

TO THE SUBURBS OF BAGHDAD: CLINTON'S EXTENSION OF THE SOUTHERN IRAQI NO-FLY ZONE

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In the early morning hours of September 3, 1996, the United States conducted military strikes against an old foe.¹ Once again United States guns were discharging upon the nation of Iraq and its obstinate leader, Saddam Hussein. In addition to striking at Hussein's defenses, President Bill Clinton extended the already existing no-fly zone south of the thirty-second parallel to the thirty-third parallel.² The strikes were not only to punish Hussein for his incursion into the northern Kurdish conflict plaguing Iraq since the end of the Gulf War, but to, "protect the safety of our aircraft enforcing this [extended] no fly zone."³

The United States' military strikes were unquestionably unilateral and stirred unprecedented wavering responses from the international community, especially, the Gulf War Coalition [hereinafter the Coalition]. Many question the legality of President Clinton's extension of the no-fly. This comment will examine the illegality of the extension of the southern no-fly zone in light of United Nations Security Council Resolutions

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1. Bradley Graham, *U.S. Launches More Cruise Missiles Against Iraq; Air Defenses Near Baghdad Hit; No-Fly Zone Extended in South*, WASH. POST, Sept. 4, 1996, at A1.

2. *Id.*

3. *Letter Dated 3 September 1996 from the Charge D'Affaires A.I. of the Permanent Mission of the United States of America to the United Nations Addressed to the President of the Security Council*, U.N. SCOR, Annex, U.N. Doc. S/1996/711 (1996) [hereinafter *Letter dated 3 September 1996*].

[hereinafter Resolutions] as well as offer some counter-arguments that may provide satisfactory justification for this United States unilateral response to Hussein's intervention in the northern Kurdish conflict. The first part of this comment shall address Saddam Hussein's actions after the Gulf War and the incessant testing of the United States, the United Nations, and the Coalition's resolve to enforce Resolutions, as well as international law and recognized international behavior.

The second part will examine at the United States unilateral response to the Iraqi intervention in the Kurdish civil disturbances in northern Iraq and the Clinton Administration's reasoning for the extension of the thirty-second parallel. The third portion will examine the original creation and imposition of the Iraqi no-fly zones and their probable illegality, as well as its legal relationship to the current extension by the Clinton administration. The final portion of the comment will establish the probable illegality of the current extension, but will present some viable arguments for its necessity in light of the unprecedented international legal quandary offered by the current Iraqi conflict.

I. THE ROAD TO THE PRESENT CONFLICT

Since the end of hostilities in the Gulf War, Iraq has tested the resolve of both the United Nations and the Coalition. The situation in the Middle East and Iraq following the cease fire was "far from peaceful."⁴ One example is the conflict which arose between the International Atomic Energy Agency [hereinafter IAEA] and Iraq over nuclear inspections mandated by Resolution 687.⁵ Iraq has repeatedly hindered nuclear weapons inspections conducted by the IAEA. Following the Gulf War, the IAEA was aware of Iraq's possession of nuclear material that was in a "readily nuclear-weapons-usable form," or "direct-use material."⁶ Due to the presence of these volatile materials, the United Nations mandated inspections to ensure that Iraq would not develop weapons of mass destruction.⁷ From the very beginning, Iraq's compliance was unsatisfactory. Iraq repeatedly concealed evidence on uranium enrichment and nuclear weapons development.⁸ It denied access to agency teams and

4. Alan D. Surchin, *Terror and the Law: The Unilateral Use of Force and the June 1993 Bombing of Baghdad*, 5 DUKE J. COMP. & INT'L L. 457, 459 (1995).

5. U.N. DEP'T OF PUB. INFO., U. N. AND THE IRAQ-KUWAIT CONFLICT 1990-1996 at 367, U.N. Doc. S/23295, U.N. Sales No.E.96.I.3 (1996).

6. As of December 17, 1991, 400 grams of unirradiated high-enriched uranium remained in Iraq. *Id.* at 368.

7. *Id.* at 367.

8. *Id.*

even detained them on one occasion, confiscating their documents.⁹ In addition, Iraq occasionally denied aerial inspections of its territory as required by the IAEA and Resolution 687.¹⁰

By 1992, the Security Council acknowledged Iraq's "lack of indication of how the government of Iraq intends to comply with the resolutions of the Council."¹¹ In fact, Iraq had frustrated the Security Council with "baseless threats, allegations, and attacks launched against the Security Council by the Deputy Prime Minister of Iraq."¹² As late as November 1993, Iraq's declarations regarding nuclear materials in its possession were still incomplete.¹³ Iraq's relationship with the IAEA since the inspections began was characterized as a "rocky road of cooperation."¹⁴

In June 1993, the United States, acting unilaterally, bombed an Iraqi Intelligence building in Baghdad in retaliation for an alleged assassination plot against former President George Bush.¹⁵ United States Intelligence officials had informed President Clinton about the plot, which allegedly had been masterminded by Saddam Hussein.¹⁶ Some, including Great Britain, found this assassination plot to be a violation of Resolution 687, where Iraq promised an end to Iraqi-sponsored terrorism.¹⁷ In addition to such alleged terrorism, Iraq has been evasive in cooperating with the United Nations Commission on Human Rights in providing information on the location of missing Kuwaiti nationals resulting from the invasion of Kuwait and the Gulf War itself.¹⁸ In fact, as recently as December 1995, the General Assembly expressed its concern with major human rights violations in Iraq by condemning the torture, mutilation, execution, and disappearances of its own citizens.¹⁹

9. *Id.*

10. *Id.*

11. U.N. DEP'T OF PUB. INFO., *supra* note 5, at 490.

12. *Id.*

13. *Id.* at 667.

14. Iraq offered an ultimatum at one point. Early in August 1995, Iraq stated that "cooperation would cease if no progress was made in the Security Council in the direction of easing or lifting sanctions and the oil embargo." *Id.* at 773.

15. David Von Drehle & R. Jeffrey Smith, *U.S. Strikes Iraq for Plot to Kill Bush*, WASH. POST, June 27, 1993, at A1.

16. *Id.*

17. Surchin, *supra* note 4, at 467.

18. U.N. DEP'T OF PUB. INFO., *supra* note 5, at 793.

19. *Id.* at 821.

Saddam Hussein also challenged the world's military nerves following the war.²⁰ In October of 1994, Iraq conducted military deployments in the direction of the Kuwait border in violation of paragraph 2 of Resolution 678.²¹ The United Nations Security Council officially condemned this action, demanding that Iraq not redeploy troops to the South or take any other action to enhance its military capacity in southern Iraq.²² This official condemnation of Hussein's troop movements demonstrated the Council's belief Iraq could still pose a threat to the region.

The initial concern following the end of hostilities which lead to the original formation of the no-fly zones was the safety of Iraqi nationals whom had opposed Saddam Hussein, namely the Kurdish in northern and southern Iraq.²³ Saddam Hussein began repressing those whom opposed him during the war which led to a United Nations demand through Security Council Resolution 688 that the repression end.²⁴ The United States still contends Saddam Hussein, "shows no signs of complying with United Nations Security Council Resolution 688."²⁵ This type of non-compliance led the United States and its Coalition partners to establish the original no-fly zones in June 1991, and in August 1992.²⁶ This type of non-compliance has also prevented the United Nations from lifting the embargoes levied against Iraq by Resolution 661.²⁷

The underlying threat Saddam Hussein presented to the United States, and at varying times to the Coalition, was Iraq's threat to its neighbors in the South and consequently, their oil interests.²⁸ The United States believes Hussein's "aggressive military action" constitutes a viable threat to the flow of oil and the national security of Israel, Jordan, Kuwait, and Saudi Arabia.²⁹ These interests are the primary reason why the United

20. *Id.* at 694.

21. *Id.*

22. *Id.*

23. Bob Deans, *Conflict in Iraq: Arab Response*, ATLANTA J. & CONST., Sept. 4, 1996, at 6A.

24. *Id.*

25. *Text of Clinton Letter on Military Force Against Iraq Resolution*, U.S. NEWSWIRE, Nov. 5, 1996.

26. *Iraq Protests to U.N. Over No-Fly Zones*, REUTERS N. AM. WIRE, Sept. 11, 1996.

27. S.C. Res. 661, U.N. SCOR, 45th Sess., 2933rd mtg. & 9(b), U.N. Doc. S/RES/661 (1990).

28. Secretary of Defense William J. Perry & Gen. Joseph Ralston, *USAF Vice Chairman of the Joint Chiefs of Staff, News Briefing and Question and Answer Session, Pentagon* (Sept. 3, 1996) <<http://www.dtic.dla.mil/defense/links/pubs/di96/di1179.html>> .

29. *Id.*

States remains and maintains its presence in the Gulf region. Nevertheless, Hussein's actions in the North have been sufficient to demand, according to the White House, a strong response.³⁰

On August 31, 1996, Saddam Hussein sent thirty-thousand Iraqi troops to assist the Kurdistan Democratic Party (KDP) with the Patriotic Union of Kurdistan in the Kurdish enclave of Irbil.³¹ Consequently, the KDP overran their rivals in northern Iraq.³² This Iraqi *attack*, as the White House called it, "adds fuel to the factional fire and threatens to spark instability throughout the region."³³ This action resulted in the military strikes against southern Iraqi defense installations and President Clinton's extension of the southern no-fly zone from the thirty-second to the thirty-third parallel.³⁴

II. THE UNITED STATES' UNILATERAL RESPONSE

United States officials conceded that the purpose of the September 3rd attacks on the southern defense radar installations was not to "forcibly evict the Iraqi army from the north," but to "make it safe for American and other jets to enforce the new restrictions [no-fly zone]."³⁵ Any type of military attacks in the north would have posed too many risks and dangers.³⁶ The terrain is more mountainous than in the South and would have prevented a quick and effective strike.³⁷ By all indications, the true punishment to Hussein for his incursion into the Kurdish conflict was the extension of the southern no-fly zone. The action was a broad stroke attempt to restrict and monitor Hussein in his own territory.

As President Clinton stated in his letter to the United Nations, "[w]e are extending the no-fly zone in southern Iraq airspace from the Kuwaiti border to the southern suburbs of Baghdad and significantly restrict Iraq's ability to conduct offensive operations in the region."³⁸ The letter makes no reference to restricting Hussein in the North in a similar

30. Graham, *supra* note 1.

31. *Provocation and Response*, ECONOMIST (U.S. ed.), Sept. 7, 1996, at 37.

32. *Id.*

33. *Id.*

34. Graham, *supra* note 1.

35. John F. Harris & John Mintz, *U.S. Warplanes Patrol Wider No-Fly Zone*, WASH. POST, Sept. 5, 1996, at A1.

36. John F. Harris & Bradley Graham, *After Quick Response to Iraq, A Lengthy Debate on Motive; Politics at Home and Abroad Dictated Military Action, Sources Say*, WASH. POST, Sept. 8, 1996, at A29.

37. *Id.*

38. *Letter dated 3 September 1996, supra* note 3.

manner and indicates that the Clinton Administration was more concerned with southern security than protective measures for the Kurdish settlements in the North.

The extension increases the no-fly zone northward by approximately 110 kilometers (seventy miles)³⁹ and curtails Hussein's military capability in defending Baghdad, advancing towards the South, and using two major training areas.⁴⁰ In fact, the United States had even considered extending a similar restricted zone towards the West, making it safer for allied aircraft to maneuver between Turkey and Saudi Arabia.⁴¹ This plan was abandoned because, as one official said, "one problem with it was the difficulty we would have explaining it to the public and the allies. The decision to expand the southern zone was complicated enough to explain."⁴²

The extension, although denounced by the Iraqi government as a "flagrant aggression against Iraq's sovereignty and the safety of its political independence in contravention of United Nations Charter and norms of international law," abided by the new additional seventy miles of restricted airspace.⁴³ Although the current United States action has served to control Saddam Hussein further in his quest to reestablish himself militarily in the South, some argue that the no-fly restrictions imposed after the Gulf War are most likely illegal⁴⁴ and consequently, so is the recent extension of the southern zone.

39. Graham, *supra* note 1.

40. By expanding the southern no fly zone one degree X from the 32nd to the 33rd parallel, a distance of about seventy miles X officials said Saddam will be deprived of two major air force training areas and use of about forty percent of the air defense capability that existed in the greater Baghdad area. The huge banned area, over half of Iraq, includes a couple of air bases where the planes have either been moved north or are presumably grounded.

Id.

41. Harris & Graham, *supra* note 36.

42. *Id.*

43. Iraqi helicopters accompanying UN weapons inspectors are providing concrete proof that Iraq is respecting an expanded no-fly zone which now extends almost to the Baghdad suburbs, a top UN official said Friday. Rolf Ekeus, the chairman of the UN Special Commission, told AFP that on Thursday, when he instructed a UN team in Baghdad to fly for the first time into the new no-fly zone, two Iraqi helicopters accompanying a UN helicopter had turned sharply to avoid entering the zone.

Iraq Respecting New No-Fly Zone: U.N., AGENCE FR. PRESSE, Sept. 20, 1996.

44. 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, 83 (1994).

III. THE ORIGINAL CREATION AND IMPOSITION OF THE NO FLY-ZONES

In June 1991, the Coalition forces, led by the United States, created a no-fly zone north of the thirty-sixth parallel in Iraq.⁴⁵ In August 1992, a southern no-fly zone was established from the Kuwaiti Border to the thirty-second parallel.⁴⁶ According to the United States Department of Defense, the "UN authorized the United States to organize a coalition to conduct Operation Provide Comfort, which enforced a no-fly zone north of 36 degrees, and later authorized Operation Southern Watch, which enforced a no-fly zone south of 32 degrees."⁴⁷ However, no United Nations Security Council Resolution *specifically* authorized or mandated any member state to take such actions.⁴⁸ In fact, the United Nations acknowledges the restricted zones only by stating that, "some of the coalition countries, in what *they* stated was an effort to enforce and monitor compliance with resolution 688 (1991), created two no-fly zones"(emphasis added).⁴⁹ The report goes on to say that, "[a]ccording to these coalition countries, the cease fire agreement ending the war empowered them to impose such controls over Iraqi military flights."⁵⁰ Although this demonstrates that the Coalition members are acting on their own initiative, this language hardly condemns the imposition of the zones.

Alan D. Surchin states in his article titled, *Terror and the Law: The Unilateral use of Force and the June 1993 Bombing of Baghdad*, that "it is essential that explanations for controversial uses of force be grounded in law, not expediency."⁵¹ The explanations provided by the Gulf War Coalition for the creation of the no-fly zones are based on their interpretation of several Security Council Resolutions, including Resolutions 678, 688, 686, and 687.⁵² However, the justification provided for the recent United States action seems limited to the enforcement of Resolution 688.⁵³

45. U.N. DEP'T OF PUB. INFO., *supra* note 5, at 41.

46. *Id.*

47. Perry & Ralston, *supra* note 28.

48. McIlmail, *supra* note 44, at 49-83.

49. U.N. DEP'T OF PUB. INFO., *supra* note 5, at 41.

50. *Id.*

51. Surchin, *supra* note 4, at 457.

52. McIlmail, *supra* note 44, at 50-53.

53. "Saddam Hussein shows no signs of complying with UNSCOR 688, which demands that Iraq cease the repression of its own people." U.S. NEWSWIRE, *supra* note 25.

Article 39 of the United Nation's Charter mandates that the Security Council, "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42 to maintain or restore international peace and security."⁵⁴ This serves as a statement by the international community on an event or situation, "thereby focusing international attention on the event and encouraging the relevant parties to seek an expeditious resolution."⁵⁵ This also, "triggers" the Security Council's ability to, "pursue enforcement powers under Chapter VII of the Charter," namely articles 40, 41 and 42.⁵⁶ Once such a determination is made, as it was with Iraq's actions against Kuwait, article 42 permits the Security Council to take adequate actions, "by air, sea, or land forces as may be necessary to maintain or restore international peace and security."⁵⁷ A member nation, such as the United States, attains its powers for enforcement of Security Council resolutions from article 49, which provides that, "[t]he members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council."⁵⁸

It seems apparent that the only time a member state may act unilaterally is under article 51 which states, "[n]othing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace."⁵⁹ In this current situation, as with the conditions following the Gulf War, the United States has not been attacked, nor has the Security Council mandated a response by member states.

Resolution 688 was adopted to address and abate a "vast humanitarian calamity" occurring with approximately 1.5 million Iraqi citizens, mostly Kurds, "fleeing towards and across bleak mountain borders with Turkey and the Islamic Republic of Iran."⁶⁰ The Security Council, by the powers of the United Nations Charter under article 2, paragraph VII, identified this problem as a threat to "international peace

54. CENTER FOR RESEARCH AND STUDIES ON KUWAIT, UNITED NATIONS ROLE IN MAINTAINING INTERNATIONAL PEACE AND SECURITY 80, 84 (1995).

55. Sean D. Murphy, *The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War*, 32 COLUM. J. TRANSNAT'L L. 201, 210 (1994).

56. *Id.*

57. CENTER FOR RESEARCH AND STUDIES ON KUWAIT, *supra* note 54, at 85.

58. *Id.* at 87.

59. U.N. CHARTER art. 51.

60. U.N. DEP'T OF PUB. INFO., *supra* note 5, at 40.

and security in the region.”⁶¹ Although this resolution exhibits the United Nation’s resolve to condemn and rectify the deteriorating humanitarian situation in Iraq, it did not create any no-fly zones, nor did it authorize the United States or any of its Coalition partners to “enforce the demand that Iraq cease its repression of civilians.”⁶² In its call for action, this resolution only appeals to the “Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts.”⁶³

If the Security Council had intended for the Coalition to directly enforce its resolution, the Council would have surely used its typical procedures by including in the resolution a “specific invocation of Chapter VII authority, an *authorization* of Member State’s action, and the use of the term *all necessary means* to indicate authority to use force,” as it had in Resolution 678.⁶⁴ Although the Security Council’s authorization to use force has been granted infrequently, there are examples of the Council’s use of specific and unambiguous language. In 1950, the Security Council permitted member states to “furnish such assistance to South Korea as may be necessary to repel the attack and restore international peace and security in the area.”⁶⁵ The Council here allows the “necessary” nature of the actions to be determined by member states, but limits such action to “repelling the attack” and restoring of peace and security.⁶⁶ When the Security Council passed Resolution 665, it specifically allowed necessary measures to be taken to enforce the maritime embargo against Iraq, but limited the permissible action to the enforcement of the embargo, nothing else.⁶⁷

The Security Council has also used such empowering language in Resolution 836, stating that member states could take, “all necessary measures, through the use of air power” in the safe havens of Bosnia-Herzegovina.⁶⁸ Here, the language is specific and unambiguous because it allows measures to be taken, but limits such measures to air power. If the

61. S.C. Res. 688, U.N. SCOR, 46th Sess. at 1, 2982nd mtg., U.N. Doc. S/RES/688 (1991).

62. McIlmail, *supra* note 44, at 50.

63. S.C. Res. 688, *supra* note 61.

64. McIlmail, *supra* note 44, at 50.

65. Murphy, *supra* note 55, citing S.C. Res 83, U.N. SCOR, 5th Sess., at 5, U.N. Doc. S/RES/83 (1950); S.C. Res. 82, U.N. SCOR, 5th Sess., at 4-5, U.N. Doc. S/RES/82 (1950).

66. *Id.*

67. Alissa Pyrich, *United Nations: Authorizations of Use of Force - Security Council Resolution 665, August 25, 1990 & Security Council Resolution 678*, 32 HARV. INT’L L.J. 270 (1991).

68. S.C. Res. 836, U.N. SCOR, 48th Sess., 3228th mtg. at & 10, U.N. Doc. S/RES/836 (1993). See also, Murphy, *supra* note 55, at 232.

Security Council wished for such force to be used to enforce Resolution 688, there is no reasonable explanation why no specific language was used to that effect. Therefore, from this narrow interpretation, Resolution 688 does not justify the imposition of the no-fly zones either in northern or southern Iraq.⁶⁹

The Coalition, when originally imposing these zones, also relied on Resolution 678 to justify their actions.⁷⁰ Resolution 678 demanded that Iraq “comply fully with Resolution 660 and all subsequent relevant resolutions” and authorized member states “co-operating with the Government of Kuwait . . . to use 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.”⁷¹ (emphasis added). This resolution addresses the *restoring* of international peace, not the maintenance of international peace.⁷² Resolution 660, in addition to condemning the Iraqi invasion of Kuwait, demands that, “Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990.”⁷³ It can be argued that once the Iraqis had withdrawn back beyond their own borders, and the threat to Kuwait was terminated, the objective had been achieved, no further measures need have been taken within Iraqi territory.

Alternatively, the American government may maintain, and perhaps legitimately, that the language of Resolution 678, namely, “and all subsequent relevant resolutions” includes Resolution 688.⁷⁴ By this interpretation, Resolution 678 would allow the Coalition, to “use all necessary means to uphold” Resolution 688.⁷⁵ At first blush, this seems a viable reading of the resolutions, but an argument presented by Timothy P. McIlmail, suggests that “subsequent relevant resolutions” only pertain to Resolutions adopted “after the invasion of Kuwait” but “prior to the authorization of force to liberate Kuwait.”⁷⁶ This would clearly limit the Coalition’s reach in imposing any type of multilateral or, as in the recent extension of the no-fly zone, unilateral measures to control Saddam

69. McIlmail, *supra* note 44, at 50.

70. *Id.* at 54.

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

72. McIlmail, *supra* note 44, at 52.

73. S.C. Res. 660, U.N. SCOR, 45th Sess., 2932nd mtg., & 2 U.N. Doc. S/RES/660 (1990).

74. McIlmail, *supra* note 44, at 51-2.

75. *Id.*

76. *Id.*

Hussein's future actions, unrelated to the invasion and liberation of Kuwait. A contrary interpretation of the Resolutions would allow the Coalition to indefinitely impinge upon the sovereignty of a nation merely based upon their national interests and political motivations.

This is contrary to the Security Council's intent stated in Resolution 686 as affirming,

the commitment of all member states to the independence, sovereignty and territorial integrity of Iraq and Kuwait, and noting the intention expressed by the Member States cooperating under paragraph 2 of Security Council 678 (1990) *to bring their military presence in Iraq to an end as soon as possible* consistent with achieving the objectives of the resolution (emphasis added).⁷⁷

It may also be argued that the objectives of the resolution include, as it states, "a definitive end to the hostilities," as well as "the need to be assured of Iraq's peaceful intentions, and the objective in Resolution 678 (1990) of restoring international peace and security in the region."⁷⁸ The integrity of this argument rests heavily upon the question of whether hostilities in Iraq have truly ended and whether international peace and security in the region have been restored. Hussein's incessant violation of certain resolutions may contribute to the theory that security in the region still has not been established. Therefore, such an argument would contend that a continued military presence by the United States and the Coalition forces is not only prudent and justifiable, but within the authority provided by the United Nations Security Council.

Another possible justification originates from Resolutions 686 and 687.⁷⁹ Resolution 686 recognized the "suspension of offensive combat operations," and demanded that Iraq, "implement all 12 relevant Security Council Resolutions."⁸⁰ In actuality, this Resolution set the terms for a formal cease fire and "in effect," created a no-fly zone around Coalition aircraft while over Iraqi territory.⁸¹ But such language cannot be read too broadly since it is specific as to its purpose.

Another argument of illegality is that "Resolution 686 contemplates the presence of Coalition aircraft in Iraqi airspace," but that

77. S.C. Res. 686, U.N. SCOR, 46th Sess., 2978th mtg. at 1, U.N. Doc. S/RES/686 (1990).

78. *Id.*

79. McIlmail, *supra* note 44, at 54.

80. U.N. DEP'T OF PUB. INFO., *supra* note 5, at 182.

81. McIlmail, *supra* note 44, at 53.

this same resolution, "contemplated an end to these activities by offering Iraq cease fire terms."⁸² Therefore, as the formal hostilities ended, so should the restriction on Iraqi aircraft over its own territory.⁸³ But, again a valid counter argument is that Resolution 686 authorizes a use by member states, through its invocation of paragraph 2 of Resolution 678, of "all necessary means to uphold and implement . . . all subsequent relevant resolutions and to restore international peace and security in the area."⁸⁴ Resolution 686, in Paragraph 3, Section d (4), recognizes that, "during the period required for Iraq to comply with paragraphs 2 and 3 . . . the provisions of paragraph 2 of resolution 678 remain valid."⁸⁵ Resolution 687 formalizes Resolution 686's terms and could be argued to allow member states to use military force to implement the cease-fire terms.⁸⁶ Resolution 686, therefore, applies Resolution 678's use of force clause until Iraq complies with Resolution 686. Logically, if the United States believes that Iraq has yet to comply with both Resolutions 686 and 687, Resolution 678 would still allow the use of force. Therefore, one could conclude that as long as Iraq does not comply with any provision of Resolution 686, Coalition forces may implement all necessary measures to enforce compliance, as per Resolution 678, which would include no-fly zones to protect Coalition aircraft.⁸⁷

As noted by the United Nations, the Coalition countries believed that the cease fire agreement ending the war empowered them to impose no-fly zones over Iraqi military flights to enforce Resolution 688.⁸⁸ The purpose of Resolution 688 was to address the Kurdish repression in Iraq and to demand the allowance of humanitarian relief to enter Iraq.⁸⁹ The cease fire resolutions did not address all necessary means to "protect Iraqi civilians," only the conditions set forth in Resolution 686 and 687.

Although, if one argues that "all relevant subsequent resolutions" includes Resolution 688, contrary to Timothy P. McIlmail's analysis,⁹⁰ the Coalition forces could have the authority under Resolution 678 to impose the no-fly zones to protect the Kurds. But as Resolution 686 seems to indicate under Section d(4), paragraph 2 of Resolution 678 is then limited

82. *Id.* at 52-53.

83. *Id.*

84. S.C. Res. 686, *supra* note 77.

85. *Id.*

86. McIlmail, *supra* note 44, at 54.

87. *Id.* at 53-54.

88. U.N. DEP'T OF PUB. INFO., *supra* note 5, at 41.

89. S.C. Res. 688, *supra* note 61.

90. McIlmail, *supra* note 44, at 51-52.

to the time, "during the period required for Iraq to comply with paragraph 2 and 3" of Resolution 686.⁹¹ This argument of legality seems to fail because, as noted above, the end of the repression of the Kurds was not a factor in the cease fire agreements and would not be a condition to its enforcement.⁹² Iraq's repression of the Kurds does not violate the cease-fire agreements.

By this interpretation, the Coalition forces did not have authority to impose the no-fly zones to protect Iraqi civilians.⁹³ The only justification allowed would have been the enforcement of the cease fire agreement resolutions.⁹⁴ Resolution 688 only directs member states to provide humanitarian assistance to the repressed people of Iraq, not use military intervention or impose restrictions on Iraqi airspace.⁹⁵ Resolution 688 alone would not justify the impositions, and the argument that Resolution 678 allows a blanket use of force and military presence to enforce Resolution 688 does not seem credible under the language of Resolution 686. Essentially, as Timothy P. McIlmail states, "[i]f the Security Council wished to establish a no-fly zone to protect the Kurds, it could have drafted language to reflect that intent."⁹⁶ Essentially, there is very little doubt that the no-fly zones, "had no explicit basis in the resolutions of the Security Council."⁹⁷

The original imposition of the no-fly zones could be legal under article 106 of the United Nations Charter.⁹⁸ Article 106 allows permanent members of the Security Council, such as the United States, France, and Great Britain to enforce Security Council decisions if acting in coalition.⁹⁹ Therefore, once the Security Council determines that a threat to international peace exists, under article 106, permanent members, "have independent authority to act and may use armed forces."¹⁰⁰ The article seems to demand that action under its authority must be joint and only after consultation with other permanent members.¹⁰¹ The problem and

91. S.C. Res. 686, *supra* note 77.

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

93. McIlmail, *supra* note 44, at 54-55.

94. *Id.*

95. S.C. Res. 688, *supra* note 61.

96. McIlmail, *supra* note 44, at 59.

97. Murphy, *supra* note 55, at 234.

98. McIlmail, *supra* note 44, at 60-62.

99. *Id.* at 59.

100. *Id.* at 60.

101. *Id.* at 61.

uncertainty about this article 106 argument is that "precise rules governing the application of article 106 do not yet exist."¹⁰² Consequently, although states have never invoked or rejected article 106, it seems probable its use would only be permissible if the Security Council was incapable of enforcing its own resolutions under article 42.¹⁰³ Conversely, since no rules have been applied it can be argued the article, "permits action without strict unanimity of purpose among permanent members."¹⁰⁴ By this latter conclusion, the Coalition can argue that they could impose its own no-fly zones to enforce Resolution 688, and to "oversee the maintenance of international peace."¹⁰⁵

IV. THE PROBABLE ILLEGALITY OF THE EXTENSION

The White House claims the extension of the no-fly zone is permissible to enforce Resolution 688, which calls for the protection of the Kurdish areas north and south of Baghdad. By its own admission, the extension of the no-fly zone was not for the protection of the Kurds, but for a more stable and sure-footed hold on Saddam Hussein's ability to strike out at its neighbors.¹⁰⁶ As President Clinton stated,

America's vital interests in the Persian Gulf are constant and clear: to help protect our friends in the region against aggression, to work with others in the fight against terrorism, to preserve the free flow of oil and to build support for a comprehensive Middle East peace.¹⁰⁷ We must reduce Iraq's ability to strike out at its neighbors and we must increase America's ability to contain Iraq over the long run.¹⁰⁸

Therefore one could conclude that the recent action by the Clinton Administration is not in pursuance of the enforcement of Resolution 688 and is purely a unilateral action without United Nations support or mandate. If such action was permissible for the enforcement of the resolution, Resolution 688 would have contained the words, "all necessary

102. *Id.* at 62.

103. *Id.* at 60.

104. McIlmail, *supra* note 44, at 62.

105. *Id.*

106. Graham, *supra* note 1.

107. Nancy Mathis, *Clinton Reiterates his Resolve to Keep Saddam in Check*, HOUS. CHRON., Sept. 15, 1996, at A1.

108. *Letter dated 3 September 1996, supra* note 3.

means, as is customary for United Nations resolutions calling for the use of force."¹⁰⁹

It is clear that the Kurds were merely a catalyst for military prudence and strategy in a political feud between the United States and Saddam Hussein. As Clinton stated, "[n]ow, we control the skies over Iraq from the border of Kuwait to the southern suburbs of Baghdad. This action tightened the strategic straightjacket on Hussein, making it harder for him to threaten Saudi Arabia and Kuwait and easier for us to stop him if he does."¹¹⁰ The United States took the opportunity to place themselves in a more strategic position to deter future actions by Hussein and consequently placing themselves in a more favorable position if such action occurs. The extension was never designed to protect or even address the Kurds, it was merely designed to keep closer tabs on Hussein. In fact, "administration members who deal regularly with Iraq had been looking for an opportunity to implement just such measures."¹¹¹ As one United States official stated, "[t]he U.S. is no longer willing to act just around the periphery of Iraq X in the Kurdish north or the Shiite south We are now prepared to respond with attacks to the center."¹¹² This is clearly a strategic action which has no United Nations mandate. It deals with Hussein's "control of his own turf," which to date, no United Nations Security Council Resolution has directly addressed.¹¹³ Most importantly, the no-fly zones are created and extended in this case to protect the oil fields of Kuwait and Saudi Arabia.¹¹⁴

The Clinton administration does have some legitimate concerns for the region. Clinton has stated that Hussein is, "in better shape than he was the day after the Gulf War in 1991."¹¹⁵ Hussein has maintained a military presence in the south which consistently poses a threat to Saudi Arabia as well as Kuwait.¹¹⁶

In response to questions at a Pentagon press conference, Defense Secretary William J. Perry admitted that within the last six months or year,

109. Bob Deans, *Conflict in Iraq: Arab Response*, ATLANTA J. & CONST., Sept. 4, 1996, at 6A.

110. Mathis, *supra* note 107.

111. Graham, *supra* note 1.

112. Robin Wright, *News Analysis; In Hussein's Backyard, a New Line in the Sand*, L.A. TIMES, Sept. 4, 1996, at A1.

113. *Id.*

114. *Operation Desert Prick*, NEW REP., Sept. 30, 1996, at 7.

115. Greg McDonald, *Kuwait Balks at U.S. Plans; Arab Allies are Hesitant to Support Deployments*, HOUS. CHRON., Sept. 16, 1996, at A1.

116. Perry & Ralston, *supra* note 28.

the area between the thirty-second and thirty-third parallel had shown, "significant training activity."¹¹⁷ In the same news conference, he stated that, "[e]ven after their defeat in Desert Storm, the Iraqis still have the largest and most powerful military force in the region."¹¹⁸ With evidence of heavy training and troop movement around Iraq, the United States wishes to contain a "theoretical threat" from becoming a "real threat."¹¹⁹

The President, in his letter to Congress regarding this latest incident presents perhaps a better attempt at justifying the military presence in southern Iraq.¹²⁰ Clinton cites Security Council Resolution 949, passed in 1994, which "demands that Iraq not threaten its neighbors or UN operations in Iraq and that it not redeploy or enhance its military capacity in southern Iraq."¹²¹ Although the Security Council expressly recognizes that any action by Iraq against its neighbors "constitutes a threat to peace and security in the region," it does not provide authority to the permanent members to enforce this resolution.¹²² One argument is, since the Security Council is recognizing Iraqi military activity near the Kuwaiti border,¹²³ and since Resolution 949 specifically refers back to Resolution 687, such action breaches Resolution 687 and subsequently, the conditions of the cease fire. The United States could have authority under Resolution 686, by its reference to Resolution 678, to use all means necessary to enforce the breached cease-fire agreement, which would justify the extension of a no-fly zone to ensure compliance and abate the ever growing threat in southern Iraq. This would be a more credible justification of the extension than the stated reason of enforcing Resolution 688, primarily because Resolution 688 only addresses the repression of Kurds and does not mandate enforcement of the resolution by member states.

It should not be mistaken, that although a theoretical threat exists, the threat is felt most by the United States, as evidenced by the Coalition response to the extension of the no-fly zone and the military attacks on defense installations. Great Britain, Germany, Canada, and Japan were the only Security Council members to offer general support for the United

117. *Id.*

118. *Id.*

119. *Id.*

120. *Text of Clinton Letter on Military Force Against Iraq Resolution*, *supra* note 25.

121. *Id.*

122. S.C. Res. 949, U.N. SCOR, 49th Sess. 3438th mtg., at 1, U.N. Doc. S/RES/949 (1994).

123. *Id.*

States' action.¹²⁴ Russia denounced the action while France and Spain felt the United States "acted too hastily" or "should have sought a political solution."¹²⁵ Russian Foreign Minister Yevgeny Primakov said the unilateral use of force by any country is absolutely impermissible.¹²⁶ France in fact refused to fly into the new expanded zone and would only do so within the old zone, up to the thirty-second parallel.¹²⁷ French Foreign Ministry Officials said, "Saddam may have been within his rights to send troops to the North. He did nothing illegal."¹²⁸ However, it is important to note that France has its own interests in mind, since it stands to gain a great deal of trade, namely oil, once the limited embargo on Iraqi oil shipments is lifted.¹²⁹

The wavering support by Coalition members, including Saudi Arabia,¹³⁰ does prove problematic since most initiatives by the United Nations seem to require concerted action. This lack of support indicates that even if the United States would have attempted to attain approval from the Security Council, permanent members such as Russia and China could have prevented such action to be mandated. Therefore, the only way in which the United States and certain Arab interests could be protected, was for the United States to act unilaterally and forego the arguable costs of delay that preceded the Gulf War.

124. Graham, *supra* note 1.

125. *Id.*

126. John Lancaster & Bradley Graham, *Iraq and U.S. Move to Slacken Tensions; Baghdad to End Missile Firings; Perry to Visit Region*, WASH. POST, Sept. 14, 1996, at A1.

127. Graham, *supra* note 1.

128. *Id.*

129. "France hopes to restore long-standing commercial ties with Iraq when United Nations sanctions eventually are lifted. And Chirac . . . has domestic political considerations -- a large and sometimes restive Muslim population that might make trouble if it saw a disproportionate or unjustified attack against a Muslim Arab state." Thomas W. Lippman, *France Refuses Christopher Bid for Aid in Expanded Iraqi 'No-Fly' Zone*, WASH. POST, Sept. 6, 1996, at A32.

[T]hey also saw in France's refusal to support America an attempt by Paris to establish a strong French presence in the Middle East, and a long-term calculation that this would put France in a good position to win Iraqi oil and trade contracts once the U.N. sanctions were lifted. With millions of pounds worth of potential deals at stake when sanctions end, France has emphasized its concern for the territorial integrity of Iraq.

Ben MacIntyre & Michael Binyon, *France Refuses to Patrol Widened Iraq No-Fly Zone*, THE TIMES, Sept. 6, 1996, available in 1996 WL 6517544.

130. An initial attack plan that called for having jet fighters take off from air bases in Saudi Arabia and Jordan was abandoned, U.S. officials said, after leaders of those countries made clear to Joint Chiefs Chairman Gen. John Shalikashvili and Assistant Secretary of State Robert Pelletreau . . . that such an operation would cause them political problems at home.

Graham, *supra* note 1.

Essentially, the United States is worried that Hussein will once again, as recent actions seem to indicate, establish himself militarily and pose a greater threat to the stability in the Middle East region, and the crucial supply of oil. In accordance with international law, a nation should not act unilaterally unless it is defending itself, as proscribed by the United Nations Charter.¹³¹ However, a power such as the United States must at times consider its own national interests and forgo the costs of delay that a United Nations response may procure. The lack of response by the Security Council may be an indication that its purpose of ensuring international peace and security is failing. A nation, with the resources of the United States should not jeopardize its national security and overall interest by waiting without reason for the Security Council to act. As one commentator stated, "a legal system which merely prohibits the use of force and does not make adequate provision for the peaceful settlement of disputes invites failure."¹³² The United States financed the brunt of the Gulf War and has a consequential interest in preventing a recurrence, even if it requires the unilateral violation of Iraqi sovereignty in order to contain this incessant agitator of international peace and civility. United Nations' actions of "issuing declarations" and the placing of economic sanctions, "by themselves" have not resolved crisis.¹³³

This may indicate a legitimate concern by the Clinton Administration that waiting would serve little purpose, but the political purposes of others, such as the situation with France.¹³⁴ It is also important to note that the United Nations has not condemned the Coalition no-fly zones,¹³⁵ originally, and in response to this latest extension of the no-fly zones by the Clinton Administration. As President Clinton noted, "historically, the United States takes the lead in such matters."¹³⁶ As one commentator stated,

[t]he Iraq-Kuwait situation provided the United Nations and the United States with an opportunity to posture on and strengthen the virtues of international law and world

131. John Quigley, *Missiles with a Message: The Legality of the United States Raid on Iraq's Intelligence Headquarters*, 17 HASTINGS INT'L & COMP. L. REV. 241, 250 (1994).

132. Surchin, *supra* note 4, at 459 (citing Sir Humphrey Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 *Recueil des Cours* 456 (1952 vol. II), *reprinted in International Law* 1223-24 (Barry Carter & Phillip Trimble eds., Little, Brown and Company 1991)).

133. Murphy, *supra* note 55, at 223

134. MacIntyre & Binyon, *supra* note 129.

135. McIlmail, *supra* note 44, at 58.

136. Graham, *supra* note 1.

order. The seemingly congenial relationship developing between the United States and the Soviet Union, as well as the unsavory nature of Hussein and his actions, presented the United States with a prime situation in which to legitimize international law.¹³⁷

Such an approach may not only be prudent, but necessary to abate future threats to international peace in regions such as the Middle East.

V. CONCLUSION

The extension of the southern no-fly zone in Iraq from the thirty-second to the thirty-third parallel finds little, if any, support in Security Council Resolutions, especially Resolution 688, which is claimed by the Clinton Administration to be a justification for the extension. Resolution 688 was drafted and passed to address the treatment of Kurds in Iraq, but never mandated force or no-fly zones to be used to enforce its demands. No resolutions expressly address or allows the United States to unilaterally extend the zones to satisfy its political and military purposes. In fact, many questions remain as to the legality of the original imposition of the zones in 1991 and 1992.

Actions pursuant to a lack of direct adherence to United Nations Resolutions should not be dispositive of the validity of those actions. Although the extension is seemingly illegal due to its lack of United Nations authority, policy reasons may justify the original imposition and the recent extension. Saddam Hussein has proven to be an unpredictable foe of international peace, and requires treatment more severe than current international procedures allow. Despite this departure from strict adherence to Security Council resolutions, the Security Council and General Assembly still have not formally condemned the zones and consequently have indirectly condoned its imposition and enforcement,¹³⁸ as well as its recent extension.

The necessity of containing Saddam Hussein's military action is readily apparent and the unilateral actions of a world leader, such as the United States, may be necessary to effectuate the international peace and security demanded by the Security Council. Hussein's behavior since the Gulf War has been provocative and incendiary, demanding unique responses. The United Nations must be flexible to address these unprecedented challenges to the world community. In doing so, it must

137. Thomas Yoxall, *Iraq and Article 51: A Correct Use of Limited Authority*, 25 INT'L LAW. 967-68 (1991).

138. McIlmail, *supra* note 44, at 58.

allow a broad reading of its resolutions, to allow its permanent members, either collectively, or individually, to follow through and enforce what the Council and the member states have defined to be a threat to international peace and security. President Clinton's extension of the southern no-fly zone in September of 1996 was technically illegal, but its validity and necessity is apparent in light of Saddam Hussein's incessant testing of an international resolve to maintain peace in the Middle East.