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Col James Russell, JTF-SWA/9 ASETF-SW/JA and Col Charles Dunlap, U.S. Central Command Air Forces/JA, advise Lt Gen Hal Hornburg, U.S. Central Command Air Forces Commander, during Desert Fox.

The Legal Basis for No-Fly Zones

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One of the most important responsibilities of a judge advocate in the deployed environment is advising commanders on the propriety of the use of military force in a given situation. Although most judge advocates realize the importance of the rules of engagement in this regard, not all appreciate the necessity of understanding the underlying legal basis supporting the use of force in a specific operational setting. The reality is that absent a "situational awareness" of that legal framework there is not only the risk that force will be used inappropriately, there also is danger of the emergence of "mission creep" as the original legal rationale for a mission becomes obscured or misunderstood. The risk of this is especially great in the kind of complex, hybrid operations we see today. This brief article addresses one such operation: the enforcement of no-fly zones (NFZs) in Iraq.

Under current international law the use of force by those countries that are members of the United Nations (UN) is ordinarily limited to two situations: 1) in self-defense pursuant to Article 51 of the UN Charter; and 2) pursuant to a resolution of the Security Council. Since 1992 the United States has been enforcing a no-fly zone in northern and southern Iraq.² At various times, however, Iraq and other countries have asserted that the no-fly zone enforcement regime is illegal under international law. The central contention is that there is no explicit UN Security Council resolution authorizing the NFZs. While it is true that there is no such resolution *per se*, it does not necessarily follow that there is no legal basis for the NFZs.

Specifically, the basic authority for the NFZs in Iraq is traceable to United Nations Security Council Resolution (UNSCR) 678, dated November 29, 1990. This is the original resolution that authorized the use of force in the Gulf War. In the text, the Security Council authorized "Member States cooperating with the government of Kuwait...to use all necessary means to uphold...all subsequent relevant resolutions and to restore international peace and security to the area." The "all means necessary" language encompasses the use of force under Chapter VII of the UN Charter.

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Following the cease-fire agreement with the Gulf War coalition in 1991, Iraq nevertheless proceeded to engage in major military operations against members of its own population. Kurds in the north and Shias in the south were subjected to a series of counter-insurgency operations, often marked by exceptionally brutal actions against innocent civilians. Consequently, in April of 1991, the Security Council passed a further resolution that condemned Iraq for repressing its civilian population "in many parts of Iraq".

Furthermore, that resolution (UNSCR 688) stated that such actions threatened "international peace and security in the region". Because of continued attacks upon civilians in Southern Iraq, the coalition took action to "restore international peace" by issuing a *démarche* advising the government of Iraq that a no-fly zone was established south of 32 degrees north latitude. By denying it the use of its still-significant inventory of combat aircraft, this action was designed to diminish Iraq's capability to attack its own people. Coalition aircraft began patrolling the NFZs to ensure that policy set forth in the *démarche* was observed.

Judge advocates should understand, however, that operators often misunderstand the nature of *démarches*. They sometimes assume a *démarche* has the same legal effect as a UNSCR itself. This, of course, is not the case. A *démarche* is simply a government-to-government communiqué. While it may reflect international law, it does not itself constitute independent legal authority. Nevertheless, in this instance it did, in fact, reflect international law in that it was based on a Security Council resolution that does constitute legal authority.

It is, of course, true that some countries, including even a few allies of the United States, maintain that notwithstanding the legitimacy of the original Security Council directives, the *démarches* establishing the NFZs exceed the scope of the supporting resolutions. However, one might legitimately conclude that the complete absence of Security Council action in the intervening years, to either rescind the supporting resolutions or direct the discontinuance of the NFZ, illustrates that the legitimacy of the NFZ's regime is accepted international practice.

It should be noted, however, that the legal basis for such uses of force as Operation Desert Fox's air strikes is not exactly the same as that for the NFZ. Essentially, Desert Fox was based on UNSCR 687, the resolution that brought about the cease-fire after Desert Storm. UNSCR 687 required, among other things, that Iraq destroy all stocks of chemical and biological weapons, as well as the related research, development, support and manufacturing facilities. In addition, that resolution required Iraq to agree to an on-site inspection regime by the U.N. Special Commission (UNSCOM). A series of subsequent resolutions (along with formal statements to the Security Council by the United States and others) expressed international concern about Iraq's compliance with its obligations.

When Iraq elected to expel UNSCOM inspectors in December of 1998, it placed itself in violation of the cease-

fire agreement. Thus, the authority found in UNSCR 678, (the original Gulf War UNSCR authorizing "all necessary means" under Chapter 7 of the UN Charter) provided the basis to launch the attacks aimed at forcing Iraqi compliance with the mandated inspection regime and diminishing its capacity to produce weapons of mass destruction.

Following Desert Fox, Iraq engaged in an intense series of provocative actions (ranging from NFZ violations to the firing of missiles and anti-aircraft artillery at coalition aircraft) that threatened the safety of coalition aircrews enforcing the NFZ. As a result, U.S. and British forces have repeatedly been required to attack various elements of Iraq's air defense system. Again, the legal authority for these actions is traceable to the original UNSCRs authorizing the Gulf War itself.

There are a number of lessons-learned from operations in Southwest Asia that are applicable elsewhere. For example, legal advisors need to ensure that commanders understand that the authority to use force is not unlimited. It must be demonstrated in each instance that a particular use of force is related to the purpose for which the UNSCR was issued. Moreover, this analysis may also affect the propriety of attacking a particular target. Of course, recourse to a UNSCR is not necessary when force is being used in self-defense as provided by Article 51.

As indicated at the beginning of this essay, it is imperative that the deploying or supporting judge advocate become familiar with the legal authority for the use of force in his or her particular situation. There are a number of sources for obtaining this information — not the least of which is the legal staff of the Combatant Command conducting the operation. Another source that I've found helpful is the White House Website (www.whitehouse.gov).

It seems to be among the earliest unclassified sources for material helpful in determining the legal basis for a given operation. Once the legal basis is determined (and vetted by the appropriate higher authorities in the chain of command), it is a good idea to reduce it to a one-page talker and get it distributed to the staff. This allows everyone to be (quite literally!) on the same sheet of music. It is especially important to ensure that the senior leadership — particularly those who may be speaking to the press — understand the legal rationale. Keep in mind that the specific legal basis may also affect the legal

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status of those involved. In short, it is vital that everyone has a grasp of this issue; otherwise, you expose your operation to misunderstandings and miscalculations that can undermine its ultimate success.

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² Great Britain and France have joined the U.S. in enforcing NFZs in southern Iraq.