

Denver Journal of International Law & Policy

Volume 20
Number 1 *Fall*

Article 3

January 1991

The Use of Force in the Post-Cold War Era: An Introduction

Ved P. Nanda

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

Ved P. Nanda, The Use of Force in the Post-Cold War Era: An Introduction, 20 Denv. J. Int'l L. & Pol'y 1 (1991).

This Comment is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, digitalcommons@du.edu.

The Use of Force in the Post-Cold War Era: An Introduction

Keywords

War, International Law: History, States

SYMPOSIUM: THE USE OF FORCE IN THE POST-COLD WAR ERA

The Use of Force in the Post-Cold War Era: An Introduction

VED P. NANDA*

I.

After the United Nations Security Council, acting under Chapter VII of the U.N. Charter, authorized collective measures against Iraq's invasion and annexation of Kuwait in Resolution 678,¹ the United States and the coalition troops struck Saddam Hussein's occupying forces in Iraq.² The 43-day Gulf War forced Iraq to withdraw from Kuwait and accept the terms of a permanent cease-fire arrangement.³ Since the end of the war, the United Nations has been actively engaged in the implementation of the historic Security Council Resolution 687, which in its nine-part text set out specific conditions by which international peace and security would be restored to the region.⁴

Resolution 687 is unprecedented in its reach. Under it, the Security Council demanded that Iraq and Kuwait respect the inviolability of the 1963 international boundary between them and called upon the Secre-

* Thompson G. Marsh Professor of International Law and Director, International Legal Studies Program, University of Denver College of Law. This is an adapted version of the remarks made by the author as the opening address of a regional conference of the American Society of International Law, funded by the Ford Foundation, and hosted by the International Legal Studies Program, University of Denver College of Law, at the Law School on March 15, 1991.

1. See Security Council Resolution 678, Nov. 29, 1990, *reprinted in* 29 I.L.M. 1565 (1990). For an account of U.N. action, see Ved Nanda, *The Iraqi Invasion of Kuwait — the U.N. Response*, 15 S. ILL. U.L.J. 431 (1991) [hereinafter Nanda].

2. Hostilities began on the evening of January 16, 1991. For summary statements of the representatives of Kuwait, Saudi Arabia, and the United States on the beginning of the military operations, see U.N. CHRONICLE, June 1991, at 9.

3. See *War in Persian Gulf Area Ends*, *id.* at 4.

4. Security Council Resolution 687, April 3, 1991, *reprinted in* 30 I.L.M. 847 (1991).

tary-General to help demarcate that boundary.⁵ Among other provisions, the Security Council decided that, "Iraq shall unconditionally accept the destruction, removal, or rendering harmless, under international supervision," of all its chemical and biological weapons and ballistic missiles with a range greater than 150 kilometers, and provided for the development of a plan to ensure its implementation.⁶ The Council also reaffirmed Iraq's liability "under international law for any direct loss, damage, . . . or injury to foreign governments, nationals and corporations, as a result of its unlawful invasion and occupation of Kuwait."⁷

The debate will undoubtedly continue on whether the action by the coalition forces was an international enforcement action or a collective self-defense action,⁸ whether the decision process leading to the adoption and execution of Security Council Resolution 678 was in conformity with the letter and spirit of the U.N. Charter,⁹ and what the implications of the Security Council decisions are for future action.¹⁰

My purpose here is not to enter this important debate but to make some preliminary observations on the subject of this conference, namely, the use of force in the post-cold war era.

II.

By all accounts the process of ending the cold war has not only earnestly begun but has gathered considerable momentum. Consider the dynamics of economic, political and social changes sweeping the erstwhile Eastern bloc states. The transformation of societies in Central and Eastern Europe, independence of the Baltic Republics, and the disintegration of centralized authority and control of the federal government in the Soviet Union and the evolving relationships between and among the other Republics there, are unambiguous indicators of a historic change. The Warsaw Pact is extinct, NATO is seeking a reorientation and a fresh mandate, bipolarity has ended, Europe has a new persona, and the forces of democratization, liberalization, and privatization are auguring a new era in East-West relations. This post-cold war environment presents a unique opportunity for revisiting the existing norms on the use of force in the international arena.

The new era holds promise for the establishment of what President

5. See *id.*, Part A, at 849.

6. See *id.*, Part C, at 850-51.

7. See *id.*, Part E, at 852.

8. See Eugene Rostow, *Until What? Enforcement Action or Collective Self-Defense?*, 85 AM. J. INT'L L. 506 (1991). See also LAW AND FORCE IN THE NEW INTERNATIONAL ORDER (Lori F. Damrosch & David J. Scheffer eds. 1991).

9. See Burns Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 AM. J. INT'L L. 516 (1991).

10. See Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 2 (1991). See also Agora, *The Gulf Crisis in International and Foreign Relations Law*, *id.* at 63.

Bush calls "a new world order." In his 1991 address on the State of the Union, the President explained that at stake in the Gulf War was the "big idea" of such an order, "where diverse nations are drawn together in common cause to achieve the universal aspirations of mankind — peace and security, freedom, and the rule of law."¹¹

In the same address, after predicting that the coalition forces "will succeed in the Gulf," he suggested that when they did, "the world community will have sent an enduring warning to any dictator or despot, present or future, who contemplates . . . aggression."¹² He continued: "The world can, therefore, seize this opportunity to fulfill the long-held promise of a new world order, where brutality will go unrewarded and aggression will meet collective resistance."¹³

There are legitimate questions about the meaning and content of the new world order, and as to how new it is, and what is new about it.¹⁴ It is, however, fair to conclude from President Bush's statements that the new world order would be built on the foundation of the rule of law and a regime of collective resistance to deter aggression, and if deterrence fails, collective measures to resist aggression and restore international peace and security.

The initial United Nations response to the Gulf Crisis was marked by a resolute stand of the Security Council against Iraq's aggression. The Council acted within six hours after the invasion on August 2, 1990, and adopted a resolution, by a vote of 14 to 0, with Yemen abstaining, condemning the Iraqi invasion and demanding an unconditional and immediate withdrawal of Iraqi forces from Kuwait.¹⁵ The Security Council acted collectively, in a manner the U.N. founders had prescribed in the Charter and had envisaged that it would act for the maintenance of international peace and security. Its next response was four days later, with the imposition of a sweeping sanctions regime against Iraq, including an arms and trade ban.¹⁶ The Council decided to establish a sanctions committee to monitor the implementation of the resolution. Again, no Council member voted against the resolution, although Cuba and Yemen abstained, and the vote was 13 to none.

When several more Security Council resolutions failed to bring about a change in Iraq's aggressive and intransigent policies in the Gulf, the Council on November 29, 1990, after lengthy deliberations, adopted a resolution authorizing states to use force in order to implement its resolu-

11. George Bush, *Address Before a Joint Session of the Congress on the State of the Union*, 27 WKLY. COMP. PRESIDENTIAL DOCS., Jan 29, 1991, at 90.

12. *Id.* at 95.

13. *Id.*

14. See, e.g., *Symposium: What's New About the New World Order?*, 15 FLETCHER FORUM OF WORLD AFF. 1 (Summer 1991); Louis Sohn, *How New is the New International Legal Order?*, 20 DENV. J. INT'L L. & POL'Y (1992).

15. See Nanda, *supra* note 1, at 434-35.

16. See *id.* at 435-36.

tions. It gave Iraq "one final opportunity, as a pause of good will," to comply fully with its resolutions by January 15, 1991. If Iraq failed to comply, the Council authorized states cooperating with the Government of Kuwait "to use all necessary means to uphold and implement the Security Council . . . [r]esolutions and to restore international peace and security in the area."¹⁷

When the coalition forces struck on January 16, 1991, it was not a Security Council action undertaken pursuant to Article 42 after the determination by the Council that the measures it had taken under Articles 40 and 41 against Iraq had proven inadequate. As a highly regarded former U.N. official has noted, the United States assumed the leadership role during the Gulf crisis in exploring a "parallel operation" to that of the Security Council for the protection of Saudi Arabia.¹⁸ Among others, Professor Richard Falk has criticized the Security Council for its refusal "to control the United States and the coalition, allowing the U.N. to become formally associated with waging unrestricted warfare" in the Gulf.¹⁹

The *Report of the U.N. Secretary-General on the Work of the Organization*, issued in September 1991, offers some pertinent observations on the U.N. action in the Gulf crisis:

Another important aspect is that the enforcement action was not carried out exactly in the form foreseen by Articles 42 *et sequentia* of Chapter VII. Instead, the Council authorized the use of force on a national and coalition basis. In the circumstances and given the costs imposed and capabilities demanded by modern warfare, the arrangement seemed unavoidable. However, the experience of operations in the Gulf suggests the need for a collective reflection on questions relating to the future use of the powers vested in the Security Council under Chapter VII.

In order to preclude controversy, these questions should include the mechanisms required for the Council to satisfy itself that the rule of proportionality in the employment of armed force is observed and the rules of humanitarian law applicable in armed conflicts are complied with. Moreover, careful thought will have to be given to ensuring that the application of Chapter VII measures is not perceived to be overextended. In today's conditions of economic interdependence, the effect of the imposition of comprehensive economic sanctions on third States that are economic partners of the offender State requires that Article 50 of the Charter be supplemented by appropriate agreements creating obligations to assist concretely the disadvantaged third State or States. The human effect of sanctions on the population of an offending State, if it lacks the political means to bring about a reversal

17. *Id.* at 440. See generally *id.* at 436-40.

18. See Brian Urquhart, *Learning from the Gulf*, N.Y. REVIEW OF BOOKS, March 7, 1991, at 34.

19. Richard Falk, *Reflections on the Gulf War Experience: Force and War in the United Nations System* 22 (manuscript dated May 28, 1991, on record at the offices of the DENV. J. INT'L L. & POL'Y).

of the policy that gives rise to the offence, will also need to be carefully borne in mind. As I stated at meetings of the Security Council, enforcement is a collective engagement, which requires a discipline all its own.²⁰

This criticism of the United Nations action notwithstanding, the fact remains that during the early phases of the Gulf Crisis, the Security Council demonstrated the capacity and willingness to take collective measures for repelling aggression. The post-cold war era offers the opportunity to realize the United Nations' potential for the maintenance of international peace and security. This would undoubtedly include the use of collective measures as envisaged under Chapter VII, especially the establishment of a Military Staff Committee and standing forces under U.N. command for peacekeeping and even enforcement purposes.²¹ But, even more important, effective mechanisms will be instituted, including the enhanced use of the authority of the Secretary-General's office in the engagement of preventive diplomacy and toward the promotion, utilization and further strengthening of the available means for pacific settlement of international disputes.

This new opportunity can be distinguished from the period following the Second World War, which was also popularly regarded as the dawn of a new era,²² in that the present period results from superpower cooperation during a period of peace: cooperation was chosen as a preferred policy by the two superpowers rather than as a last resort forced upon them by a struggle against a common threat. Viewed in this light, it is not surprising that the new global order after World War II failed due to lack of cooperation since the common threat had been removed.²³

Despite the fact that the prospects for the present era of cooperation seem brighter, it is foolhardy to assume that there remain no severe threats to global peace and security. For example, ethnic and regional conflicts, especially claims for self-determination, are major potential threats.

III.

The papers published in this symposium issue are the product of a Regional Conference of the American Society of International Law, entitled "Use of Force in the Post-Cold War Era," hosted by the International Legal Studies Program of the University of Denver College of Law and funded by the Ford Foundation. The Conference was held on March 15, 1991 at the College of Law. The subject areas discussed ranged from

20. U.N. Doc. A/46/1, at 607 (Sept. 6, 1991).

21. See, e.g., Bruce Russett & James S. Sutterlin, *The U.N. in a New World Order*, 70 *FOREIGN AFF.* 69, 83 (Spring 1991).

22. See Brian Urquhart, *Problems and Prospects of the United Nations*, 44 *INT'L J.* 803, 804 (Autumn 1989).

23. See *id.* at 804-05.

humanitarian intervention, self-defense, and self-determination, to the use of the United Nations and other multilateral machinery to limit and regulate the unauthorized use of force in the international arena.

Professor Kevin Ryan discusses "humanitarian intervention," that is, intervention by a state in the territory of another state on humanitarian grounds. The ostensible purpose of such interventions is to bring a halt to egregious violations of human rights. He analyzes the problems inherent in the application of this doctrine, concluding with the warning that "nations must be extremely wary of using force, regardless of how legitimate that use may seem to be." This warning is given because of the strict prohibition under international law on use of force against the territorial integrity and political independence of another state²⁴ and the inadequacies of the existing mechanisms for international fact-finding. Professor Ryan acknowledges, however, the primacy of human rights under contemporary international law and the duty of states under Articles 55 and 56 to promote respect for international human rights.

Of particular concern to Professor Ryan is intervention on behalf of a people claiming self-determination. He contends that the doctrine of self-determination is "extremely complicated." Nevertheless, once the recommended criteria are met, he would consider humanitarian intervention legitimate even in cases involving the claim of self-determination, preferring that such intervention be undertaken multilaterally.

Professor David Penna inquires into the United Nations' role in security. He discusses the evolution of the self-defense exception to the rule against the use of force in the cold war setting. He then presents alternative systems of self-defense, including their logistical ramifications, and analyzes the Gulf conflict. Last, he explores the application of the self-defense doctrine in the new post-cold war system.

In examining the United Nations' response to the invasion of Kuwait, Professor Penna studies the various resolutions of the Security Council, their ambiguities and uncertainties, and the interpretation of these resolutions by the coalition partners. He discusses how various states determined whether the criteria of necessity and proportionality in judging the permissibility of the use of force were met. In this context, he examines the differentiation between state actions in collective self-defense under Article 51 and U.N. enforcement actions under Chapter VII.

Professor Penna concludes by stating that the powers given to states under Article 51 and the power of the Security Council to "maintain international peace and security" became "fused" — or "confused" — in the Kuwait crisis. The implications, he finds, are for an increased role for the Security Council in self-defense determinations and for states in collective self-defense actions. Ultimately he concludes that the Kuwait cri-

24. See U.N. CHARTER art. 2(4), which embodies the authoritative community proscription of "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."

sis signals the globalization of the security system, a promising evolution.

Dr. Charles Milligan studies the option of economic sanctions against Iraq as a viable alternative to the use of force in the Gulf crisis. He begins by detailing the U.N. Charter's provisions which call for restrained measures in the enforcement of Security Council actions. He notes that force is only to be used as a last resort, and only within limitations placed upon it under the authorizing resolution and provisions of other articles of the U.N. Charter.

Next Dr. Milligan describes hindrances to the effectiveness of the U.N., stating that the cold war made impossible the cooperation between states necessary for progress under the U.N. However, he lauds the U.N. peace-keeping forces as being of tremendous potential in the avoidance of massive hostilities.

Dr. Milligan then examines the costs of the Gulf war, including the financial loss, loss of life, the plight of refugees, degradation of the environment, and the plunder of resources. By contrast he studies the nonviolent alternatives, principally the use of economic sanctions, including the disadvantages of sanctions and why such alternatives are politically unpopular. He concludes by noting a double standard between the pronouncements of peaceful settlement of disputes by the United States for other nations and its handling of its own conflicts. In the end, he emphasizes: "There are times in life when destructive force must be used. But this should be a *last* resort in international relations, and if we are ever to have a livable world it is imperative that we learn better ways to use alternatives to force."

Professor James Nafziger presents a comprehensive study of what he calls, "the battle-strewn terrain of self-determination and humanitarian intervention." His goal is to "highlight the aridity of those rights." He accomplishes this goal admirably by providing an appropriate historical context and by analyzing these concepts in light of state practice, authoritative pronouncements of regional and international intergovernmental organizations, judicial decisions, and publicists' writings.

After demonstrating the normative ambiguities inherent in these rights and raising pertinent questions related to the difficulty of applying these concepts in a changing world, Professor Nafziger suggests that "the new reality of a community of power" demands that multilateral decisions be taken pertaining to the application of these concepts. Specifically, he illustrates how this might occur by reference to the United Nations and the European Community. He concludes:

Perhaps the day will arrive when unilateral self-determination and humanitarian intervention will have become largely obsolete. Instead, turning these terms around, the global community will rely on international and regional organizations to make binding humanitarian determinations about self-determination by states as well as foreign interventions. We may learn to rely, after so many battles, on the better angels of our nature

IV.

This symposium issue has discussed only selected aspects of the use of force. The message is clear: the post-cold war era promises the regulation of the unauthorized use of force by multilateral means. Another message which is implicit even if not well-defined in these papers is that states share a common interest in voluntarily exercising principled constraints on the use of force. Whether and when this new world order is established, where the rule of law and not the rule of the jungle prevails, will be determined by the vision and will of the major actors in the international arena. Consequently, the primary responsibility for the establishment of such order lies with the permanent members of the Security Council and the Secretary-General of the United Nations.