

It is apparent that the cornerstone of the whole justification was the authorization provided by Resolution 678 (1990) and its potential revival *in casu* effectuated by Resolution 1441 (2002). Consequently, these two Resolutions are the *interpretanda*, ie the objects of interpretation in the case of Operation Iraqi Freedom, to which the previously analysed hermeneutic principles and

[121] See Dworkin (n 50).

[122] It is imperative to stress here that the ensuing discussion will be restrictred to the Resolutions pertaining to the legality of the invasion of Iraq and will not canvass the ex post facto ones regarding its occupation (see Res 1483 (2003), 1500 (2003), 1511 (2003), 1546 (2003) et al). This is not due to the insignificance of the latter but due to the spatial confines of the present essay and moreover due to the emphasis placed herein predominantly on the type of Resolutions-Authorizations.

[123] See (n 9) (USA) and 10 (UK).

presumptions should be applied. According to the latter, each of the Resolutions should be interpreted in the following way: firstly, the collective will or the (inter)subjective intent of the Council should be ascertained. Even though the point of departure would be the terms used therein, primary role would be ascribed to the relevant *travaux*, as well as to the context, not only in the sense of Article 31(2) of VCLT, but also in the sense of the pertinent previous and subsequent Resolutions. Secondly, the institutional setting of the Council will be taken into account and more precisely emphasis will be placed on the aforementioned presumptions. Lastly, it will be assessed whether the interpretation is in keeping with both the subjective and the objective purpose of the Resolutions, ie the intention of the Council *in casu* and the ultimate purpose of the maintenance of international peace and seurity respectively.

Commencing from Resolution 678 (1990), the vexed question was, of course, the authorization to use force in operative paragraph 2. It is true that the wording of the pertinent mandate, ie 'to uphold and implement Resolution 660 and all subsequent relevant Resolutions and to restore international peace and security in the area' has prompted dissonant views about whether it can be extended beyond the Operation Desert Storm (1991) and provide something like a *carte blanche* authority for subsequent uses of force against Iraq.[124] Nevertheless, a detailed review of this argument in light of the above-mentioned interpretative process reveals its flaws and tenuous assumptions and vindicates the countervailing thesis that the delegation of power to take military action that occurred in Resolution 678 (1990) did not extend beyond Resolution 687 (1991).[125]

To begin with, the (inter)subjective intent of the Council reflected by the adoption of the said Resolution was exclusively the restoration of Kuwaiti sovereignty and not a broad and without *ratione temporis* limits mandate for contingent action against Iraq. This is corroborated by a perusal of the *travaux* of the Resolution in question,[126] as well as by the stance of the coalition of the willing in this regard.[127] Moreover, it attains even more credence by a close scrutiny of its 'context', such as its preamble, at the first place, which lists all

[124] See inter alia N Krisch, 'Unilateral Enforcement of the Collective Will: Kosovo, Iraq and the Security Council' (1999) 3 Max Planck Yearbook United Nations Law 71 et seq; C Denis, 'La Résolution 678 (1990) peut-elle légitimer les actions armies menées contre l'Iraq postérieurement à l'adoption de la resolution 687 (1991)?' (1998) 31 Revue Belge de Droit International 485–525; Wedgwood (n 18) et al.

[125] See also per the above position: C Denis (n 124) 495; Franck (n 19) 613; R Hofmann, 'International Law and the Use of Military Force against Iraq' (2002) 45 German Yearbook of International Law 19.

[126] The Council meeting at which 678 was adopted showed that the Member States viewed this as giving the Coalition authority to push Iraq out of Kuwait and to restore peace between the two States, not to take any wider action. See S/PV 2963rd meeting (29 Nov 1990). See also relevant analysis in Sicilianos (n 22) 75.

[127] The Coalition of the Wiling never pursued a regime change in Iraq and the hostilities ceased as soon as Kuwait was liberated. President Bush Sr said respectively that 'The UN Resolutions never called for the elimination of Saddam Hussein', quoted in Franck (n 19) 612 (n 18).

11 Resolutions adopted by the Council between the date of the occupation of Kuwait and the date of its adoption (28 November 1990), denoting that these are the 'all subsequent relevant resolutions' referred to in paragraph 2 of 678 (1990). As far as the interpretation of the above phrase is concerned, the principle of contemporaneity, in the sense that the terms of a Resolution should be construed in accordance with the meaning they possess at the time of the adoption of the Resolution would seem to be of considerable importance *in casu*.[128] Accordingly, it is a non sequitur that this phrase could mean all the 'subsequent Resolutions after 678', so as to embrace also the disarmament obligations laid down in 687 (1991).

Furthermore, as was reiterated above, the 'context' of the Resolution comprises also the subsequent pertinent Resolutions. In this vein, it can tenably be argued that Resolution 687 (1991) butresses certainly the deduction that the raison d'être of 678 (1990) was only the liberation of Kuwait, while the relevant mandate was terminated and not just suspended. It readily demonstrates not only that the authorization in question was effectively revoked but also that the Council itself was responsible for the implementation of the Resolution.[129] Enlightening also with regard to the leitmotif of the authorization of 678 (1990) is the fact that of all the detailed provisions in the ceasefire, only the paragraph guaranteeing the inviolability of Iraq–Kuwait border (para 4) contained language authorizing the use of force and then only by Security Council.[130] It is noteworthy also that the only subsequent *expressis verbis* reference to paragraph 2 of 678 (1990) was in Resolution 949 (1994), which was adopted following the massive presence of Iraqi troops alongside the Kuwaiti borders, namely a propos the same situation which led to the authorization accorded by the former.[131] Therefore, it is clear that the collective intention of the Council conveyed by the adoption of Resolution 678 was only the liberation of Kuwait and as a result, any other interpretation of the Resolution in question in order to justify the use of force for other reasons runs counter to the above-mentioned will.

[128] See with regard to this principle (n 103) and corresponding text.

[129] Of paramount importance in this regard is besides the reaffirmation of the commitment of all States to the sovereignty and territorial integrity of Iraq in the preamble, the declaration of the Council in the last paragraph that it 'remains seized of the matter and would take such further steps as may be required for the implementation of this resolution and to secure peace and security to the area' (para 34). This was confirmed by an Indian declaration in the Council debate preceding the adoption of the said Resolution. According to that statement, 'as regards operative paragraph 34 of the draft resolution, it is India's understanding that it does not confer authority on any country to take unilateral action under any of the previous resolutions of the Council. Rather, the sponsors have explained to us that in case of an threat or actual violation of the boundary in the furure the Security Council will meet to take, as appropriate, all necessary measures . . .', see Doc S/PV.2981, 3 Apr 1991, p 72 et seq. See also Sicilianos (n 22) 103 and Frowein (n 16) 107.

[130] See Lobel and Ratner (n 18) 149.

[131] See respectively G Gottereau, 'Rebondissement d'octobre en Iraq: la resolution 949 du conseil de sécurité (15 octobre 1994)' (1994) 40 Annuaire Français de Droit International 175–93.

This is also in accord with the other proposed interpretive tenets, namely, on the one hand, the institutional setting of the Council and the presumptions applicable therein and on the other, the object and purpose of the Resolution. Suffice to note in respect of the first, the application of the presumption in favour of a *stricto sensu* interpretation of the Authorizations and also of the one according to which limitations of sovereignty may not be lightly presumed, both of them entailing that the mandate in question should not be extended *ratione materiae et temporis* more than it is explicitly stated in the Resolution. As far as the second tenet is concerned, it is reasonable to presume that the 'subjective purpose' of Resolution 678 (1990), ie the goal of the particular Resolution, *in casu* the restitution of Kuwait's independence, as well as the 'objective' one, namely the ultimate value of the maintenance of international peace and security was attained completely with the restoration of the peace by dint of Operation Desert Storm in 1991, while the other subsequent operations based on the vague authority of Resolution 678[132] were beyond the bounds of the properly construed '*telos'*, ie purpose of the said Resolution.

In addition to the authority furnished by the revived operation of Resolution 678 (1990), the aforementioned etiology rested in part upon the implicit authorization stemming from Resolution 1441 (2002). The latter was to be construed not only as determining the 'material breach' of the cease-fire on the part of Iraq, but also as authorizing implicitly the use of force in the following sense: should have Iraq failed to abide by the disarmament obligations, what the Resolution in question required before the 'serious consequences', which it threatened, to materialize, was only the matter to be discussed in the Council and not a further decision to this end. Although the above line of reasoning is more than well articulated and seems credible, being premised *arguendo* upon a *stricto sensu* grammatical interpretation of 1441/2002 (especially paragraph 12), it still rings hollow, due to its failure to take seriously into account the collective will and the institutional setting of the Council. Any reading of the said Resolution in light of the proposed *regulatio interpretandi* warrants the following assertions: firstly, the collective intent of the community of the Council reflected by the adoption of that Resolution was not to authorize the use of force, but to establish an enhanced inspection mechanism and to give a last warning to Iraq that it will not endure any more defiance of the latter's disarmament obligations. That was the consensus at the meeting at which the Resolution was adopted, in other words the shared understanding of the (institutional) community of the Council, depicted in the majority of the statements made by the Member States, even those of the drafters of the Resolution, which is submitted that they attain an incremental value and which were reassuring the other States that no 'automaticity' and 'hidden triggers' were

[132] See nn 17 and 18 and corresponding text.

contained in the Resolution.[133] Although the States concerned, ie the United States and the United Kingdom, insinuated that they might still proceed *uti singuli*, as they eventually did, they refrained from enunciating unequivocally that at the meeting, while they pondered that they had to have recourse again to the Council (UK) or to premise their action on a different basis, eg self-defence (USA).[134]

The lack of any such authorization is substantiated also by the non-existence of the magic formula 'to use all necessary means' in the *corpus* of the Resolution, which denotes, according to the shared practices and understandings of the community, the authority to use force. It is noteworthy in this regard that an earlier draft of what became paragraph 4 of 1441 (2002) contained the above-mentioned formula, but it was deleted eventually, principally because of the objections of France and Russia.[135] Apart from the *travaux* and the lack of the necessary wording to that effect, a systematic reading of the Resolution as a whole also militates against the alleged revival of the authority of 678 (1990). In more detail, the allusion to the latter takes place in conjuction with the cease-fire Resolution, denoting thus that it has been superseded by 687 (1991) by chronological sequence. Moreover, it is telling that it just recalls 678 (1990) among all the previous relevant Resolutions and in no way reaffirms its being in force, as emphatically did in the context of Resolution 949 (1994).[136] Furthermore, following the proposed interpretative process, the analysis of the 'context'of the Resolution is of considerable importance to our discussion and especially in relation to the 'material breach' argument of paragraph 4. The 'context' comprises *in casu* also the Reports of the IAEA and UNMOVIC in respect of Iraqi compliance to the disarmament obligations, to which there is explicit reference in the *corpus* of the Resolution.[137] Suffice it to say that the Reports afford no warrant for the assertion that a contextual interpretation of the said Resolution could give a different meaning to 1441, so as to imbue the Operation with legitimacy, since they steered clear from condemning Iraq for another 'material breach' of its obligations.[138]

Turning the focus of the interpretive enterprise to the critical question of the requirement of discussion in paragraph 12, which, according to the advocates of the legality of the invasion, lends credence to the hypothesis that 'all that

[133] See S/PV. 4644, 8 Nov 2002, p 2 et seq and thorough analysis of the relevant *travaux* in O Corten (n 19) 216 et seq and ND White and PJ Myjer (n 19) 4 et seq, and Hofmann (n 124) 22 et seq.

[134] See S/PV. 4644, 8 Nov 2002, p 3.

[135] See D McGoldrick, 'From "9-11" to the "Iraq War 2003"' *International Law in an Age of Complexity* (Hart Publishing, Oxford, 2004) 62.

[136] See (n 131).

[137] It should be reiterated here that, according to the view of the present writer, the 'context' of a Resolution encompasses also the documents to which explicit allusion is made in the *corpus* of the Resolution in question, eg the Reports of the Secretary General. See (n 78) and corresponding text.

[138] See in this respect F Nguyen-Roualt (n 18) 843 et seq and further references therein.

resolution 1441 requires is reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to authorise force',[139] we could tenably argue premised upon the aforementioned hermeneutic proposal the following: first, bearing in mind that in the interpretation of such Resolutions the collective will of the Council should be primarily taken into account, it is far from clear whether the above interpretation was congruent with the view of the other Member States, especially France, as it was implied by the British Attorney General.[140] Secondly, the analysis of the *travaux* reveals that the initial draft of paragraph 12 had stated that the purpose of the reconvening of the Council after a Report of non-compliance was to 'restore' international peace, following the language of Resolution 678 (1990).[141] This was changed to 'secure' international peace, with the effect to disassociate further the Resolution in question from 678 (1990) and also to make it imperative for the Council to determine once more in a pertinent Resolution that international peace has been breached or at least threatened, so as the States concerned to 'secure' it. Logically, also, the notion of 'discussion' is the first and requisite step towards an ensuing 'decision', especially in communities where effective discourse takes place, such as the Council and it is *reductio ad absurdum* to expect that the Council would be obliged only to discuss a matter without having to proceed to a relevant decision.[142]

Moreover, the above contention defies the primary responsibility bestowed upon the Council by the Charter (Article 24) and runs counter to the whole fabric of the institutional setting of the said organ. *A fortiori*, it is refuted by the application of the aforementioned presumptions, mainly the presumption for explicit and narrowly construed authorizations to use force and also the one in favour of the peaceful settlement of disputes, stemming from Article 2(3) of the Charter, which entails that more time should have been given to the inspection mechanism in place therein. Lastly, it would have to be fallacious to hold the view that such an interpretation is in line with a broad notion of the principle of effectiveness, since it loses sight of the fact that both the 'subjective' and 'objective' purpose of such a Resolution is to 'secure' international peace and security with a *de minimis* use of force, when all other peaceful means have been exhausted (principle of necessity) and not to construe it in a way that gives effect to unilateral rather than collective interests and values.

[139] See Lord Goldsmith (n 10) 812.

[140] In his Advice on 7 March 2003, Lord Goldsmith revealed in this respect that 'I was impressed by the strength and sincerity of the views of the US Administration which I heard in Washington on this point. However, the difficulty is that we are reliant on their assertions for the view that the French (and others) knew and accepted that they were voting for a further discussion and no more', see ibid 774.

[141] See D McGoldrick (n 135).

[142] Logic as interpretive method is not a *terra incognita* in the context of our enquiry, bearing in mind the relevant reference to it in the *Tadić* case; see (n 37). See also in this respect: O Corten (n 19) 212 et seq.

The preceding analysis has elucidated that the hermeneutic paradigm of the present essay with its principles and presumptions is a workable tool in the hands of the interpreter of Security Council Resolutions to cope effectively with the intricancies of the latter and to construe them appropriately. It has been applied to the case of the latest Iraqi crisis to underline that a proper interpretation of a Reolution certainly sheds light on and resolves obscure issues of legality in the international legal order.

III. CONCLUDING REMARKS

Despite the importance of the Security Council on the international plane and the voluminous intellectual work devoted to several aspects of its function, the issue of the hermeneutics of its Resolutions has not attracted equal scholarly interest. The latter, however, loomed large in the context of the latest Iraqi conflict, since it struck at the heart of the legal etiology put forward by the States involved. Hence, it seemed important to the writer to explore this matter in light of the various theories of legal hermeneutics in general and with regard to treaties in particular and to propose a hermeneutic paradigm applicable to the intricacies of the said organ.

At the outset, it was essential to ascertain the exact legal nature of the Resolutions in question and to decipher their relation to treaties, bearing in mind that what was implied from the arguments of the States involved in Operation Iraqi Freedom was that there might be an overlapping between these two categories. On the one hand, the legal term 'material breach' of the *sedes materiae* of the law of treaties could apply with the same legal effect to the realm of Security Council Resolutions and on the other, the latter could be construed in light of the Articles 31–3 of the VCLT. The above contention was discredited in the present enquiry. First, it was submitted that the legal nature of the Security Council Resolutions is different from that of the treaties, due mainly to the lack of the consent to be bound in the context of the former, which, however is a *conditio sine qua non* in the latter. On the contrary, the Resolutions in question should be considered as executive acts of an international organization and taking into account their similarities with unilateral acts, they could be more aptly designated as unilateral 'institutional' acts with binding force *erga omnes partes* by dint of its constituent instrument, ie Article 25 of the UN Charter. Consequently, these Resolutions should not be subject to the same legal regime as the treaties and hence any transplantation of rules pertaining to the *sedes materiae* of the law of treaties to the ambit of the above-mentioned Resolutions should be met with considerable doubt.

Having ascertained that initially, the focus of the present enquiry was turned predominantly to the question of what canons of interpretation should be followed in this regard and the discussion led to following conclusions: as a consequence of the above-mentioned distinction of the Resolutions in question

and treaties, it was maintained that the provisions of Articles 31–3 of VCLT were neither applicable *ipso jure* nor *mutatis mutandis*. This assertion was also warranted by an analysis of the relevant international jurisprudence. Therefore, the critical question was which theoretical framework in relation to the hermeneutics in international law could serve better the purposes of the present enquiry, namely provide the most coherent theory for the interpretation of Security Council Resolutions. Drawing insights from Stanley Fish's idea of 'interpetive communities' as adapted in the sphere of international law by Ian Johnstone, it was possible to propound the thesis that the relevant *ius interpretandi* should pay due regard to the institutional setting of the 'community' of the Council, which in turn qualified the 'intersubjective' approach or the collective will of the latter in light of the object and purpose of the Charter, ie the maintainance of peace and security, as the most pertinent hermeneutic paradigm. This paradigm has much in common with the purposive interpretation theory posited recently by Ahron Barak, in the sense that it confronts the intention of the Council and the ultimate purpose of the Charter in the same way as the latter formulates its foundational components of subjective and objective purposes correspondingly.

On the basis of the above multidimensional yet synthetic and coherent jurisprudential framework, the essay proceeded and articulated a rubric of interpretive principles and presumptions to be applied in this regard. Having as a background the aforementioned paradigm and in juxtaposition with the relevant structure of VCLT, it assessed all the pertinent interpretive methods and tools and qualified those which were more appropriate to the *interpretandum* in question. Central to the relevant analysis was the use of flexible presumptions, which are also more akin to the political character of the Security Council. The emphasis was placed on the elucidation of the (inter)subjective intent of the latter with the help of the relevant *travaux* and the 'context' of the Resolution in question, as well as on the presumptions reflecting the institutional setting of the said organ. Any interpretation, of course, should be in light of the 'objective' purpose of the maintenance of international peace and security. Moreover, to substantiate that the proposed *regulatio interpretandi* was not solely a theoretical endeavour, the case of Operation Iraqi Feedom served as the most appropriate test-drive in this regard.

An eminent author wrote a few years ago that 'the future shape of the international legal system will depend, above all, [amongst others] on *how* we interpret Security Council Resolutions. . . .'[143] The correctness of this proposition was strengthened by the latest Iraqi crisis and the unilateral interpretations of the said Resolutions put forward by the States involved. Hopefully, a slight contribution to the above challenge, at least in the academic field, has been provided by the present essay.

[143] See Byers (n 16) 41.