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# No-Fly Zones: The Imposition And Enforcement Of Air Exclusion Regimes Over Bosnia And Iraq

TIMOTHY P. MCILMAIL\*

## I. INTRODUCTION

Air exclusion zones (“no-fly zones”) prohibit the entry of unauthorized aircraft into airspace over specified territory. No-fly zones currently exist in the following regions: (1) over Bosnia,<sup>1</sup> (2) over northern Iraq,<sup>2</sup> and (3) over southern Iraq.<sup>3</sup> Within the airspace of these zones, aircraft of foreign states have destroyed local aircraft. These no-fly zones have become an important tool of international law and conflict management, and have wide-ranging legal, military, and political implications.

No-fly zones have permitted outside powers to intervene in dangerous conflict areas with relatively little risk. They allow highly industrialized and technologically superior powers to take advantage of their virtual monopoly over combat aircraft and anti-air defense systems to project power over territory defended mostly by ground forces. Furthermore, no-fly zones have helped the United Nations deliver critical humanitarian assistance to besieged populations. They have also enabled the states that enforce the zones to conduct airborne reconnaissance and intelligence gathering unrelated to the purpose of excluding

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\* Timothy P. McIlmail, J.D., George Washington University, 1994. This Article is dedicated to my wife, Joan, and our baby expected in December.

1. Paul Lewis, *U.N. Bans Flights in Bosnia But Is Silent on Enforcement*, N.Y. TIMES, Oct. 10, 1992, at L3.

2. Elaine Sciolino, *U.S. Warns Against Attack By Iraq On Kurdish Refugees*, N.Y. TIMES, Apr. 11, 1991, at A10.

3. Michael R. Gordon, *U.S. Thinks Iraq Prepares For Big Push on the Shiites*, N.Y. TIMES, Aug. 18, 1992, at A6.

prohibited aircraft.<sup>4</sup> Their most significant impact is that they have permitted a coalition of states to deprive another state—Iraq—of a large measure of its territorial sovereignty. The existence of no-fly zones raises serious questions of international law in general and international humanitarian law in particular.

This Article will examine the legality of the imposition and enforcement of both the Bosnian and Iraqi no-fly zones, and criticize their value as legal models for future air exclusion efforts. Part II of this Article examines the regime of United Nations Charter (“Charter”) law and United Nations Security Council<sup>5</sup> (“Security Council”) resolutions regarding the Bosnian no-fly zone. Part III analyzes the legal arguments that may justify the imposition and enforcement of the Iraqi no-fly zones, including the Security Council Resolutions that emerged from the War to Liberate Kuwait and its aftermath, the doctrine of humanitarian intervention, special Permanent Member authority under Article 106 of the United Nations Charter, and the doctrine of belligerent occupation. Part IV compares North Atlantic Treaty Organization (“NATO”) enforcement of the Bosnian no-fly zone to the enforcement of the Iraqi no-fly zones, and examines whether enforcement of the zones complies with applicable rules of war. Finally, this Article will conclude that, while the Bosnian no-fly zone is an example of the ineffective enforcement of a legally imposed air exclusion regime, the Iraqi zones represent the effective enforcement of illegally imposed air exclusion zones.

4. Joseph B. Treaster, *U.S. Jets Fly Dry Runs on Iraq Targets to Show “We’re Home”*, N.Y. TIMES, Oct. 18, 1994, at A9.

5. The U.N. Charter states:

The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.

U.N. CHARTER art. 23, ¶ 1 (1963 text) [hereinafter U.N. CHARTER]. In 1991, the Russian Federation replaced the Union of Soviet Socialist Republics in the Security Council and all other United Nations organs. U.N. DAG HAMMARSKJÖLD LIBRARY, INDEX TO PROCEEDINGS OF THE SECURITY COUNCIL, 1992, at 135, U.N. Doc. ST/LIB/SER.B/S.28, U.N. Sales No. E.92.I.12 (1992).

## II. The Case of Bosnia

In April 1992, fighting in the territory of the former Yugoslavia moved to Bosnia and Herzegovina.<sup>6</sup> Bosnia and Herzegovina, ethnically divided between Muslims, Serbs, and Croats, proclaimed its independence in early 1992. The Yugoslav National Army and Bosnian Serbs launched an armed offensive against the Muslim-dominated Bosnian government in Sarajevo to force Bosnian Muslims to abandon territory and to create a Greater Serbia ruled from Belgrade.<sup>7</sup>

### A. *The Imposition of the Zone*

#### 1. Background

Throughout the summer and into the fall of 1992, the deteriorating situation in Bosnia caused Western States to intervene in the Yugoslavian crisis.<sup>8</sup> The Security Council resolved to deliver humanitarian assistance and authorized peacekeeping troops to aid in the delivery of this assistance.<sup>9</sup> The aircraft participating in the humanitarian relief flights were exposed to anti-aircraft fire while airborne, however, impeding the delivery of assistance.<sup>10</sup> In addition to attacking humanitarian relief aircraft, Serbian air forces, in control of Bosnian airspace, conducted bombing and strafing operations against Bosnian Muslim forces and civilian

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6. For a background of events leading up to hostilities throughout Yugoslavia, see *A Whirlwind of Hatreds: How the Balkans Broke Up*, N.Y. TIMES, Feb. 14, 1993, at E5.

7. *Id.*; Chuck Sudetic, *Serbs Attack Muslim Slavs and Croats in Bosnia*, N.Y. TIMES, Apr. 4, 1992, at L3.

8. Craig R. Whitney, *Europe's Caution on Bosnia Provokes Growing Criticism*, N.Y. TIMES, Aug. 1, 1992, at L5.

9. Paul Lewis, *U.N. Council Votes to Support Force in Assisting Bosnia*, N.Y. TIMES, Aug. 14, 1992, at A1, A6.

10. In September 1992, the United Nations temporarily suspended relief flights after an Italian relief plane was shot down, presumably by a Bosnian surface-to-air missile. Chuck Sudetic, *U.N. Relief Plane Reported Downed On Bosnia Mission*, N.Y. TIMES, Sept. 4, 1992, at A1, A6. A United States helicopter was hit by small-arms fire on a mission to rescue the downed aircraft. Michael R. Gordon, *Pentagon Says a Rescue Helicopter Was Fired On in Bosnia*, N.Y. TIMES, Sept. 16, 1992, at A3. There were also reports that Serbian military aircraft "shadowed" relief flights in an attempt to avoid anti-aircraft fire from ground forces. Michael R. Gordon, *U.S. Says Serbian Warplanes Use Relief Flights as 'Cover'*, N.Y. TIMES, Sept. 11, 1992, at A10.

populations.<sup>11</sup> These twin threats to humanitarian aid and peace moved the Security Council to impose a no-fly zone over Bosnia in October 1992.<sup>12</sup>

The Charter implicitly allows the imposition and enforcement of no-fly zones. The Charter entrusts "primary responsibility for the maintenance of international peace and security" to the Security Council.<sup>13</sup> In performing this function, the Security Council must abide by the "Principles of the United Nations,"<sup>14</sup>

11. Michael R. Gordon, *Bush Backs A Plan On Combat Flights In Bosnia Airspace*, N.Y. TIMES, Oct. 2, 1992, at A1.

12. Lewis, *supra* note 1.

13. U.N. CHARTER art. 24, ¶ 1.

14. Article One of the Charter provides:

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

*Id.* art. 1.

Article Two of the Charter provides:

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventative or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

and, in the case of U.N.-chartered dispute settlement by regional organizations, Chapters VII and VIII will govern.<sup>15</sup>

## 2. Article 39: Maintaining or Restoring the Peace.

Chapter VII provides the framework under which the Security Council may act to maintain or restore international peace.<sup>16</sup> Article 39 allows the Security Council to decide whether action is necessary "to maintain or restore international peace and security."<sup>17</sup> An Article 39 decision is a condition precedent to any Security Council action to maintain or restore peace.<sup>18</sup> Before deciding to take action, the Security Council must first determine that a situation threatens peace, has breached the peace, or constitutes an act of aggression.<sup>19</sup>

The Security Council's adoption of Resolution 781 established "a ban on military flights in the airspace of Bosnia."<sup>20</sup> The Resolution, however, did not claim Chapter VII as its source of authority for this action, nor did it determine that a situation threatened or breached international peace. Rather, the Resolution stated that the Security Council acted pursuant to the provisions of Resolution 770.<sup>21</sup> Nevertheless, the adoption of Resolution 781 complied with the demands of Article 39.

Resolution 770 demanded that the parties to the war in Bosnia cease their fighting and determined "that the situation in Bosnia and Herzegovina constitutes a threat to international peace and

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

*Id.* art. 2.

15. *Id.* art. 24, ¶ 2.

16. For a brief overview of the mechanics of Chapter VII, see Derek Gilman, Comment, *The Gulf War and the United Nations: Did the Security Council Fulfill Its Original Mission?*, 24 CONN. L. REV. 1131 (1992).

17. U.N. CHARTER art. 39.

18. HANS KELSEN, *THE LAW OF THE UNITED NATIONS* 294 (1950).

19. U.N. CHARTER art. 39; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 703 cmt. g (1987); 2 LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE: DISPUTES, WAR, AND NEUTRALITY* 163 (Hesch Lauterpacht ed., 1952).

20. S.C. Res. 781, U.N. SCOR, 47th Sess., 3122d mtg., at 2, U.N. Doc. S/RES/781 (1992).

21. *Id.*

security.”<sup>22</sup> In adopting this Resolution, the Security Council, expressly invoking its Chapter VII authority, called on states to assist the United Nations with its effort to deliver humanitarian assistance to Bosnia and decided to “remain actively seized of the matter.”<sup>23</sup>

The language of Resolution 781, including its specific reference to Resolution 770, demonstrates that the Security Council viewed a no-fly zone as necessary for “the safety of the delivery of humanitarian assistance and a decisive step for the cessation of hostilities in Bosnia,” the very goals of Resolution 770.<sup>24</sup> The Security Council imposed the no-fly zone as a means to implement Resolution 770.<sup>25</sup> Accordingly, Resolution 770 implicitly permits the no-fly zone authorized by Resolution 781.

The Security Council possesses very broad discretion to determine what constitutes a threat to international peace.<sup>26</sup> Its determination that the circumstances in the former Yugoslavia constituted a threat to international peace was a proper exercise of its Article 39 authority. The fighting in Bosnia was widely regarded as a threat that could lead to general Balkan warfare.<sup>27</sup> In addition, the deterioration of humanitarian conditions within Bosnia created refugee problems for countries at its borders.<sup>28</sup>

22. S.C. Res. 770, U.N. SCOR, 47th Sess., 3106th mtg., at 1, U.N. Doc. S/RES/770 (1992).

23. *Id.* at 2.

24. S.C. Res. 781, *supra* note 20, at 2. In Resolution 770, the Security Council recognized “that the provision of humanitarian assistance in Bosnia and Herzegovina is an important element in the Council’s effort to restore international peace and security in the area.” S.C. Res. 770, *supra* note 22, at 2.

25. S.C. Res. 781, *supra* note 20, at 2.

26. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 727 (1990); *see also* OPPENHEIM, *supra* note 19, at 163 (stating that the Security Council has broad determination discretion); *cf.* Mary Ellen O’Connell, *Commentary on International Law: Continuing Limits on Intervention in Civil War*, 67 IND. L.J. 903, 911 (1992) (stating that although some commentators believe that “the Security Council need not find an actual threat to international peace” to decide to take action, “[s]hort of giving unlimited scope to the concept of threat to the peace, there is no legal basis for” United Nations action).

27. *See* David Binder, *U.S. Worries Balkan War Could Spread*, N.Y. TIMES, Aug. 22, 1992, at L3.

28. Croatia, for example, found itself near the limits of its ability to deal with 650,000 Bosnian refugees by the summer of 1992. Stephen Kinzer, *Croatian Aid Staggered By Steady Refugee Pace*, N.Y. TIMES, Aug. 30, 1992, at L18.

The imposition of the no-fly zone over Bosnia, therefore, complied with the requirements of Article 39.<sup>29</sup>

### 3. Article 41: Interruption

Resolution 781 did not specify which Article of the Charter authorized the Security Council to establish the no-fly zone. Pursuant to Article 40, however, the Security Council may, “[i]n order to prevent an aggravation of the situation, . . . call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable.”<sup>30</sup> An air exclusion zone might be considered a “provisional measure” within the meaning of Article 40. The strong language of Resolution 781, however, is inconsistent with the conciliatory language of Article 40. If the Security Council fails to negotiate the maintenance or restoration of peace and security through the application of Article 40, it must rely on the stronger action authorized by Article 41.<sup>31</sup> Article 41 provides:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.<sup>32</sup>

One might argue that the imposition of a no-fly zone does not constitute an “interruption” of air communication within the meaning of Article 41. The Article relies on the non-military cooperation of Member States to carry out its purposes. This

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29. Even if the Council's action did not properly come within Chapter VII, the imposition of the no-fly zone was arguably legal because the Bosnian government consented. At a London meeting in September 1992, the parties to the Bosnian war agreed to put their heavy weapons—arguably including aircraft—under United Nations control. See Andrew Rosenthal, *U.S. May Be Ready to Discuss Ban on Warplanes Over Bosnia*, N.Y. TIMES, Sept. 23, 1992, at A14. The Security Council refers to this agreement in Resolution 781. S.C. Res. 781, *supra* note 20, at 1. For analytical purposes, however, this Article assumes that the no-fly zone over Bosnia is non-consensual.

30. U.N. CHARTER art. 40.

31. See John Quigley, *The United Nations Action Against Iraq: A Precedent For Israel's Arab Territories?*, 2 DUKE J. COMP. & INT'L L. 195, 202 (1992). Article 39 of the U.N. Charter provides: “[T]he Security Council . . . shall . . . decide what measures shall be taken in accordance with Articles 41 and 42.” U.N. CHARTER art. 39

32. U.N. CHARTER art. 41.



strongly suggests the interruption of civilian rather than military traffic through the use of sanctions and embargoes, not by bans on military aircraft.<sup>33</sup>

Article 41 nevertheless provides the needed authority for the imposition of the no-fly zone. The language of Article 41 is descriptive rather than prescriptive,<sup>34</sup> permitting measures that may include the restriction of military traffic through airspace. Accordingly, the Security Council, pursuant to Article 41, properly exercised its power.

### B. Enforcement

Serbian aircraft violated the no-fly zone immediately after its imposition.<sup>35</sup> Violations continued throughout 1992<sup>36</sup> and into 1993,<sup>37</sup> despite an October 1992<sup>38</sup> agreement by the Bosnian Serbs to place their aircraft under United Nations supervision.

Article 42 authorizes the Security Council to deploy armed forces to implement its decisions if the peaceful measures authorized by Article 41 prove inadequate.<sup>39</sup> Therefore, the Security Council would have authority to aggressively enforce the no-fly zone over Bosnia if the Council determined that the imposition of the zone over Bosnia failed to sufficiently maintain international peace, or that peaceful measures, such as negotiation, did not result in compliance with the zone.

As a result of the violations of the no-fly zone and acting pursuant to Article 42, the Security Council resolved to implement

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33. See OPPENHEIM, *supra* note 19, at 167.

34. For a discussion of the mechanics of Article 41, see Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 454 (1991).

35. Chuck Sudetic, *Serbian Planes Said to Kill 19 After U.N. Ban*, N.Y. TIMES, Oct. 11, 1992, at L10.

36. Paul Lewis, *Serbs Are Reported to Fly 18 Flights in Bosnia Despite U.N.'s Ban*, N.Y. TIMES, Nov. 6, 1992, at A8. Serbs violated the zone hundreds of times, using helicopters and fixed-winged aircraft to transport troops and equipment, train pilots, and bomb ground targets. Elaine Sciolino, *U.S. May Seek the Use of Force To Stop Serbs' Flights Over Bosnia*, N.Y. TIMES, Dec. 4, 1992, at A1, A12.

37. The U.S. State Department charged that Serbian aircraft conducted three bombing raids on Muslim villages in eastern Bosnia in March 1993. David Crary, *Serbs Maintain Choke Hold on Muslim Enclave*, WASH. POST, Mar. 18, 1993, at A34.

38. Paul Lewis, *Bosnian Serbs' Forces Agree to Grounding of Military Planes*, N.Y. TIMES, Oct. 14, 1992, at A10.

39. U.N. CHARTER art. 42.

a more aggressive enforcement policy.<sup>40</sup> Several factors hampered efforts to adopt a resolution, including the desire of peace negotiators to reach a possible settlement,<sup>41</sup> the concern of France and the United Kingdom for the safety of their soldiers deployed as peacekeepers in Bosnia,<sup>42</sup> and Russia's reluctance to authorize or permit military action against its traditional Serbian allies during a constitutional and political crisis in Moscow.<sup>43</sup>

Finally, in March 1993, nearly six months after imposing the no-fly zone, the Security Council adopted Resolution 816.<sup>44</sup> Resolution 816 extended the no-fly zone "to cover flights by all fixed-wing and rotary-wing aircraft" except those authorized by the United Nations.<sup>45</sup> Article 42 provides that the Security Council may enforce this extension either through "forces of Members of the United Nations," or through forces of the United Nations Organization itself.<sup>46</sup>

### 1. Article 53: Regional Organization Enforcement

Chapter VII of the Charter establishes the framework for enforcement of Security Council resolutions through regional organizations. Under Article 53, the Security Council "shall, where appropriate, utilize . . . regional arrangements or agencies for enforcement action under its authority."<sup>47</sup> Resolution 816

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40. Paul Lewis, *NATO to Help U.N. on Yugoslav Plans*, N.Y. TIMES, Dec. 16, 1992, at A3 [hereinafter Lewis, *NATO to Help U.N.*]; Paul Lewis, *U.N. Moving to Toughen Yugoslav Flight Ban*, N.Y. TIMES, Mar. 19, 1993, at A11; Paul Lewis, *U.N. About to Step Up Action on Serbia*, N.Y. TIMES, Dec. 18, 1992, at A14. The United States declared that Resolution 781 committed the Security Council to enforcing the no-fly zone in the case of violations. Lewis, *supra* note 1, at L3.

41. David Binder, *Vance Asks Bush for More Time for Bosnia Talks*, N.Y. TIMES, Dec. 19, 1992, at L6.

42. See Alan Riding, *France Opposes Air-Strikes*, N.Y. TIMES, Dec. 17, 1992, at A22; Paul Lewis, *U.N. Undecided on Action To Halt Fighting in Balkans*, N.Y. TIMES, Dec. 24, 1992, at A8.

43. Paul Lewis, *U.N. Postpones Enforcing Ban On Serb Flights*, N.Y. TIMES, Mar. 25, 1993, at A3.

44. Paul Lewis, *U.N. Approves Plan to Enforce Bosnia Flight Ban*, N.Y. TIMES, Apr. 1, 1993, at A12.

45. S.C. Res. 816, U.N. SCOR, 48th Sess., 3191st mtg., at 2, U.N. Doc. S/RES/816 (1993).

46. Article 42 provides that the Security Council "may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action *may include* . . . operations by air, sea, or land forces of Members of the United Nations." U.N. CHARTER art. 42 (emphasis added).

47. U.N. CHARTER art. 53, ¶ 1.

authorized "Member States, acting nationally or through regional organizations" to take "all necessary measures . . . to ensure compliance" with the flight ban.<sup>48</sup> While the resolution did not expressly refer to any specific regional organization, the Security Council adopted it with NATO in mind.<sup>49</sup> NATO agreed to accept enforcement authority.<sup>50</sup>

NATO could not have enforced the Bosnian no-fly zone without the adoption of resolution 816. No Security Council "enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council."<sup>51</sup> Because the Security Council imposed the no-fly zone over Bosnia, only it may have authorized the zone's enforcement.

Pursuant to Article 51, regional organizations may impose no-fly zones within their own regions as a matter of collective self-defense.<sup>52</sup> Article 52 requires that regional organizations "make every effort to achieve pacific settlement of local disputes . . . before referring them to the Security Council."<sup>53</sup> Once the regional organization makes such a referral, however, the Security Council may find that these efforts in fact constitute a threat to international peace and, therefore, may order these organizations to cease their efforts.<sup>54</sup> If the Security Council takes note of the action and approves, or remains silent, the action may continue.<sup>55</sup> This mechanism, however, does not apply to NATO's role in

48. S.C. Res. 816, *supra* note 45, at 2.

49. Lewis, *supra* note 44, at A12. The Security Council planned as early as December 1992 to enforce the zone through NATO. Lewis, *NATO to Help U.N.*, *supra* note 40, at A3.

50. Alan Riding, *NATO Agrees to Enforce Flight Ban Over Bosnia Ordered by U.N.*, N.Y. TIMES, Apr. 3, 1993, at A5. NATO could not have enforced the Bosnian no-fly zone without the adoption of Resolution 816. No Security Council "enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council." U.N. CHARTER art. 53, ¶ 1.

51. U.N. CHARTER art. 53, ¶ 1.

52. "[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 . . ." U.N. CHARTER art. 51.

53. *Id.* art. 52, ¶ 2.

54. OPPENHEIM, *supra* note 19, at 156-57 (stating that a regional organization's decision to act in self-defense is subject to Security Council review).

55. Schachter, *supra* note 34, at 471 (stating that the absence of Security Council disapproval, but not express approval, is needed).

Bosnia because Bosnia does not fall within NATO's regional jurisdiction.<sup>56</sup>

## 2. Article 42: Member State Enforcement

In addition to authorizing the deployment of armed forces, Article 42 also permits the Security Council to enlist Member Nations to enforce its decisions on its behalf. Security Council "action may include . . . operations by air, sea, or land forces of Members of the United Nations."<sup>57</sup> The Security Council determines which Members are authorized to take such action.<sup>58</sup>

Member States acting outside of NATO could enforce the Bosnian no-fly zone. Resolution 816 authorizes enforcement by "Member States . . . acting nationally or through regional organizations."<sup>59</sup> Thus, a non-NATO state such as Russia may also participate in enforcement of the no-fly zone.

## 3. Article 43: Security Council Enforcement

The Charter authorizes the Security Council to enforce the Bosnian no-fly zone with its own forces. If the Security Council chooses not to employ Member Nations' forces, it may nonetheless take action through other "air, sea, or land forces."<sup>60</sup> This distinction between Member Nations' forces and non-Member Nations' forces permits the formation of United Nations forces.<sup>61</sup> The aircraft the United Nations would use to enforce a no-fly zone would consist of "national air-force contingents" made available to the Security Council through Article 45.<sup>62</sup>

Under Article 43, Member Nations, when called on by the Security Council, must provide forces to the Security Council

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56. NATO's decision to enforce the Bosnian no-fly zone marked its first combat mission outside NATO territory. See Riding, *supra* note 50, at A5.

57. U.N. CHARTER art. 42.

58. "The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine." *Id.* art. 48, ¶ 1.

59. S.C. Res. 816, *supra* note 45, at 2.

60. U.N. CHARTER art. 42.

61. *Id.* arts. 42, 43. *But c.f.* OPPENHEIM, *supra* note 19, at 169-71 (stating that there is support for the view that the Charter does not contemplate the creation of such forces).

62. U.N. CHARTER art. 45.

according to "special agreements."<sup>63</sup> Because these agreements require ratification, they differ from a "call" on a Member Nation to take action with its own forces on the Security Council's behalf.<sup>64</sup>

The Charter contemplates that these forces will be under the direct political and military authority of the Security Council itself.<sup>65</sup> Article 46 provides: "Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee." This "Committee" consists of the Chiefs of Staff of the permanent Members of the Security Council.<sup>66</sup> This military committee would, therefore, direct enforcement of the no-fly zone.<sup>67</sup>

### C. No-Fly Zones and State Sovereignty

Under treaty and customary international law, a state has exclusive sovereignty over its own airspace.<sup>68</sup> Other states may

63. Article 43, paragraph 1, of the U.N. Charter states:

All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces . . . necessary for the purpose of maintaining international peace and security.

*Id.* art. 43, ¶ 1. See also Schachter, *supra* note 34, at 464 (stating that Article 43 agreements are not a "condition precedent" to the exercise of Security Council power under Article 42).

64. Article 43, paragraph 3, of the U.N. Charter states:

The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to the ratification by the signatory states in accordance with their respective constitutional processes.

U.N. CHARTER art. 43, ¶ 3.

65. *Id.* art. 46.

66. Article 47 of the U.N. Charter states that:

There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to *the Security Council's* military requirements for the maintenance of international peace and security, the employment and command of forces placed *at its disposal*, the regulation of armaments, and possible disarmament.

*Id.* art. 47, ¶ 1 (emphasis added).

67. Article 47 states that "the Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council." *Id.* art. 47, ¶ 3.

68. "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory." Convention on International Civil Aviation, Dec. 7, 1944, art. 1, ICAO 2 [hereinafter Chicago Convention]; J.M. SPAIGHT, AIR POWER AND WAR RIGHTS 400 (1947).

only use this airspace with that state's consent.<sup>69</sup> Because a state may impose flight restrictions over its own airspace,<sup>70</sup> a restriction on flight imposed by an outside power impinges on that state's sovereignty. Accordingly, the Bosnian no-fly zone acts as an impingement on Bosnian sovereignty.

Article 2 provides that United Nations action normally may not "intervene in matters which are essentially within the domestic jurisdiction of any state."<sup>71</sup> This principle, however, does not apply to "enforcement measures under Chapter VII" of the Charter.<sup>72</sup> Because the Security Council explicitly acted pursuant to Chapter VII when it imposed the no-fly zone and authorized its enforcement, the zone did not violate the non-intervention principle embodied in Article 2. Additionally, the Security Council did not violate Article 2 because its action addressed issues of human rights.<sup>73</sup> States no longer possess sole authority to address human rights violations;<sup>74</sup> this authority is shared with and controlled by the United Nations.

#### E. Summary

The Security Council's actions in Bosnia demonstrates the most appropriate way to establish and enforce a no-fly zone. The six month delay in enforcing the Bosnian no-fly zone strongly indicates the level of states' understanding of what constitutes lawful imposition and enforcement of a no-fly zone. The Security Council, NATO, and the Western states involved in the negotiations over enforcement believed that imposition and enforcement of the Bosnian no-fly zone required the Security Council's specific authorization. In October 1992, prior to the imposition of the

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69. "No state aircraft of a contracting State shall fly over the territory of another State or land thereon without the authorization by special agreement or otherwise, and in accordance with the terms thereof." Chicago Convention, *supra* note 67, at 1. See also U.S. DEP'T OF THE AIR FORCE, JUDGE ADVOCATE GEN. ACTIVITIES, INTERNATIONAL LAW: THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS 2-6 (1978) [hereinafter INTERNATIONAL LAW: THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS] (stating that the Chicago Convention is inapplicable to military aircraft except for this consent provision).

70. Chicago Convention, *supra* note 67, at 4.

71. U.N. CHARTER art. 2, ¶ 7.

72. *Id.*

73. See Christiane Bourloyannis, *The Security Council of the United Nations and the Implementation of International Humanitarian Law*, 20 DENV. J. INT'L L. & POL'Y 335, 352 (1992).

74. *Id.*

zone, U.S. President George Bush declared "[i]f asked by the U.N., the U.S. will participate in enforcement measures."<sup>75</sup> NATO waited for specific authorization as well.

The absence of unilateral state action in the Bosnian case reflects a straightforward principle governing no-fly zones: when the Security Council imposes a no-fly zone, only the Security Council may enforce it. Whether the Security Council possesses the sole power to impose air exclusion zones largely depends on an examination of those zones in place over Iraqi territory.

### III. The Imposition of the Iraqi No-Fly Zones

On August 2, 1990, Iraq invaded Kuwait. In January 1991, a Western-led coalition of states launched an attack to force Iraq to withdraw. Kuwait was liberated in February 1991, and offensive action ended in March 1991.<sup>76</sup> A Security Council-approved cease-fire began in April 1991.<sup>77</sup> Thereafter, the Iraqi government turned its forces against rebel uprisings among the Kurdish population in the country's north and the Shiite population in the south.<sup>78</sup> On April 5, 1991, the Security Council condemned Iraq's repression of its civilian population and demanded that such repression cease.<sup>79</sup> On April 10, 1991, the United States announced that France and the United Kingdom would join in the imposition of a no-fly zone over Iraqi territory north of the 36th parallel.<sup>80</sup> On August 19, 1992, the United States announced the imposition of a second no-fly zone over Iraqi territory south of the 32nd parallel.<sup>81</sup>

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75. *Bush's Bosnia Remarks: Halting a 'Cruel War'*, N.Y. TIMES, Oct. 3, 1992, at L5.

76. R.W. Apple, Jr., *U.S. Says Iraqi Generals Agree to Demands 'On All Matters'; Early P.O.W. Release Expected*, N.Y. TIMES, Mar. 4, 1991, at A1.

77. Patrick E. Tyler, *Bush Sees Accord On 'Safe Havens' for Kurds in Iraq*, N.Y. TIMES, Apr. 12, 1991, at A1.

78. Paul Lewis, *U.N. Votes to Condemn Handling of Iraqi Rebels*, N.Y. TIMES, Apr. 6, 1991, at L5.

79. *Id.*

80. The zone also prohibited Iraqi ground forces from entering northern Iraq. Sciolino, *supra* note 2, at A10.

81. Michael R. Gordon, *British, French and U.S. Agree to Hit Iraqi Aircraft in the South*, N.Y. TIMES, Aug. 19, 1992, at A1.

### A. *Legal Justifications for the Coalition's Imposition of the No-Fly Zones*

The authority claimed by the Gulf-War coalition of the United States, the United Kingdom, and France ("Coalition") to impose the Iraqi no-fly zones rests principally on an interpretation of several Security Council resolutions adopted to address the consequences of Iraqi military action both inside and outside Iraq.<sup>82</sup> Alternative justifications, such as authority under Article 106, unilateral humanitarian intervention, or occupation authority are examined below. These justifications, however, rest on shaky legal grounds. This lack of international legal support undermines the applicability of the Iraqi no-fly zone experience to future situations.

#### 1. Authority Through Security Council Resolutions

##### a. *Resolution 688: Response to Repression*

After the Iraqi defeat of Kurdish rebels following the liberation of Kuwait, waves of Kurdish refugees fled to snow-covered mountains on Iraq's borders with Iran and Turkey.<sup>83</sup> On April 10, 1991, the Security Council adopted Resolution 688,<sup>84</sup> recognizing for the first time that "a massive flow of refugees towards and across international frontiers . . . threaten[s] international peace and security."<sup>85</sup> The Security Council based this determination on the fact that the presence of the refugees on Iraq's borders put significant pressure on Turkey and Iran.<sup>86</sup> Resolution 688 expressed concern for "the repression of the Iraqi civilian population," particularly "in Kurdish populated areas."<sup>87</sup> It condemned the repression of Kurds and other civilians, found that the repression posed a threat to international peace, and demand-

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82. See Sciolino, *supra* note 2, at A10; *Excerpts From Bush's Talk: Iraqi Air Zone Is Off-Limits*, N.Y. TIMES, Aug. 27, 1992, at A14.

83. Alan Cowell, *Kurds Fall Back from Iraqi Forces*, N.Y. TIMES, Apr. 2, 1991, at A8.

84. Lewis, *supra* note 77, at L5.

85. S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg., at 1, U.N. Doc. S/RES/688 (1991); see also James A.R. Nafziger, *Self-Determination and Humanitarian Intervention in a Community of Power*, 20 DENV. J. INT'L L. & POL'Y 9, 29 (1992); Bourloyannis, *supra* note 72, at 352.

86. See Clyde Haberman, *Turkey Rejects Mass Entry of Kurds*, N.Y. TIMES, Apr. 4, 1991, at A11; Lewis, *supra* note 77, at L5.

87. S.C. Res. 688, *supra* note 84, at 579.



ed that it end.<sup>88</sup> The Security Council also insisted that Iraq permit the delivery of humanitarian assistance to the civilian population.<sup>89</sup>

The Coalition claimed that Resolution 688 authorized the imposition of a no-fly zone over northern Iraq in order to force compliance with the Security Council demand that Iraq stop repressing its civilian population.<sup>90</sup> Resolution 688, however, did not itself establish any flight ban. Nor did the Resolution authorize Member States to enforce the demand that Iraq cease its repression of civilians. The only Member State action it contemplated, except for its demands on Iraq, was an "appeal" for states "to contribute to . . . humanitarian relief efforts."<sup>91</sup>

This language almost certainly contemplates material and financial assistance, rather than state action to enforce a demand to cease civilian repression. In fact, during negotiations regarding Resolution 688, China opposed aggressive enforcement.<sup>92</sup> Other resolutions dealing with Iraq, however, clearly reflect the practice the Security Council follows when authorizing Member States to enforce its decisions. Standard features of those resolutions include: (1) a specific invocation of Chapter VII authority, (2) an "authorization" of Member States' action, and (3) the use of the term "all necessary means" to indicate authority to use force.<sup>93</sup> Resolution 688 contains none of these elements. It is clear, therefore, that Resolution 688 alone does not justify the Coalition's no-fly zones.<sup>94</sup>

88. *Id.* at 1-2.

89. *Id.* at 2.

90. Sciolino, *supra* note 2, at A10.

91. S.C. Res. 688, *supra* note 84, at 2.

92. See Paul Lewis, *Europeans Back Off Plan to Help Kurds*, N.Y. TIMES, Apr. 10, 1991, at A12 (discussing the Security Council's refusal to include an enforcement provision); O'Connell, *supra* note 26, at 903, 906.

93. In Resolution 678, for example, the Security Council "[a]cting under Chapter VII of the [U.N.] Charter . . . [a]uthorizes Member States . . . to use all necessary means to uphold and implement resolution 660." S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., at 1, U.N. Doc. S/RES/678 (1990). See *No-Fly in Iraq—Why?*, N.Y. TIMES, Aug. 28, 1992, at A24 (noting that the term "all necessary means" has come to mean the use of force).

94. O'Connell, *supra* note 26, at 907. Ruth Gordon, *United Nations Intervention In Internal Conflicts: Iraq, Somalia, and Beyond*, 15 MICH. J. INT'L L. 519, 549 n.164 (1994).

*b. Resolution 678: Restoration of Peace*

The Coalition did not rely exclusively on Resolution 688 when it imposed the no-fly zones over Iraq. The United States argued that its authority to enforce Resolution 688 is derived from its authority to prosecute the war to liberate Kuwait and to enforce the terms of the cease-fire agreement.<sup>95</sup>

Resolution 678, adopted in November 1990, 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."<sup>96</sup> An analysis of the argument that Resolution 678 grants authority to impose no-fly zones to protect Iraqi civilians must examine the language of Resolution 678, particularly the terms "subsequent relevant resolutions" and "to restore international peace and security."

The first question is whether Resolution 688 is a "subsequent relevant resolution" to Resolution 660, the Security Council's first response to the invasion of Kuwait.<sup>97</sup> The argument may be made that Resolution 688 follows Resolution 660 in numerical and chronological terms. More significantly, Resolution 688 concerns Iraq, and is, therefore, facially relevant to a contemporaneous regime of resolutions dealing with Iraq. Additionally, because Iraq's repression was the direct result of the war to liberate Kuwait, the subject matter of Resolution 688—the protection of Iraqi civilians—is directly relevant to Resolution 660 and its progeny. Moreover, both Resolutions 660 and 688 refer to "international peace and security" in the region. Thus, both Resolutions reflect a concern for the effect that Iraq's actions will have on neighboring states.

A more careful and reasonable interpretation, however, shows that Resolution 688 does not pertain to Resolution 660 within the meaning of Resolution 678. First, the term "relevant resolutions" refers to those resolutions adopted by the Security Council after the invasion of Kuwait and prior to the authorization of force to

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95. Gordon, *supra* note 80, at A1, A6.

96. S.C. Res. 678, *supra* note 92, at 1.

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

liberate Kuwait.<sup>98</sup> These “relevant resolutions” addressed the “breach of international peace and security as regards the Iraqi invasion of Kuwait,”<sup>99</sup> the need to “restore the sovereignty, independence and territorial integrity of Kuwait,”<sup>100</sup> and the “well being of third state nationals in Iraq and Kuwait.”<sup>101</sup> Neither of these “relevant resolutions” mentions concern for Iraqi civilians or reprimands Iraq’s repression of its civilians. Unlike Resolution 688, these “relevant resolutions” refer back to Resolution 660.

Resolutions 660 and 688 do not address identical challenges to international peace and security. In Resolution 660, the Security Council determined that the invasion of Kuwait constituted “a breach of international peace and security.”<sup>102</sup> The Security Council adopted Resolution 678 “to restore” that peace.<sup>103</sup> Resolution 688, however, only determined that Iraqi actions “threaten[ed] international peace and security.”<sup>104</sup> Because the determinations declared in resolutions 660 and 688 are distinct, the chosen action must be distinct as well. Resolution 678, which authorizes force to “restore international peace,”<sup>105</sup> does not justify force to “maintain international peace.” A contrary conclusion ignores the clear difference in the language of the two Resolutions.<sup>106</sup>

### c. Resolutions 686 and 687: Cease-Fire Agreement

The no-fly zone is also justified because it constitutes part of the cease-fire agreement that ended the war to liberate Kuwait. Resolution 686 set the terms for a formal cease-fire, including a demand that Iraq “[c]ease hostile or provocative actions by its

98. The Security Council recalled and reaffirmed Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674 and 677. S.C. Res. 678, *supra* note 92, at 1.

99. S.C. Res. 660, *supra* note 96, at 1.

100. S.C. Res. 661, U.N. SCOR, 45th Sess., 2933d mtg. at 1, U.N. Doc. S/RES/661 (1990).

101. S.C. Res. 664, U.N. SCOR, 45th Sess., 2937th mtg. at 1, U.N. Doc. S/RES/664 (1990).

102. S.C. Res. 660, *supra* note 96, at 1.

103. S.C. Res. 678, *supra* note 92, at 1.

104. S.C. Res. 688, *supra* note 84, at 1.

105. S.C. Res. 678, *supra* note 92, at 1.

106. *But see* Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 AM. J. INT'L L. 516, 525 (1991) (stating that the term “international peace and security” is open to flexible interpretation when used in combination with ambiguous language in other resolutions).

forces against all Member States, including missile attacks and flights of combat aircraft.”<sup>107</sup> This language, in effect, established a no-fly zone around Coalition aircraft whenever and wherever the aircraft flew over Iraq. In fact, before the cease-fire went into effect, the United States informed Iraq that the use of helicopters to attack rebels violated Resolution 686.<sup>108</sup>

A closer examination of Resolution 686, however, reveals that it imposed a very limited restriction on Iraqi aircraft. First, it demanded that Iraq cease missile and combat aircraft attacks against Coalition forces, not against Iraqi civilians. Thus, the language of Resolution 686 contemplates the presence of Coalition aircraft in Iraqi airspace. When the Security Council adopted Resolution 686, Coalition aircraft flew in Iraqi airspace because of military activities authorized by the Security Council. Resolution 686 contemplated an end to these activities by offering Iraq cease-fire terms.

Presumably, the end of Security Council-authorized military activity would have terminated the authority that allowed Coalition aircraft to enter Iraqi airspace that would have, in effect, terminated this temporary no-fly zone. Otherwise, Resolution 686 would impose an indefinite prohibition on Iraq’s customary right to respond to intrusions by aircraft into its sovereign airspace.<sup>109</sup> A more reasonable interpretation is that Resolution 686 banned Iraqi attacks on Coalition aircraft flying in Iraqi airspace until a formal end of hostilities.

On April 3, 1991, the Security Council adopted Resolution 687, which set conditions for a formal cease fire.<sup>110</sup> Iraq accepted those conditions on April 16, 1991.<sup>111</sup> On April 11, the Security Council acknowledged that a cease-fire had gone into effect.<sup>112</sup>

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107. S.C. Res. 686, U.N. SCOR, 46th Sess., 2978th mtg. at 2, U.N. Doc. S/RES/686 (1990).

108. See Neil A. Lewis, *U.S. and Iraq to Meet on Request By Baghdad to Shift its Warplanes*, N.Y. TIMES, Mar. 17, 1991, at A1, A17.

109. See Major John T. Phelps, *Aerial Intrusions by Civil and Military Aircraft in Time of Peace*, 107 MIL. L. REV. 255, 291 (1985).

110. Paul Lewis, *U.N. Votes Stern Conditions For Formally Ending War; Iraqi Response Is Uncertain*, N.Y. TIMES, Apr. 4, 1991, at A1, A10; S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. at 1, U.N. Doc. S/RES/687 (1991).

111. Alan Cowell, *Baghdad Formally Agrees to “Unjust” U.N. Conditions for Permanent Cease Fire: Truce Now Official*, N.Y. TIMES, Apr. 7, 1991, at A1, A14.

112. *United Nations Security Council Resolutions Relating To The Situation Between Iraq And Kuwait*, U.N. Department of Public Information, at 3, U.N. DOC.

The cease-fire conditions imposed upon Iraq by Resolution 687 included a demand that Iraq respect the inviolability of its boundary with Kuwait and provided for the demarcation of that border by the United Nations.<sup>113</sup> The Resolution also required the elimination of all Iraqi weapons of mass destruction.<sup>114</sup>

The Coalition has argued that Resolution 687 grants it continuing authority to enforce the cease-fire conditions and that if Iraq violates those conditions, the cease-fire agreement becomes ineffective. The nullification of the cease-fire agreement would permit the Coalition to exercise the broad military powers granted to it by previous resolutions.

This persuasive argument supported by the language of Resolution 687. Resolution 687 affirms Resolutions 660, 678, and 686, "except as expressly changed . . . to achieve the goals of" Resolution 687.<sup>115</sup> Broadly interpreted, Resolution 687 grants to the Coalition power to take military action to force Iraq to cooperate with United Nations disarmament procedures, to respect Kuwaiti territorial integrity, and to comply with other conditions of the cease-fire agreement. This power would permit the Coalition to establish a temporary no-fly zone to protect Coalition aircraft, which are present in Iraq in order to enforce the provisions of Resolution 686, or a more permanent no-fly zone under Resolution 678's "all necessary means" authority.

Indeed, this argument supports the U.S. action to counter Iraqi troop movements toward Kuwait in October 1994.<sup>116</sup> Arguably, the Coalition had the authority to take action against Kuwait to punish cease-fire violations since the end of the Gulf War because Iraq had refused to recognize Kuwaiti sovereignty or the United Nations' demarcated border.<sup>117</sup>

Although this argument may provide legal justification for Coalition military action against Iraq to enforce provisions of the

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DPI/1104/Rev.3-41183 (1991).

113. S.C. Res. 687, *supra* note 109, at 4.

114. *Id.* at 5.

115. *Id.* at 4.

116. Michael R. Gordon, *U.S. Sends Force As Iraq Soldiers Threaten Kuwait*, N.Y. TIMES, Oct. 8, 1994, at A1 [hereinafter Gordon, *U.S. Continuing Buildup*]; Michael R. Gordon, *U.S. Continuing Buildup, Sees Signs of Iraqi Retreat*, N.Y. TIMES, Oct. 12, 1994, at A1; Barbara Crossette, *Head of U.N. Inspection Team Says Baghdad Threatens Weapons-Monitoring Effort*, N.Y. TIMES, Oct. 12, 1994, at A8.

117. Barbara Crossette, *Russia and Iraq Work Out Plan to Ease Gulf Tension*, N.Y. TIMES, Oct. 14, 1994, at A8.

cease-fire agreement, it does not justify the imposition of no-fly zones to protect Iraqi civilians. First of all, the cease-fire agreement does not contain a provision for this purpose. Second, each zone is either geographically or temporarily divorced from the events that surrounded the cease-fire agreement. For example, although the northern Iraqi no-fly zone was established when the cease-fire agreement was executed, it covers an area far from the industrial centers of both Kuwait and Iraq and neither protects Kuwait nor assists in disarming Iraq. Linking the southern Iraqi no-fly zone to the cease-fire agreement is a particularly weak legal argument because this zone was imposed more than fifteen months after the formal end of hostilities and exempted the armored forces that most threaten Kuwait.<sup>118</sup>

Even the most broad interpretation of the cease-fire agreement does not permit the Coalition to patrol Iraqi airspace indefinitely in order to protect Iraqi civilians. Such a suspension of Iraqi sovereignty unduly strains the meaning of Resolutions 660, 678, and 687 and threatens to undermine respect for Security Council resolutions in general.

Nevertheless, the Coalition's legal strategy consistently aims to blur the distinction between the demand to end civilian repression contained in Resolution 688 and the cease-fire conditions imposed by Resolution 687. Evidence of this strategy can be found in the Coalition's approach toward sanctions imposed by Resolutions 661 and 687.<sup>119</sup> In early 1993, for example, the United States no longer conditioned its vote in the Security Council to lift the sanctions upon the removal of Saddam Hussein.<sup>120</sup> Nevertheless, because Iraq continued to violate the cease-fire agreement, Secretary of State Warren Christopher declared that the United States would continue to "try to ensure that the United Nations resolutions are lived up to [by maintaining sanctions]."<sup>121</sup> The United States believed that these resolutions required participation in the boundary commission established by the agreement,

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118. Daniel Williams, *U.S., in Easing Pressure on Iraq, Feared Coalition Breakup and Shiite State*, WASH. POST, Oct. 14, 1994, at A34.

119. S.C. Res. 661, *supra* note 99; S.C. Res. 687, *supra* note 109.

120. See Paul Lewis, *U.S. and Britain Softening Emphasis on Ousting Iraqi*, N.Y. TIMES, Mar. 30, 1993, at A3.

121. *Id.*

cooperation with the United Nations weapons inspectors, and demanded an end to repression of Kurds and Shiites.<sup>122</sup>

By late 1993, the United States and the United Kingdom adopted a more sophisticated position, arguing that continued Iraqi compliance with the cease fire agreement could not be ensured while Saddam Hussein remained in power because Hussein's continued repression of Kurds and Shiites proved that Iraq could not be trusted to honor the disarmament and inspection provisions of the agreement.<sup>123</sup>

This approach was also evident during the late 1994 troop movement crisis. President Clinton declared, "Saddam Hussein has shown the world before . . . that he cannot be trusted. Iraq's troop movements . . . are more proof of this. . . . [T]he sanctions will be maintained until Iraq complies with all relevant U.N. resolutions."<sup>124</sup> The United States linked a planned new demilitarized zone in southern Iraq to both the southern no-fly zone and "existing Security Council resolutions." The no-troop zone was described as an extension of the no-fly zone.<sup>125</sup> The United States appeared to define this new zone as all of Iraq below the 32nd parallel, the same territory bounded by the no-fly zone.<sup>126</sup> The United States also claimed it had the authority to strike Iraqi forces within Iraq under then existing resolutions.<sup>127</sup> These events indicate that the United States, pursuant to the Security Council resolutions it claimed authorized the no-fly zones, believed it had authority to establish a "no-troop" zone.

Although the United States claimed sufficient authority existed for its actions, the United States nevertheless sought Security Council adoption of a resolution specifically authorizing a no-troop zone for southern Iraq.<sup>128</sup> The adopted resolution was less sweeping than the United States desired and only demanded an Iraqi withdrawal of elite troops back to their previous location.

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122. Lewis, *supra* note 119, at A3.

123. Paul Lewis, *U.S. Is Hardening Its Stand On Iraq*, N.Y. TIMES, Dec. 19, 1993, at A1.

124. *Transcript of Clinton's Address: No Evidence the Iraqis Have Pulled Back*, N.Y. TIMES, Oct. 11, 1994, at A8.

125. Gordon, *U.S. Continuing Buildup*, *supra* note 115, at A10.

126. Michael R. Gordon, *Perry Reports Elite Iraq Army Is Set to Retreat*, N.Y. TIMES, Oct. 16, 1994, at A1.

127. David Brown, *Christopher Says 'Saddam Has Been Put on Notice'*, WASH. POST, Oct. 17, 1994, at A11; Crossette, *supra* note 116, at A16.

128. Barbara Crossette, *U.S. Is Demanding A Quick U.N. Vote On Iraq Pullback*, N.Y. TIMES, Oct. 15, 1994, at A1.

Furthermore, this resolution did not authorize the use of force to ensure compliance.<sup>129</sup>

The unanimous vote to adopt the resolution was marked by disagreement among Permanent Members and the Coalition.<sup>130</sup> France disagreed with the United States and Britain over whether the Coalition possessed the authority to attack Iraq.<sup>131</sup> Russia also asserted that the resolution did not authorize the use of force if Iraq failed to comply.<sup>132</sup> This disagreement regarding interpretation, as well as on the decision to seek a Security Council vote in the first place, further demonstrates the uncertainty of the legitimacy of the Iraq no-fly zones.

The Coalition did not seek Security Council authority when it established the southern no-fly zone, arguing that it already had sufficient authority. The Coalition, however, sought Security Council approval before attempting to establish a no-troop zone, a purpose much more directly connected to the resolutions argued to support the no-fly zones. Although the United States claimed the new resolution strengthened its authority,<sup>133</sup> the events of October 1994 may indicate the erosion of the Coalition's confidence in its authority to take military action under the cease-fire agreement. If the Coalition cannot ban elite Iraqi troops from near the Kuwaiti border without a supporting Security Council resolution, it cannot legally ban Iraqi aircraft from Iraqi airspace.

While Coalition strategy might constitute an effective diplomatic policy, it lacks sound legal basis. The cease-fire agreement does not end civilian repression. Essentially, this strategy, which blurs the distinction between the cease-fire agreement and the unrelated Security Council Resolution 688, enables the Coalition to claim that its no-fly zones are justified by a regime of authorized inspection and sanction activity.

The Coalition's diplomatic success thus far with these arguments is evident in the absence of state protest over the no-fly

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129. Barbara Crossette, *U.S. Is Compromising on Measure Chastising Iraq*, N.Y. TIMES, Oct. 16, 1994, at A12 [hereinafter Crossette, *U.S. Is Compromising*]; Barbara Crossette, *U.N. Council Unanimous In Condemning Iraq Move*, N.Y. TIMES, Oct. 17, 1994, at A10.

130. Crossette, *supra* note 116, at A16; Crossette, *U.S. Is Compromising*, *supra* note 128, at A12.

131. Crossette, *U.S. Is Compromising*, *supra* note 128, at A12.

132. Steven Greenhouse, *U.S. Says Iraq Appears to Resume Pullback from Kuwait Border*, N.Y. TIMES, Oct. 17, 1994, at A7.

133. Brown, *supra* note 126, at A11.



zones. Moreover, the Security Council has taken no action against the zones. Later Security Council Resolutions contribute to the blurring of issues by referring to Resolutions 686, 687, and 688 together, as if they constitute one single resolution.<sup>134</sup> The Coalition might argue that by referring to Resolution 688 without condemning the Coalition's no-fly zones<sup>135</sup> the Security Council impliedly ratified the no-fly zones.

This argument calls for unreasonable speculation. The Security Council has never been called upon to consider the legality of the Iraqi no-fly zones.<sup>136</sup> Furthermore, if called upon to do so, the Security Council members in the Coalition could veto any resolution adopted to condemn the zones as illegal. Reliance on Security Council condemnation to signify illegality would mean that no Permanent Member action could ever be illegal because the offending Permanent Member may always veto a condemnation.<sup>137</sup> Such a rule would disregard the traditional roles of treaty and customary law. International treaty and customary law, as well as Security Council resolutions, should determine the legality of Permanent Member action.

#### d. Summary

The international community has an important interest in predictable and reasonable interpretations of Security Council resolutions. The tortuous interpretations necessary to find justification indicate that the Iraqi no-fly zones have no basis in the resolutions relied upon by the Coalition.<sup>138</sup>

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134. S.C. Res. 706, U.N. SCOR, 46th Sess., 3004th mtg. at 1-2, U.N. Doc. S/RES/706 (1991); S.C. Res. 712, U.N. SCOR, 46th Sess., 3008th mtg. at 1, U.N. Doc. S/RES/712 (1991).

135. S.C. Res. 706, *supra* note 133, at 2.

136. See Michael R. Gordon, *NATO Jets in Bosnia Told to Fire as Last Resort*, N.Y. TIMES, Apr. 12, 1993, at A8.

137. The influence of the United States as the only remaining superpower makes its actions less likely to be condemned by the Security Council, or subjected to international disapproval. For a discussion of the present-day hegemony of the United States in the Security Council and The United Nations generally, see 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, 273 (1994).

138. Remarks of international legal scholars at the 1991 American Association of International Law annual meeting illustrate that the resolutions are not seen as strong authority for the no-fly zones. See Neil A. Lewis, *Legal Scholars Debate Refugee Plan, Generally Backing U.S. Stand*, N.Y. TIMES, Apr. 19, 1991, at A8.

If the Security Council wished to establish a no-fly zone to protect the Kurds, it could have drafted language to reflect that intent. The fact that the Security Council chose to establish and enforce the Bosnian zone in such a different manner indicates that the Iraqi zones exemplify poor Security Council resolution interpretation. If these no-fly zones are not outright illegal, they may be *sui generis*.<sup>139</sup>

## 2. Article 106: Permanent Member Authority

Article 106 of the Charter may provide authority for the Coalition's no-fly zones.<sup>140</sup> Article 106 permits enforcement of Security Council decisions by Permanent Members acting in coalition.<sup>141</sup> The Security Council may exercise Article 106 authority only if it has not concluded Article 43 agreements or determined that it is otherwise capable of enforcing its decisions.<sup>142</sup> Once the Security Council concludes such "special agreements" or claims the capacity to enforce its decisions, such authority vanishes.<sup>143</sup> Thus far, no such agreements or declarations have been made.<sup>144</sup>

139. There was muted but immediate international criticism of the coalition's enforcement of the zones. William E. Schmidt, *Iraq Says It is Ready to Fight Allies over Air Zone*, N.Y. TIMES, Aug. 27, 1992, at A14. Iraq labeled the Coalition action an "unjust, hostile decision." William E. Schmidt, *Iraq Fires Words, but No Missiles, at Allied Planes*, N.Y. TIMES, Aug. 28, 1992, at A8. Other observers suggested that the link between Resolutions 688 and 678 were "strained," especially in light of previous specific Security Council authorization under Chapter VII of states' or coalitions' military action. *No-Fly In Iraq—Why?*, *supra* note 92, at A24.

140. Article 106 of the U.N. Charter provides:

Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Moscow, October 30, 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.

U.N. CHARTER art. 106. For a brief and helpful discussion of the mechanics of Article 106, see Gilman, *supra* note 16, at 1139-45.

141. See generally OPPENHEIM, *supra* note 19, at 171-72; Gilman, *supra* note 16, at 1139 n.58.

142. Gilman, *supra* note 16, at 1139 n.58.

143. KELSEN, *supra* note 18, at 758.

144. Gilman, *supra* note 16, at 1138.

### a. Threat Determination

Article 106 action must be "necessary for the maintenance of international peace."<sup>145</sup> Article 106, however, does not specify which entities may determine that a threat to the peace exists. Despite this uncertainty, the argument may be made that the Security Council must determine that a threat to the peace exists before Article 106 action may be taken.<sup>146</sup> Due to the non-existence of Article 43 special agreements, Article 106 only applies when the Security Council cannot act under Article 42.<sup>147</sup> Neither article concerns the Security Council's ability to determine the existence of a threat to international peace.

Threat determination is the Security Council's responsibility under Article 39.<sup>148</sup> Article 106 does not specifically supplant the Security Council's role in determining the existence of threats to international peace. Moreover, the absence of Article 43 special agreements does not abrogate that responsibility. Therefore, Article 106 action should require a prior Security Council determination that a threat to international peace exists.

Article 106 imposes an affirmative duty upon the Permanent Members to oversee the maintenance of international peace.<sup>149</sup> Once the Security Council determines that a threat to peace exists, and that it is authorized to act to maintain the peace, the Permanent Members must work together to maintain the peace.

### b. Article 106 in Practice

Once the Security Council makes the initial determination that a threat to peace exists, the Permanent Members have independent authority to act and may use armed force.<sup>150</sup> Arguably, then, the Permanent Members can independently enforce Security Council-imposed no-fly zones. Additionally, one could argue that they may

145. U.N. CHARTER art. 106.

146. Gilman, *supra* note 16, at 1142-43. *But see* KELSEN, *supra* note 18, at 761 (stating that joint action is not subject to a threat determination by the Security Council).

147. Gilman, *supra* note 16, at 1142 n.80.

148. *See supra* notes 17-29 and accompanying text.

149. As long as the Security Council is unable to enforce its resolutions, the Permanent Members "shall . . . consult with one another . . . with a view to such joint action . . . as may be necessary for the purpose of maintaining international peace and security." U.N. CHARTER art. 106.

150. KELSEN, *supra* note 18, at 761.

also determine that the maintenance of international peace requires the imposition and enforcement of a no-fly zone even without imposition of a zone by the Security Council.

Once Permanent Members decide to act under Article 106, they do so "on behalf of" the United Nations.<sup>151</sup> As such, the Permanent Members act with all of the Organization's powers and obligations. Therefore, once the Permanent Members act under Article 106, other Member Nations must assist their efforts.<sup>152</sup>

Permanent Member action under Article 106 must be joint action and may only commence after Permanent Membership consultation.<sup>153</sup> Although military action requires unanimous consent by the Permanent Members,<sup>154</sup> a Permanent Member may decline to take an active role.<sup>155</sup>

In August 1990, the Security Council adopted Resolution 665, authorizing Member States "to use such measures commensurate to the specific circumstances as may be necessary . . . to halt" all shipping into and out of Iraq and occupied Kuwait.<sup>156</sup> One commentator argues that Resolution 665 implicitly authorized Article 106 military action by the Permanent Members.<sup>157</sup> All five Permanent Members ratified Resolution 665 and agreed that the use of force was necessary to restore peace. In the absence of Article 43 agreements, the action may be seen as an exercise of Permanent Members' Article 106 authority.

A similar analysis shows that Resolution 688, demanding an end to Iraqi repression of civilians, was not an exercise of Article 106 authority.<sup>158</sup> Because China abstained from voting, the Permanent Members did not unanimously share concern for the

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151. U.N. CHARTER art. 106; *see also* KELSEN, *supra* note 18, at 92, 761.

152. "All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action." U.N. CHARTER art. 2, para. 5; *see also* KELSEN, *supra* note 18, at 761; OPPENHEIM, *supra* note 19, at 172.

153. U.N. CHARTER art. 106; Gilman, *supra* note 16, at 1144.

154. *See* KELSEN, *supra* note 18, at 759 (stating that "the interpretation which seems to be most plausible is that all five Powers must agree."); OPPENHEIM, *supra* note 19, at 172 (stating that unanimity is required).

155. Gilman, *supra* note 16, at 1144 (stating that Article 106 authority requires unanimity of purpose, but not of participation, among the Permanent Members).

156. S.C. Res. 665, U.N. SCOR, 45th Sess., 2938th mtg. at 1, U.N. Doc. S/RES/665 (1990).

157. Gilman, *supra* note 16, at 1150-53.

158. S.C. Res. 688, *supra* note 84, at 1.

protection of Iraqi civilians.<sup>159</sup> The fact that Resolution 688 did not contain an enforcement mechanism reflects the disagreement among the Permanent Members as to whether protection of Iraqis required military force. Under a strict analysis of Article 106, the Coalition had no independent authority to impose and enforce the no-fly zones.

Under a more flexible analysis, however, Article 106 could justify the no-fly zones. States have never invoked or rejected Article 106.<sup>160</sup> Given this lack of state practice, precise rules governing the application of Article 106 do not yet exist. A more flexible interpretation of Article 106 permits action without strict unanimity of purpose among Permanent Members. Such an interpretation could make Article 106 a viable solution to Security Council paralysis.

Article 106 does not expressly require unanimity of purpose. Rather, the Permanent Members must "consult with one another . . . with a view to such joint action on behalf of the Organization as may be necessary."<sup>161</sup> Thus, when the Security Council determines that a threat to international peace exists but cannot extinguish it due to lack of resources or will, a coalition of Permanent Members may take action as long as all Permanent Members have consulted with one another.

With the adoption of Resolution 688, there existed a threat to international peace, consultation among the Permanent Members, and a lack of uniform will by the Permanent Members to use force to protect Iraqi civilians. Accordingly, one could argue that a coalition of less than five Permanent Members should have possessed the authority to take action on behalf of the Security Council. This approach would enable Article 106 to respond to Security Council paralysis rather than to mirror it.<sup>162</sup> Until now, however, Security Council members have never voted to adopt resolutions while acknowledging that any threat determination authorizes independent joint-enforcement action by Permanent Members. While this approach could justify imposition and

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159. *Id.*

160. Interview with Captain Thomas J. Connelly, Deputy Legal Counsel, U.S. Navy, Office of the Chairman, The Joint Chiefs of Staff (Mar. 25, 1993).

161. U.N. CHARTER art. 106.

162. See IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 345-46 (1983) (stating that no intervention is possible when the Security Council is paralyzed by a Permanent Member's veto).

enforcement of no-fly zones, it cannot justify the Iraqi no-fly zones.

#### 4. Unilateral Humanitarian Intervention

##### a. *An Emerging Rule of Law?*

Much, if not all, of the motivation behind the Iraqi no-fly zones is a humanitarian desire to protect Iraqi civilians from repression by their government in Baghdad.<sup>163</sup> The doctrine of Humanitarian intervention, therefore, presents another possible justification for the Iraqi no-fly zones.<sup>164</sup> In the nineteenth century, states reserved the right to intervene militarily in other states' affairs to protect persons under the latter state's control.<sup>165</sup> There is disagreement whether this doctrine reflected customary international law.<sup>166</sup> The influence of this doctrine in the twentieth century further eroded with the adoption of the Charter in 1945.<sup>167</sup>

While the Charter does not expressly prohibit unilateral humanitarian intervention, Article 2(4) provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."<sup>168</sup> There is considerable disagreement over the extent to which this provision undercuts the doctrine of humanitarian intervention.<sup>169</sup>

163. The northern no-fly zone was part of a larger "safe haven," which the United States declared was necessary to protect both civilians and aircraft delivering humanitarian relief. Sciolino, *supra* note 2, at A10. The southern zone was imposed in response to reports of an impending Iraqi offensive on Shiites in the marshes of southern Iraq. Gordon, *supra* note 3, at A6. United Kingdom Prime Minister John Major stated that the zone was necessary to prevent the "systematic murder" of Iraqi Shiites. Gordon, *supra* note 80, at A1, A6.

164. Intervention here refers to dictatorial interference, or forcing a state to behave in a certain manner under the threat or use of force. See generally BROWNLIE, *supra* note 161, at 338-42.

165. *Id.* at 338; BROWNLIE, *supra* note 26, at 564-65.

166. Nafziger, *supra* note 84, at 24-25.

167. *Id.*

168. U.N. CHARTER art. 2, ¶ 4; BROWNLIE, *supra* note 161, at 341-42 (stating that the adoption of the United Nations Charter effectively terminated the doctrine of humanitarian intervention).

169. See Gordon, *supra* note 93, at 530-31. State practice supports the view of many authorities that unilateral intervention by a state to rescue its own nationals within the target state is a legal use of force. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1629, 1641 (1984); RESTATEMENT (THIRD) OF THE

One analysis, supported by the International Court of Justice,<sup>170</sup> contends that non-intervention is a rule of customary international law and that intervention without state consent is almost certainly illegal.<sup>171</sup> This view recognizes that any intervention, even for humanitarian purposes, will inevitably impact the target state's territorial integrity and political independence.<sup>172</sup> Indeed, the establishment of safe havens in Iraqi Kurdistan has had a similar effect: the creation of a Kurdish quasi-state in Iraqi territory.<sup>173</sup> Moreover, the exclusion of a target state's aircraft from its territorial airspace undermines its territorial integrity and political independence. Under this analysis, humanitarian intervention does not legally justify the Iraqi no-fly zones.

Nevertheless, a growing number of commentators believe that humanitarian intervention is a proper response to gross, persistent, and systematic human rights abuses.<sup>174</sup> They argue that states' obligation to human rights<sup>175</sup> is at least consistent with the non-intervention principle. Therefore, the use of force in defense of human rights would not violate the prohibition on force.<sup>176</sup> These proponents of the non-intervention principle further argue that as long as these interventions are necessary, are motivated by humanitarian concerns, and require only a reasonable level of

FOREIGN RELATIONS LAW OF THE UNITED STATES § 703 cmt. e, n.8 (1987). *But cf.* BROWNLIE, *supra* note 26, at 301 (arguing that such intervention is illegal). Necessity, proportionality, and immediacy limit this right, if it exists. Nafziger, *supra* note 84, at 39.

170. Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 263 (June 27).

171. RESTATEMENT (THIRD) OF THE FOREIGN AFFAIRS RELATIONS LAWS OF THE UNITED STATES, *supra* note 19, § 703 cmt. e, n.8; BROWNLIE, *supra* note 26, at 341-42, 346-47; Schachter, *supra* note 168, at 1629; Jost Delbruck, *Commentary on International Law: A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887, 890 (1992); Nafziger, *supra* note 84, at 24-25.

172. BROWNLIE, *supra* note 161, at 267-68; Schachter, *supra* note 168, at 1641.

173. John Darnton, *Almost a Nation: The Kurds in Iraq—A Special Report; Kurds Rebuilding Shattered Land, Winning a Precarious Autonomy*, N.Y. TIMES, Jan. 21, 1994, at A1.

174. OPPENHEIM, *supra*, note 19, at 312-21; Ved P. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti—Revisiting the Validity of Humanitarian Intervention Under International Law—Part I*, 20 DENV. J. INT'L & POL'Y 305, 310 (1992); Kevin Ryan, *Rights, Intervention, and Self-Determination*, 20 DENV. J. INT'L & POL'Y 55, 59 (1991). Ryan also argues that protecting a peoples' right to self-determination, a goal of the Kurdish people, can justify humanitarian intervention. *See id.* at 61-66.

175. *See* U.N. CHARTER art. 56.

176. *Id.* art. 2, ¶ 4.

force, they do not violate "territorial integrity and political independence."<sup>177</sup>

One commentator argues that the Coalition's intervention in Iraqi Kurdistan satisfies these criteria.<sup>178</sup> The intervention, necessary to save the lives of civilians,<sup>179</sup> was purely humanitarian<sup>180</sup> and employed the minimum force necessary to protect both civilians and intervening troops.<sup>181</sup> Moreover, the intervention was temporary.<sup>182</sup> A similar argument might justify the imposition and enforcement of the southern zone.

A closer analysis of the facts, however, reveals weaknesses in this argument. First, the no-fly zones are not U.N. operations and are examples of long-term intervention.<sup>183</sup> Second, the intervention interfered with Iraq's territorial integrity and political independence. Iraqi Kurdistan is nearly a de facto state with an internal government, population, and roughly-defined territory over which Baghdad exercises little or no control.<sup>184</sup> Third, the no-fly zones themselves deprive Iraq of the use of a portion of its sovereign airspace. Finally, the states enforcing the no-fly zones have implied that the zones will not end until Iraq's government changes.<sup>185</sup> These facts demonstrate that the Coalition intervention in Iraq, including the no-fly zones, violates the non-intervention principle embodied in Article 2(4).

There is no question, however, that as a matter of humanitarian policy, the Coalition's intervention and the imposition of the no-fly zones saved Iraqi lives and eliminated a threat to international peace. A passionate advocate of the doctrine recently lamented

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177. For an explanation of these criteria, see Nanda, *supra* note 173, at 330; Ryan, *supra* note 173, at 66-70.

178. Nanda, *supra* note 173, at 330-34.

179. *Id.* at 332.

180. *Id.* at 331.

181. Cowell, *supra* note 82, at A8.

182. Eric Schmitt, *Last Troops Begin Withdrawing From Northern Iraq*, N.Y. TIMES, July 13, 1991, at L3.

183. At the time of publication, the northern Iraqi no-fly zone has existed for more than three and one half years. The southern Iraqi no-fly zone has existed for more than two years.

184. Darnton, *supra* note 172, at A1.

185. The United States claims that full compliance with Security Council resolutions does not require the removal of Saddam Hussein; nevertheless, it views full compliance as impossible as a practical matter under Hussein because full compliance means ending the oppression that the United States sees as central to Hussein's rule. See Lewis, *supra* note 119.



that current international law prevents assistance to victims of large-scale human rights abuses and stated: "If international law is to aid in the foundation of a new world order, it . . . must focus . . . on securing just relations among peoples and their governments, rather than on maintaining the inviolability of state sovereignty."<sup>186</sup>

Certainly, international law has restricted states' ability to mistreat their peoples as well as state sovereignty. State sovereignty, however, is the foundation of the international legal regime and has not eroded to the extent that a foreign power may force rearrangement of the relations between a sovereign state and its citizens.<sup>187</sup>

Recent state practice suggests that states do not recognize a right of unilateral humanitarian intervention. In late 1992, the United States received Security Council approval before dispatching forces into Somalia to end starvation.<sup>188</sup> In 1994, France waited for Security Council approval, and sought the cooperation of other states, before deploying troops into Rwanda to stop mass killings of Rwandans by the controlling Hutu tribe.<sup>189</sup> In the same year, the United States obtained Security Council authorization and multinational cooperation before occupying Haiti to remove a military dictatorship, an action motivated partly by humanitarian concerns.<sup>190</sup> The uncertain status of the doctrine of humanitarian intervention demonstrates that the doctrine is not yet an accepted rule of customary law. At most, it represents a movement toward an emerging rule and thus does not justify unilateral imposition of no-fly zones in Iraq.

Even assuming that the doctrine of humanitarian intervention became established as a rule of international law, such a rule could

186. Paul W. Kahn, *Lesson for International Law from the Gulf War*, 45 STAN. L. REV. 425, 440 (1993).

187. Schachter, *supra* note 168, at 1629.

188. Michael R. Gordon, *U.N. Backs A Somalia Force As Bush Vows A Swift Exit; Pentagon Sees Longer Stay*, N.Y. TIMES, Dec. 4, 1992, at A1; Michael Wines, *Bush Declares Goal in Somalia to 'Save Thousands'*, N.Y. TIMES, Dec. 4, 1992, at A1.

189. *France Says It Will Send Intervention Force to Rwandan Border*, N.Y. TIMES, June 19, 1994, at 11; Richard D. Lyons, *French Officer Is First Step Toward a Multinational Force*, N.Y. TIMES, June 23, 1994, at A8.

190. Douglas Jehl, *Clinton Seeks U.N. Approval Of Any Plan to Invade Haiti*, N.Y. TIMES, July 22, 1994, at A1; Richard D. Lyons, *U.N. Authorizes Invasion Of Haiti To Be Led By U.S.*, N.Y. TIMES, Aug. 1, 1994, at A1; *Clinton's Speech: The Reasons Why*, N.Y. TIMES, Sept. 20, 1994, at A5.

not legally justify the existence of the Iraqi no-fly zones. Iraq objected to the zones from their inception as a violation of its sovereignty.<sup>191</sup> Therefore, as an original and persistent objector, it is exempt from its application.<sup>192</sup>

#### *b. Security Council Humanitarian Intervention*

If humanitarian intervention is emerging as a legitimate instrument of international law, its exercise should be limited to the collective international community.<sup>193</sup> In the past, powerful individual states have cynically abused the doctrine, disguising their self-interests with international humanitarian motives.<sup>194</sup> The Security Council is the only international body with the legitimacy and political accountability to determine that a state's sovereignty may be violated to protect that state's nationals.<sup>195</sup> Prevention of unilateral intervention will preserve the principle of sovereignty that has marked the international rule of law to date.<sup>196</sup>

#### 4. Occupation Authority

Once the Coalition established itself in Iraqi airspace, it assumed certain obligations to persons within the zones. Military occupation is defined as control of territory by an outside power without consent.<sup>197</sup> An occupier at the end of hostilities has legal

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191. See, e.g., Alan Cowell, *Iraq, Assailing Bush's Plan, Says U.N. Will Open Camps*, N.Y. TIMES, Apr. 18, 1991, at A16.

192. BROWNLIE, *supra* note 26, at 533.

193. See Louis B. Sohn, *How New Is the New International Legal Order?*, 20 DENV. J. INT'L L. & POL'Y 205, 210 (1992) (stating that unilateral humanitarian intervention would be legal when authorized by the Security Council).

194. BROWNLIE, *supra* note 161, at 339-41; BROWNLIE, *supra* note 26, at 564-65. Nazi Germany, for example, cited concern for the well-being of ethnic Germans in bordering states to justify, in part, its territorial acquisitions in Austria and Czechoslovakia. WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* 332-33 (1959). For other examples of unilateral interventions justified at least partly on humanitarian grounds, see Nanda, *supra* note 173, at 311-30.

195. See Robert W. Gomulkiewicz, *International Law Governing Aid to Opposition Groups in Civil War: Resurrecting the Standards of Belligerency*, 63 WASH. L. REV. 43, 51 (1988); EDWIN BROWN FIRMAGE, *Summary and Interpretation*, in *THE INTERNATIONAL LAW OF CIVIL WAR* 421 (Richard A. Falk ed., 1971); Schachter, *supra* note 34, at 469.

196. Delbruck, *supra* note 170, at 891.

197. Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44 (1990).

authority in all territory over which it exercises effective control.<sup>198</sup>

Before the formal end of hostilities on April 6, 1991, and after the cease-fire agreement came into effect, the Coalition sent aircraft and troops to protect the establishment of humanitarian relief camps.<sup>199</sup> With the withdrawal of Iraqi troops and aircraft from northern Iraq, the Coalition exercised effective control as occupier both in the air and on the ground.<sup>200</sup> Coalition forces also occupied much of southern Iraq at the end of the war.<sup>201</sup> As long as Coalition forces exercised effective control in northern Iraq, the Coalition, as occupier, restricted access to Iraqi airspace<sup>202</sup> and thus exerted and bore the powers and obligations of an occupier over that territory.

Occupiers must ensure that persons within occupied territories are "at all times humanely treated, and . . . protected especially against all acts of violence or threats thereof,"<sup>203</sup> and must "bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate."<sup>204</sup> Accordingly, the Coalition had an affirmative duty to protect Iraqi civilians in Coalition-controlled territory and to provide humanitarian assistance. Any measures, including the imposition of a no-fly zone, the use of force to protect civilians, and the supply of humanitarian assistance, were permissible pursuant to the Coalition's role as occupier.

The Coalition granted control of both the northern<sup>205</sup> and

198. For a general discussion of occupation power, see GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION* (1957).

199. Clifford Krauss, *U.S. Will Airdrop Food and Clothes to Kurds In Iraq*, N.Y. TIMES, Apr. 6, 1991, at A1, A5; see Cowell, *supra* note 190, at A16.

200. Chuck Sudetic, *Iraqi Forces Begin Pullback In North As The Camps Rise*, N.Y. TIMES, Apr. 22, 1991, at A1, A8.

201. Coalition forces occupied southern Iraq up to the Euphrates River. See Michael R. Gordon, *G.I.s In Iraq Start Moving To A Zone Bordering Kuwait*, N.Y. TIMES, Apr. 15, 1991, at A1, A8.

202. See GLAHN, *supra* note 197, at 29-30 (stating that loss of physical control over territory ends occupation and legal effect of occupation orders).

203. Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, Aug. 12, 1949, art. 27, reprinted in DOCUMENTS ON THE LAWS OF WAR 272 (Adam Roberts & Richard Guelff eds., 1982) [hereinafter Geneva Convention IV].

204. *Id.* art. 55.

205. Schmitt, *supra* note 181, at L3; Cowell, *supra* note 190, at A16; Elaine Sciolino, *Iraq and U.N. to Carve Out Routes In Plan to Speed Refugees' Return*, N.Y. TIMES, Apr.

southern safe havens to the United Nations.<sup>206</sup> Airspace, however, is considered territory; thus, a no-fly zone arguably constitutes occupied territory even if the sovereign controls the land below the zone.<sup>207</sup> Therefore, once the Coalition established effective control in Iraqi airspace, Iraqi sovereignty would be suspended for the duration of that occupation. Accordingly, imposition of the Iraqi no-fly zones arguably constituted a proper exercise of occupation authority.

As stated before, an occupier of territory over which it exercises control at the end of hostilities establishes its authority over that territory.<sup>208</sup> Once the Coalition took control of Iraqi airspace, it could shoot down Iraqi aircraft and was obligated to do so when necessary to protect Iraqi civilians.<sup>209</sup> That analysis, however, does not justify the Coalition's presence in Iraqi airspace. An occupier's management of an illegal occupation must nevertheless comply with international humanitarian law.<sup>210</sup>

Occupations are normally transitional measures at the end of armed conflict.<sup>211</sup> The Iraqi no-fly zones, particularly the three-and-one-half-year-old northern zone, are approaching the status of a prolonged occupation.<sup>212</sup> The duration of such occupations apparently depends on the longevity of the governing regime.<sup>213</sup> As long as the Coalition maintains effective control over airspace, it assumes trustee obligations for the well-being of the persons therein.<sup>214</sup>

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19, 1991, at A1, A8. This agreement, however, did not provide for the introduction of United Nations troops into northern Iraq. Schachter, *supra* note 34, at 469.

206. Edward A. Gargan, *Control in South Iraq Passes To U.N. In a Symbolic Move*, N.Y. TIMES, Apr. 25, 1991 at A13.

207. GLAHN, *supra* note 197, at 28, 31.

208. *Id.* at 28.

209. This view is shared by Allan Gerson, Chief Counsel of the United States Mission to the United Nations under President Ronald Reagan. Gerson, however, does not appear to distinguish between the Coalition's occupation power at the end of hostilities and that status after the United Nations assumed power. See Lewis, *supra* note 137, at A4.

210. Roberts, *supra* note 196, at 46.

211. *Id.* at 47.

212. One commentator defines prolonged occupation as an occupation lasting more than five years in duration. *Id.* at 47. Customary law, however, places no outside limit on the length of an occupation. *Id.*

213. Occupations normally end after a gradual period of emergence of indigenous political institutions able to assume sovereign control. *Id.* at 102. The question in the case of Iraq, particularly in the northern zone, is whether that sovereignty will be exercised by Iraqis or Kurds.

214. *Id.* at 68.

## 5. Summary

The foregoing discussion demonstrates the weak legal foundation upon which the no-fly zones in Iraq rest and their inapplicability as a model for the imposition and enforcement of future no-fly zones. The veto power of the Coalition will probably deter the Security Council from taking action to lift the zones until the Coalition decides to lift them. The recent decision in the Libya case, however, indicates that the International Court of Justice may become the interpreter of Security Council resolutions.<sup>215</sup> If Iraq can obtain jurisdiction, this court might review Coalition actions based on both Security Council resolutions and customary international law.<sup>216</sup>

Although policy reasons may justify the Iraqi no-fly zones, determination of the legality of their imposition and enforcement depends upon their applicability in other situations. Syria, for example, was a member of a group of states authorized by Resolution 678 to use force to liberate Kuwait.<sup>217</sup> The view that the Coalition's zones are legally valid must also recognize the right of Syria, or any of the other states that assisted Kuwait, to impose an indefinite, unilateral no-fly zone or other measures necessary to protect Iraqi civilians. Such a right could lead to an international "free-for-all" in which states may unilaterally determine what is best for their neighbors.<sup>218</sup> The international system of law that deters the use of force against state sovereignty must not be undermined by a policy of expediency. When the international community desires to invade a state's sovereignty by establishing a no-fly zone in order to protect that state's nationals, it should follow the model of the Bosnian zone.

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215. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1991 I.C.J. 114, Request for the Indication of Provisional Measures, General List No. 89 (Order of Apr. 14), implicitly claiming the power of judicial review over a chapter VII decision of the U.N. Security Council.

216. Thomas M. Franck, *The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT'L L. 519, 523 (1992).

217. WESTON, *supra* note 105, at 525.

218. Professor Thomas M. Franck warns of a "recipe for chaos" if this model becomes precedent. See Lewis, *supra* note 137.

#### IV. ENFORCEMENT ACTIONS

The establishment of a no-fly zone does not suspend the application of the laws of war within the zone.<sup>219</sup> Regardless of the legality of the particular zone, the enforcers and challengers of no-fly zones are bound by treaties and customary international law.<sup>220</sup> This section will examine whether the Coalition and Iraq have complied with the applicable laws of war.

##### A. *Enforcement in Iraq*

##### 1. Relevant Laws of Air Warfare

The Coalition has, on several occasions, aggressively enforced the Iraqi no-fly zones. The majority of Coalition enforcement measures over Iraq have involved air warfare. The international community has failed to adhere to the two major efforts to codify a comprehensive set of rules governing air warfare. Although The Rules of Aerial Warfare<sup>221</sup> were never adopted in legally binding form, they were regarded as an authoritative attempt to clarify and formulate rules of air warfare.<sup>222</sup> Nevertheless, these rules were

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219. Air exclusion zones operate in much the same manner as the maritime exclusion zone established by the United Kingdom around the Falklands-Malvinas Islands during its 1982 war with Argentina. This maritime zone served as "an officially declared combat zone" that essentially warned ships not to enter the zone. HILAIRE MCCOUBREY, *INTERNATIONAL HUMANITARIAN LAW* 154 (1990). This zone did not "create an area within which the laws of armed conflict are suspended, especially in relation to neutral and protected shipping." *Id.* The difference between the United Kingdom's maritime exclusion zone and an air exclusion zone is that the latter exists over a state's sovereign territory. Under the rules of warfare, an air exclusion zone established by competent authority would expose an aircraft within it to attack if that aircraft would have normally been so exposed during armed conflict in the absence of a zone. It would not, however, expose an aircraft that was protected during armed conflict to attack, simply because the craft entered the zone. See also SPAIGHT, *supra* note 67, at 400-01 (offering an analogy to maritime exclusion zones).

220. See Schachter, *supra* note 34, at 466 (stating that the laws of war apply to attackers and defenders alike).

221. Rules of Aerial Warfare, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 202, at 123-35 [hereinafter Hague Rules].

222. DOCUMENTS ON THE LAWS OF WAR, *supra* note 202, at 121. See also W. Hays Parks, *Air War and the Law of War*, A.F. L. REV. 1, 31 (1990). But see William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 95 (1982); SPAIGHT, *supra* note 67, at 42-43; INTERNATIONAL LAW: THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, *supra* note 68, paras. 5-11 (all stating that the Hague Rules have the force of the eminence of their drafters).

largely ignored by the states during World War II.<sup>223</sup> Representatives of sixty-eight states<sup>224</sup> signed the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts ("Protocol I").<sup>225</sup> Protocol I, however, does not reflect general state practice.<sup>226</sup>

Despite the absence of comprehensive rules, three general principles of humanitarian law should govern the Coalition's enforcement of no-fly zones. First, customary international law permits attacks on targets of military importance wherever they are located.<sup>227</sup> Second, civilians may not be the target of direct attack.<sup>228</sup> Third, the possible loss of civilian lives must be considered in determining whether to attack.<sup>229</sup>

The 1907 Fourth Hague Convention ("Hague IV"), to which all of the Coalition members are parties, prohibits the bombardment of undefended targets.<sup>230</sup> The 1907 Ninth Hague Convention ("Hague IX") introduced the principle that the legitimacy of a target depends on the extent to which it "could be utilized for the needs of" the enemy.<sup>231</sup> This principle, though first stated in a treaty on naval bombardment, now reflects customary international law that governs targeting in general and replaces the defended-undefended test.<sup>232</sup>

223. DOCUMENTS ON THE LAWS OF WAR, *supra* note 202, at 122.

224. *Id.* at 459-60.

225. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Aug. 12, 1949, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 202, at 389-446 [hereinafter Protocol I].

226. Parks, *supra* note 220, at 224 (stating that the drafters of Protocol I mistakenly endeavored to resurrect the failed provisions of the 1923 Hague Air Rules and that it is unlikely that its efforts to regulate the conduct of hostilities will meet with any greater degree of success than did the 1923 Hague Air Rules).

227. *Id.* at 18.

228. OPPENHEIM, *supra* note 19, at 524; Parks, *supra* note 220, at 31, 55; Fenrick, *supra* note 220, at 93-94.

229. Parks, *supra* note 229, at 45.

230. Annex to the Convention Regulations Respecting the Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 22, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 202, at 52; SPAIGHT, *supra* note 67, at 221.

231. Convention (IX) Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, art. 2, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 202, at 95 [hereinafter Hague Convention IX]; see Paul Whitcomb Williams, *Legitimate Targets in Aerial Bombardment*, 23 AM. J. INT'L L. 570, 571 (1929).

232. Fenrick, *supra* note 220, at 93-94; Parks, *supra* note 220, at 177; Williams, *supra* note 229, at 573.

Ironically, the Hague Rules and Protocol I, which generally do not reflect customary international law, expressly prohibit direct attacks on civilians, whereas treaties applicable to Coalition enforcers do not.<sup>233</sup> Hague IV provides only that “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited.”<sup>234</sup> Geneva IV states that protected persons “shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof,” but applies only to those “in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”<sup>235</sup> Nevertheless, state practice indicates that direct attacks on civilians are contrary to customary international law.<sup>236</sup>

The third principle, consideration of potential civilian casualties, is difficult to state with precision. Customary international law accepts the inevitability of civilian casualties in armed conflict.<sup>237</sup> Humanitarian principles, however, require that civilians be immune from being the targets of direct attacks during armed conflict.<sup>238</sup> International law demands more than mere absence of intent to attack civilians; it requires states to consider the fate of civilians when deciding on the means and method of attack.<sup>239</sup>

Commentators have described this principle as proportionality,<sup>240</sup> or “ordinary care” to avoid civilian casualties.<sup>241</sup> Modern

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233. Article 22 of the Hague Rules provides: “Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants is prohibited.” Hague Rules, art. 22, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 202, at 126. Protocol I provides: “The civilian population as such, as well as individual civilians, shall not be the object of attack.” Protocol I, art. 51(2), reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 202, at 415.

234. Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 22, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 202, at 52. Protocol I reiterates this prohibition. Protocol I, art. 35, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 202, at 409.

235. Geneva Convention IV, arts. 4, 27, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 202, at 273-74, 284.

236. William J. Fenrick, *Legal Aspects of Targeting in the Law of Naval Warfare*, 28 CAN. Y.B. INT’L L. 238, 239 (1991).

237. Hague Convention IX imposes no liability for “unavoidable” civilian damage. Hague Convention IX, art. 2, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 202, at 95. One commentator suggests that such “unavoidable” damage is an acceptable consequence of war. Fenrick, *supra* note 220, at 92.

238. *Id.* at 93.

239. *Id.*

240. *Id.* at 94.

241. Parks, *supra* note 220, at 31.



humanitarian law requires parties to a military conflict to consider potential civilian casualties that may result from an attack on a military target.<sup>242</sup> It urges the planner to forgo a particular method of attack if it results in a direct attack on civilians.<sup>243</sup> Therefore, pursuant to this principle, the propriety and perhaps even the legality of the attack are brought into question if civilian casualties exceed the military benefit gained.

#### a. Aerial Combat

Coalition aircraft have enforced the Iraqi no-fly zones by shooting down Iraqi warplanes that have penetrated them.<sup>244</sup> These actions do not violate any laws of war; during armed conflict, military aircraft are always legitimate targets for attack.<sup>245</sup> Furthermore, as long as a military attack does not affect civilian aircraft, any force used to overcome military aircraft is legal.<sup>246</sup>

The Coalition's approach toward "medical aircraft" in the no-fly zones complied with humanitarian law. Military action by the Coalition to force Iraqi compliance with the no-fly zone constitutes "armed conflict" between states, triggering the provisions of the Geneva Conventions<sup>247</sup> that protect medical aircraft.<sup>248</sup> En-

242. Compare Fenrick, *supra* note 220, at 94, 125 (stating that regardless of whether proportionality is customary law, it is the necessary balancing step between the rule permitting attacks on military objectives and the rule prohibiting direct attacks on civilians) with Parks, *supra* note 220, at 168, 173 (stating that, while proportionality is not customary law, it is "a part of the law of war"). See also Williams, *supra* note 229, at 571 (arguing for a "double test" of military expediency balanced with humanitarian interests).

243. Fenrick, *supra* note 220, at 94.

244. Michael R. Gordon, *U.S. Shoots Down an Iraqi Warplane In No-Flight Zone*, N.Y. TIMES, Dec. 28, 1992, at A1, A11 [hereinafter Gordon, *U.S. Shoots Down*]; Michael R. Gordon, *Bush Launches Missile Attack On A Baghdad Industrial Park As Washington Greets Clinton*, N.Y. TIMES, Jan. 18, 1993, at A8 [hereinafter Gordon, *Bush Launches*]. In one "friendly-fire" incident, U.S. jets, enforcing the northern zone, shot down two U.S. helicopters mistaken for Iraqi helicopters. Michael R. Gordon, *U.S. Jets Over Iraq Attack Own Helicopters In Error*, N.Y. TIMES, Apr. 15, 1994, at A1.

245. INTERNATIONAL LAW: THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, *supra* note 68, ¶ 4-1; Parks, *supra* note 220, at 177.

246. Parks, *supra* note 220, at 170.

247. Geneva Convention IV, art. 2, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 202, at 272-73.

248. "Medical aircraft . . . shall not be attacked . . . while flying at heights, times and on routes specifically agreed upon between the belligerent concerned." Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 36, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 202, at 184.

forcement of the no-fly zones may not include attacks on designated medical aircraft flying over the zones pursuant to authorized flight plans.<sup>249</sup> Medical aircraft, however, may not fly over enemy territory without prior agreement.<sup>250</sup> The fact that Iraqi medical aircraft flying over the no-fly zones do not actually fly over "enemy territory" raises the question of whether this prohibition applies.

Military commanders always have the right to establish "restriction zones" around their forces.<sup>251</sup> If any aircraft approaches or enters these zones without permission, military commanders may shoot down these aircraft, with or without warning.<sup>252</sup> Regardless of the legality of the zones, Iraq must take heed for the safety of medical aircraft entering the zones. In any case, the Coalition has exceeded its responsibility in this area, allowing an Iraqi helicopter to rescue a downed pilot in the southern zone.<sup>253</sup>

#### b. Attacks On Anti-aircraft Defenses

The Coalition attacked Iraqi anti-aircraft batteries and radar that fired upon or illuminated Coalition aircraft.<sup>254</sup> Anti-aircraft batteries are legitimate targets in combat zones.<sup>255</sup> Some of these attacks may have resulted in civilian casualties, bringing into play the principles of targeting that protect civilians. Nevertheless,

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249. *Id.*

250. "Unless agreed otherwise, flights over enemy or enemy occupied territory are prohibited." *Id.*

251. SPAIGHT, *supra* note 67, at 400-01.

252. INTERNATIONAL LAW: THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, *supra* note 68, at 4-1, 4-2, 4-7 n.20.

253. Gordon, *U.S. Shoots Down*, *supra* note 242, at A1, A11.

254. Gordon, *Bush Launches*, *supra* note 242, at A8; Michael R. Gordon, *U.S. Leads Further Attacks On Iraqi Antiaircraft Sites; Admits Its Missile Hit Hotel*, N.Y. TIMES, Jan. 19, 1993, A1, A8 [hereinafter Gordon, *U.S. Leads*]; Michael R. Gordon, *Under Standing Orders, U.S. Jets Hit Iraq: Radar Seen As Threat*, N.Y. TIMES, Jan. 22, 1993, at A1, A6; Elaine Sciolino, *New Iraqi Site Raided As White House Vows Firmness*, N.Y. TIMES, Jan. 23, 1993, at L3; Michael R. Gordon, *U.S. Plane Bombs on Iraqi Gun Position*, N.Y. TIMES, Jan. 24, 1993, at L14; Eric Schmitt, *Iraqi Gunners Fire On American Jets In North, U.S. Says*, N.Y. TIMES, Apr. 10, 1993, at A1, A5; Douglas Jehl, *U.S. Jet Patrolling Iraq Fires Missile at Artillery Site*, N.Y. TIMES, June 30, 1993, at A3; Stephen Engelberg, *Another U.S. Jet on Patrol Fires at Iraqi Antiaircraft Battery*, July 26, 1993, N.Y. TIMES at A6; Eric Schmitt, *U.S. Bombs Iraqis For Firing At Jets*, N.Y. TIMES, Aug. 20, 1993, at A8.

255. See INTERNATIONAL LAW: THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, *supra* note 68, at 4-1 (stating that attacks on missile batteries are legal outside neutral zones).

the attacks are legal because they meet the tests of military necessity and consideration of civilian casualties.

The mere presence of civilians in the vicinity of a military target does not immunize that target from attack.<sup>256</sup> Moreover, responsibility for civilian deaths resulting from those attacks rests upon Iraq, which has the primary responsibility to protect its civilians under customary international law.<sup>257</sup>

Even under the more demanding standards of Protocol I, attacks on anti-aircraft defenses would be legal. Protocol I prohibits "indiscriminate attacks." This provision may not apply to an attack on a single battery because Protocol I defines an "indiscriminate attack" as one "which treats as a single military objective a number of clearly separated and distinct military objectives."<sup>258</sup> Attacks on sparsely populated areas would not be affected by this provision because indiscriminate attacks only include attacks directed at targets "located in a city, town, village, or other area containing a similar concentration of civilian or civilian objects."<sup>259</sup>

Assuming the provisions apply, the attacks on the batteries would be legal under Protocol I. Attacks on anti-aircraft batteries provide enforcers of air exclusion zones with definite and measurable advantages because such attacks enable the enforcers to protect themselves and, at the same time, ensure that the inviolability of the zone is directly proportional to the ability of the defender to attack aircraft. The resulting civilian casualties do not rise to the level of "excessive," which one commentator defines as "as much as or more than severe,"<sup>260</sup> or "indiscriminate"<sup>261</sup> has been defined as causing "considerable and widespread incidental damage to the civilian population," out of proportion to the military objective gained.<sup>262</sup> Moreover, anti-aircraft defenses may be attacked regardless of their stage of operation because they are always a military target and potentially adversarial.

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256. "The presence of a protected person may not be used to render certain points or areas immune from military operations." Geneva Convention IV art. 28, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 202, at 283.

257. Parks, *supra* note 220, at 112.

258. Protocol I art. 51, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 202, at 416.

259. *Id.*

260. Fenrick, *supra* note 220, at 111.

261. SPAIGHT, *supra* note 67, at 230, 277.

262. *Id.*

If imposition and enforcement of the Iraqi no-fly zones were not supported by international law, attacks on Coalition aircraft would still be lawful exercises of the right to self-defense.<sup>263</sup> If the zones were legal, Iraqi resistance would violate the dictate of the Security Council. Regardless of the status of the no-fly zones, however, the means and methods employed by the Iraqis in their resistance to the zones must be examined according to the laws of war.<sup>264</sup>

The Iraqi attacks on Coalition aircraft are perfectly legal as a matter of humanitarian law. Military aircraft are always legitimate targets of attack. Should the Iraqi political and military leaders be tried before a war crimes tribunal, they would not be convicted of war crimes as a result of those attacks.

## 2. Naval Bombardment: The Zaafaraniya Cruise Missile Attack

On January 17, 1993, the United States launched more than forty Tomahawk cruise missiles from ships in the Persian Gulf in an attack on a suspected weapons factory eight miles southeast of Baghdad.<sup>265</sup> One missile slammed into a Baghdad hotel, killing three civilians.<sup>266</sup> The United States claimed that the missile that killed the Baghdad civilians had been shot down by Iraqi anti-aircraft fire as it was passing over Baghdad on its way to the Zaafaraniya complex and that the explosion was caused by the missile's fuel.<sup>267</sup> Iraq charged that the Al Rashid Hotel was the missile's target and that the missile detonated upon impact.<sup>268</sup>

### a. Law Applicable to the Coalition

A factory is a military objective and is, therefore, a legitimate target for naval bombardment under Hague IX and customary

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263. States may fire upon intentional military intruders who fly into sovereign airspace without warning and without request to land. See Phelps, *supra* note 108, at 292.

264. One commentator suggests that the existence of the no-fly zones is an indication that Iraq and the Coalition are still at war. See Kahn, *supra* note 185, at 425.

265. Gordon, *Bush Launches*, *supra* note 242, at A8. The attack coincided with attacks on surface-to-air missile batteries and radar in the northern zone that fired upon or illuminated Coalition aircraft. *Id.*

266. Gordon, *U.S. Leads*, *supra* note 252, at A1, A8.

267. *Id.*; Eric Schmitt, *Path of U.S. Missiles Brings Debate About Their Ability*, N.Y. TIMES, Jan. 19, 1993, at A8. At least one commentator notes that, according to humanitarian law, attackers are not to be held responsible for deaths to civilians caused by their government's defense efforts. See Parks, *supra* note 220, at 177.

268. *Baghdad Again Feels War*, N.Y. TIMES, Jan. 18, 1993, at A8.

international law. Nevertheless, the manner of attack by the United States undermines the legality of the attack.

In a purely military sense, the attack did not relate to the enforcement of the no-fly zones. The factory was outside both no-fly zones and had no military impact on the Coalition's ability to enforce the zones.<sup>269</sup> Moreover, the circumstances surrounding the factory had more to do with the inspection regime than the no-fly zones.<sup>270</sup>

U.S. efforts to force compliance with the inspection regime were imperceptibly linked with its efforts to enforce the no-fly zones, however. Iraq's interference with the activities of United Nations weapons inspectors coincided with attacks on Coalition aircraft by anti-aircraft batteries stationed within the zones.<sup>271</sup>

The United States claimed that the attack was part of a demonstration of its commitment to force Iraqi compliance with Security Council resolutions.<sup>272</sup> The failure to distinguish between enforcement of the inspections regime and the no-fly zones suggests that, politically, the attack was meant to both goals. Indeed, the Zaafaraniya attack occurred only days after a Coalition attack on anti-aircraft batteries in the southern zone that hit only half their targets. That performance was widely viewed as a demonstration of the Coalition's limitations and of Iraq's ability to violate the no-fly zones.<sup>273</sup> The Zaafaraniya attack was part of a strategy designed to enforce the no-fly zones, in addition to its other goals.<sup>274</sup>

269. The United States claimed that the factory was part of Iraq's nuclear weapons program; Iraq said it produced molds and dies. Gordon, *supra* note 242, at A8; Gordon, *U.S. Leads, supra* note 252, at A1, A8.

270. After the attack by journalists, some international jurists expressed their view that the United States had the authority under Security Council Resolutions 707 and 715 to attack the Zaafaraniya site. Paul Lewis, *U.S. Is Broadening Enforcement Role*, N.Y. TIMES, Jan. 18, 1993, at A8.

271. Michael R. Gordon, *Iraq Refuses to Assure the Safety Of Inspectors' Flights in South*, N.Y. TIMES, Jan. 17, 1993, at A1.

272. *Id.*

273. Ironically, the attack may have had a political effect opposite of the effect that was intended. Previously-united international and Coalition support for military action against Iraq suffered a setback after the attack. Russia and France expressed concern over the death of civilians; Russia called for a special meeting of the Security Council. Paul Lewis, *U.S.-Led Raids On Iraq Strain Unity of Gulf War Coalition*, N.Y. TIMES, Jan. 20, 1993, at A1, A10. The Arab league expressed its regret about the escalation of violence. Youssef M. Ibrahim, *Arabs Protesting Attacks On Iraq*, N.Y. TIMES, Jan. 20, 1993, at A11.

274. See Michael R. Gordon, *Raids On Iraq: Few Choices For Clinton*, N.Y. TIMES, Jan. 21, 1993, at A10.

*b. A Protocol I Analysis*

Under Protocol I, the legality of the Zaafaraniya attack would be suspect. Protocol I requires that military planners

take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimizing, incidental loss of civilian life, injury to civilians, and damage to civilian objects; and refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians . . . which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>275</sup>

An analysis under these provisions raises two concerns. First, the United States sent its cruise missiles over Baghdad even though the Zaafaraniya factory was eight miles south of the city. This path was not the only one available. If the missiles were sent over uninhabited territory, however, the accuracy of the attack would have been diminished.<sup>276</sup> Although the destruction of the hotel was caused by anti-aircraft fire, it could have been caused by a malfunctioning missile.<sup>277</sup>

U.S. commanders had to consider the risk posed to Baghdad civilians by the flight path<sup>278</sup> and the importance of destroying the Zaafaraniya factory.<sup>279</sup> The fact that an alternate, militarily-feasible flight path to the Zaafaraniya factory existed signifies that the damage caused by the hit at the Al Rashid was avoidable.

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275. Protocol I art. 57, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 202, at 420.

276. Tomahawk cruise missiles are guided by comparison of on-board digital maps and photographs with the terrain of their flight paths. Their most favorable routes are urban settings. The variable altitude readings of buildings are easier for the missile to follow than are flat, featureless territory, such as the alternate route to the factory. Schmitt, *supra* note 265, at A8.

277. See D.P. O'Connell, *The Legality of Naval Cruise Missiles*, 66 AM. J. INT'L L. 785, 794 (1972) (stating that cruise missiles pose a threat to civilians that imposes a responsibility upon attackers to exercise "maximum restraint" to minimize civilian exposure and raises the question of liability under international law in the case of casualty to innocent bystanders).

278. The Al Rashid missile was almost certainly shot down by Iraqi anti-aircraft fire, a predictable risk to military planners; missile malfunction also poses a risk to the civilian population. For example, one of the missiles targeted at Zaafaraniya malfunctioned and fell into the sea. See Schmitt, *supra* note 265, at A8.

279. U.S. officials recognized the decreased risk to civilians posed by a south and west route to Zaafaraniya but claimed that the attack's overall accuracy outweighed the risk to civilians. Some experts, including military experts, stated that convenience of guidance motivated the planners' choice and that the Baghdad route was a mistake. *Id.*

Second, while customary law recognizes that military advantage may result from attacks with political or psychological effect,<sup>280</sup> Protocol I requires consideration of the "direct and concrete military advantage" alone.<sup>281</sup> The principal advantage of the attack was political, and it resulted in civilian casualties; thus, its legality is suspect if the Protocol I standard is applied.

The strict military advantage gained by destruction of the factory alone was negligible. U.S. Defense Secretary Richard B. Cheney stated that Iraq's overall military structure had been badly damaged during the war and that sanctions imposed by the Security Council had limited Iraq's ability to develop weapons of mass destruction.<sup>282</sup> Under a Protocol I analysis, the risk to civilians could outweigh the strict military advantage gained by the attack.

On the other hand, an analysis applying Protocol I may legitimize the attack. The operative term in the balancing test is "excessive." If "excessive" is defined to mean "as much as or more than severe," the attack does not violate even this stricter standard. The loss of several civilians, while unfortunate and undesirable in human terms, cannot be considered "excessive."

Even the possibility of illegality under Protocol I demonstrates the weakness of the treaty as a standard for humanitarian law. By placing civilians in the path of an attack, the attacker may violate humanitarian law. Because humanitarian law serves to protect civilians, the result of the Zafaraniya attack is adverse to that goal.

### B. Enforcement in Bosnia

In April 1993, aircraft from the United States, France, and the Netherlands began enforcing the Bosnian no-fly zone on behalf of NATO, the Security Council's enforcement agent.<sup>283</sup> Article 103

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280. For examples of lawful attacks, particularly for a comparison with the 1986 U.S. attack on Libya, whose effect was not strictly military, see Parks, *supra* note 220, at 141-43. *But see* SPAIGHT, *supra* note 67, at 277 (arguing that bombing for "moral effect" alone is illegal).

281. Protocol I art. 57, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 202, at 420.

282. The U.S. Government, however, claimed that the site's potential for the manufacture of weapons justified the raid. *Id.*

283. Alan Cowell, *NATO Jets Start to Enforce Ban on Illegal Bosnia Flights*, N.Y. TIMES, Apr. 13, 1993, at A8.

of the Charter exempts Member Nations from their treaty obligations "in the event of a conflict between the obligations of the Members of the United Nations Charter . . . and their obligations under any other international agreement."<sup>284</sup> Therefore, if the Security Council calls on the Member Nation to take action that would violate a provision of an international humanitarian law treaty to which the Member is a party, the Member's obligation to carry out that action should trump its obligation under that treaty. The Security Council, however, authorized NATO to enforce the no-fly zone without giving specific instructions as to how to enforce it.<sup>285</sup> Arguably, therefore, the limitations imposed by the aforementioned treaties and customary international law may govern the states' actions to enforce the zone.

The rules of engagement governing NATO's enforcement of the Bosnian no-fly zone permit firing upon military aircraft violators only after repeated warnings are ignored.<sup>286</sup> These rules are consistent with customary international law's treatment of unintentional military intruders in sovereign airspace in peacetime.<sup>287</sup> This approach indicates that the Security Council does not view itself as a party to the conflict.<sup>288</sup>

The limitations on NATO enforcement are politically motivated, not legally based.<sup>289</sup> These motivations result in the virtual non-enforcement of the no-fly zone.<sup>290</sup> The rationale behind the establishment and enforcement of the Bosnian zone may provide a basis for the expansion of the rules of engagement based on the principle of military necessity.<sup>291</sup> One of the original goals of the

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284. U.N. CHARTER art. 103.

285. Lewis, *supra* note 40, at A3.

286. Gordon, *supra* note 135, at A8.

287. See Phelps, *supra* note 108, at 276.

288. The principle that civilian aircraft should not be shot down is consistent with customary international law on peacetime intrusion. *Id.*

289. The no-fly zone itself contemplated more of a political than a military effect. Lewis, *supra* note 43, at A3.

290. In February 1994, NATO shot down aircraft that violated the no-fly zone. Michael R. Gordon, *NATO Craft Down 4 Serb Warplanes Attacking Bosnia*, N.Y. TIMES, Mar. 1, 1994, at A1. This incident, however, was an exception, as hundreds of previous violations went unpunished. Chuck Sudetic, *Tough Calls: Enforcing a Flight Ban Over Bosnia*, N.Y. TIMES, July 12, 1993, at A8.

291. Earlier proposals for the enforcement of the zone, in fact, involved more aggressive rules of engagement, including shooting down violators and bombing Serbian aircraft on the ground. Michael R. Gordon, *Bush Would Use Force to Ban Serbs' War Flights*, N.Y. TIMES, Oct. 3, 1992, at L1, L5; William E. Schmidt, *Britain Wary of Using*



zone was to help provide a more secure environment for the delivery of humanitarian assistance.<sup>292</sup> The United Nations has periodically suspended the humanitarian airlift due to the risk imposed upon military transports from ground attack.<sup>293</sup> Some of that risk results from the use of anti-aircraft fire.<sup>294</sup> This risk justifies attacks on anti-aircraft defense in a fashion similar to the proposed arguments that justify the enforcement of the Iraqi no-fly zone.

In March 1993, a United Nations helicopter evacuation of wounded civilians from a besieged town in eastern Bosnia was interrupted by artillery fire on the landing site.<sup>295</sup> British helicopters brought in to evacuate the wounded from the attack were fired upon by snipers.<sup>296</sup> These actions clearly posed a threat to United Nations aircraft in Bosnian airspace and frustrated the intent of the no-fly zone itself. This threat provided an additional justification for expanding the rules of engagement. The enforcement authority, as demonstrated by the model of Coalition enforcement in Iraq, would apply to attacks on all of these targets.

The Zaaferaniya attack demonstrated that the principle of military necessity may justify an attack that serves a political purpose. This principle could be used in Bosnia to expand the rules of engagement to include targets not logically linked to the enforcement of a no-fly zone. These targets might include military supply depots, command centers, or artillery sites, whose destruction may increase respect for the no-fly zones.<sup>297</sup>

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*U.S. Air Power in Bosnia*, N.Y. TIMES, Oct. 5, 1992, at A13. By late 1994, NATO acted contrary to its restrictive rules of engagement, requesting that the Security Council amend its mandate to permit wider targeting. Roger Cohen, *NATO Requests a Broader Right to Attack Targets in Bosnia*, N.Y. TIMES, Oct. 11, 1994, at A8.

292. Lewis, *supra* note 1.

293. See, e.g., John F. Burns, *Besieged Bosnians Facing A New Peril As U.N. Aid Dries Up*, N.Y. TIMES, Apr. 12, 1993, at A1.

294. *Id.*

295. Two civilians were killed, and two Canadian peacekeepers wounded. John F. Burns, *Shelling Grounds Bosnia Evacuation*, N.Y. TIMES, Mar. 25, 1993, at A3.

296. United Nations officials said the helicopters were "deliberately targeted." *Id.*

297. The establishment of the United Nations "safe areas" in Bosnia and their protection by NATO aircraft made expansion of the no-fly zone enforcement rules unnecessary for this goal. Paul Lewis, *U.N. Is Authorizing Allied Airstrikes Against The Serbs*, N.Y. TIMES, June 5, 1993, at A1, A6.

## V. CONCLUSION

While military strategists may prefer to model future no-fly zones after those established over Iraq, the Bosnian no-fly zone offers a better model for legal imposition and enforcement authorization. The experience of the Bosnian no-fly zone demonstrates that the imposition and enforcement of this zone constitutes a legally justifiable exercise of United Nations' power under international law. The Security Council properly determined that a threat of international peace existed and that the establishment of the Bosnian no-fly zone was necessary to maintain the peace. NATO realized that imposition and enforcement of this no-fly zone required the approval of the Security Council and waited for this authorization.

In contrast, legal justification for imposition and enforcement of the Iraqi no-fly zones has no basis in any resolution adopted by the Security Council. While the Iraqi no-fly zones have achieved significant political, military, and humanitarian goals, their imposition and enforcement cannot be justified under existing international law. Rather, the Iraqi no-fly zones constituted an illegal deprivation of Iraqi territorial sovereignty by the Coalition.

The imposition and enforcement of no-fly zones represent both a breakthrough in international law and a powerful tool in political-military strategy. Due to their unique characteristics and capabilities, states will most certainly employ no-fly zones in the future. Clearly-established rules governing the imposition and enforcement of no-fly zones must be developed and acknowledged to ensure their effective and controlled use in the future.

