

The Iraqi Quagmire: Enforcing the No-Fly Zones

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In a relatively short period of time following the Iraqi invasion of Kuwait on August 2, 1990, the United Nations Security Council issued a series of resolutions that served as the international legal predicate for the use of force by the coalition. The first, Resolution 660¹, issued on that very day, determined that the invasion constituted a breach of international peace and security; and the Council, acting under Articles 39 and 40 of the Charter, condemned the invasion and demanded that Iraq withdraw immediately and unconditionally. Thereafter, within a span of less than four months, the Security Council issued eleven more resolutions calling for economic embargoes, blockades and finally, the use of armed force in its attempt to force Iraq to withdraw from Kuwait. The last of the twelve, Resolution 678², passed on November 29, 1990, authorized member states "to use all necessary means to uphold and implement resolution 660 and all subsequent resolutions and to restore international peace and security in the area" if Iraq did not, by January 15, 1991, comply with the previous eleven resolutions.³ As we all know, Saddam Hussein did not comply, and Operation Desert Storm commenced in the early morning hours of January 17, 1991, with air strikes lasting for some thirty-nine days, followed by a 100-hour ground campaign that ended on February 28th with a declaration of an end to hostilities.⁴ There can be no question of the legality of the use of force by the coalition to oust the Iraqi troops from Kuwait in Operation Desert Storm. It was specifically sanctioned by the Security

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1. S.C. Res. 660, U.N. SCOR, 45th Sess., 2932nd mtg., U.N. Doc. S/RES/660 (1990).

2. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg., U.N. Doc. S/RES/678 (1990).

3. *See id.*

4. *See generally Triumph Without Victory: The History of the Persian Gulf War*, U.S. NEWS & WORLD REPORT (1992).

Council acting under Chapter VII and invoking Article 42 of the Charter.⁵ With respect to the clarity and certainty of the international legal predicate for this operation, I would suggest that it differs markedly from NATO's Operation Allied Force in Kosovo some eight years later.

THE LEGALITY OF THE NO-FLY ZONES

The so-called "no-fly" zones over Iraq were created soon after the cessation of hostilities, with the northern exclusion zone — north of the 36th parallel — established in June, 1991 incident to Operation Provide Comfort, and the corresponding southern zone — south of the 32nd parallel — established in August, 1992.⁶ The southern zone was ultimately extended in 1996 to cover all the airspace south of the 33rd parallel.⁷ The ostensible purpose of the zones was to protect the Kurds in the north and the Shiites in the south from Iraqi oppression. My concern regarding these exclusion zones has less to do with their stated purpose than with their foundation in law.

The legal argument put forth to justify the creation of the "no-fly" zones over northern and southern Iraq rests upon an interpretation of and necessary interaction between four Security Council resolutions. The first is one I have already mentioned — Resolution 678 of November 29, 1990, which authorized the coalition to use force in implementing the previous eleven resolutions and to restore peace and security in the area.⁸

The second is Resolution 686⁹ of March 2, 1991, which noted the suspension of combat activities but reaffirmed that Resolution 678 and its eleven predecessors were still in "full force and effect" and went on to demand that Iraq implement its acceptance of all of them.¹⁰ More particularly, the resolution demanded that Iraq rescind its purported annexation of Kuwait; accept its liability under international law for the loss, damage and injury to all countries as a result of the invasion and occupation of Kuwait; release all Kuwaiti and third-state nationals and prisoners of war; return all seized Kuwaiti property; cease any hostile or provocative actions; designate military commanders to meet with coalition commanders to arrange for military aspects of a cessation of hostilities; and provide information and assistance regarding the identification of mines, booby

5. See U.N. CHARTER art. 42.

6. See Alain E. Boileau, *To The Suburbs of Baghdad: Clinton's Extension of the Southern Iraqi No-Fly Zone*, 3 J. INT'L & COMP. L. 875, 881 (1997).

7. SIMON CHESTERMAN, JUST WAR OR JUST PEACE? 199 (2001).

8. See *supra*, note 2, and accompanying text.

9. S.C. Res. 686, U.N. SCOR, 46th Sess., 2978th mtg., U.N. Doc. S/RES/686 (1991).

10. See *id.*

traps, explosives, and chemical and biological weapons.¹¹ Finally, Resolution 686 stated that the specific authorization of force contained in the second paragraph of Resolution 678 would remain valid during the time required for Iraq to comply with these demands.¹²

The third resolution with relevance to the purported legality of the “no-fly” zones is Resolution 687¹³ of April 3, 1991, which recalled and affirmed the prior thirteen resolutions “except as expressly changed . . . to achieve the goals of the present resolution, including a formal cease – fire”.¹⁴ It thereafter set forth certain conditions upon Iraq, notably the requirement for the destruction, removal or rendering harmless of all chemical and biological weapons and ballistic missiles. Paragraph thirty-three of the resolution stated that once Iraq notified the Security Council of its acceptance of the listed conditions, a formal cease – fire would be in effect.

The final resolution bearing on this issue is Resolution 688¹⁵ of April 5, 1991. In it, the Security Council addressed and condemned the oppression of the Iraqi civilians, especially in Kurdish populated areas, which it said threatened international peace and security in the region. The Council demanded that Iraq end the oppression and insisted that international humanitarian organizations be granted immediate access to those in need in the country. Finally, it appealed to all member states and humanitarian organizations to contribute to relief efforts. Of particular significance is the fact that the Security Council did *not* state anywhere in the resolution that it was acting pursuant to Chapter VII of the Charter, a phrase oftentimes found when coercive measures are being authorized, nor did it contain any authorization for protection of humanitarian relief efforts.

Those who argue that the “no-fly” zones are clearly supported in law suggest that the authorization for the use of force contained in paragraph two of Resolution 678 has never been rescinded.¹⁶ Accordingly, that provision remains viable and may be invoked whenever there is a perceived breach of the cease – fire conditions under Resolution 686, or any other incident threatening the peace or stability of the region, such as a violation of the conditions regarding the destruction or removal of

11. *See id.*

12. *See id.*

13. S.C. Res. 687 U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991).

14. *Id.*

15. S.C. Res. 688 U.N. SCOR, 46th Sess., 2982nd mtg., U.N. Doc. S/RES/688 (1991).

16. *See* Timothy P. McIlmail, *No-Fly Zones: The Imposition and Enforcement of Air Exclusion Regimes Over Bosnia and Iraq*, 17 *LOY. L.A. INT'L & COMP. L.J.* 35, 51 (1994).

chemical and biological weapons under Resolution 687. Another variant of the argument is that the provisions of Resolution 688 imply an enforcement mechanism to ensure that Iraq ends its suppression of its people, and that the “no-fly” zones are just such an enforcement mechanism.¹⁷ If the “no-fly” zones have a proper legal predicate under Security Council resolutions, the argument goes, then force can be used in “self-defense” in response to attacks or threats of attack by Iraqi air defense facilities. I disagree not with this last issue of the use of force in self-defense, but rather with the underlying argument supporting the “no-fly” zones themselves.

While the wording of Resolution 678 certainly authorizes the coalition to “use all necessary means to uphold and implement resolution 660 (1990) and all subsequent resolutions . . . ;”¹⁸ I would contend the phrase “all subsequent resolutions” clearly refers only to those ten resolutions passed after 660 and before 678. To argue otherwise is to suggest that there is a continuing mandate for the coalition countries, individually or collectively, to use force under the auspices of Operation Desert Storm in dealing with any breach of future resolutions involving Iraq or any threat to peace in that area of the world. Since the Security Council indicated that *it* was remaining seized of the matter, I find this argument untenable.

With regard to the assertion that authority for the “no-fly” zones emanates from or is a legal complement to Resolution 688, I find this equally problematic. As mentioned before, this resolution does not mention that the Security Council is acting under Chapter VII, nor does it purport to sanction, explicitly or even implicitly, the use of enforcement action. Its primary and stated focus is to require that Iraq grant unfettered access to international humanitarian organizations in order to give assistance to those in need, and also to appeal to all member states and humanitarian organizations to contribute to the relief efforts. Granted, the resolution “condemns” the Iraqi suppression of its people and “demands” that it cease the suppression, but it falls far short of any possible grant of authority to impose “no-fly” zones for the purpose of ensuring Iraqi compliance with its terms.

In sum, even though the Security Council has not spoken out to challenge the exclusion zones being maintained by American and British fighter aircraft, I do not see in that silence an affirmation of the zones. Without the firm legal predicate for us to be within the sovereign airspace of Iraq, the justification for our use of force in self-defense is greatly weakened.

17. See CHESTERMAN, *supra* note 7, at 198.

18. S.C. Res. 678, *supra* note 2.

HAVE THE ZONES ACHIEVED THEIR PURPOSE?

With regard to what was accomplished in Desert Storm back in 1991, there can be no argument that it was a successful military campaign with a remarkably low casualty rate. The criticism of that operation, now more in vogue than ever before, focuses on the belief that the ground offensive was terminated too early — that we did not “finish” the job by removing Saddam Hussein from power and toppling his regime.¹⁹ In the wake of the September 11th terrorist attacks on the World Trade Center and the Pentagon, and the assumption that Iraq may have been involved in some way in those attacks, or perhaps in the anthrax attacks through use of the mail, much is now being said about the need for the United States to “go to Baghdad” and complete the job that George Bush Sr. failed to do back in 1991. I was in uniform back in those days and there were several reasons why we did not press the attack in Baghdad. First of all, from a purely legal perspective, we did not believe that the Security Council resolutions, individually or collectively, gave us the authority to do anything other than dislodge Saddam Hussein from Kuwait. Second, we were concerned with the immense and protracted logistical effort which would have been required in any occupation of Iraq. Third, we were also concerned that toppling the Iraqi government at that time would have created a power vacuum upon which Iran could have easily capitalized. Finally, we believed, erroneously in hindsight, that we could always go back and get rid of Saddam Hussein whenever we wanted and through a variety of means. For whatever it is worth, that was our reasoning at the time.

In appraising the measure of success of the “no-fly” exclusion zones over the last decade, we need to ask whether they have achieved their stated purpose of protecting the Kurds in the north and the Shiites in the south. On balance, we would probably all agree that they have. The minority populations have been shielded from the type of Iraqi armed repression that immediately followed the cessation of hostilities in 1991.²⁰ In addition, having aircraft in the skies over northern and southern Iraq has probably yielded additional dividends in providing excellent intelligence on what Saddam is doing, as well as restricting his movement of military assets within the country.²¹ I would suggest, however, that enforcement of the “no-fly” zones has eclipsed its original purpose and has become an

19. See Daniel Pipes & Jonathan Schanzer, *On to Baghdad?: Yes – The Risks Are Overrated*, N.Y. POST, Dec. 3, 2001; see also Editorial, *Good Cop, Bad Cop*, ST LOUIS POST-DISPATCH, Sept. 26, 2001, at B6.

20. See *Dual Purpose to No-Fly Zones Imposed on Iraq*, PATRIOT LEDGER (Quincy MA.), Dec. 30, 1998, at 3.

21. See *id.*

integral part of the much larger policy of containment; a policy, which in addition to the “no-fly” zones, also includes U.N. imposed inspections for weapons of mass destruction and a sanctions regime. With regard to this overall policy of containment, the record is probably more mixed. Saddam Hussein still appears to be fully in control and I believe there is little likelihood that he will be taken down from within. As to the inspections for weapons of mass destruction, inspectors have not been in the country since December 1998. Furthermore, conjecture has it that Saddam secreted away thousands of pounds of materials and that he is probably also rebuilding his nuclear, chemical and biological weapons programs.²² The sanctions regime, originally imposed by Security Council resolution 661²³ on August 6, 1990, is linked to these weapons inspections since Security Council resolution 687²⁴ provides that the sanctions are to continue until Iraq has destroyed, removed or rendered harmless its weapons of mass destruction. But the sanctions regime is arguably ineffective at best and counterproductive at worst. Shipments of food, medicine and equipment to rebuild the country’s essential infrastructure are immersed in massive amounts of red tape, and consequently delayed, while other products such as DVD players and electronic equipment bypass the “oil for food” inspection system and can be bought openly if one has enough money.²⁵ To a certain extent, the sanctions regime plays into Saddam’s hand because it has provided him with an excuse for the suffering of his people.²⁶ That is why there have been constant calls for the use of “smart sanctions” to replace the current regime, sanctions that would more precisely target materials which could be used in weapons systems while alleviating to a much greater measure the plight of the Iraqi citizenry.

We, therefore, appear to be at an impasse with our interconnected policy of containment.²⁷ We have used fairly sizeable air strikes on occasion to try to force compliance — notably Desert Strike in 1996 where we sought to punish Saddam for sending his troops to the north to assist a pro-Iraqi Kurdish faction against a pro-western Kurdish faction, and Desert

22. See Robert A. Pape, Editorial, *Our Iraq Policy is Not Working*, N. Y. TIMES, Feb. 24, 2001, at A13.

23. S.C. Res. 661, U.N. SCOR, 45th Sess., 2933rd mtg., U.N. Doc. S/RES/661 (1990).

24. S.C. Res. 687, *supra* note 13, ¶ 22.

25. See Michael Slackman, *Response to Terror*, L. A. TIMES, Oct. 19, 2001, at A1; Larry Kaplow, *Iraq: Years of Sanctions Hurt Iraqis More than Regime*, ATLANTA J. & CONSTITUTION, Oct. 20, 2001, at 6A.

26. See Yahia Said, Letter, *Why I Oppose Sanctions*, GUARDIAN (London), Jan. 9, 2001, at 21.

27. See *Iraq Airstrikes: Unfinished Business*, HERALD SUN, Aug. 19, 2001, at A12.

Fox in 1998 when we tried to force him to allow access by UNSCOM inspectors to facilities within the country — but the results were marginal. Further, it is clear that Saddam Hussein has little incentive to subject his country to renewed weapons inspections without some assurance that sanctions might be lifted in return, which I believe to be highly unlikely in light of current events.²⁸ Finally, there is a high cost to maintaining the “no-fly” enforcement zones over the north and south. Some 150-200 aircraft are used on a daily basis to fly and support enforcement missions, and those assets are greatly in demand elsewhere in the world.²⁹ Also, remember that a U-2 surveillance aircraft, flying at 70,000 feet, came very close to being shot down last summer by a modified Iraqi SAM-2 missile; and the Iraqis were successful in shooting down an unmanned Predator aircraft shortly thereafter, a surveillance platform costing almost \$3.2 million each.³⁰ With Saddam determined to continue to use his air defense systems to engage aircraft flying the enforcement missions, it is probably only a matter of time before we lose a piloted aircraft. These missions are costly in other ways. Turkey’s Prime Minister has expressed concerns about the frequent clashes in the northern “no-fly” zone and has indicated it could undermine support in his country for our continued use of Incirlik Air Base for the missions.³¹

CONCLUSION

Simply put, I believe that the “no-fly” exclusion zones in northern and southern Iraq rest not only on a dubious legal predicate, but have also produced marginal results when weighed against the costs involved. There have been recent indications, albeit before the tragic events of September 11th, that the Bush administration was re-evaluating the exclusion zones with a view towards possibly reducing or even eliminating this aspect of its overall containment policy of Saddam Hussein. That would certainly be well-advised.

28. See Roula Khalaf, *Disarming Baghdad Attempt to Break Deadlock*, FINANCIAL TIMES (London), June 17, 1999, at 8.

29. See Pamela Hess, *Pentagon Weighing Iraq Options*, UPI, Mar. 28, 2001.

30. See Thom Shanker, *U.S. Tells Iraq It May Retaliate for Missile Attack on Spy Plane*, N. Y. TIMES, July 27, 2001, at A4; Editorial, *Drone, But Also an Omen*, COMMERCIAL APPEAL (Memphis, TN), Aug. 29, 2001, at A6.

31. See *Iraq: Defying “no-fly” Zones Continues*, UPI, Feb. 11, 1999.

