

Submitted by Pui-Yin Lo

Dear Sir/Madam,

I write in respect of the invitation of the Inquiry for submissions on specified questions of international law.

I am a LLB graduate of the London School of Economics (1991) and Ph D candidate of the Faculty of Law, The University of Hong Kong (part time). I am a practising barrister in Hong Kong.

I had written on the proper understanding of the three UN Security Council resolutions concerning Iraq in March 2003 in Chinese. A copy of the article (republished in 2005 by Ming Pao Publishing Ltd) is attached. The article can be cited as Lo, PY, *No War Preferable to War* in Lo, PY, *One Living Tree* (Hong Kong: Ming Pao Publishing, 2005) pp 229-236.

I wish to set out in English the essential terms of my discussion of the matter back in 2003 to assist the Inquiry.

UN Security Council Resolution No 678 (1990) was drafted and adopted in the background of Iraq refusing to comply with the demand in UN Security Council Resolution No 660 (1990) that it should withdraw its military forces from the territories of Kuwait that it invaded and with the obligations in the ten resolutions adopted thereafter.

Paragraph 1 of Resolution No 678 repeated the demand that Iraq should fully comply with Resolution No 660 and all subsequent relevant resolutions but gave Iraq the last opportunity to comply with the resolutions. Thus paragraph 2 of Resolution No 678 authorized the Member States in co-operation of Kuwait that unless Iraq fully implements, as set forth in paragraph 1 above, the abovementioned resolutions on or before 15 January 1991, all necessary means may be used to uphold and implement Resolution No 660 and all subsequent relevant resolutions and to restore the international peace and security of the area. Paragraph 2 has constantly been understood by international jurists as the legal authorization for the allied forces to use force against Iraq in the 1991 Gulf War.

Some academics supporting the legality of the use of force by the US/UK coalition in 2003 contended that Resolution No 678 continued to have effect and applied to the use of force in 2003 because the authorization provision in paragraph 2 encompassed all upholding and implementation of "all subsequent relevant resolutions" and applied to any use of force for the purpose of implementing any "relevant resolution" and "restoring the international peace and security of the area" adopted by the Security Council since 1991. The UK Attorney General's opinion was similar to this contention. He opined that the subsequent Resolution No 687 (1991) suspended the use of force authorization of Resolution No 678 conditionally and that the authorization would be revived when Iraq committed a major breach of the obligations under Resolution No 687.

I was of the view that both contentions clearly took the matter out of context. The “all subsequent relevant resolutions ” referred to in paragraph 2 of Resolution No 678 and the “abovementioned resolutions” referred to in the same paragraph both bore the same meaning, namely, in light of the drafting background of Resolution No 678, those ten resolutions that were adopted subsequent to Resolution No 660, that were referred to in preamble of Resolution No 678 and of which Iraq’s full compliance was required in paragraph 1 of Resolution No 678. I considered that the meaning of the expression “all subsequent relevant resolutions” in paragraphs 1 and 2 of Resolution No 678 may not, under ordinary rules of construction, have different meanings. As paragraph 1 established a deadline, the resolutions that Iraq was required to fully comply with were only and could only have been the resolutions already adopted, so the phrase “all subsequent relevant resolutions” in paragraph 1 must refer to the ten resolutions adopted subsequent to Resolution No 660 but before the adoption of Resolution No 678. As mentioned earlier, paragraph 2 was to implement paragraph 1 and there should not have been different meanings. This consideration thus refuted the contention of those in support of the use of force by the United States and the United Kingdom in 2003 that Resolution No 678 might be the basis for using force to implement Resolution No 687 in the absence of a new authorization.

As to the phrase “restoring the international peace and security of the area” in paragraph 2 of Resolution No 678, this phrase may not be construed in isolation. It was immediately after the phrase “upholding and implementing Resolution No 660 and all subsequent relevant resolutions” and the word “and” connected the two phrases. These showed that “restoring the international peace and security of the area” was not another separate authorization. Rather it was used to set out the extent of the authorization to Member States in upholding and implementing resolutions.

My understanding of the limited authorization under paragraph 2 of Resolution No 678 was supported by Resolution No 686 (1991) of the Security Council later when the Gulf War was nearing its end. The Security Council accepted in paragraph 4 of Resolution No 686 that in the period of time between Iraq’s implementation of the twelve resolutions on the situation in Kuwait (ie from Resolution No 660 to Resolution No 678) and the completion of certain specified steps for cessation of hostilities, the provisions of paragraph 2 of Resolution No 678 remained in force. I believed that this paragraph 4 was a provision for the avoidance of doubt, affirming the legality of the use of force of Member States after the liberation of Kuwait and before the formal cessation of hostilities (including acts within Iraqi territory).

Resolution No 687 did express the complicated opinion of the UK Attorney General above. Although its paragraph 1 confirmed resolutions including Resolution No 678, this was not equivalent to conferring new effect or extending the original effect of paragraph 2 of Resolution No 678. If the purpose of the authorization was fulfilled, it would cease to have effect. My reading of the provisions of Resolution No 678 is that this was a resolution drafted on the one hand for the cessation of hostilities as quick as practicable and the ending of military presence of the armed forces of the Member States in Iraq, and on the other hand for ensuring the international peace and security of the Gulf region later on. Thus the resolution declared in paragraph 33 that if Iraq notified formally the Secretary-General of the United Nations and the Security Council that it accepted all provisions of the resolution (as opposed to full implementation of all provisions of the resolution),

then formal ceasefire would come into effect; and indicated in paragraph 34 that the Security Council would where necessary adopt further steps to implement the resolution to ensure peace and security of the region.

In other words, the Security Council let Iraq off when adopting Resolution No 687 and required Iraq only to make promises before there would be ceasefire. As to whether Iraq carried out its promises and obeyed the provisions, this was a matter for the future.

The authorization in paragraph 2 of Resolution No 678 also ceased to have effect by reason of exhaustion. If the authorization continued to have effect or had become suspended, the language of the said provisions of Resolution No 687 would have been different; they would have particularly stated that after formal ceasefire, there was the possibility of resumption of fire or hostilities and the conditions that would lead to such situations. The UK Attorney General had now turned round the provisions to say that following Iraqi indication of acceptance of all provisions of the resolution and formal ceasefire, if there was a major breach of the provisions of the resolution, then it would be treated as the Security Council having authorized the use of force. Such an approach not only was strained but also appeared to have forced into the provisions some additional and hitherto unthought of meaning.

The UK Attorney General claimed that Resolution No 1441 supported his opinion, namely that where Iraq committed a major breach of the provision in Resolution No 687 on the obligations she should implement, the use of force authorization in Resolution No 678 would revive in effect. This claim was not only inconsistent with paragraph 34 of Resolution No 687 but also inconsistent with the purpose of Resolution No 1441. Resolution No 1441 was adopted on the premise of continuing non-implementation on the part of Iraq of obligations imposed upon her in all relevant resolutions, including Resolution No 687, to give Iraq the last opportunity to carry out her obligations and to treat in the case of Iraq not obeying and implementing with full co-operation Resolution No 1441 the relevant act or omission as a further major breach of the obligations imposed upon Iraq. But according to Resolution No 1441, the consequence of this "further major breach" was only that the Security Council would carry out an evaluation in accordance with paragraphs 11 and 12 of Resolution No 1441. The action to be taken after the evaluation was to be decided by the Security Council.

Although the Security Council stated in paragraph 13 of Resolution No 1441 that it "recalled" that the Security Council had previously "warned Iraq repeatedly of the serious consequences for continuing to act contrary to its obligations", such a form of language, when compared with the language in paragraph 2 of Resolution No 678 to authorize the Member States in co-operation with the Government of Kuwait to "use all necessary means" to implement the resolution when Iraq did not fully implement the resolution before the deadline, was ambiguous and uncertain and so should be understood as a new authorization.

I hope the above would be of assistance to the Inquiry.

Yours Sincerely,

LO, Pui-yin (Mr.)

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