# LAW and FORCE in the NEW INTERNATIONAL ORDER


edited by LORI FISLER DAMROSCH
& DAVID J. SCHEFFER

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Cover photo: Members of the Security Council vote to adopt Resolution No. 678 (November 29, 1990) authorizing the use of "all necessary means" to enforce relevant Security Council resolutions against Iraq unless Iraq fully implements them by January 15, 1991 (United Nations photo 177113, by Milton Grant)



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# Law and Force in the New International Order

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# Preface

The end of the Cold War has focused new attention on international law, especially in areas that previously seemed to elude legal control. During the long decades when the United States and the Soviet Union were constantly struggling through proxy wars, covert activities, and projections of power around the globe, many questioned whether international law could ever be brought to bear to regulate such behavior. And if the superpowers were acting in many respects as if law had little relevance to their activities, it was hardly surprising that other actors questioned its relevance as well.

Momentous events of recent years have shown the tremendous potential for developing and applying international law, even in the area that has always presented the greatest challenge—the use of force. When the Iraqi army invaded and occupied Kuwait in August of 1990, the United States and the Soviet Union together with other major powers took a united position on the relevance of international law, its normative content, and its enforceability through decisions of the U.N. Security Council. This was the first time since the adoption of the U.N. Charter in 1945 that the five permanent members had acted in concert to enforce the international law governing the use of force against an aggressor state.

The groundwork for many of the recent changes in the outlook for international law was laid by changes in the long-held positions of the Soviet Union with respect to both law and foreign policy. Among the initiatives launched by Mikhail Gorbachev was the idea of the primacy of law over politics, in the international sphere as well as domestically. This idea formed one of the cornerstones of the "new political thinking" that has dominated Soviet foreign policy in recent years.

To American international lawyers, the idea that law should govern foreign relations was not a new one. On the contrary, U.S. leaders had pressed for this idea beginning in the late nineteenth century, though not always consistently. And there were many occasions when the actions of the U.S. government seemed out of compliance with the rules of law that the United States itself had promoted. On such occasions, the claim that law should not bind one superpower alone was frequently heard.

By the end of the 1980s, many American and Soviet international lawyers seemed at least to be speaking the same language about the non-use of force to achieve ideological aims. The Soviet Union had definitively repudiated the Brezhnev Doctrine—the argument that had been put forward in 1968 to justify the invasion of Czechoslovakia in the interests

of the preservation of socialism and the promotion of class interests. The Soviet parliament had condemned both that invasion and the 1979 invasion of Afghanistan as violations of international law, thus bringing the Soviet view in line with long-held Western positions. The Reagan Doctrine—which at its core sanctioned U.S. military support for insurgencies against totalitarian governments being supported with arms from the Soviet Union—was not officially repudiated by the Bush administration, but the doctrine became increasingly irrelevant to U.S. foreign policy as Soviet expansionism contracted and the regional conflicts of the 1980s moved toward peaceful resolution. Yet in December of 1989 the United States invaded Panama, putting forth claims that bore at least some similarity to the discredited Brezhnev Doctrine. Could military force be applied for the sake of democracy, when its application for the preservation of socialism was thoroughly rejected? And in the Soviet Union, the central government's use of force to confront independence movements within some of its own republics raised fresh concerns that the Brezhnev Doctrine had risen from the dead to haunt national and subnational groups struggling to assert sovereignty.

These issues and many more bearing upon the relationship of international law and the use of force following the Cold War were the focus of a joint U.S.-Soviet Conference on International Law and the Non-Use of Force held in Washington, D.C., on October 4-6, 1990. The conference was organized by the American Society of International Law and supported by the Ford Foundation. Approximately 100 international lawyers, scholars, government officials, and practitioners attended the conference. Leading authorities on international law in the United States and the Soviet Union delivered papers and commentaries on a wide spectrum of issues relating to the relationship between international law and the application of armed force to achieve political, military, economic, or humanitarian objectives.

The present volume is based on the conference. It constitutes the first published result of a collaborative effort by U.S. and Soviet experts to rethink international law in light of new political conditions. Special attention is given to the Iraq-Kuwait crisis, which was in progress at the time these papers were in preparation.

Part One focuses on the law of self-defense. Abram Chayes argues that the requirements of collective security can qualify the right of collective self-defense and that the Iraq-Kuwait crisis proved the merit of placing some limitations on the right of self-defense in deference to the primary responsibility of the Security Council when it is taking measures to deal with a situation involving use of force. Rein Mullerson, a Soviet scholar, points out how both the Soviet Union and the United States, as well as many other states, have made exaggerated and unfounded claims of self-defense. He believes that the end of the Cold War offers an

opportunity to limit such elastic interpretations, including in situations involving indirect aggression. Michael Reisman believes that the United Nations is not yet an autonomous actor capable of implementing an effective collective security system. In his view, the real challenge facing the new international order is to clarify those policies and contingent events that legitimize unilateral uses of force. Genuine self-determination, Reisman writes, has become the basic postulate of political legitimacy and thus its advancement may justify the unilateral use of force. The commentaries by Richard N. Gardner and David B. Rivkin, Jr., that conclude Part One criticize the Chayes thesis on the relationship between U.N. action and unilateral actions by states; they also address other issues concerning the use of force in self-defense.

Part Two examines collective security through the United Nations, with particular focus again on the Iraq-Kuwait crisis. Oscar Schachter surveys uses of force authorized by the United Nations and regional organizations, including armed force as an enforcement measure taken by the Security Council under Chapter VII of the U.N. Charter or by regional bodies, self-defense measures approved by the United Nations, U.N. peacekeeping forces, and joint action by the five permanent members of the Security Council. Schachter construes Chapter VII as enabling the Security Council to exercise considerable discretion in authorizing military force. Nikolai Krylov of the Soviet Union offers several proposals for strengthening the U.N. collective security system, including the deployment of peacekeeping forces on territory threatened by external aggression. In his commentary, David J. Scheffer examines the relationship between collective security and collective self-defense and argues that various provisions of Chapter VII can be interpreted with flexibility to respond to modern conflicts such as the Iraq-Kuwait crisis.

Part Three addresses four categories of the law of intervention: by invitation, against illegitimate regimes, for humanitarian purposes, and to combat international terrorism and drug trafficking. John Lawrence Hargrove presents a framework of criteria for assessing the legality of intervention by invitation. He argues that international law should permit the use of armed force in cases of internal disorder where consent is obtained from either the host government (provided it is not anti-democratic or repressive) or a dissident group with clearly democratic intentions seeking to replace a clearly anti-democratic and repressive government. Rein Mullerson of the USSR reviews cases where governments have claimed that they were invited by another government to use force on its territory and concludes that the facts relating to the external military threat as well as the character of the invitation itself are often dubious: both the USSR and the United States have made spurious or at least questionable claims of invitation. Mullerson also believes that a government intervening in cases of internal disorder bears a heavy

burden of proof that its intervention does not contradict the principles of noninterference, non-use or threat of force, or self-determination of peoples. Commentaries by Ruth Wedgwood and Benjamin Ferencz suggest ways that interventions by invitation can be brought under more meaningful legal control.

Igor I. Lukashuk of the USSR reviews the role of the United Nations in categorizing certain governments as illegitimate and accepting the principle of intervention, under certain circumstances, to change those governments. He examines intervention as a means of combatting illegitimate regimes when there have been mass and gross violations of human rights. Thomas M. Franck discusses the merits of creating a new legal entitlement that would guarantee all citizens of every state the right to participate democratically in the process of governance. Franck believes that the international community needs to create a standard of democratic legitimacy, a system of monitoring and collective enforcement mechanisms, such as denial of access to international and bilateral privileges and facilities. But in Franck's view it is premature to consider military intervention against such illegitimate regimes unless they qualify as threats to international peace and security. Commentaries by Anne-Marie Burley and Ved Nanda draw attention to the root causes of illegitimacy of regimes and to some of the inconsistencies in the practice of states taking sanctions against them.

In his chapter on humanitarian intervention, Tom J. Farer critically examines interventions to combat massive and flagrant violations of human rights. He analyzes the differing jurisprudential approaches of the classical school of international law on the one hand and the realist school on the other, concluding that the former condemns humanitarian intervention as contrary to the U.N. Charter while the latter would legitimize it. Vladimir Kartashkin of the USSR points to the international criminality of mass and flagrant human rights violations and stresses the power of the Security Council to authorize sanctions and military enforcement action to stop such violations. Commentaries by Theodor Meron and Lori Fisler Damrosch consider the possibilities for action under U.N. auspices to terminate human rights violations through military means, as well as some of the objections to such action.

Geoffrey M. Levitt explains that while forcible responses to international terrorism have required re-sculpting the classical self-defense paradigm, the use of force to combat international drug trafficking requires an entirely new legal foundation. Yuri Kolosov of the USSR argues for limitations on the right of self-defense and calls on the U.N. Security Council to undertake collective sanctions against offending states. Commentaries by Jane E. Stromseth and John F. Murphy stress the desirability of combatting terrorism and drug trafficking through cooperative rather than forcible measures.

Part Four examines limitations and safeguards in arms control agreements. John B. Rhinelander provides an overview of existing agreements as well as those that may enter into force in the immediate future. Commentaries by John H. McNeill and Edwin Smith focus on dispute settlement under arms control agreements, as well as on the dynamic rather than static nature of arms control regimes.

In Part Five Richard B. Bilder offers a comprehensive study of judicial procedures relating to the use of force and the advantages and disadvantages of using international tribunals to resolve such cases. Bilder calls for a review of the U.S. policy in current discussions with the USSR to negotiate an exclusion of all use-of-force cases from the jurisdiction of the International Court of Justice. Stephen M. Schwebel, a judge at the Court, explains his dissent in the recent case brought by Nicaragua against the United States, in which he criticized both the Court's fact-finding in respect of the conduct of Nicaragua and its treatment of the international law concerning indirect aggression. The commentary by Gennady Danilenko of the USSR considers trends toward enhancing use of the International Court of Justice, while the commentary by Barry Carter encourages resort to other mechanisms such as arbitration.

It is hoped that the diversity of opinion expressed throughout this book will point toward a manageable synthesis of views between and among U.S. and Soviet legal scholars on how military force can and should be legally regulated in the future. For if the world that emerges from the Cold War is to evolve into a new international order—one that transcends past expectations and realities—then it will be the special responsibility of the United States and the Soviet Union to conduct their foreign relations with an enlightened, mutual understanding of the principles of international law.

*Lori Fisler Damrosch*
*David J. Scheffer*

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# Contents