Is there a Legal Basis for the Air Strikes Against Iraq?

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The strikes by United States and British aircraft on 16 February 2001 against targets in Iraq, including some near Baghdad, have attracted much media attention but were part of a wider ongoing campaign that has been dubbed the silent air war. Since the end of “Operation Desert Storm” in early 1991, there have been several major air operations, notably in January 1993, September 1996 and December 1998. In addition, there have been numerous limited operations by United States and United Kingdom aircraft against a variety of targets in Iraq.

The reasons for these air operations are twofold. They are designed to enforce no-fly zones in northern and southern Iraq imposed by France, the United Kingdom and the United States in April 1991 and August 1992. These no-fly zones serve the purpose of protecting the civilian population in these areas, notably Kurdish and Shiite minorities. The second reason is to force compliance by Iraq with the terms of the cease-fire of 3 April 1991, in particular to secure cooperation with the weapons inspection system established by Security Council Resolution 687 of that date.

The justifications put forward for these air strikes usually follow three types of arguments. The military operations are said to be a legitimate exercise of the right to self-defence to ward off Iraqi anti-aircraft batteries. They are said to be authorized, at least implicitly, by Security Council resolutions. In the absence of a specific authorization by the Security Council to use force, they are said to be necessary to implement Security Council resolutions or to enforce humanitarian and other principles contained in the United Nations Charter.

Legitimate self-defence by aircraft operating over foreign territory would require a legal justification for these operations. In the case of the no-fly zones this means that there must be a legal basis for the establishment and enforcement of these zones. Since there is obviously no consent by the territorial State, this justification must be sought in Security Council Resolutions. The Security Council has never imposed or authorized these no-fly zones explicitly. Therefore, a justification is construed from a combination of Security Council Resolutions 688 and 678. Resolution 688 of 5 April 1991 condemns the repression of the Iraqi civilian population and states that the consequences of this repression threaten international

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peace and security. It also appeals to Member States to contribute to humanitarian relief efforts. But it contains no authorization to use military force. In fact, its preamble reaffirms the sovereignty, territorial integrity and political independence of Iraq.

Resolution 678 of 29 November 1990 was adopted to provide the legal basis for the liberation of Kuwait from Iraqi occupation. It authorized Member States 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. The formula “use all necessary means” is commonly understood to include the use of military force. Resolution 688 is subsequent to Resolution 660 and might therefore be embraced by the reference to subsequent relevant resolutions. The broad purpose of Resolution 678, to restore international peace and security in the area, might be seen to include the protection of essential human rights in Iraq.

A closer examination of the two Resolutions and the circumstances of their adoption make this argument less than convincing. Resolution 678 was adopted for the clear purpose of putting an end to the military occupation of Kuwait. The “subsequent relevant resolutions”, mentioned there, are identified elsewhere in the Resolution as dealing with withdrawal from Kuwait and reaching up to and including Resolution 677. Resolution 688 contains no reference to Resolution 678, a fact that is significant in light of the Security Council's practice to list earlier relevant resolutions. The construction of an implicit and tacit authorization to use military force is also made implausible by the Security Council's practice to express such authorizations unequivocally in other cases. These unequivocal decisions have included the imposition of a no-fly zone in Bosnia through Resolution 781(1992). In addition, Resolution 678 has been overtaken by Resolution 687 establishing a cease-fire. It is not plausible to argue that Resolution 678 gave a license to use military force for the indefinite future and for matters not envisaged in the original resolution.

Military action to secure compliance by Iraq with the weapons inspection system imposed by Resolution 687 is based on the legal argument that Iraq's obstruction constitutes a material breach of the cease-fire imposed by that Resolution. The Security Council itself has found Iraq to be in blatant violation of the terms of the cease-fire and has threatened severe consequences. It is argued that, therefore, Iraq's opponents in the preceding hostilities of 1991 have the right to regard the cease-fire as suspended and to resume military action. In addition, it is argued that under these circumstances Resolution 678, which granted the original authorization to take military action against Iraq, may be regarded as revived and as furnishing continuing authority to take military action.