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Security Council Resolution 687 (1991)

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1 Introduction

The aim of the present chapter is to look into the interconnections between the work of the United Nations Security Council and treaty law and practice: it is for this reason that it appears as one of the studies on the *contextual* dimension of the modern law of treaties in this volume. In order to achieve this purpose, it considers, among other things, the possible application of concepts drawn from the law of treaties in the specific context of Security Council Resolution 687 (1991) of 3 April 1991.[1] This was the 'ceasefire' resolution,[2] intended to bring the 1991 Gulf Conflict to an end. Like many a peace settlement, it imposed heavy obligations on the vanquished. Like many a peace settlement, it cast a long shadow and spawned endless disputes, eventually leading to further conflict. For almost twelve years, from its adoption on 3 April 1991 to the invasion of Iraq on 19 March 2003, Resolution 687 (1991) served as a framework for the myriad of efforts 'to restore international peace and security in the region',[3] efforts largely conducted by or with the assent of the Security Council – until, that is, the March 2003 invasion. Resolution 687 (1991) had a long and active life, a life to which it is not possible to do justice within the confines of this chapter.[4] It led to

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[1] The Resolution was adopted by twelve votes to one (Cuba) with two abstentions (Ecuador and Yemen).

[2] On the meaning of the term 'ceasefire' in Security Council Resolution 687 (1991), see Section 4.

[3] Security Council Resolution 678 (1990) (29 Nov. 1990), operative paragraph 2.

[4] Among writings specifically on Resolution 687 (1991), see S. Sur, 'La résolution 687 (3 avril 1991) du Conseil de sécurité dans l'affaire du Golfe', *AFDI*, 37 (1991), 25–97; L. D. Roberts, 'United Nations Security Council Resolution 687 and Its Aftermath: The Implications for Domestic Authority and the Need for Legitimacy', *N.Y.U. J. Int'l L. & Pol.*, 45 (1993),

many legal arguments, some of which resembled or were at least inspired by arguments that arise in the life of a treaty.

These debates have been somewhat overshadowed by the controversy over the interpretation of a resolution adopted some eleven years later, Security Council Resolution 1441 (2002) of 8 November 2002,[5] which was central to the question of the legality of the March 2003 invasion of Iraq.[6] Yet that debate was not about Resolution 1441 (2002) in isolation but turned on the interpretation of a series of resolutions, including Resolution 678 (1990) of 29 November 1990[7] and Resolution 687 (1991) as well as Resolution 1441 (2002). A key factor in interpreting Resolution 1441 (2002) concerned who was to determine whether a breach of Resolution 687 (1991) was sufficiently grave as to authorise the resumption of hostilities that had terminated with the ceasefire imposed by Resolution 687 (1991) (a 'material breach').

There is already some writing on the role of the Security Council in relation to treaties.[8] The aim of the present chapter is to explore certain provisions of the 3 April 1991 resolution. It should be recalled that the resolution was adopted very early in the post–Cold War period, a period which saw a remarkable revival in the work of the Security Council.[9] Yet, while the 1991 resolution was in many respects innovative, it also reflected a degree of caution – caution that has since been thrown to the winds

593–626; R. Wedgwood, 'The Enforcement of Security Council Resolution 687: The Threat of Force against Iraq's Weapons of Mass Destruction', *AJIL*, 92 (1998), 724–728; N. Jalilossoltan, 'Désarmement de l'Irak en vertu de la résolution 687 (1991) du Conseil de sécurité de l'ONU', *AFDI*, 46 (2000), 719–740; C. Hindawi, 'D'une guerre à l'autre ou un retour sur les ambiguïtés de la résolution 687 (1991) du Conseil de sécurité', 37 *Études internationales*, 37 (2006), 357–382, and D. Battistella, '687 (1991): Iraq et Koweït' in M. Albaret, E. Decaux, N. Lemay-Hébert and D. Placidi-Frot (eds.), *Les grandes résolutions du Conseil de sécurité des Nations unies* (Paris: Dalloz, 2012), pp. 121–136.

[5] Adopted unanimously.

[6] Among the many writings on the question, see in particular S. D. Murphy, 'Assessing the Legality of Invading Iraq', *Georgetown Law J.*, 92 (2004), 173–258. For the present author's contemporaneous view, see various documents made public by the United Kingdom Iraq Inquiry ('Chilcot Inquiry'); see, also, his written and oral evidence to that Inquiry (www.iraqinquiry.org.uk/).

[7] The Resolution was adopted by twelve votes to two (Cuba and Yemen) with one abstention (China).

[8] S. Talmon, 'Security Council Treaty Action', *Revue hellénique de droit international*, 62 (2009), 65–116, and M. Wood, 'The Law of Treaties and the UN Security Council: Some Reflections' in E. Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (Oxford: Oxford University Press, 2011), pp. 244–255.

[9] The thaw in the Security Council seems to parallel that in East-West relations, cooperation among the permanent members is often thought to have begun with the drafting of Security Council Resolution 598 (1987) (20 July 1987) (on the 1980–88 Iran-Iraq War).

(some would say). For example, while it imposed the international boundary agreed in the contested 1963 Agreed Minutes between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters,[10] it merely 'invited' Iraq to ratify certain other treaties. Later resolutions went further, imposing upon States obligations set forth in treaties to which they were not parties.[11]

Security Council resolutions, while not treaties, share some of their characteristics. In certain respects, of course, they have important advantages over treaties, not least in terms of timeliness: timeliness of adoption, application, interpretation and amendment, and termination.[12] But there are also disadvantages, including in terms of clarity and legitimacy.[13]

The chapter considers briefly (in Section 2) the background and content of Resolution 687 (1991). Section 3 then recalls the approach to the interpretation of Security Council resolutions adopted by the International Court of Justice. Section 4 addresses the Resolution's nature as a ceasefire – not a peace treaty – and goes on to review the circumstances in which the use of force might be used to enforce Iraq's obligations under the resolution. Section 5 offers some modest conclusions.[14]

[10] 1964 UNTS 326.

[11] See, e.g., Security Council Resolution 1624 (2005) (14 Sept. 2005) on terrorist financing and Security Council Resolution 1757 (2007) (30 May 2007) on the Special Tribunal for Lebanon.

[12] See the various contributions in V. Popovski and T. Fraser (eds.), *The Security Council as Global Legislator* (London: Routledge, 2014). Specifically on the termination of Security Council resolutions, see, also, J. Galbraith, 'Ending Security Council Resolution', *AJIL*, 109 (2015), 806–821.

[13] For a moderate approach (despite its title), see A. Tzanakopoulos, *Disobeying the Security Council* (Oxford: Oxford University Press, 2011). On the obscure notion of 'legitimacy', see A. E. Roberts, 'Legitimacy versus Legality: Can Uses of Force Be Illegal but Justified?' in P. Alston and E. MacDonald (eds.) *Human Rights, Intervention, and the Use of Force* (Oxford: Oxford University Press, 2008), pp. 179–213.

[14] The chapter does not cover all treaty issues arising in connection with the resolution, in particular the relationship of the resolution to certain treaties mentioned therein. Security Council Resolution 687 (1991) refers to various treaties and in various ways: the 1963 Agreed Minutes between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters, 1964 UNTS 326 (effectively confirming their validity); the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, or of Bacteriological Methods of Warfare, 94 LNTS 65 (which Iraq was politely 'invited' to ratify); the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, 729 UNTS 161 (Iraq 'invited' to reaffirm unconditionally its obligations thereunder); the 1972 Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1015 UNTS 163, and the 1979 International Convention Against the Taking of Hostages, 1316 UNTS 205.

2 Background and Content of Security Council Resolution 687 (1991)

The 1991 Gulf Conflict was precipitated by Saddam Hussein's unlawful invasion of Kuwait on 2 August 1990 and his unlawful occupation of Kuwait and purported incorporation of Kuwait into Iraq.[15] The Security Council immediately condemned Iraq's invasion of Kuwait and demanded the immediate and unconditional withdrawal of its forces.[16] A coalition prepared to eject Iraq from Kuwait in exercise of the right of collective self-defence of Kuwait, but the legal basis shifted when the Security Council authorised Member States cooperating with Kuwait to take all necessary means 'to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area' ('Operation Desert Storm', to give it its American name).[17] Following the successful military action in January and February 1991, the Council on 2 March 1991 noted 'the suspension of offensive combat operations by the forces of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678 (1990)',[18] and, then, a month later, on 3 April 1991, imposed a formal ceasefire, which took effect on 11 April 1991.[19]

[15] The Security Council decided 'that annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void': Resolution 662 (9 Aug. 1990), operative paragraph 1.

[16] Security Council Resolution 660 (1990) (2 Aug. 1990).

[17] Security Council Resolution 678 (1990) (29 Nov. 1990). On the debate concerning this resolution and the distinction between collective self-defence and Security Council authorisation, see D. Bowett, 'Collective Security and Collective Self-Defence: The Errors and Risks of Identification' in M. R. Montaldo (ed.), *El derecho internacional en un mundo en transformación: liber amicorum en homenaje al profesor Eduardo Jiménez de Aréchaga* (Vol. I) (Montevideo: Fundación de Cultura Universitaria, 1994), pp. 425–440; F. Berman, 'The Authorization Model: Resolution 678 and Its Effects' in D. M. Malone, (ed.) *The UN Security Council: From the Cold War to the 21st Century* (Boulder, CO: Lynne Reiner Publishers 2004), pp. 153–165, and M. Wood, 'Collective Security and Collective Self-Defence: Key Distinctions' in M. Weller (ed.), *The Oxford Handbook on the Use of Force* (Oxford: Oxford University Press, 2015), pp. 649–660. On the resolution more generally, see E. Rostow, 'Until What? Enforcement Action or Collective Self-Defense?', *AJIL*, 85 (1991), 506–516; C. Denis, 'La résolution 678 (1991) peut-elle légitimer les actions menées contre l'Irak postérieurement à l'adoption de la résolution 687 (1991)?', *RBDI*, 31 (1998), 485–537; E. Convergne, '678 (1991): Iraq et Koweït' in Albaret, Decaux, Lemay-Hébert and Placidi-Frot (eds.), *supra* n. 4, pp. 111–120, and O. Corten, *Le droit contre la guerre* (Paris: Pedone, 2nd ed., 2014), pp. 594–610.

[18] Security Council Resolution 686 (2 March 1991), fifth preambular paragraph.

[19] See Letter from the President of the Security Council to the Permanent Representative of Iraq to the United Nations: S/22485 (11 Apr. 1991) ('[t]he members of the Security

Resolution 687 (1991) lays down in some detail the terms for the ceasefire, which were to be accepted by Iraq before the ceasefire took effect (which it did on 11 April 1991).[20] It deals with a wide range of matters, and had some notoriety as the longest and most complex Security Council resolution yet adopted.[21] It has twenty-six preambular and thirty-four operative paragraphs. After operative paragraph 1, which reaffirms all previous resolutions, the operative part is divided into nine sections:

A. The inviolability of the international boundary and the allocation of islands between Iraq and Kuwait, as set out in the Agreed Minutes Between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters (the validity of which had been contested by Iraq).[22]
B. The deployment of a United Nations force in a demilitarised zone either side of the international boundary.
C. Disarmament obligations in the fields of chemical and biological weapons, ballistic missiles, and nuclear weapons, with intrusive inspection procedures (led by the International Atomic Energy Agency (IAEA) and a subsidiary organ of the Security Council, the United Nations Special Commission (UNSCOM) – later the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC)).
D. Return of Kuwaiti property seized by Iraq.
E. Iraq's liability for direct loss, damage and the depletion of natural resources or injury to foreign Governments, nationals and corporations as a result of Iraq's unlawful invasion and occupation of Kuwait and the creation of a fund to pay compensation for resulting claims.

Council have ... asked me to note that the conditions established in paragraph 33 of resolution 687 (1991) have been met and that the formal cease-fire referred to in paragraph 33 of that resolution is therefore effective').

[20] *Ibid*. For Iraq's acceptance, see Letters dated 6 April 1991 from the Permanent Representative of Iraq to the Secretary-General (S/22456) and 10 April 1991 from the Permanent Representative of Iraq to the President of the Security Council, transmitting the decision of the National Assembly of Iraq adopted on 6 April 1991 accepting Resolution 687 (S/22480).

[21] The regrettable trend towards ever lengthier (and hence less intelligible and focused) Security Council resolutions seems unstoppable, though they have not yet reached the dimensions of some General Assembly resolutions: by way of example, see Resolution Adopted by the General Assembly on 29 Dec. 2014, A/RES/69/245 (which has forty-five preambular and 313 operative paragraphs).

[22] See, in particular, M. Mendelson and S. C. Hulton, 'The Iraq-Kuwait Boundary', *BYbIL*, 64 (1993), 135–195.

F. Modifications of the sanctions imposed on Iraq.
G. Repatriation of all Kuwaiti and third-country nationals.
H. International terrorism.
I. Ceasefire and decision 'to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area'.

The key provisions of Resolution 687 (1991), for present purposes, are those contained in section I (paragraphs 33 and 34), in which the Security Council:

> 33. *Declares* that, upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the provisions above, a formal cease-fire is effective between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with resolution 678 (1990);
> 34. *Decides* to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area.[23]

Resolution 687 (1991) has been summarised in the following terms:

> Resolution 687 set out the steps which the Council required Iraq to take in order to restore international peace and security in the area. Resolution 687 suspended, but did not terminate, the authority to use force in resolution 678. The United Kingdom's position was that a determination by the Security Council that Iraq was in material breach of its obligations under resolution 687 was capable of reviving the authorisation to use force in resolution 678.[24]

[23] Mention should also be made of Security Council Resolution 688 (1991) (5 Apr. 1991), adopted just two days after Security Council Resolution 687 (1991), in the face of the looming humanitarian catastrophe created by the flight from northern Iraq of large numbers of Kurds under attack by Saddam Hussain: see A. Pellet, '668 (1991): Iraq' in Albaret, Decaux, Lemay-Hébert and Placidi-Frot (eds.), *supra* n. 4, pp. 137–148. Resolution 688 (1991) was not expressed to be adopted under Chapter VII of the United Nations Charter, and did not authorise the use of force: it was part of the background to the United Kingdom's 'humanitarian intervention' argument for the safe havens and no-fly zones: see M. Wood, 'The International Law on the Use of Force: What Happens in Practice?', *Indian JIL*, 53 (2013), 345–367, at 360–365.

[24] *Legality of Military Action in Iraq: Disclosure Statement Made by the Cabinet Office and the Legal Secretariat to the Law Officers* (Annex 6 to the Information Commissioner's Enforcement Notice of 22 May 2006, addressed to the Legal Secretariat to the Law Officers): reproduced in *BYbIL*, 77 (2006), 831–837 (paragraph 6). This Disclosure Statement details the processes culminating in the Attorney General reaching 'the clear conclusion that the better view was that there was a lawful basis for the use of force without a second resolution' (Legal Secretary's record of 13 March 2003), and the Attorney General's written statement to Parliament of 19 March 2003.

3 The Interpretation of Security Council Resolutions

The extent to which the customary international law rules of treaty interpretation, reflected in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT),[25] may be applied to the interpretation of Security Council resolutions was addressed by the International Court of Justice in its *Kosovo* advisory opinion of July 2010. The key passage reads:

> . . . the Court must recall several factors relevant in the interpretation of resolutions of the Security Council. While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require[s] that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 116), irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.[26]

In an article published in 1998, the present author referred to a number of differences between Security Council resolutions and treaties relevant in the context of interpretation.[27] These included the following:

[25] 1155 UNTS 331.

[26] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) (2010) ICJ Rep. 403, at p. 422 (paragraph 94). The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea has also referred to the Vienna rules when interpreting binding 'instruments that are not treaties': *Responsibilities and Obligations of States with Respect to Activities in the Area* (Advisory Opinion) (2011) ITLOS Rep. 10, at p. 21 (paragraphs 59–60).

[27] M. Wood, 'The Interpretation of Security Council Resolutions', *Max Planck Yb. UN Law*, 2 (1998), 73–95, and M. Wood, 'The Interpretation of Security Council Resolutions, Revisited', *Max Planck Yb. UN Law*, 20 (2016), 3–35.

- Given the way Security Council resolutions are drafted, less reliance can be placed upon preambular language as a tool for the interpretation of the operative part;[28]
- Security Council resolutions are often not self-contained but refer to and incorporate by reference other documents (reports of the United Nations Secretary-General, for example);
- Security Council resolutions are often part of a series and can only be understood as such. They look forward and back;
- There are no 'parties' to a resolution, only the Security Council, and the various references in the Vienna rules to the 'parties' to a treaty are not easy to apply in the context of an Security Council resolutions;
- Given the way they emerge and that for the most part Security Council resolutions are intended to be political documents, one should not expect them to be drafted with the same attention to legal detail and consistency as is normally the case with treaties;
- Under the rules of the VCLT, there shall be taken into account, together with the context, any relevant rules of international law applicable in the relations between the parties.[29] Quite apart from the fact that there are no parties to Security Council resolutions, the impact of other rules of international law may be subject to Article 103 of the 1945 Charter of the United Nations;[30]
- The VCLT's distinction between the general rule in Article 31 and supplementary means of interpretation in Article 32 is likely to be less significant in the case of Security Council resolutions than in the case of treaties, given the importance of the historical background for the interpretation of resolutions. Any serious effort at interpreting a resolution will need to have regard to all the available *travaux préparatoires* and to the circumstances of the resolution's adoption.[31]

Some of the preceding points are matters of degree. For example, treaties may also refer to other documents or be part of a series, but this happens much less frequently than with Security Council resolutions. Other

[28] On preambles, see E. Suy, 'Le préambule' in E. Yakpo and T. Boumedra (eds.), *Liber Amicorum Mohammed Bedjaoui* (The Hague: Kluwer Law International, 1999), pp. 253–269 (dealing with preambles to Security Council resolutions at pp. 263–268). See, also, the contribution to this volume of Klabbers at pp. 172–200 (Chapter 7).

[29] Art. 31(3)(c) VCLT: *supra* n. 25. [30] 1 UNTS 16.

[31] See C. Greenwood, 'New World Order or Old? The Invasion of Iraq and the Rule of Law', *Modern L. Rev.*, 55 (1992), 153–178, at 166 ('it is impossible properly to understand the text of any Security Council resolution without reference to the debates which preceded it').

points noted previously, such as the non-existence of parties, clearly distinguish the interpretation of treaties from the interpretation of Security Council resolutions as well as preclude the direct transposition by analogy of many rules on of the law of treaties.

These differences also become apparent when considering subsequent agreements and subsequent practice.[32] In the case of treaty interpretation, particularly in the case of long-lived and active treaties, subsequent agreements and subsequent practice may play an important role. As far as Resolution 687 (1991) is concerned, it was certainly long-lived and had an active life. However, since subsequent agreements and subsequent practice as elements of treaty interpretation presuppose an agreement on interpretation among the parties to the treaty, they do not apply directly to resolutions of the Security Council. The equivalent in the case of Security Council resolutions would be subsequent decisions of the Council establishing the Council's understanding of the interpretation of the resolution or subsequent practice of the Council likewise establishing the Council's understanding. Subsequent decisions would principally be found in later resolutions, while subsequent practice of the Council takes a variety of forms, including Presidential statements and letters, as well as practice of subsidiary organs of the Council, such as sanctions committees or the Counter-Terrorism Committee. Given the nature of the Council's activities, it seems likely that subsequent decisions and subsequent practice play a greater role in the case of the interpretation of resolutions than do subsequent agreements and subsequent practice in the interpretation of treaties.

4 The Nature of Resolution 687 (1991) and the Use of Force to Remedy a Breach

This is not the occasion to discuss the nature of Security Council resolutions as compared with other sources of international legal obligation such as treaties or unilateral declarations of States. In any event, it may be difficult to generalise. Security Council resolutions include a great variety of provisions, from legally binding decisions (within the meaning of Article 25 of the Charter of the United Nations) to internal operational decisions (for example, establishing a subsidiary organ or

[32] Art. 31(3)(a) and (b) VCLT: *supra* n. 25. See, also, the International Law Commission's current work on '[s]ubsequent agreements and subsequent practice in relation to the interpretation of treaties' and, further, the contribution to this volume of Buga at pp. 363–391 (Chapter 12).

recommending candidates for United Nations Secretary-General). They may range from 'treaty-like' instruments, such as the Statutes of the International Criminal Tribunals for the Former Yugoslavia[33] and Rwanda,[34] to policy statements not unlike those to be found in General Assembly resolutions.

As far as Resolution 687 (1991) is concerned, it has occasionally been suggested by writers that it is a peace treaty.[35] That cannot be right. While some of its provisions cover issues that might be found in a peace treaty (boundary demarcation, a demilitarised zone, reparation, arms limitation and disarmament), it is neither a peace treaty between belligerents, as it was imposed by the Security Council,[36] nor even an equivalent or substitute for a peace treaty. The use of the term 'ceasefire' is significant.[37] Its key provision in this regard – paragraph 33 set out earlier – established

[33] Security Council Resolution 827 (25 May 1993).

[34] Security Council Resolution 955 (8 Nov. 1994).

[35] C. Gray, 'After the Ceasefire: Iraq, the Security Council and the Use of Force', *BYbIL*, 65 (1994), 135–174, at 144 ('despite the terminology used in Resolution 687, it is clearly more than a mere suspension of hostilities. The substance is that of a peace treaty') and O. Schachter, 'United Nations Law in the Gulf Conflict', *AJIL*, 85 (1991), 452–473, at 456 (arguing that it is similar to the Treaty of Versailles).

[36] See J. Yoo, 'International Law and the War in Iraq', *AJIL*, 97 (2003), 563–575, at 569.

[37] Terms such as 'ceasefire, 'cessation of hostilities', 'armistice' and '(peace) settlement' are not used consistently; the effect of any particular instrument depends upon its terms and context, not the name given to it – though its name can be an important pointer. See, generally, J. K. Kleffner, 'Peace Treaties' in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Vol. VIII) (Oxford: Oxford University Press, 2012), pp. 104–105; C. Bell, 'Ceasefires' in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Vol. II) (Oxford: Oxford University Press, 2012), p. 10–18, at p. 11, and Y. Dinstein, 'Armistice' in *Max Planck Encyclopedia of Public International Law* (Vol. I) (Oxford: Oxford University Press, 2012), pp. 642–643. The terms 'cease-fire', 'truce' and 'armistice' have not been used by the Security Council consistently or with specific technical meaning: see S. D. Bailey, 'Cease-Fires, Truces, and Armistices in the Practice of the UN Security Council', *AJIL*, 71 (1977), 461–473. The Security Council is not alone in not using terms with precision: C. Greenwood, 'Scope of Application of International Humanitarian Law' in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford: Oxford University Press, 2nd ed., 2008), pp. 45–78, at p. 67 ('the dividing line between ceasefires, armistices and other forms of suspensions of hostilities has become increasingly blurred') and Bell, *ibid*. ('[t]he terms truce, armistice, ceasefire, and cessation of hostilities are often used colloquially as interchangeable. While historically each term captured similar but distinct situations on a continuum from war to peace, with both the start of war and the end of war characterized by formal declarations, their meaning has changed over time, erasing clarity as to the distinctions between each term and leading to some overlap between terms. A number of writers have noted the flexible use of the term ceasefire by the UN, and the tendency to collapse pre-Charter concepts of truce, armistice, and even *peace treaties* into the term "ceasefire" so that each of the concepts has now become virtually indistinguishable') (citations omitted).

(upon Iraq's acceptance of the terms) 'a formal cease-fire',[38] between Iraq and 'the Member States cooperating with Kuwait in accordance with resolution 678 (1990)'.

Even more crucial was the answer to the question: Who was authorised by the Council to determine that the ceasefire had broken down and that 'the Member States cooperating with Kuwait under resolution 678 (1990)' could resume hostilities against Iraq?

The main legal justification[39] of the invasion in March 2003 turned on Iraq's breach of its weapons of mass destruction obligations under Resolution 687 (1991) and subsequent resolutions, in particular its repeated failure to cooperate fully with the weapons inspectors.[40] It was never seriously suggested that as a general matter the breach of legal obligations deriving from binding Security Council resolutions, adopted under Chapter VII of the Charter of the United Nations, gives rise to a right to enforce such breach through the use of force. That is clearly not the law, any more than a breach of treaty obligations gives rise to a right to use force.[41] The legal consequences of an internationally wrongful act are not affected by the origin of the obligation breached, be it customary, treaty or other.[42]

[38] Operative paragraph 1 expressly states that the goals of the resolution include a formal ceasefire.

[39] There were also hints of a self-defence argument in certain US statements, including their March 2003 letter to the President of the Security Council (S/2003/351), but this does not seem to have been a serious argument on the facts, and was not relied upon by any other members of the alliance. See, further, D. Kritsiotis, 'Arguments of Mass Confusion', *EJIL*, 15 (2004), 233–278. References to 'regime change' or retaliation for Saddam Hussein's attempted assassination of former President George H. Bush in in Kuwait in April 1993 were largely political rhetoric.

[40] The fact that weapons of mass destruction and ballistic missiles were not found following the invasion does not affect the legal argument, which was based not on the possession of such weapons but on failure to cooperate with the inspectors.

[41] See, for example, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*: Nicaragua v. United States of America (Merits) (1986) ICJ Rep. 14, at p. 134 (paragraph 267) ('where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights *as are provided for in the conventions themselves*') and pp. 134–135 (paragraph 268) ('*the use of force could not be the appropriate method to monitor or ensure such respect*') (emphases added).

[42] See *YbILC* (2001–II), Part Two, 55 ('the origin or provenance of an obligation does not, as such, alter the conclusion that responsibility will be entailed if it is breached by a State, nor does it, as such, affect the regime of State responsibility thereby arising. Obligations may arise for a State by a treaty and by a rule of customary international law or by a treaty and a unilateral act': paragraph 4 of the Commentary to Art. 12 of the Articles on State Responsibility). See, further, the contribution to this volume of Tams at pp. 440–467 (Chapter 14).

The Security Council itself may authorise the use of force to enforce its resolutions, as it has frequently done, for example, in connection with sanctions resolutions.[43] The popular idea that breach of a binding Chapter VII resolution gives rise to a right to use force is one of a number of myths about Chapter VII of the Charter of the United Nations.[44]

In 2002/2003, the question turned on whether a breach of Resolution 687 (1991) – the ceasefire resolution – could revive the authorisation to use force given by the Security Council in Resolution 678 (1990) (the 'revival' argument). If it could, the next – and crucial – questions were what kind of breach could revive the authorisation to use force and who was to determine that the breach was of such a nature as to lead to such revival. The United States and the United Kingdom held opposing views on that last question: Who decides?[45]

As early as August 1992, the United Nations Legal Counsel, Dr Carl-August Fleischhauer, had given written advice on the interpretation of Resolution 687 (1991) as regards the use of force, in which he argued that its authorisation by Resolution 687 was of a continuing nature – that is, if the obligations included therein were violated, the ceasefire would come to an end and use of force would again be authorised. He gave a further opinion in January 1993.[46] Ralph Zacklin, United Nations Deputy Legal Counsel throughout the relevant period, has described the influence of the Fleischhauer opinions as follows:

[43] For one example among many, see Security Council Resolution 665 (1990) (25 Aug. 1990), calling on States 'to use such measures commensurate to the specific circumstances as may be necessary . . . to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990)'.

[44] M. Wood, *The UN Security Council and International Law* (Sir Hersch Lauterpacht Memorial Lectures, 7–9 Nov. 2006): paragraphs 31–33 of First Lecture (www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/lectures/2006_hersch_lecture_1.pdf).

[45] Wedgwood, *supra* n. 4.

[46] The substance of Dr. Fleischhauer's advice was subsequently made public in Ralph Zacklin's Hersch Lauterpacht Memorial Lectures of Jan. 2008, and is now reproduced in the book based on those lectures: R. Zacklin, *The United Nations Secretariat and the Use of Force in a Unipolar World: Power v. Principle* (Cambridge: Cambridge University Press, 2010). The Fleischhauer advice is described at pp. 18–20 of that work, and its application discussed at pp. 20–22 and pp. 145–146. There was a further legal opinion of the United Nations Legal Counsel, in Jan. 1993, which concluded that the Presidential statements of 8 and 13 Jan. 1993 made it clear on balance that the serious consequences included all necessary means. As Zacklin goes on to note at pp. 20–22, the UN's semi-official 1996 'Blue Book' cited the Presidential statements as the basis for the 1993 airstrikes: *The United Nations and the Iraq-Kuwait Conflict 1990–1996* (Vol. IX) (New York, NY: United Nations Blue Books, 1996).

> The legal opinions of August 1992 and January 1993 did not constitute authoritative interpretations of Security Council resolutions but they had considerable significance in terms of the Secretariat's interpretation of the inter-play of the decisions to authorize use of force and the establishment of the cease-fire. They came to be seen, even in 1993, as the basis for the argument that a resumption of the use of force could not be automatic. Not everyone agreed, and the United States in particular did not share the interpretation, but many Council members did.[47]

These matters were considered on many occasions following the adoption of Resolution 687 (1991), including in January 1993, December 1998 and 2002/2003. In each case, the breach was a failure to cooperate with the weapons inspectors.

On 7 January 1993, Iraq notified UNSCOM that it could no longer use the Habbaniyah airfield, thus preventing short-notice inspections. The President of the Security Council quickly denounced the action as an 'unacceptable and material breach of the relevant provisions of Resolution 687 (1991), which established the cease-fire and provided the conditions essential to the restoration of peace and security in the region'.[48] In a further Council statement on 11 January 1993, Iraq was warned that 'serious consequences' would flow from 'continued defiance'.[49] On 13 January 1993, the United States, United Kingdom and France conducted air raids on sites in southern Iraq.[50]

In 1997/1998, when Iraq was seriously obstructing the inspectors, the Security Council found Iraq to be in 'flagrant violation' of its obligations[51] and warned that 'serious consequences' would follow from Iraq's failure to allow inspections.[52] After United Nations Secretary-General Kofi A. Annan had secured a Memorandum of

[47] Zacklin, *supra* n. 46, at p. 22. [48] S/25081 (8 Jan. 1993). [49] S/25091 (11 Jan. 1993).

[50] R. W. Apple, Jr., 'U.S. and Allied Planes Hit Iraq, Bombing Missile Sites in South in Reply to Hussein's Defiance', *N.Y. Times*, 14 Jan. 1993, A1, and B. Gellman and A. Devroy, 'Military Action against Iraq Signaled by Administration', *Wash. Post*, 14 Jan. 1993, A1. This was followed by further strikes on 17 and 18 Jan. 1993. See Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions (19 Jan. 1993): reproduced in *Public Papers of George Bush* (Vol. 2) (Washington, DC: Govt. Printing Office, 1993), pp. 2269–2270.

[51] Security Council Resolution 1134 (1997) (23 Oct. 1997); Security Council Resolution 1137 (1997) (12 Nov. 1997) and Security Council Resolution 1205 (1998) (5 Nov. 1998).

[52] S/PRST/1997/49 (29 Oct. 1997) ('The Security Council condemns the decision of the Government of Iraq to try to dictate the terms of its compliance with its obligation to cooperate with the Special Commission. The Security Council warns of the serious consequences of Iraq's failure to comply immediately and fully with its obligations under the relevant resolutions').

Understanding from Iraq,[53] the Council in Resolution 1154 (1998) of 2 March 1998 warned that any failure by Iraq to provide 'immediate, unconditional and unrestricted access' would 'have the severest consequences'. Again, on 31 October 1998, in Resolution 1205 (1998), the Council '*[c]ondemn[ed]* the decision by Iraq of to cease cooperation with the Special Commission as a flagrant violation of resolution 687 (1991) and other relevant resolutions'. These resolutions were followed, in December 1998, by intensive bombing in and around Baghdad (Operation Desert Fox), lasting just a few days.[54]

On the last occasion – in 2003 – the advice of the United Kingdom's Attorney General of 7 March 2003 (first leaked, then officially made public) went into the issues in some depth, and it is worth quoting some key passages:

> 9. Law Officers have advised in the past that, provided the conditions are made out, the revival argument does provide a sufficient justification in international law for the use of force against Iraq. That view is supported by an opinion given in August 1992 by the then UN Legal Counsel, Carl-August Fleischauer [*sic*]. However, *the UK has consistently taken the view (as did the Fleischauer [sic] opinion) that, as the cease-fire conditions were set by the Security Council in resolution 687, it is for the Council to assess whether any such breach of those obligations has occurred. The US have a rather different view: they maintain that the fact of whether Iraq is in breach is a matter of objective fact which may therefore be assessed by individual Member States*. I am not aware of any other state which supports this view. This is an issue of critical importance when considering the effect of resolution 1441.
> 10. The revival argument is controversial. It is not widely accepted among academic commentators. However, I agree with my predecessors' advice on this issue. Further, I believe that the arguments in support of the revival argument are stronger following adoption of resolution 1441. That is because of the terms of the resolution and the course of the negotiations which led to its adoption. Thus, preambular paragraphs 4, 5 and 10 recall the authorisation to use force in resolution 678 and that resolution 687 imposed obligations on Iraq as a necessary condition of the cease-fire. Operative paragraph (OP) 1 provides that Iraq has been and remains in material breach of its obligations under relevant resolutions, including the

[53] S/1998/166 (27 March 1998).

[54] F. X. Clines and S. L. Myers, 'Attack on Iraq: The Overview; Impeachment Vote in House Delayed as Clinton Launches Iraq Air Strike, Citing Military Need to Move Swiftly', *N.Y. Times*, 17 Dec. 1998, A1.

> resolution 687. OP 13 recalls that Iraq has been warned repeatedly that 'serious consequences' will result from continued violations of its obligations. *The previous practice of the Council and statements made by Council members during the negotiation of resolution 1441 demonstrate that the phrase 'material breach' signifies a finding by the Council of a sufficiently serious breach of the cease-fire conditions to revive the authorisation in resolution 678 and that 'serious consequences' is accepted as indicating the use of force.*
>
> 11. I disagree, therefore, with those commentators and lawyers, who assert that nothing less than an *explicit* authorisation to use force in a Security Council resolution will be sufficient.[55]

The US position, admitting a unilateral decision, was set out by Ruth Wedgwood (writing of threats of force by the United States in 1997/98):

> Was the United States entitled under international law to threaten the use of military force to gain Iraqi compliance with disarmament obligations? We need not enter into the continuing debate over the limits of individual and collective self-defense. Defenders of the United States position have available at least two powerful quasi-constitutional arguments in support of the legitimacy of the threat of force against Iraq to maintain the UN weapons inspection regime: these are the conditional nature of the 1991 cease-fire, and prior practice under the UNSCOM regime, in particular, the use of force in 1993 to deter Iraqi interference with inspections . . .

[55] Attorney General's Advice on the Iraq War – Iraq: Resolution 1441: reproduced in *ICLQ*, 54 (2005), 767–778, and *BYbIL*, 77 (2006), 819–829 (emphases added). For the legal justifications of the UK, USA and Australia, see their respective letters to the President of the Security Council: S/2003/350 (20 March 2003), S/2003/351 (20 March 2003) and S/2003/252 (20 March 2003). Furthermore, on the UK legal position: Attorney General's Written Answer to a Parliamentary Question, 17 March 2003, Hansard, 646 HL Debs., WA 2, and FCO Paper 'Iraq: Legal Basis for the Use of Force' reproduced in *BYbIL*, 73 (2003), 792–796, and *ICLQ*, 52 (2003), 811–814; 'Review of Intelligence on Weapons of Mass Destruction' (Butler Review, July 2004, HC 898), paragraphs 366–387; 'Legality of Military Action in Iraq: Disclosure Statement made by the Cabinet Office and the Legal Secretariat to the Law Officers', at Annex 6 to the Information Commissioner's Enforcement Notice of 22 May 2006, addressed to the Legal Secretariat to the Law Officers, reproduced in *BYbIL*, 77 (2006), 831–837. On the US legal position: W. H. Taft IV and T. F. Buchwald, 'Preemption, Iraq, and International Law', *AJIL*, 97 (2003), 557–563 (without the usual disclaimer); State Department Press Briefing on UN Security Council Resolution 1441 (www.staff.city.ac.uk/p.willetts/IRAQ/BRIEF.HTM) and *Digest of United States Practice in International Law 2002* (Washington, DC: Dept. of State, 2002), pp. 937–945. On the Australian legal position: 'Memorandum of Advice on the Use of Force against Iraq to the Commonwealth Government: 18 March 2003', *Melbourne JIL*, 4 (2003), 78–182.

> Iraq's calculated defiance of these cease-fire terms in the 1997–1998 confrontation allowed the United States to deem the cease-fire in suspension and to resume military operations to enforce its conditions . . .[56]

Wedgwood relied on what she considered to be the 1993 precedent to support her view that there was no need for the Security Council to ascertain a material breach. However, on that occasion, it was the Council that had determined the breach.[57]

These various long-held legal positions underlie the structure and the wording of the key provisions of Resolution 1441 (2002) and the arguments about whether it revived the authorisation to use force without a subsequent decision of the Security Council. This is not the occasion to rehearse these arguments, which have been canvassed fully in the evidence to the Chilcot Inquiry and in the literature.[58]

As was the case on earlier occasions,[59] Resolution 1441 (2002) employs the term 'material breach', which echoes Article 60 VCLT.[60] Ireland, for example, made it abundantly clear that it conceived the term as stemming

[56] Wedgwood, *supra* n. 4, at 725–726.

[57] See, also, Yoo, *supra* n. 36, at 571 ('In sum, well-established principles of UN Security Council practice, treaty law, and armistice law allowed the United States to suspend the cease-fire in response to Iraq's material breaches of Resolution 687. The United States then could rely on Resolution 678 to use "all necessary means" to bring Iraq into compliance. Nothing in Resolution 1441 suggested that the Security Council needed to adopt any additional resolution to establish the existence of further material breaches to provide the basis for the use of force under Resolution 678. Indeed, Resolution 1441 left intact Resolution 678's reference to the use of force. Resolution 1441 neither revoked Resolution 678's language concerning the use of "all necessary means" against Iraq, nor terminated its effect in any way').

[58] For a detailed British analysis of the arguments surrounding Resolution 1441 (2002), see letter of 9 Dec. 2002 from the FCO Legal Adviser to the Legal Secretariat to the Law Officers (www.iraqinquiry.org.uk/media/43707/document2010-01–27-100553.pdf). For an extended analysis of many of the arguments surrounding the revival doctrine and Resolution 1441 (2002), see Murphy, *supra* n. 6. The Chilcot Inquiry published its twelve-volume report on 6 July 2016 (www.iraqinquiry.org.uk/the-report/).

[59] In Resolution 707 (1991) (15 Aug. 1991), the Security Council '*[c]ondemn[ed]* Iraq's serious violation of a number of its obligations under section C of resolution 687 (1991) and of its undertakings to cooperate with the Special Commission and the IAEA, which constitutes a material breach of the relevant provisions of resolution 687 which established a cease-fire and provided the conditions essential to the restoration of peace and security in the region' (operative paragraph 1).

[60] Though not in the French version, which characterises Iraq's conduct as being in '*violation patente*' of its obligations, while the French version of Art. 60 VCLT employs the term '*violation substantielle*'. In the Spanish as in the English text the language of Art. 60 VCLT is employed ('*violación grave*'): *supra* n. 25.

from Article 60 VCLT and that it was rightly used and should be resorted to again in case Iraq continues to defy its obligations deriving from Resolution 687.[61]

In relation to the use of force and the revival argument, statements before and after the vote on Resolution 1441 (2002) affirmed the rejection of 'any automaticity in the use of force'.[62] The United States and the United Kingdom equally rejected 'automaticity' and 'hidden triggers'. Bulgaria, Cameroon, China, Mexico and Syria also emphasised this point.[63]

The term 'material breach' was the clearest term to convey the underlying idea behind the revival argument, since it was the term of art used in Article 60 VCLT,[64] which is defined in Article 60(3) as consisting in '(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'.

Nevertheless, earlier practice (such as in 1993, 1994 and 1998) showed that it was the idea rather than the actual terminology that mattered. On those occasions, reference had been made to 'flagrant violation', 'serious consequences' and 'the severest consequences'. What mattered was that the Council had used language that all concerned understood to mean that the breach was sufficiently serious as to justify the use of force. It has to be noted again that Security Council resolutions are 'rarely self-contained'.[65] The references to previous resolutions and the parallels

[61] U.N. Doc. S/PV. 4644 (8 Nov. 2002) ('As the concept of material breach is a key element of this resolution, let me make it clear that Ireland's understanding of this concept is in accordance with the definition contained in the 1969 Vienna Convention on the Law of Treaties . . . There is no doubt, on the basis of this definition, that Iraq has been in material breach of its obligations. We fully expect this same definition to be applied in determining whether any further material breach has occurred, should it become necessary to do so').

[62] Joint Statement by China, France and the Russian Federation issued as a Security Council document after the meeting at which Resolution 1441 (2002) was adopted: S/2002/1236 (8 Nov. 2002); see, also, United States statement at the Council meeting: U.N. Doc. S/PV. 4644 (8 Nov. 2002)

[63] U.N. Doc. S/PV. 4644 (8 Nov. 2002).

[64] See Memorandum by Professor Christopher Greenwood, CMG, QC, The Legality of Using Force Against Iraq, 24 Oct. 2002 (www.publications.parliament.uk/pa/cm200203/cmselect/cmfaff/196/2102406.htm) ('Accordingly, my conclusion is that military action against Iraq would be justified if: – . . . (2) The Security Council indicated that Iraq was in material breach of Resolution 687 (1991) and that breach entailed a threat to international peace and security, in which case action would be justified within the framework of Resolution 678 (1990)') (three disjunctive conditions are provided).

[65] Wood (1998), *supra* n. 27, at 93.

drawn between similar situations are an invaluable interpretative tool. Thus, it is in this context that Resolution 1441 (2002) has to be seen.

Article 60 VCLT does not apply directly to breaches of mandatory Security Council resolutions. It is the basic idea behind Article 60 that applies – the idea that a material breach gives rise to a right to terminate the instrument or suspend its operation. But the detailed terms of Article 60 (which are in any event of a residual nature)[66] and the elaborate associated procedures in Articles 65 to 68 VCLT cannot apply, even by analogy, in the case of the material breach of a Security Council resolution.[67] The main reason for this is that a resolution has no parties, unless the Security Council and the States and others upon whom the resolution imposes obligations are viewed as such. In the case of Resolution 687 (1991), the Council and Iraq could indeed be seen as 'parties', which is consistent with the position that it was for the Council itself to determine whether there had been a material breach and to specify the consequences that flowed therefrom.

5 Conclusions

The critical question under Resolution 687 (1991) was who decides whether there has been a material breach such as to justify the use of force. The answer was connected with the nature of the resolution and the ceasefire that it established. We have seen the differing views of the United States and the United Kingdom, and the position taken by the United Nations Legal Counsel. A further clear indication is given in its last paragraph – operative paragraph 34 – under which the Security Council decided that it would 'take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area'. It was for the Security Council, not one or more members of the 'coalition of the willing', to determine whether there was a material breach, as had happened in 1993 and 1998. And it was for the Security Council to take any steps required for the implementation of Resolution 687 (1991).

We have tried to summarise in this chapter some of the differences between treaty interpretation and the interpretation of Security Council

[66] Art. 60(4) VCLT reads: 'The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach'.

[67] Efforts to explain matters by reference to the detailed provisions of Art. 60 VCLT are therefore beside the point. See, e.g., M. Weller, *Iraq and the Use of Force in International Law* (Oxford: Oxford University Press, 2010), pp. 106–119.

resolutions, which seem particularly relevant to the interpretation of Resolution 687 (1991). That resolution is a typical example of a resolution that has to be read as part of a series, stretching back to Resolution 660 (1990) and forward to Resolution 1441 (2002) and beyond. The interpretation of Resolution 687 (1991) was under constant scrutiny over this twelve-year period, which resulted in many subsequent decisions and much subsequent practice. And the fact that a resolution is an act of an organ of an international organization, not an agreement between two or more States, becomes even more significant when it is a resolution imposing a ceasefire.

The present chapter has touched on one aspect of Resolution 687 (1991). Its many interesting provisions would also benefit from further analysis, now that it is no longer at the centre of ongoing political controversy and the complete story of its life is known.