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The Commander in Chief and United Nations Charter Article 43: A Case of Irreconcilable Differences?

by James W. Houck*

I. Introduction

The United Nations was founded on the vision that the international community could create a system of international collective security to prevent the type of aggression that had driven the world to two world wars in less than 30 years. While the Cold War left this vision unfulfilled, the sudden collapse of Soviet communism gave the world a renewed hope that the United Nations might fulfill its promise as a guarantor of the peace.¹ The end of the Cold War created new hopes within the United States as well. After nearly 50 years of global vigilance, the U.S. electorate seemed no longer inclined to assume the role of “global policeman” and hoped instead to concentrate on internal renewal. At the same time, however, a realization existed that isolationism would be impossible and that the United States must somehow remain internationally engaged.²

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Given the wide support for increased U.S. participation in the U.N. expressed by key members of the new Clinton Administration, it came as no surprise that one of the President’s first national security priorities was to consider how the United States might contribute to the U.N.’s increasingly necessary military capability. What followed was an extensive review within the National Security Council, the Department of State, and the Department of Defense. This policy review seriously considered a number of initiatives designed to enhance the U.S./U.N. security partnership. However, it ultimately collided with the reality of the U.N.’s difficulties in Somalia and the former Yugoslavia. Intense Congressional criticism of the U.N.’s performance in both conflicts ultimately caused the Administration to reconsider its emerging policy in what is likely to be a dramatically more conservative approach.

One of the casualties of the Administration’s lowered expectations is the revival of a long dormant provision of the U.N. Charter, Article 43. Article 43 was designed to give the U.N. Security Council the

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6. See U.N. Charter art. 43. Article 43 provides:

1. 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, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. 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

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6. See U.N. Charter art. 43. Article 43 provides:

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CURRNT File. Secretary of State Christopher stated:

America cannot be the world’s policeman. We cannot be responsible for settling every dispute or answering every alarm. We are indispensable, but we certainly must not be indiscriminate. . . . Our imperative is to develop international means to contain and, more important, to prevent these conflicts before they erupt. Here it is critical that we use the United Nations in the manner its founders intended, and there is high new hope that this may take place.

Id.
ability to respond quickly to aggression through a deployment of U.N. armed forces. Having anticipated the difficulty of creating a standing U.N. army, the U.N.'s founders, including the United States, chose instead to rely on a provision that called for a network of standing agreements between the Security Council and member states. This provision was designed to guarantee the Security Council immediate access to military forces, facilities, and other assistance. Because of Cold War enmity within the Security Council, however, these "Article 43 agreements" were never concluded.

The end of the Cold War stirred new interest in Article 43 within the U.N. and the U.S. Congress. While the resurrection of Article 43 had little support within the Bush Administration, the incoming Clinton Administration put U.N. observers on notice that Article 43 was a viable policy option that would receive thorough consideration. For instance, Madeleine Albright, at her confirmation hearing for appointment as U.S. Ambassador to the United Nations, stated,

We need to really explore and think about how we use the various options that we have for fulfilling the promise of Article 43 . . . . I think that we ought to give life to Article 43 and I think that what we need to do is to make sure that our constitutional prerogatives are properly preserved and that we in fact see how we can create a way that the United Nations can have some teeth.

A year later, however, the bloom is off the Article 43 rose. The Administration has stopped well short of what Article 43 prescribes, and it appears, at least for the short term, that Article 43 is destined to remain a dead letter.

Article 43's demise within an initially sympathetic administration can no doubt be attributed to a number of policy considerations, one of which may be a more restrained and realistic view of U.N. capabilities. While this and other concerns have dominated recent public discussions, less attention has been given to the legal consequences that might arise from the conclusion of an Article 43 agreement. Given the President's role as Commander in Chief of the Nation's armed forces, perhaps the foremost legal question concerns the extent to which the conclusion of an Article 43 agreement might limit the President's authority to deploy military forces in furtherance of U.S. foreign policy objectives. If Article 43 limits the Commander in Chief's power in any significant way, it seems unlikely that any administration will support an Article 43 revival.

There are several aspects to this question. In the international sphere, what legal obligations will an Article 43 agreement create toward the U.N.? In the domestic sphere, how will an Article 43 agreement affect the war powers balance between Congress and the President? Most importantly, how should the answers to these legal questions ultimately influence future policy choices?

Part II of this paper provides an overview of the U.N. Charter's framework for collective security, with a particular focus on the Charter's provision for the creation, command, and control of U.N. military forces. During the Cold War, this framework fell into desuetude, and U.N. forces that participated in enforcement actions, such as Korea and Iraq, as well as peacekeeping operations, were created in ad hoc fashion outside the Charter's framework. Part III examines this development and considers how the conclusion of an Article 43 agreement might alter the President's authority under international law to pursue U.S. interests while participating in a U.N. operation.

International law is but one source of possible limitation on the President's authority to commit U.S. forces. Congress plays a central...

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revival of Article 43 would be a policy option under consideration by the Clinton Administration).

Finally, among the witnesses at the September 1992 Hearing, see Senate Article 43 Hearing, supra note 8, was current Director of Central Intelligence, R. James Woolsey, who appeared then in his capacity as chairman of a United Nations Association-United States of America (UNA-USA) report endorsing a revival of Article 43 agreements. See UNITED NATIONS ASSOCIATION-UNITED STATES OF AMERICA, PARTNERS FOR PEACE (1992) [hereinafter UNA-USA report].
role as well. Part IV considers how the conclusion of an Article 43 agreement might alter the existing war powers balance between the President and Congress. Part V evaluates Article 43's future in light of the international and domestic legal consequences associated with the conclusion of an Article 43 agreement.

II. The Charter Framework for Creating U.N. Military Forces

The U.N. Charter was designed in 1945 to create a system of international collective security so that no state could ever again drive the world to war. The U.N. Security Council was meant to be the bulwark of this commitment and was given primary responsibility for the "maintenance of international peace and security." Chapter VI of the Charter gave the Security Council a mandate to pursue the "peaceful settlement of disputes," but if these efforts failed, the signatories to the U.N. Charter expected that the Security Council would resort to its authority under Chapter VII.

Chapter VII gives the Security Council a range of options for taking action against any "threat to the peace, breach of the peace, or act of aggression." The Security Council may call on disputants to comply with "provisional measures," such as negotiations or a cease-fire. Alternatively, the Security Council may make non-binding recommendations to member states on action they might take to restrain disputants, or the Security Council may render binding decisions on the proper course of action to be taken under Articles 41 or 42.

Article 41 authorizes the Security Council to enforce its decisions with non-forcible measures, such as the severance of diplomatic relations and the interruption of commerce or communications with an offending state. If the Security Council determines that measures under Article 41 have been or will be inadequate, it may, under Article 42, take whatever military action "may be necessary to maintain or restore international peace and security."

To facilitate application of military force authorized under Article 42, the Charter drafters gave the Security Council authority to establish a United Nations armed force. This authority, found in Article 43, was

11. Id. ch. VI.
12. Id. art. 39.
13. Id. art. 40.
14. Id. art. 39.
15. U.N. CHARTER art. 41.
16. Id. art. 42.
designed to allow the Security Council to assemble a force quickly without incurring the burden of supporting a standing United Nations army.\textsuperscript{17} The founders authorized the Security Council to enter into "special agreements" with member states that would guarantee the availability of "armed forces, assistance, and facilities, including rights of passage."\textsuperscript{18} The force would be composed of national contingents and would be available at the Security Council's call.\textsuperscript{19} The agreements would specify the "number and type of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided."\textsuperscript{20} The Security Council was given the task of negotiating these special agreements "as soon as possible."\textsuperscript{21} For assistance in this task, the Security Council turned to the Military Staff Committee, a committee composed of the Chiefs-of-Staff or their representatives and the five permanent members of the Security Council.\textsuperscript{22}

The Military Staff Committee quickly discovered the difficulty involved in creating a military force in the midst of growing Cold War suspicions. In April 1947, the Military Staff Committee submitted a divided report to the Security Council that reflected disagreement over the size of the proposed standby forces, the relative contributions to be required of or allotted to each member, the location of the forces during peacetime, basing agreements, logistics arrangements, and other details.\textsuperscript{23} Not surprisingly, the Security Council was also unable to find common ground, and key portions of the Military Staff Committee's report were never acted upon.\textsuperscript{24} The Military Staff Committee has done nothing substantive since 1947, and no further effort has ever been made to negotiate Article 43 agreements.\textsuperscript{25}

\textsuperscript{17} RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER 258 (1958).
\textsuperscript{18} U.N. CHARTER art. 43, para. 1.
\textsuperscript{19} Id.
\textsuperscript{20} Id., para. 2.
\textsuperscript{21} Id., para. 3.
\textsuperscript{22} Id. art. 47. In February 1946, the Security Council directed the Military Staff Committee to examine Article 43 from a military perspective and to submit the results of its study and any recommendations to the Security Council. See 1946-47 U.N.Y.B. 423, U.N. Sales No. 1947.1.18.
\textsuperscript{24} FINN SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR 32 (1966).
\textsuperscript{25} RALPH M. GOLDMAN, IS IT TIME TO REVIVE THE MILITARY STAFF COMMITTEE? (Center for the Study of Armament and Disarmament, Occasional Paper Series No. 19, 1990).
III. The President's Authority over U.S. Forces Participating in U.N. Operations

The Security Council's failure to make progress on Article 43 negotiations meant that the plan for a U.N. "on call" armed force went unfulfilled. Nonetheless, the Security Council has managed to field U.N. forces during the ensuing decades without the benefit of Article 43 agreements. For instance, in the late 1940s, the U.N. began creating peacekeeping forces. In addition, the Security Council authorized U.N. forces to take enforcement action against North Korea following its invasion of the Republic of Korea in 1950 and against Iraq in 1990. Finally, in December 1992, the Security Council acted under Chapter VII to authorize the U.S. led multinational humanitarian intervention in Somalia.

While the U.N. forces participating in these operations have not been "Article 43 forces," the fact that they have evolved outside the Charter's framework has not prevented the development of a common understanding between states and the U.N. regarding obligations of states toward these forces. Of particular interest is the extent to which, in the absence of an Article 43 agreement, the United States is legally obligated to participate in a U.N. operation and the extent to which the President maintains control over U.S. forces once such forces are committed to a U.N. operation. Because the United States played a central role in the Korean, the Persian Gulf, and the Somali actions, each provides insight into the President's international obligations.

A. The President's Authority in the Absence of Article 43 Agreements

Soon after North Korea crossed the 38th Parallel into South Korea in June 1950, the U.N. Security Council, in the absence of the Soviet representative, responded by passing Security Council Resolution 83. This Resolution \"[r]ecommend[ed] that all Members providing military forces and other assistance \ldots make such forces and other assistance available to a unified command under the United States.\" Forty years

26. The original function of peacekeeping was the monitoring of truces and cease-fire agreements by unarmed U.N. military observers. See Brian Urquhart, Beyond the 'Sheriff's Posse,' 32 SURVIVAL 196, 196 (1990). Peacekeeping forces were first introduced during the Suez Crisis of 1956, and have historically been characterized by deployments only with the consent of all parties and conditioned upon the non-use of force by the peacekeepers, except in self-defense. Id.
later, following Iraq’s invasion of Kuwait, Security Council Resolution 678 “[a]uthorized Member States co-operating with the Government of Kuwait . . . to use all necessary means . . . to restore international peace and security in the area.”31 In both the Korean and Persian Gulf conflicts, the United States provided the majority of forces as well as the theater commander.32 In addition, both forces took strategic direction from the President of the United States rather than the U.N. Security Council.33

Though these operations were conducted under authority of the U.N., neither the United States nor any other U.N. member was legally obligated to participate. By “authorizing” member states to participate in the Persian Gulf operation, the Security Council left participation to member state discretion.34 While use of the term “recommendation” in the Korean resolution might imply a greater obligation, in fact, the legal effect was the same.35 The only manner in which the Security Council can create an obligation binding on its members is to “decide” on a particular course of action.36 During the Persian Gulf War, for example, when the U.N. “decided” to impose sanctions on Iraq,37 states were obligated to comply with the sanctions.38 In the absence of a “decision,” however, member states have no legal obligation to participate in a U.N. action.

While this distinction between binding decisions and other forms of Security Council authorization is well accepted, the consensus today is that even a Security Council “decision” is insufficient to require states to provide their military forces to a U.N. operation. Absent an Article 43 agreement, states have a right to not contribute forces to U.N.

33. Bowett, supra note 32, at 42. “Strategic direction” is defined as the “translation of . . . political directives into military terms.” Id. at 359. See also U.S. DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR I-9 (1992).
35. Id.
36. U.N. CHARTER art. 25. Article 25 provides that “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” Id.
38. Schachter, supra note 34, at 68.
operations.\(^3^9\) This right to not contribute survives even if a state makes an initial contribution to an operation. Thus, while forces contributed to an operation are obligated to obey the orders of the U.N. commander so long as they participate in the operation,\(^4^0\) nothing prevents a contributing state from withdrawing its forces from the operation.\(^4^1\)

These principles are important for understanding the U.S. obligation to the ongoing United Nations Operation in Somalia (UNOSOM). In December 1992, the Security Council accepted an offer by the United States to establish an operation to create a secure environment for the delivery of humanitarian relief to Somalia.\(^4^2\) Unlike the Korean and Persian Gulf conflicts, during which the President exercised complete control over the U.S. forces participating within the U.N. force, the Security Council was successful in gaining a measure of control over the Somalia operation. The Security Council insisted on participating in the creation of the unified command, appointing an ad hoc commission composed of Security Council members to report on conduct of the operation and, most importantly, on retaining control over the timing of the operation’s termination.\(^4^3\)

While the Security Council’s control over the Somalia operation was unprecedented and put important political restraints on the President, it had no impact on the President’s legal right to withdraw U.S. forces from Somalia. Absent an Article 43 agreement, the Security Council had no legal authority to insist on continued U.S. participation. Were the President to withdraw U.S. forces, the United States would be situated no differently than it would have been had it elected not to participate at all.

The U.S. legal posture did not change when several thousand U.S. logistics personnel were placed under U.N. “command” for the second phase of the UNOSOM operation (UNOSOM II) in May of 1993.\(^4^4\) The U.S. logistics forces reported directly to the UNOSOM Deputy Commander, U.S. Army Major General Thomas Montgomery, who, in

39. See, e.g., SEYERSTED, supra note 24, at 161-162; Schachter, supra note 34, at 71.
40. See SEYERSTED, supra note 24, at 163 (States providing forces to a U.N. command have “thereby ceded their organic jurisdiction over them.”); ROBERT C.R. SIEKMANN, NATIONAL CONTINGENTS IN UNITED NATIONS PEACE-KEEPING FORCES 119 (1991) (U.N. member states relinquish their “power of disposal” over their forces when they place units under a U.N. peacekeeping command.).
41. See BOWETT, supra note 32, at 379; SIEKMANN, supra note 40, at 187.
42. S.C. Res. 794, supra note 29.
43. Id.
addition to serving as UNOSOM Deputy Commander, serves as the Commander, U.S. Forces Somalia, with a direct chain of command to the Commander in Chief, U.S. Central Command. Even if U.S. forces are solely under U.N. command, which they are not in Somalia, no international legal obligation currently prevents the President from removing the forces from a U.N. command should he desire.

B. The Potential Limiting Effects of an Article 43 Agreement

The President has complete freedom under international law, in the absence of Article 43 agreements, to commit forces to U.N. operations, as well as to withdraw them. How would this change under an Article 43 agreement?

1. The Potential Loss of Control Over Unacceptable Missions.—An Article 43 agreement would legally require the United States to provide forces to the Security Council upon its request. Forces provided to the


46. See supra note 36 and accompanying text. U.S. obligations under mutual security treaties do not require the United States to use military force to fulfill treaty obligations. The two that come closest are the Inter American Treaty of Reciprocal Assistance, opened for signature Sept. 2, 1947, 62 Stat. 1681, 21 U.N.T.S. 77 [hereinafter Rio Treaty] and the North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 [hereinafter NATO Treaty]. The Rio Treaty provides that "an armed attack by any State against an American State shall be considered as an attack against all... and... each one of the said Contracting Parties undertakes to assist in meeting the attack." Rio Treaty, art. 3, § 1. Article 20 of the Rio Treaty also provides, however, that "no state shall be required to use armed force without its consent." Id. art. 20. The NATO Treaty provides that in fulfilling its collective self-defense obligations under the treaty, a state shall take such action "as it deems necessary." NATO Treaty, art. 5. The commitments made in subsequent U.S. mutual security treaties are even less specific. See, e.g., Mutual Defense Treaty, Aug. 30, 1951, U.S.-Phil., 3 U.S.T. 3947, T.I.A.S. No. 2529; Multilateral Security Treaty, Sept. 1, 1951, U.S.-Austl.-N.Z., 3 U.S.T. 3420, T.I.A.S. No. 2493 (ANZUS Treaty); Southeast Asia Collective Defense Treaty and Protocol, Sept. 8, 1954, 6 U.S.T. 81, T.I.A.S. No. 3170, 209 U.N.T.S. 28 (SEATO Treaty). See also Michael J. Glennon, United States Mutual Security Treaties: The Commitment Myth, 24 COLUM. J. TRANSNAT’L L. 509, 1547 (1986): [In each of these treaties, the] United States, in its sole discretion, retained the option to do nothing. The terms of the treaties say nothing about what the United States must do if another party is attacked. They say nothing about when the United States must do it. They say nothing about how long the United States must do it. They say nothing about what the United States will take into account in determining what it will do. The treaties say nothing, in short, about any of the myriad factors essential to deciding whether the United States has honored or abandoned its treaty commitment.
Security Council would be subject to strategic direction from the Security Council and the Military Staff Committee. In addition, any U.S. combat forces provided could be placed under direct command of a U.N. commander. While each of these steps would be unprecedented, proponents of Article 43 agreements are quick to note that they are not as dramatic as they might first appear. As a permanent member of the Security Council, the United States would be able to use its veto to stop any unacceptable use of U.S. forces.

The operation of the assumed "veto-protection" is best illustrated by an example. Consider a hypothetical U.N. operation in which the Security Council called for 8,000 U.S. forces pursuant to an Article 43 agreement. If the President were concerned that such forces would be used in an unacceptable way, the United States could wield its veto-threat to ensure that the resolution authorizing the operation took these concerns into account. If the President agreed to an initial troop commitment, strategic concerns that might arise during the course of the operation could be addressed by ensuring that the operation was subject to reauthorization at appropriate intervals. In theory, this would give the United States periodic opportunities to structure the progress of the operation and to block any unacceptable changes in the original mandate.

While the "veto-protection" theory seems reasonable, reality may prove more complicated. First, the initial authorizing resolution would need to strike a careful balance between the flexibility necessary both for political consensus on the Security Council and subsequent political or operational exigencies and the precision desired by states, such as the United States, who may be interested in ensuring a degree of control over missions to which their forces are assigned. Drafting a resolution

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47. U.N. CHARTER art. 47, para. 3. Paragraph 3 provides 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. Questions relating to the command of such forces shall be worked out subsequently." Id.
48. Id.
49. As of March 2, 1993, the United States had 520 military personnel serving under U.N. command in seven different U.N. peacekeeping operations. In addition to U.N. operations, the United States has two battalions currently assigned to the multinational observers organization in the Sinai, the command of which rotates among contributing states, with the exception of the United States. During World War I and World War II, U.S. forces served under the command of non-American officers. French Field Marshal Foch commanded allied forces in World War I. In World War II, U.S. forces in Africa served under Field Marshal Montgomery. Great Britain's Lord Mountbatten also commanded allied forces fighting in the Asian continent in the China-Burma-India theatre. See supra note 46.
50. See Senate Article 43 Hearing, supra note 8, at 12 (statement of Sen. Biden); id. at 44 (statement of Robert F. Turner, Professor of History, University of Virginia).
that satisfies both of these demands would not be an easy task.\textsuperscript{51} Historically, Security Council resolutions have been extraordinarily vague.\textsuperscript{52} Unless the United States is able to persuade the Security Council to pass more precise authorizing resolutions, future resolutions will be imperfect devices for limiting the use of U.S. forces.

Additionally, reliance on the Security Council veto also would not account for objections that might arise over the tactical use of U.S. forces. Even the most competent foreign commanders will likely make judgements about the use of U.S. forces to which the United States will object. These decisions, however, would presumably be beyond the veto's reach.\textsuperscript{53}

2. Potential Restrictions on the President's Freedom to Deploy Forces.—Assuming arguendo that the veto or threat of veto provides the United States sufficient leverage against any unacceptable use of its forces, Article 43 proponents have generally neglected to address the converse issue: to what extent would an Article 43 agreement restrict the President's ability to deploy U.S. forces?

Assume, for example, that U.S. forces are assigned, under an Article 43 agreement, to the United Nations Protection Force (UNPROFOR) in the former Yugoslavia. Assume also that Serbian activity leads the President to conclude that more aggressive action against the Serbs is warranted, but that the operation's authorizing resolution does not permit such action. If a single Security Council permanent member does not share the President's desires, that member's ability to veto authorization of the desired action would force the President to forgo the action, or to pursue the action without Security Council authorization.

Presumably, there are two ways the President can proceed without Security Council authorization. First, the President might deploy a

\textsuperscript{51} See Johan J. Horst, Enhancing peace-keeping operations, 32 SURVIVAL 264, 268 (1990) (discussing the tension that exists between the interest in "high precision and clarity in order to enhance the operational security and effectiveness of the force" and the interest in "ambiguity which may provide diplomatic leeway to exert influence over subsequent developments").


Mandates tend to reflect the political play in the Security Council. Ambiguous mandates are often a sign that the great powers' perceived interests in the situation diverge, but each of the potential veto-wielders is willing to go along with the operation for the time being, so long as its duties are fudged. (footnote omitted).

\textsuperscript{53} While it might be possible to address concerns about the use of U.S. forces by insisting in the Article 43 agreement that the United States maintain command of its forces, such a demand seems contradictory to the rationale behind a U.N. force.
separate U.S. contingent not under U.N. command. While this option
would enable the United States to act without violating its obligation to
the U.N. under the Article 43 agreement, it would not enable the United
States to act without first obtaining legal justification for the independent
use of force. Without recourse to Security Council authorization, the
only legitimate international legal basis for U.S. action would be the
right to assist another state in the exercise of that state’s inherent right
of self-defense under Article 51 of the Charter. This Article provides:

Nothing in the present Charter shall impair the inherent right of
individual or collective self-defense if an armed attack occurs against
a Member of the United Nations, until the Security Council has taken
measures necessary to restore international peace and security.
Measures taken by Members in the exercise of this right of self-
defense shall be immediately reported to the Security Council and
shall not in any way affect the authority and responsibility of the
Security Council . . . to take at any time such action as it deems
necessary in order to maintain or restore international peace and
security. 54

It is unclear under Article 51, however, whether the United States
may legally intervene unilaterally in a situation in which the Security
Council is already actively engaged. 55 One could argue with little
difficulty that such intervention would undermine Security Council
authority and defeat the purpose of fielding a U.N. operation in the first
place. Assuming, however, the absence of a clear principle forbidding
such intervention, the United States would at least have a colorable legal
basis for circumventing the Security Council. If the United States were
to act under Article 51, the Security Council would have the right to
“take measures necessary to restore international peace and security,”
including passing a resolution directing the United States to cease and
desist. Of course, such a resolution would be impossible because the
United States would exercise its veto to prevent the resolution’s adoption.

While this option would appear to provide the President with a legal
basis for committing U.S. forces outside the scope of a Security Council
resolution, the President should not assume this will be a satisfactory
option in every case. Apart from the potentially adverse political

54. U.N. CHARTER art. 51 (emphasis added).
55. The Security Council has not yet encountered such a situation. Cf: U.N. CHARTER art. 53
(prohibiting a regional organization from taking enforcement action without Security Council
authorization); U.N. CHARTER art. 12 (providing that Security Council can preclude the General
Assembly from making recommendations on any “matters relative to the maintenance of international
peace and security which are being dealt with by the Security Council”).
consequences that might arise from defiance of the Security Council, the President might face several tactical problems.

First, circumstances may require an immediate U.S. response possible only with forces already on scene by virtue of their commitment to the U.N. operation. Second, the situation might require unique capabilities possessed only by the forces committed to the U.N. operation. Third, even if U.S. forces not assigned to the U.N. and possessing the requisite capabilities are available, the deployment of these additional forces might trigger domestic political and legal considerations that would not arise if the U.S. forces committed to the U.N. were merely redeployed within the theater. In any of these circumstances, the President’s only option would be to withdraw the U.S. forces from the U.N. command so that they could pursue his preferred course. This, of course, would place the United States in clear breach of its legal obligation under Article 43.

IV. The President’s Constitutional Authority to Commit U.S. Forces to U.N. Operations

In addition to creating potential limits on the President’s authority to act under international law, U.S. entry into an Article 43 agreement would raise an important constitutional question: to what extent would such an agreement alter the war powers balance between Congress and the President?

A. The President’s Authority To Commit U.S. Forces in the Absence of Article 43 Agreements

In many ways, the constitutional question regarding the President’s authority to commit U.S. forces to U.N. operations is merely a subset of the larger war powers debate that has challenged government officials, jurists, and scholars from the beginning of the Republic. Presidents have claimed broad authority to send U.S. forces into combat based on the Commander in Chief and executive powers, while advocates of a vigorous Congressional role point to constitutional grants such as the powers to declare war, raise and support armies, provide and maintain a navy, and make rules for the regulation of the armed forces. Advocates for both views have relied on a variety of historical, doctrinal, and structural arguments to support their respective positions.

Further complicating the war powers debate in the U.N. context, however, is the fact that multinational operations in which U.S. forces participate with a mandate from the world community are difficult to categorize. Are these operations "wars" or something else? Supporters of a Presidential right to commit forces to U.N. operations without Congressional approval have argued that such operations are "police actions" conducted under authority of the international community as represented by the U.N. Security Council.\textsuperscript{59} Police action theorists argue that Congress has no constitutional basis for demanding control over the President's commitment of forces to U.N. sanctioned operations.\textsuperscript{60}

The police action argument was first advanced by President Truman during the Korean conflict in 1950 when he stated that the U.S. was not at war in Korea, but was instead participating in a U.N. "police action."\textsuperscript{61} Not surprisingly, the President's supporters made no effort to outline any limit on the police action theory. So long as the Security Council authorized an operation, the President could act in support of the authorization.\textsuperscript{62} Because Congress at first supported the President's


The United Nations system is an elegant, carefully crafted instrument to make war illegal and unnecessary. . . .

The new alternative to traditional wars of self-defense is collective police actions by the members of the international community. . . .

[Global police action] will not work, however, if the design is misinterpreted as simply a continuation of that discredited old legal order it was specifically intended to replace: the unilateral war system.

\textsuperscript{60} Id. at 74:

[The police action theory] comports with the intent of the drafters of the Constitution. The purpose of the war-declaring clause was to ensure that this fateful decision did not rest with a single person. The new system vests that responsibility in the Security Council, a body where the most divergent interests and perspectives of humanity are represented and where five of fifteen members have a veto power. This Council is far less likely to be stampeded by combat fever than is Congress. See also Senate Article 43 Hearing, supra note 8, at 44 (statement of Robert F. Turner, Professor of History, University of Virginia) ("[T]he use of troops under article 43 would not be an act of war, and I think the limited power to declare 'war' is what the Founding Fathers gave to Congress.").


\textsuperscript{62} See 96 CONG. REC. 9647, 9649 (1950) (statement of Sen. Paul Douglas), quoted in Stromseth, supra note 61, at 634 ("[O]nce the United Nations called upon its members to lend military aid . . . any use of armed force by us was not an act of war, but, instead, merely the exercise of police power under international sanction.").
policy in Korea, President Truman's "police action" rationale was not initially challenged.  

Forty years later, as President Bush prepared to confront Iraq, Congress was less quiescent. As soon as the President began to assemble a force with an avowed offensive capability, legislators began asserting a Congressional right to authorize the use of offensive force. The Bush Administration responded by asserting the President's right as Commander in Chief to commit forces without Congressional authorization. In addition, the Administration suggested that a declaration of war was neither necessary nor appropriate if the United States were to participate in an "international force" operating under U.N. authorization. Ultimately, a political accommodation was reached. The President sought Congressional "support" for his prospective use of force, while Congress preserved its right to approve a resolution giving the President authority to use force.

63. Stromseth, supra note 61, at 630.
65. In response to questioning from Senator Edward Kennedy during a December 1990 hearing before the Senate Armed Services Committee, Secretary of Defense Dick Cheney outlined the Administration position:

I do not believe the President requires any additional authorization from the Congress before committing US forces to achieve our objectives in the Gulf. But there have been some 200 times, more than 200 times, in our history, when Presidents have committed U.S. forces, and on only five of those occasions was there a prior declaration of war. The President, as Commander-in-Chief, under Title II, Section 2, of the U.S. Constitution, has the authority to commit US forces.

Senate Persian Gulf Hearing, supra note 32 (statement of Dick Cheney, Secretary of Defense).
66. Id. (statement of Dick Cheney, Secretary of Defense):

Given the authorization, the vote, not authorization, but certainly the vote, by the United Nations in support of that effort, the President is within his authority at this point to carry out his responsibilities. I can think that the notion of a declaration of war, to some extent, flies in the face of what we're trying to accomplish here. What we're trying to accomplish is to marshal an international force, some 26, 27 nations having committed forces to the enterprise, working under the auspices of the United Nations Security Council. And that having put together an international venture, an international force, an international support for the proposition of using all means necessary to implement the policy of the United Nations, I'm not sure why you would want to have the United States go out unilaterally on its own and turn this into an Iraq-US war. I'm not sure that that's such a sensible policy.

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The war powers issue in a U.N. context has arisen again with the U.N.-authorized, U.S.-led intervention in Somalia and will no doubt surface if the Administration attempts to involve U.S. forces in peacekeeping in the former Yugoslavia. While it was unclear when this article went to press how use of force questions would be resolved between Congress and the President, the Iraqi and Somali experiences suggest that war powers issues in the U.N. context are far from resolved.

B. The Potential Limiting Effects of an Article 43 Agreement

How would an Article 43 agreement alter the uncertain war powers balance between Congress and the President? The Charter provides that Article 43 agreements “shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.” While not specifying what “constitutional process” is required, this provision is widely believed to have been inserted at the request of the U.S. delegation to satisfy Congressional concerns that the President might commit forces to the U.N. without consulting Congress. This view was confirmed in 1945 when Congress passed the U.N. Participation Act (UNPA), which provides, inter alia, that once the President has negotiated an Article 43 agreement with the Security Council, it must be approved by Congress. Upon Congressional approval of an Article 43 agreement, the President would require no further authorization to make available to the Security Council the forces, facilities, or assistance provided for in the agreement.

In one respect, the Article 43-activated UNPA would seem to strengthen the President’s war powers hand by providing advance

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69. U.N. CHARTER art. 43, para. 3.
70. Schachter, supra note 34, at 70.
73. Id. The current viability of the UNPA provisions is uncertain because of the subsequent enactment of the War Powers Resolution. See Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1982)). The War Powers Resolution places restrictions on the circumstances under which the President may unilaterally commit U.S. forces as well as the permissible duration of a commitment that is arguably inconsistent with the UNPA scheme. See id.

As Louis Henken, Professor Emeritus of Law, Columbia University School of Law, noted:

In the War Powers Act . . . Congress denied that the President had power to introduce forces into hostilities without authorization of Congress, but the President might well argue that as regards any U.S. contingents provided to the Security Council pursuant to an Article 43 agreement, the U.N. Participation Act provides the authorization from Congress required by the War Powers Act. On the other hand, the War Powers Act can be interpreted as superseding the authorization to the President implied in the U.N. Participation Act.

Senate Article 43 Hearing, supra note 8, at 23.
authorization to use force without the need for Congressional approval. While Article 43 forces could not be committed without a request from the Security Council, the UNPA provides for no Congressional participation in the decision to use force once such a request is made, regardless of the circumstances.  

What Congress gives, however, Congress may take away. The UNPA further provides that it should not be construed as an authorization for the President to make available to the Security Council any additional forces, facilities, or assistance not provided for in the Article 43 agreement.  

Thus, the UNPA strikes a bargain. In exchange for advance authority to use a pre-determined number of forces, the President surrenders the right to unilaterally commit forces to a U.N. operation in excess of the pre-determined limit.  

There are two reasons why the President might object to the UNPA bargain. First, the President might object to the manner in which the UNPA restricts the police action theory. Specifically, the UNPA effectively defines a police action in terms of the pre-determined Article 43 force level. The fact that past administrations may have stretched the police action theory beyond reasonable limits by attempting to apply it to offensive actions in Korea and Iraq does not invalidate the underlying police action theory. Thus, the President might argue that the judgement concerning whether a particular operation is a "police action" ought to be based on the character of the operation rather than on the size of the U.S. contribution to the operation. A comparatively large U.S. contribution to a defensive deployment or peace-keeping operation might legitimately be considered participation in a police action, whereas a smaller U.S. contribution to an offensive enforcement operation might more closely resemble a "war." The UNPA, however, is blind to these distinctions.  

74. § 6, 59 Stat. 621, 22 U.S.C. § 287d. A number of Senators argued during the debates preceding passage of the UNPA that Congressional approval of an Article 43 agreement would be a delegation of the Congressional power to declare war. See Franck & Patel, supra note 59, at 67. This position was ultimately rejected when the Senate refused to insert a provision that would require Congressional consent before any use of the forces. Id.  


76. Congress has not agreed to such an arrangement in the case of U.S. mutual security assistance treaties:  

[N]one of the treaties confers any war-making power on the President that he would not have had in its absence . . . .  

[The U.S.] negotiators wrote into the treaties the fullest measure of commitment that their domestic legal and political [system] would allow — which was zero. They rejected swift and sure deterrence in favor of the right [for Congress] to decide . . . .  

Glennon, supra note 46, at 551.  

77. The UNPA's deficiency in this regard was unintentionally illustrated by statements
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The second, perhaps more fundamental basis for Presidential objection would be that an Article 43-activated UNPA will make it more difficult to deploy forces in the manner considered most appropriate by the Commander in Chief. Again, the President might argue that the UNPA's reliance on a pre-determined force level as the outer limit of Presidential authority is arbitrary. The President has consistently objected to similar Congressional attempts to define the scope of this power, and a concession now would give Congress what it has never before achieved—a Presidential acknowledgement that the Commander in Chief power has fixed and relatively narrow limits that may be determined in advance, without reference to the facts of a particular conflict. 78

V. The President's Decision

A. Must the President Negotiate?

As the foregoing demonstrates, a variety of factors might give any President pause before entering a binding commitment with the U.N. Before considering how a President ought to weigh these factors, a preliminary question should be answered. Is the President legally bound to negotiate Article 43 agreements?

To date, Congress has made no attempt to require the President to pursue Article 43 negotiations. Indeed, it is doubtful that Congress has

made by Senator Joseph Biden during the debate preceding the Persian Gulf War. Senator Biden noted that "whereas the actions taken to date by the United States may be classified as a police action, an American-led attack on Iraq would cross the threshold into war." 137 Cong. Rec. S337 (daily ed. Jan. 12, 1991). At the time Sen. Biden spoke, the "actions taken to date" had been a deployment of well over 200,000 U.S. forces. Id. Had the initial defensive deployment been conducted under the U.N. pursuant to Article 43, the President would have been required to seek Congressional authorization once the U.S. force contribution reached its Article 43 limit. 78. See Veto of the War Powers Resolution, 1973 PUB. PAPERS 893 (statement of President Nixon); Statement on Signing S.J. Res. 159 Into Law, 19 WEEKLY COMP. PRES. DOC. 1422 (1983) (statement of President Reagan regarding the Multinational Force in Lebanon Resolution) ("I do not now and cannot cede any of the authority vested in me under the Constitution as President and as Commander in Chief of the United States Armed Forces."); Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq, 27 WEEKLY COMP. PRES. DOC. 48 (1991) (statement of President Bush) ("[M]y signing this resolution does not constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution."); see also Text of Letter from President Clinton on U.N. Efforts in Bosnia, U.S. Newswire, Apr. 14, 1993, available in LEXIS, Nexis Library, CURRENT File (text of President Clinton's first letter to Congress on war powers including a statement used by past Presidents that the letter was being provided "consistent with," as opposed to "pursuant to," the War Powers Resolution, and an assertion that forces could be deployed pursuant to the Commander in Chief power).
the power to compel Presidential negotiation. During 1992 Congressional testimony, however, Professor Louis Henkin observed that as we all know . . . Article 43 agreements between the Security Council and member States have not been negotiated, but, in my view, the failure to do so . . . has not vitiated the obligation to do so; I think there is an obligation to establish article 43 agreements . . . . In my view, the Security Council is required now to take the initiative.

. . . [W]hen the Security Council calls on member States to negotiate such agreements with the council, member States are legally obligated to negotiate those agreements in good faith . . . .

It would seem to be the duty — if not a legal obligation — of council members . . . including the United States, to see to it that the council takes the initiative to negotiate and conclude Article 43 agreements. 80

Professor Henkin makes two different points, of which only the first seems correct. If the Security Council calls on states to begin negotiations to establish Article 43 agreements, member states have an obligation to begin good faith negotiations. 81 This conclusion follows from the fact that the Security Council is ultimately responsible for the "maintenance of international peace and security" 82 and that U.N. members have agreed to carry out decisions of the Security Council. 83 Thus, if the Security Council decides that Article 43 agreements are necessary to fulfill this process, member states are obliged under the Charter to at least negotiate in good faith to conclude such agreements.

However, Professor Henkin's second suggestion—that Security Council members may be legally obligated to initiate the negotiation of Article 43 agreements—deserves closer examination. Accepting his

79. Senator Biden's resolution "urge[d]," but did not require that the President negotiate an Article 43 agreement. S.J. Res. 325, 102d Cong., 2d Sess. (1992), 138 Cong. Rec. S9853 (daily ed. July 2, 1992). See also United States v. Curtiss-Wright Export Corp., 299 U.S. at 319 ("Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."). Curtiss-Wright notwithstanding, Congress has a variety of tools for influencing the President's conduct of foreign affairs and could presumably employ these to seek Article 43 agreements if it was so inclined.
80. See Senate Article 43 Hearing, supra note 8, at 21, 22 (statement of Professor Louis Henkin, Professor Emeritus, Columbia University School of Law).
81. Id. at 43 (statement of Professor Robert F. Turner, University of Virginia) ("Professor Henkin is surely right. We have a legal duty . . . not necessarily to conclude an agreement under Article 43, but certainly to negotiate in good faith to that end.").
82. U.N. CHARTER art. 24, para. 1.
83. Id. art. 25.
conclusion, that the United States, as a member of the Security Council, assumes a share of the Security Council's legal obligations, the question is whether the Security Council has a legal obligation to initiate Article 43 negotiations.

Article 43(3) states that special agreements "shall be negotiated as soon as possible on the initiative of the Security Council." In Professor Henkin's view, though the Cold War made such negotiation impossible, it did not remove the Security Council's underlying treaty obligation. The obligation is reactivated upon removal of the condition that made previous compliance with the obligation impossible.

This conclusion is debatable. Certainly, when the Charter was signed 48 years ago, the Charter signatories expected Article 43 agreements would play a central role in the Security Council's effort to maintain international peace and security. If the current absence of Article 43 agreements defeats the object and purpose of the Charter, it would seem that Professor Henkin's conclusion is accurate. If, however, the Charter's objectives can be satisfied through other means, i.e., if Article 43 agreements are not, as the Security Council determined, a prerequisite for the Security Council's maintenance of international peace and security, the obligation to conclude Article 43 agreements may no longer exist.

In fact, there is no evidence that the absence of Article 43 agreements prevents the Security Council from fulfilling its functions. Indeed, there is considerable evidence to the contrary. Three major U.N. enforcement actions have been conducted independent of Article 43, as have a host of peacekeeping operations. Moreover, a widely accepted legal basis for these operations has evolved. When this practice is considered in light of the established principle that treaty obligations may be modified by the consensual subsequent practice of the parties, it is difficult to determine why the United States, as a Security

84. *Id.* art. 43, para. 3.
85. *See Senate Article 43 Hearing, supra* note 8, at 26 (statement of Louis Henkin, Professor Emeritus, Columbia University School of Law).
86. *See Schachter, supra* note 34, at 68-69 ("During the early years . . . it was thought that [Article 43 agreements] were a condition precedent to collective military measures undertaken by the Security Council. [However,] Article 43 agreements have not . . . been found necessary for military measures . . . ."); *see also* SEYERSTED, supra note 24, at 143; BOWETT, *supra* note 32, at 276-285.
87. The Vienna Convention on the Law of Treaties provides that state practice that establishes a consensus of the parties is a valid indication of how the treaty may be applied in the future. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331, 8 I.L.M 679. Article 31 provides:
Council member, would be obligated to pursue a revival of the Article 43 process.

B. Should the President Negotiate?

While the Security Council may not be obligated to revive the Article 43 process, Article 43 advocates will continue to argue that the Security Council should do so nonetheless and that the United States ought to assume a leadership role in this regard. While this Article has suggested several reasons for presidential caution, the President must weigh these concerns against the anticipated benefits of an Article 43 agreement.

1. Counting the Costs.—Were the U.S. to enter an Article 43 agreement with the Security Council, the President would face both international and domestic restrictions on his freedom to commit U.S. forces in furtherance of U.S. objectives. The President, as Commander in Chief, must ensure that U.S. forces are not given unacceptable missions, a risk that might increase under an Article 43 agreement. In addition, if the President commits U.S. forces to the Security Council, he runs the risk that he will be unable to employ those or other U.S. forces should the Security Council adopt a strategy the President deems too passive. In the domestic sphere, an Article 43-activated UNPA might require the President to acknowledge limitations both on the Commander in Chief power and the police action theory of U.S. participation in U.N. operations.

How significant are these concerns, and how should they affect policy? An Article 43 advocate might argue that these concerns are more theoretical than real. In the international sphere, for example, one might argue that a factual scenario sufficient to trigger an "Article 43 crisis" is sufficiently unlikely and, therefore, that it deserves little

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

Id.

88. See supra pp. 10-12.
89. See supra pp. 12-14.
90. See supra pp. 17-19.
consideration. In the remote event that such a scenario did develop, the
President's constitutional responsibilities as Commander in Chief might
indeed require the breach of an international obligation. While this
would be unfortunate, the President's obligation to fulfill a constitutional
obligation will always prevail over a countervailing treaty obligation.91
In the domestic sphere, those Article 43 advocates who acknowledge
deficiencies in the UNPA might argue that the proper policy is not to
avoid the Article 43 process, but to amend the UNPA.92

While these arguments have merit, they are not conclusive. As an
empirical matter, it is difficult to predict whether an international
scenario will ever bring on an "Article 43 crisis." To answer, however,
that the President will respond to such a crisis by breaching the United
States' international obligations begs a larger question. If the need and
ability of states to sometimes breach their Article 43 obligations is
acknowledged,93 is it sound policy to promote binding agreements in the
first place?

In the domestic sphere, it may indeed be possible to amend the
UNPA and, in so doing, codify an acceptable war powers compromise.
If the recent failed attempt to amend the War Powers Resolution is a
representative experience, however, amending the UNPA may prove a
difficult task.94

91. See Geofroy v. Riggs, 133 U.S. 258, 267 (1890) (treaty not construed to "extend so far
as to authorize what the Constitution forbids"); Reid v. Covert, 354 U.S. 1, 15-19 (1957)
(holding an executive agreement unconstitutional).

92. For one approach to amending the UNPA, see UNA-USA report, supra note 9, at 34:
The Congress might authorize an approval process in the special agreements on rapid-
deployment forces that is different from the process for the larger contingency forces.
In the case of rapid deployment forces, where speed is important, the Congress might
prefer to require that the President consult with the leadership of both of its Houses before
the U.S. Permanent Representative to the United Nations casts a vote in the Security
Council that would activate them. For the deployment of contingency forces it might —
and for any additional forces it would surely — call for due notice similar to that in the
War Powers Act or other appropriate procedure, leading to a congressional vote within
a prescribed period of time.
See also Stromseth, supra note 61, at 668-669. Professor Stromseth recommends amending the
UNPA to form a special bipartisan select committee on U.N. authorized military operations in each
House of Congress on the model of the House and Senate intelligence committees and requiring
increased Presidential consultation with these committees. Id.

93. See infra note 100.

proposal to amend the War Powers Resolution introduced, ultimately to no avail, in the wake of the
Iran-Contra affair).
2. **Weighing the Benefits.**—The putative benefits of Article 43 agreements also merit close examination. Advocates argue that Article 43 agreements would enhance the international collective security system in two ways. First, the prospect for confrontation with U.N. forces would deter potential aggressors.\(^9\) Second, for those aggressors who remained undeterred, the U.N. could mount a swift and effective response.\(^6\)

The legitimacy of these conclusions depends, to a large extent, on the certainty that forces committed in Article 43 agreements will actually be provided upon the U.N.'s call. A rational aggressor will be deterred only to the extent he is convinced that U.N. member states will comply with their agreements.\(^9\) Likewise, the effectiveness of the force, once called upon, will be directly related to the willingness of states to fulfill their obligations. Thus, the ideal situation would be to have a network of agreements backed by unequivocal commitments of support from participating states. The farther the system drifts from this paradigm, however, the less valuable the overall system is as a deterrent or rapid-response mechanism. Unfortunately for Article 43 advocates, it seems likely that any U.N. network of Article 43 agreements will fall far short of the paradigm.

During the drafting of the U.N. Charter, a number of "middle power" states led by Canada, insisted on a provision requiring the Security Council to allow member states to participate in decisions concerning the employment of contingents of that member's armed forces.\(^9\) These states wanted assurances that they would at least have some input before the Security Council could mandate the commitment of forces to an operation pursuant to an Article 43 agreement. While this right to participate does not, on its face, provide a legal right to withhold national forces from an operation if the Security Council

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95. See, e.g., UNA-USA report, supra note 9, at 30.
96. Id. at 32.
97. All deterrence arguments depend on the rationality of the aggressor. Query whether Saddam Hussein or other protagonists in current conflicts in which the U.N. is involved would have been deterred by a network of Article 43 agreements.
98. LELAND M. GOODRICH & EDVARD HAMBRO, CHARTER OF THE UNITED NATIONS 288 (1949). The concerns of the middle powers were eventually codified in Article 44 of the U.N. Charter. See U.N. Charter art. 44. Article 44 provides:
   
   When the Security Council has decided to use force it shall, before calling on a Member not represented on it to provide armed forces in fulfillment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

Id.
determines that the forces are required, it seems likely that most militarily-capable states would insist on such a right. In addition, because the Charter makes no provision for state input into decisions regarding the use of facilities within their territory and their obligation to provide other types of assistance, states will likely wish to reserve some authority over these decisions.

Without such assurances, states will presumably be reluctant to enter Article 43 agreements. This demand cannot be considered unreasonable given that U.S. advocates of Article 43 agreements consistently condition their support on the fact of the U.S. veto. Yet, if every state in the Article 43 network ultimately has the right to withdraw, what does the U.N. gain? Advocates would respond, quite fairly, that while the agreements may not guarantee availability, they at least make it more likely by creating an obligation for states to comply except in the most extreme circumstances. When compared to the current environment in which every U.N. operation must be started ab initio, the predictability and reliability gained through the Article 43 process would be a significant enhancement to the collective security system.

The above argument has considerable force. Nevertheless, if a reasonably reliable commitment of forces and facilities ultimately based only on each nation's sense of moral obligation (and self-interest) is all that Article 43 agreements provide, the President might ask whether there is another way to achieve the result without incurring the associated burdens.

3. Avoiding the Choice: Considering Possible Alternatives.—The Clinton Administration appears to have chosen to forgo the obligations inherent in Article 43 agreements and to instead pursue a comparatively ad hoc military relationship with the U.N. While this approach may provide the basis for an enduring U.S.-U.N. policy, it seems likely

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99. Richard N. Gardner, Professor of Law, Columbia University School of Law, has observed: I believe the Article 43 agreements may have to include an "opting out" provision to permit a UN member to withhold its earmarked units when it feels strong and compelling reasons for doing so. I recognize that such a provision will somewhat dilute the effectiveness of the collective security system. But most UN members not protected by the veto will not be willing to sign a blank check to send their armed forces into combat . . .

See Senate Article 43 hearing, supra note 8, at 33. See also David Boren, The World Needs an Army on Call, N.Y. TIMES, Aug. 26, 1992, at A21 ("Members of the United Nations that lack veto power in the Security Council could condition their commitment to a rapid-deployment force on the right to withdraw units for their own urgent national security interests.").

100. See GOODRICH & HAMBRO, supra note 98.

101. See supra note 50.
that the United States will eventually be required to confront the absence of an adequate U.N. security structure as well as what commitments the United States is willing to make to rectify these deficiencies. The question thus remains whether Article 43 should be the vehicle for such an effort.

Article 43 is designed to accomplish two primary objectives. First, it allows the Security Council to establish a ready security inventory of forces, facilities, and assistance upon which it may call in time of crisis. Second, it seeks to guarantee that states will comply with the Security Council’s call. As previously discussed, the second objective is certainly out of reach in the short run and perhaps in the long run as well. Thus, it would seem that the international community ought to focus on the first objective, i.e., of creating a reasonably reliable security inventory. In fact, if the pretense of creating binding legal obligations is abandoned, it might accelerate state willingness to establish a resource inventory.102

The President could play a key role in this process by encouraging the Security Council to pursue non-binding “standby agreements.” These agreements would provide a vehicle through which states would earmark forces and facilities much as they would in Article 43 agreements, but without the corresponding legal obligation. While these agreements would serve the goal of establishing a security inventory of national assets available for U.N. planning purposes, the agreements would make no attempt to bind states. When the need for forces and facilities arise, states would contribute or not contribute based on their calculation of self-interest and perceived obligation to the U.N., the same calculation they will likely make under any reasonably foreseeable Article 43 regime.

Given that the U.N., after 48 years, has yet to conclude a single Article 43 agreement, non-binding standby agreements might serve as confidence-building first steps toward more formal commitments in the future. If such an alternative were adopted, the President would have provided important leadership toward an improved collective security system without running the risk of having U.S. forces used in


The idea that the United Nations should have its own military capabilities to compel compliance with its edicts is impractical and counterproductive . . .

The compliance role is counterproductive because so long as it remains even an ultimate UN goal, some countries, including the United States, will fear the slippery slope. Accordingly, they will impede progress on less ambitious although still consequential UN plans as a hedge against sliding down the slope.
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unacceptable ways and without creating the potential for legal breaches with the Security Council.103

The pursuit of non-binding standby agreements would have domestic consequences as well. By not supporting the Article 43 negotiating process, the President would avoid entanglement in the UNPA's awkward distribution of war powers authority.104 If Congress and the President could reach a satisfactory war powers accommodation that included an amended UNPA, the President's domestic motivations for avoiding an Article 43 agreement might be eliminated. If, however, a war powers compromise is unlikely and the UNPA is not amended, the Executive Branch should hold its ground, insisting that decisions regarding the use of force continue to be made through the political process on a case by case basis.

VI. Conclusion

Given earlier pronouncements by President Clinton and members of his administration, the President now appears to have settled on a more conservative approach for building a security relationship with the U.N. In so doing, he has emphatically declined to adopt the approach of those who argue that U.S. support for the Article 43 process would serve the United States by enhancing the credibility and capability of the U.N. collective security system.

Given Congressional criticism of U.S. involvement in U.N. operations in Somalia and elsewhere, the President had little choice but to retreat from his Administration's ambitious agenda for the U.N. While policy concerns, no doubt, played the central role in the President's policy retreat, the President's choice also reflects legal self-interest. The conclusion of an Article 43 agreement might limit the President's authority to commit forces in furtherance of U.S. objectives and create the potential that foreign commanders might commit U.S. force to unacceptable missions. An Article 43 agreement would also activate provisions of the 1945 U.N. Participation Act that would place

103. In addition, the President would be making a subtle, but important, contribution to the international legal system. By refusing to support the imposition of binding legal obligations which states know in advance they may be unwilling to fulfill, the U.S. would preserve the value of those commitments to which the international community truly wishes to be bound.

104. The fact that UNPA in its current form is unsatisfactory is not to suggest that Congressional war powers should be circumvented, but only that they should not be enshrined in the UNPA's formulative fashion. Indeed, a strong case can be made that a Congressional debate and vote before hostilities will often serve the nation's interests. This may be especially true in the case of future U.N. operations, in which U.S. lives may be put at risk in conflicts where a direct U.S. interest is not immediately obvious.
objectionable constitutional limits on the President's authority to commit U.S. forces to U.N. operations.

While the Administration seems to have chosen to forgo a formal standing military relationship with the U.N., it does not appear to have abandoned its long term desire to enhance the U.N.'s collective security capability. A reasonable next step toward this goal, a step that can be undertaken without incurring the legal burdens inherent in an Article 43 agreement, would be to encourage the Security Council to negotiate non-binding "standby agreements" with militarily capable U.N. member states. Such agreements would enable the U.N. to begin developing a predictable security inventory of available forces and facilities, but would also ensure that the President maintains complete authority under international law to use U.S. forces as he deems appropriate. Likewise, the conclusion of non-binding agreements would ensure that important war powers issues are resolved through the political process rather than by the statutory formula provided in the UNPA.