SPECIAL AGREEMENTS IN THE POST-COLD WAR ERA:
REALITY'S CONFLICT WITH LEGAL THEORY

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"[T]he strong do what they can and the weak
do what they must."

Thucydides¹

INTRODUCTION

Fifty years ago,² the drafters³ of the United Nations Charter ("Charter") had noble ambitions⁴ to counteract international hostilities and foster a global environment of peace. Their firm resolve never again to see the death and destruction caused by two world wars led to the enactment of measures that they believed would create a

² The United Nations' Charter was adopted on June 26, 1945, and the U.N. recently celebrated its fiftieth anniversary. Barbara Crossette, U.N. Finds Skepticism is Eroding the Hope That is its Foundation, N.Y. Times, June 25, 1995, § 1, at 1. The U.N. has faced much criticism since its inception, and many lawyers and academicians recognized that its anniversary should mark a time when the U.N. is "re-examin[ed] and reapprais[ed]" because it "has many faults." Id.
³ Fifty nations met in San Francisco to draft the U.N. Charter. Mark W. Janis, An Introduction to International Law 196 (2d ed. 1993). The main powerhouses who had proposed the Charter at Dumbarton Oaks were the four victorious World War II Allies: the United States, the Soviet Union, Great Britain, and China. Id. France later joined these four nations to comprise the "Big Five" permanent members of the U.N. Security Council, id. at 198, the organ of the U.N. which has primary responsibility for maintaining international peace and security. U.N. Charter art. 24, ¶ 1.
⁴ See U.N. Charter pmbl. We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, have resolved to combine our efforts to accomplish these aims.

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

Id.
more effective organization than the failed League of Nations ("League"). The U.N. differed from its predecessor in two important ways. It benefited from both the membership of the United States and the Soviet Union and the U.N. Security Council's legal ability to employ designated national military contingents. The Charter architects intended Article 43 of the Charter ("Article 43") to give the organization the enforcement strength necessary to realize and enforce their goal of international peace. Despite the drafters' hopes, much contention existed among the permanent members of the Security Council over the development of Article 43 that foreshadowed the article's impotence. Although U.N. member states have engaged in military force in foreign territories "on the call" of the U.N., no government has ever entered into an Article 43 special agreement with the Security Council.

5. See Janis, supra note 3, at 196; see also infra text accompanying notes 130-41 (discussing the failure of the League).


7. The collective security provisions of the Charter to date have not functioned as the architects had envisioned originally. See discussion infra parts I.C, III.

8. Article 43 states:
   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 and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

   U.N. Charter art. 43, §§ 1-3.

9. Article 43 provides for the allocation of contingents for Security Council actions by member states and thus, enables the Security Council to have enforcement strength. Article 43 requires all U.N. member states to make forces available on the call of the Security Council and in accordance with special agreements which govern the logistics of such forces. See also Leland M. Goodrich et al., Charter of the United Nations: Commentary and Documents 316-17 (3d ed. 1969) (noting that U.N. member nations are obligated to take military action to maintain global peace and security under Article 42 of the Charter if the nations have concluded Article 43 special agreements).

10. See discussion infra part I.C.

11. See discussion infra part III (describing when American presidents used a U.N. resolution which "authorized" or "recommended" action as a pretext for military force).

The U.N. drafters also granted "veto" power to the permanent members of the Security Council, allowing any one of them unilaterally to terminate any Security Council resolution or action. This power often has resulted in a deadlock within the Security Council, especially during the Cold War, thereby inhibiting the formation of Article 43 special agreements.

The dissolution of the Soviet Union in the early 1990s and the conclusion of the Cold War renewed the hopes of many policymakers and legal theoreticians that the newly "cooperative" member states would enter into Article 43 special agreements. Recognizing the changed atmosphere in the U.N. as well as the new demands on the organization as an international arbiter of peace, Secretary General Boutros Boutros-Ghali in 1992 called for the revival of collective security and Article 43 as the U.N. founders had envisioned. Despite the termination of the ideological hostilities of the Cold War and the opportunity provided by subsequent U.N. actions in Somalia, Haiti, Turkey, and the Balkans, the Security Council has not entered into Article 43 special agreements.

13. U.N. Charter art. 27; see infra note 112 (quoting text of U.N. Charter art. 27).
14. See discussion infra part I.D (tracing the development of the veto power in the Charter).
15. See infra parts III-IV (discussing the impasse created by the veto).
17. See, e.g., William M. Evan, Now is the Time to Create a U.N. Army, Phila. Inquirer, Aug. 7, 1992, at A23 ("[N]ow, with the cold war over, the world community has a rare opportunity to create a global institution in the service of world peace."); A U.N. Army? Peace-keeping Ain’t What It Used To Be; To Do It Right Requires a Lot More Muscle, Phila. Inquirer, Feb. 21, 1993, at C4 (describing how to revive Article 43 in the post-Cold War era); Brian Urquhart, World Needs a New Mechanism to Stop Civil Wars, Star Tribune, Jan. 3, 1992, at A13 ("Perhaps, Article 43's time has now come . . ."). Compare James E. Rossman, Article 43: Arming the United Nations Security Council, 27 N.Y.U. J. Int'l L. & Pol. 227 (1994) (assuming that implementing Article 43 is realistically possible as long as the present opposition to collective military action gives way to some new "political will" favoring cooperation) with Tom Morganthau et al., Globo-Cops, Newsweek, Aug. 23, 1993, at 14, ("[A]s former State Department official John Bolton says, ‘We are the central multilateralists. The idea that there’s some collective international will out there is just fairyland stuff.’").
19. Id. ¶ 43. Boutros Boutros-Ghali stated: [T]he option of taking [military action to maintain or restore international peace and security] is essential to the credibility of the United Nations as a guarantor of international security. This will require bringing into being, through negotiations, the special agreements foreseen in Article 43 of the Charter, whereby Member States undertake to make armed forces, assistance and facilities available to the Security Council . . . not only on an ad hoc basis but on a permanent basis.

Id.
and Bosnia, however, no member state has entered into any Article 43 special agreements.\textsuperscript{20}

The common barrier to invoking Article 43 both during the Cold War and post-Cold War eras has been the doctrine of sovereignty, a principle which involves states acting independently of each other, based on their exclusive jurisdiction over a territory and permanent population living there, and is defined by their refusal to surrender their powers to another state or organization.\textsuperscript{21} Sovereignty, an inherent element of international law, is a natural rival to the establishment of international organizations created to dictate to independent nations. This doctrine specifically conflicts with Article 43's requirement that individual sovereign nations relinquish control of their military forces to an international organization for potentially deadly operations.

In addition to the conflict between the doctrine of sovereignty and the Article 43 and veto provisions, some nations are hindered from participating in such military agreements by their own codes or constitutions. The United States, for example, faces a domestic hurdle to entering Article 43 agreements under its Constitution which divides war powers between the executive and legislative branches.\textsuperscript{22} Congress addressed this dilemma in 1945 by passing the U.N. Participation Act ("U.N.P.A.").\textsuperscript{23} which sought to resolve these international and

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\item[21] See infra part I.A. This Note concentrates on joint international military action under U.N. command. The author recognizes that U.S. forces did serve under foreign commanders in a few previous actions. These military actions, however, were only short-term, emergency situations. Michael J. Glennon & Allisson R. Hayward, Collective Security and the Constitution: Can the Commander in Chief Power Be Delegated to the United Nations?, 82 Geo. L.J. 1573, 1586 (1994). Scholars have noted that an Article 43 special agreement, which specifies continual Security Council command over U.S. troops, is a different situation. \textit{Id.}

\item[22] For purposes of this Note, the "division" of Constitutional war powers refers to the Constitution granting both Congress and the President military powers. See \textit{infra} notes 150-52 and accompanying text (detailing the war powers division).

\item[23] Section 287d of the United Nations Participation Act, codified at 22 U.S.C. §§ 287-87e (1988), states the following in relevant part:

The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress by appropriate Act or joint resolution, providing for the numbers and types of armed forces, their degree of readiness . . . to be made available to the Security Council on its call for the purpose of maintaining international peace and security in accordance with article 43 of said Charter. The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein

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domestic tensions by empowering the President to negotiate Article 43 special agreements with the Security Council, subject to congressional approval. Because the United States has never entered into an Article 43 agreement, however, the U.N.P.A. has not been employed. Furthermore, Congress is presently cutting U.N. funding and restricting the President's ability to engage U.S. troops in U.N. operations. Such congressional actions will impede the future ability of the Security Council to participate in peace-keeping operations.

In light of the natural tension which exists between the doctrine of sovereignty and Article 43 coupled with the veto power granted by the Charter, this Note examines whether the article offers a realistic solution to international military conflicts. Part I of this Note examines the doctrine of sovereignty and its relation to international law. This part also explores the intentions of the Charter drafters with respect to collective security, Article 43 special agreements, and the veto power. Part II discusses the theory and intent behind the special agreements as understood by the U.S. Senate during the Charter ratification and passage of the U.N.P.A. Part III examines specific situations highlighting the failure to implement the special agreements during the Cold War and post-Cold War eras. Part IV explores the common legal and policy factors that have existed since the Cold War and which explain the failure to make the special agreements. This Note concludes that the political reality of sovereignty prevents nations, when furnished with the weapon of a veto, from realizing the legal ideology of the U.N. founders and thus prevents them from

24. Id.
25. As a result of Congress never employing the U.N.P.A., the domestic tension inherent in the distribution of constitutional war powers remains a highly debated legal issue. See infra note 176 and accompanying text. This Note will focus on the international tension of the failure to make special agreements at the U.N. level, an action which precedes using the U.N.P.A., which embodies the domestic tension facing the United States. This Note will examine the U.N.P.A. only in relation to its potential to constrain the United States as an international superpower and member of the Security Council.
27. Id.
28. Part III will examine the crises in Korea, Kuwait, Haiti, and Bosnia.
29. For purposes of this Note, "legal ideal," or any permutation of the word "ideal," refers to the Charter drafters' expectations of the operation of Article 43, a legal mechanism. Interestingly, even at the time of the Charter's drafting, there was significant doubt about the U.N.'s mission. See Crossette, supra note 2, § 1, at 1. One academician and alternate U.S. representative to the U.N. for special political affairs from 1981 to 1984 said,

The initial concept was terribly, terribly flawed. . . . It is, I suppose, theoretically possible to set up an institution that is somehow or other going to be better than the people who set it up . . . that is going to be more responsive to an objective world view, that will identify aggressors rapidly, that will identify trouble spots rapidly and that will have mass resources to do something about it. It is theoretically possible, but it's very unlikely.

Id. (statement of Charles M. Lichenstein, a cochairman of a congressionally mandated Commission on Improving the Effectiveness of the United Nations).
engaging in the type of military role contemplated by Article 43. This Note also draws parallels between the U.N. and the European Community and proposes that the permanent members of the Security Council relinquish their veto power over Article 43 special agreements. Absent such relinquishment, Article 43 special agreements may never be realized.

I. THE BASIS OF INTERNATIONAL LAW AND THE EMERGENCE OF THE UNITED NATIONS

The concept of "sovereignty" is the cornerstone of international law. Sovereignty is also a defining component of independent statehood and thus, ironically, acts as a hindrance to cooperation among states and poses a formidable challenge to the Charter, which is based on "international law." This part will examine the origins of the doctrine of sovereignty, its relationship to and potential conflict with international law, and the birth of the U.N.

A. The Doctrine of Sovereignty

Sovereignty emerged with the swift rise of national monarchies in the thirteenth century as the feudal era ended and the Christian church's influence over Europe diminished. With the growth of monarchies came a new thinking towards social and economic forces, as monarchs adopted the former Roman emperors' philosophy of power and the "right" to arbitrarily impose law. Niccolo Machiavelli advanced the theory of sovereignty in his guide to statehood, The Prince. He asserted that an ordered nation would afford its citizens many benefits and was thus the ultimate goal in statesmanship. To achieve this stable society, Machiavelli reasoned that sovereigns should be unconstrained in their ability to rule, "accountable to no external norms." This philosophy resulted in an "expressed belief that relationships among political states were unrestrainedly competitive; it was a matter of every state for itself."
Thus, national self-interest became the predominant motivation for governing.\(^{38}\)

In the eighteenth century, theoreticians such as John Locke and Jean Jacques Rousseau espoused the theory that the people as a body were the sovereign, thus justifying the notion of constitutional government and the American and French revolutions.\(^{39}\) Finally, modern theoreticians in the nineteenth century abandoned the attempt to place absolute power in any specific person or body within the state, and instead, assigned it to the state itself, defining it as a juristic person.\(^{40}\) This embodiment of sovereignty in a state gave rise to the modern notion of nationalism, the seeds of which can be found in the sixteenth-century Reformation when the reigning sovereigns found the opportunity to distance their monarchies from the grasp of the Church.\(^{41}\) The rise of nationalism, however, led to a major problem for international law because "if sovereignty means absolute power, and if states are sovereign in that sense, they cannot at the same time be subject to law."\(^{42}\) Consequently, the modern state becomes bound

\(^{38}\) Id. at 82-83. Several other political theorists advanced the idea of sovereignty. Jean Bodin, a French nationalist, claimed that sovereignty was supreme human power, unlimited by law, of a monarch over his citizens. Id. at 83. Bodin, unlike Machiavelli, did limit the idea of a monarch's power to the constraints of custom and natural law, the "universal precepts of nature discernible by all rational beings." Id. at 84. Bodin’s proposition of the doctrine of sovereignty posed no problem for the international lawyer. J.L. Brierly, The Law of Nations: An Introduction to the International Law of Peace 10 (6th ed. 1963) ("Sovereignty for him was an essential principle of internal political order, and he would certainly have been surprised if he could have foreseen that later writers would distort it into a principle of international disorder, and use it to prove that by their very nature states are above the law."). Thomas Hobbes developed the power of the sovereign further. Hobbes believed that "[l]aw neither makes the sovereign, nor limits his authority; it is might that makes the sovereign, and law is merely what he commands." Id. at 12-13. Francisco Suarez, a Spanish Jesuit theologian, described four types of law which governed the world: eternal, divine, natural, and human. Edwards, supra note 31, at 87-88. Natural law, based on the “natural qualities of man,” and human law, based on the customs of nations, both comprised the law of nations. Id. at 84. Hugo Grotius' premise of the law of nations suspiciously mimicked that of Suarez’s. See Head, supra note 30, at 608 (stating that Grotius set forth “a body of rules that acknowledged the political primacy of the nation-state, but subjected its leaders to fundamental dictates of natural law”).

\(^{39}\) Brierly, supra note 38, at 14. Brierly comments, however, that this theory is flawed because the whole people cannot be sovereign due to conflicting views and no absolute unity of mind over every political and legal decision. Id. at 14-15.

\(^{40}\) Id. at 15.

\(^{41}\) Edwards, supra note 31, at 82.

\(^{42}\) Brierly, supra note 38, at 16. Hobbes described the states’ relations to one another in a famous passage:

"Kings and persons of sovereign authority, because of their independency, are in continual jealousies, and in the state and posture of gladiators; their forts, and garrisons, and guns upon the frontiers of their kingdoms, and continual spies upon their neighbours; which is a posture of war." Perhaps there has never been a time when this description was more true than in our own day, when men were more cruel to one another, and when persecution of those who differ from the majority in race or language or religion was more rife. All this makes it not easy to believe today in the reality of a single
only by those rules that it had promulgated by its own volition, resulting in a natural conflict between sovereignty and international law. This conflict raises serious challenges for the U.N., whose sovereign member states purport to be bound by a "higher" law than that of the international community.

B. The Concept of "International Law"

Nationalism, or the embodiment of sovereignty, has an uneasy co-existence with international law today within the framework of the U.N. The relationship works best when national interests are compatible with interests of the larger international community.

The sources of modern international law are treaties, custom, general principles of law, judicial precedents, text writers, and the notion of "reason." Sir Frederick Pollock theorized that the only mandatory conditions for the existence of law are a political community and its members' acknowledgment of established rules that bind them in that community. Within this theoretical paradigm, international law is a valid, workable concept.

International law, however, is weak—not because of the absence of enforcement measures but because of the lack of authority and respect for such measures. Institutions based on international law have no legislature to maintain current law for the developing needs of the international community, no legal executive enforcement power, and the paucity of existing administrative bodies cannot adequately handle the large amount of business that international law produces. While mechanisms for the arbitration of disputes and an

world society, and it would be foolish to underrate the difficulties of creating one.

Id. at 42-43.

43. See Head, supra note 30, at 619-20 ("[T]raditional international law had evolved by the first part of the twentieth century into a body of rules that acknowledged and supported the primacy of the nation-state and consisted only of those rules that had been accepted by states, either by treaty or through practice. This regime offered little or no room for entities other than states or for rules not 'emanat[ing] from their own free will.' The sovereign independence of states had become the central pillar of international law." (citation omitted)).

44. See U.N. Charter art. 2, ¶ 2 ("All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter."); see also Brierly, supra note 38, at 16 (concluding that international lawyers face many problems because "if the premisses [sic] are correct[,] there is no escape from the conclusion that international law is nothing but a delusion").

45. Brierly, supra note 38, at 56-68.

46. Id. at 71.

47. Id. at 72. "It is not the existence of a police force that makes a system of law strong and respected, but the strength of the law that makes it possible for a police force to be effectively organized." Id.

48. Id. at 73.
established court of justice exist, they have no enforcement power because their rulings are not compulsory. 49

Internationalism has been defined as "world-wide co-operation [sic] for the good of all nations," 50 a definition which naively assumes a shared vision of universal welfare. 51 To promote such a concept, nations have formed organizations held together by "international law." The first international organization to embrace this concept was the League of Nations, 52 established at the end of World War I. 53 The framers 54 of the League attempted to follow Woodrow Wilson's dream of forming a world organization that would maintain global peace and prevent aggression through combined national forces. 55 Following Wilson's beliefs, they endeavored to fashion an organization that would be dedicated to collective security and thus able to ensure the peace better than the existing "balance-of-power politics." 56 The League made some progress towards this goal for a decade, 57 but when Japan invaded Manchuria, the organization was unable to stop this invasion. 58 As successive invasions occurred, 59 the League was powerless to prevent the onset of World War II. 60 The final death of the League occurred when its officials left Geneva to escape an expected invasion by Axis powers. 61

The successor to the League is the current U.N., whose charter provides for an organization of states which voluntarily limit the extent of their governments' actions. 62 Jurists have described the U.N. Charter "as a multilateral convention, a treaty that makes binding law," 63 reflecting the framers' intent that U.N. rules act as legal obligations

49. Id.; see, e.g., Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (holding that the United States must follow U.N. "laws"). The United States, however, refused to appear before the World Court or recognize this decision.
51. See infra part IV (discussing conflicts of interest between sovereign nations).
52. See infra part II.A (comparing collective security of the League of Nations with that of the U.N.).
53. Goodrich et al., supra note 9, at 2.
54. Ironically, although President Woodrow Wilson initiated the League, the United States did not join, leading to the organization's failure. Id.
55. Id. at 2.
56. Janis, supra note 3, at 194.
57. Id. at 194-95 (noting that the League helped settle the 1925 dispute between Greece and Bulgaria).
58. Id. at 195.
59. Italy invaded Ethiopia in 1934, and Germany invaded the Rhineland, Austria, and Czechoslovakia between 1936 and 1938. Id.
60. See infra notes 137-41 and accompanying text.
61. Id.
63. Id.
binding member nations' governments. The framers of the Charter ambitiously attempted to empower the U.N. to govern its members to achieve the maintenance of world peace. Unfortunately, this idealized "empowerment" has not succeeded. Though the Charter resembles documents providing for a unified "government," such as the U.S. Constitution, it suffers difficulties when applying law to a body of "independent sovereign states whose very existence implies the absence of general rules."

C. The Charter: A Codification of International Law

After World War II, the war-torn nations of the world, disgusted with the death and destruction of the previous years, tried again to create an organization that would prevent such atrocities. To further this goal, the U.N. drafters, who convened in San Francisco for the formidable task of creating the Charter, deemed that the primary driving principle of the U.N. would be "the sovereign equality of all . . . Members." The members pledged to maintain collectively, as the foremost and overriding purpose of the organization, international peace and security by eliminating threats to peace and arbitrating international disputes. This collective security system was designed to

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64. See U.N. Charter art. 2, ¶ 2; id. art. 94, ¶ 1 ("Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.").
66. See, e.g., id. ("Despite earlier attempts to cope with this issue [of governing sovereign nations] and despite nearly 50 years of practice by the United Nations, it remains unresolved.").
67. Id. at 3.
68. See supra notes 130-41 and accompanying discussion on the League of Nations.
69. See U.N. Charter pmbl.
70. Id. art. 2, ¶ 1; see infra part I.D (examining the alleged inequality of the Big Five's veto power).
71. The order of the Purposes and Principles in Articles 1 and 2 of the Charter reflects a prioritized ranking, suggesting that the maintenance of international peace and security is the primary purpose of the U.N. and takes priority over other purposes. See Goodrich et al., supra note 9, at 25-26 (citing Certain Expenses of the United Nations, 1962 I.C.J. 151, 213-15 (July 20) (separate opinion of Judge Fitzmaurice)).

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting
be universal in its application: "a wronged state was to be protected by all, and a wrongdoer punished by all." Among other modalities, Chapter VII of the Charter provided for the preservation of global peace through the use of collective force by the Security Council.


Chapter VII is entitled "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." The drafters never defined these phrases, however, and this has led to much confusion in the international legal world and within the U.N. itself.

and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

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

Id.


74. For a discussion of the six methods for maintaining international peace and security that the drafters incorporated into the U.N. Charter, see George K. Walker, United States National Security Law and United Nations Peacekeeping or Peacemaking Operations, 29 Wake Forest L. Rev. 435, 450-70 (1994). Professor Walker categorizes the six methods as (1) the resolution of the dispute by the contending nations themselves, (2) recommendations, calls for action, or decisions by the Security Council, (3) actions by regional international organizations, (4) recommendations by the General Assembly, (5) litigation before the International Court of Justice, or (6) action by the Secretary General. Id.

75. U.N. Charter arts. 39-51. But see id. art. 2, ¶ 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.").

76. Id. art. 24, ¶ 1.

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

Id.; see also supra note 9. The Charter recommends that before military action is taken, the member nations should try to settle their disputes by peaceful means, as provided for in Chapter VI. See infra notes 84-85 (text of U.N. Charter arts. 41-42).

77. U.N. Charter ch. VII.

78. Michael Akehurst, A Modern Introduction to International Law 219 (6th ed. 1987). Professor Akehurst indicates that "threats to the peace and breaches of the peace" refer to international peace. Id.


80. See, e.g., infra text accompanying note 217 (noting that during the Gulf War invasion, the Security Council could not decide under which article of Chapter VII to act).
Chapter VII contains, inter alia, Articles 39-43, the mechanisms under which the drafters envisioned the U.N. exercising its strength to combat aggression. Article 39 grants the Security Council broad authority to maintain international peace by the use of coercive arms control. Every member nation maintains its inherent right of self-defense against an attack of aggression until the Security Council has acted to protect that nation through measures provided by Article 39.

Within Chapter VII provisions, the drafters provided last-minute safety measures to prevent the actual use of force: Article 40 calls for feuding parties to comply with provisional measures before the use of force, and Article 41 empowers the Council to use nonforce measures, such as economic sanctions. If the measures within Articles 40 and 41 prove fruitless, the Security Council finally may resort to the use of force as authorized by Article 42. This article allows the Council to elect to use force when they believe that Article 41 meas-

81. "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. Charter art. 39.
82. Id. art. 51.
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 the measures necessary to maintain 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 under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.
83. Id. art. 40.
In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.
84. Id. art. 41.
The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.
85. Id. art. 42.
Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations,
ures would prove inadequate or if they have already proven inadequate.86

Article 43 empowers the Security Council to make special agreements with the member nations to supply armed forces, assistance, and facilities.87 Article 43 is always read in conjunction with Article 42; if member nations make Article 43 agreements, the members are obligated to take military action under Article 42.88 Articles 4889 and 4990 provide the Council with authority to require the members to execute all Council decisions, including the making of special agreements. Thus, the drafters intended that Article 43 special agreements would bind the participating members when called upon to use force to maintain world peace and security.91

2. The Drafting of Article 43

The drafters of the Charter considered three options for providing the Security Council with armed troops to carry out its decisions under Chapter VII enforcement measures.92 The first idea was to set up a truly international force which would have command over the national armies and eventually, might actually replace them.93 The drafters in San Francisco rejected this option, just as the founders of the League did.94 The second option, originally considered under the League, involved the enforcement of Council decisions by an ad hoc coalition of national forces under an international command.95 The

blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Id.
86. Id.
87. Id. art. 43; see infra notes 92-109 and accompanying text on the drafting of Article 43.
89. U.N. Charter art. 48.
1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.
Id.
90. Id. art. 49 (“The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.”).
91. Compare id. art. 2, ¶ 2 (obligating member states to comply with Charter) with Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 99-100 (June 27) (a World Court decision with which the United States refused to comply).
92. Goodrich et al., supra note 9, at 317.
93. Id.
94. Id.
95. Id. at 318.
drafters rejected this too and settled on the third option, whereby member nations sup4 would supply national contingents based on prior special agreements defining the number of forces and other types of assistance. The drafters left the phrase “special agreement or agreements” vague as well as the actual timing of when the agreements would begin to be employed. Thus, from the beginning, Article 43 lacked clarity and, consequently, enforceability.

The lack of clarity in Article 43 foreshadowed the future relations among the permanent members of the Security Council regarding their commitment to taking combined military action to preserve peace. Between 1946 and 1947, the Security Council instructed the U.N.’s Military Staff Committee to define Article 43 in military terms. Although the members of the Committee agreed upon a few areas, much disagreement occurred between the Soviet Union on one side and the other permanent members on the other. One major area of contention was the size of the forces contributed by the permanent members. The Soviet Union wanted each member to contribute equal numbers of troops as well as equally sophisticated machinery. The other members favored contributions relative to the size and composition of each of their domestic forces. Disagreement also occurred over the contribution of bases, the location of forces, and the withdrawal of such forces following completion of their assignment.

These problems highlighted the growing tension in the Security Council and between the Soviet Union and the United States. Iron-

96. The Charter architects planned that the permanent members would supply the majority of the forces. Id. at 319.
97. Id. at 318.
98. See infra part IV (examining the reality that the agreements have never been implemented).
99. See, e.g., Franck, supra note 1, at 52, 150-65 (recognizing that a rule must be clear and coherent to gain legitimacy, which leads to enforceability).
100. Goodrich et al., supra note 9, at 319-20.
101. The members agreed to the extent of the composition (air, sea, and land), the basic strength of the forces (“sufficient strength to enable the Security Council to take prompt action in any part of the world”), and the size (“influenced by the great ‘moral weight and potential power’ behind any Council decision”). Goodrich et al., supra note 9, at 320. The drafters also agreed that all members would have the obligation to contribute forces to the agreements. Id. Initially, the permanent members would contribute the majority of the forces; other members would contribute additional forces as necessary. Id. The drafters agreed that the respective nations would command their forces, except when the Security Council would take control. At this point, the Military Staff Committee (Articles 36, 37, and 38) would guide their tactical maneuverings. Id. at 321.
102. Id. at 321-22.
103. See id. at 321.
104. Id.
105. Id. at 322.
106. Id. at 323.
ically, the United States wanted to enforce peace throughout the world with a large quick-acting, mobile force, while the Soviets preferred a smaller force to combat aggression and maintain peace. Secretary General Hammarskjold, along with the majority of the members of the Committee, felt that a standing U.N. force was "unnecessary and impractical." The Military Staff Committee continued to meet "but only as a matter of form." Thus, the permanent members attempted to settle their disagreements but failed to do so.

D. The Political Check on Enforcement Action: The Veto

The most controversial debate among the Charter drafters concerned the "veto" power given to the Security Council's five permanent members. The major powers were in favor of the veto, but many member states were opposed, cognizant that the League failed due to a lack of unanimity. Those nations were unwilling to repeat the futility of the League.

The Security Council's permanent members made it clear to the other members of the conference that without a veto power, the U.N. would not exist. They insisted upon the veto because they anticipated their role as the principal suppliers of the men and materiel in any military action. Without the veto, they felt that the Security Council would be weakened. In addition, the veto ensured against

107. See infra part IV.C.1 (commenting that the Clinton administration is significantly scaling back U.S. participation in the U.N.).
108. Goodrich et al., supra note 9, at 323.
109. Id. at 325-26.
110. Id.
111. Id. at 324.
112. U.N. Charter art. 27.
1. Each member of the Security Council shall have one vote.
2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 32, a party to a dispute shall abstain from voting.

Id.
114. Id. at 716-17.
115. Id. at 713.
116. Id. at 723. Had the unanimity requirement been "abandoned in enforcement decisions, it maintained, the permanent members of the Council, 'representing the bulk of the military and industrial power of the world,' could be involved 'by the votes of states commanding but a fraction of that power' in a course of action ending in military sanctions." Id. at 723 (quoting a draft, jointly prepared by the Big Five, interpreting the voting formula) (citation omitted).
117. Patil, supra note 50, at 12 ("Starting from the premise that everyone desired to make the Security Council a strong and effective organ, there was no choice but to support the rule of unanimity as essential for its strength and effectiveness. The alter-
natives was a voting system which, though it might be more perfect, could in a given moment, weaken the Council in its efforts to act promptly and effectively. The Chinese delegation felt that its choice was clear between a utopian system of voting and one requiring unanimity for effective decisions."

118. Id. ("The veto power was a means of preserving that unanimity, and far from being a menace to the small Powers, it was their essential safeguard. Without that unanimity, all countries, large and small, would fall victims to the establishment of gigantic rival blocs which might clash in some future Armageddon. Co-operation among the Great Powers was the only escape from this peril; nothing else was of comparable importance." (quoting Doc. 936, III/1/45, June 12, 1945, at 4, statement of the representative of the United Kingdom)).

119. Id. at 11.

120. Secondary nations recognized the futility of the veto power. During the San Francisco convention, Colombia pronounced that it would vote against the veto, based on principle and because "politically it would produce inaction rather than unity." Russell, supra note 113, at 737. Even members of the permanent powers acknowledged the danger of the veto. Senator Vandenberg wrote in his private memoirs:

This "veto" [business] is making it very difficult to maintain any semblance of the fiction of "sovereign equality" among the nations. . . . It is fully justified in respect to the use of force because the Powers with the "veto" will be the Powers which must largely furnish the force. But it is immoral and indefensible . . . in any other application. But the irony of the situation is that the greater the extent of the "veto," the more impossible it becomes for the new League to involve America in anything against our own will.

Id. at 725-26 (quoting Arthur H. Vandenberg, Jr., ed., The Private Papers of Senator Vandenberg 200 (1952)).

121. See Russell, supra note 113, at 717-18, 727. The British delegate to the San Francisco convention elaborated:

So that really what it amounts to . . . is that by [these] proposals . . . we are taking away the right of veto from the secondary Powers while retaining it for the permanent members. That may be considered to be unequal treatment. It may be considered to be undesirable, but I would like to submit that it is not entirely unreasonable. . . . Now I don't see why, simply because we have admittedly deprived the secondary Powers on the Council of their right to veto, why because of that a permanent member should exercise the
Each permanent member could bar any Council decision that would involve either preventive or coercive action against any other nation that it desired to protect. The Charter thus granted the Big Five "a privileged status above the law." The Charter did not allow them to threaten or use force in any manner inconsistent with the U.N.'s purposes, but the formal mechanism of the veto implicitly permitted the permanent members to evaluate all decisions involving Council action according to their best interests. Thus, the Charter accorded to the permanent members a power flagrantly incompatible with the principle of equality before the law. Furthermore, the amendment process additionally protected them from any undesirable meddling with this privilege; "[v]eto guarded veto." 

Although the drafters at San Francisco passed Article 27 without objection, the smaller powers approved it begrudgingly. As one commentator noted, "[The veto debate] was not, in the last degree, a question of the rule of unanimity... it was a question of... a new world organization or no world organization... And that organization... [was] more important than any condition." The nations who were not permanent members of the Security Council realized that without the veto, the U.N. would never exist.

II. The U.S.'s Delegation of Force to an International Body

The political problem of independent nations transferring the delegation of authority over their military forces to an external unified entity existed long before the creation of the Charter. This part examines the legal background that predated the ratification of the Charter, the meaning that the U.S. Congress imputed to the Article 43 special agreements during the Charter debates, and the enactment of the U.N.P.A.

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right of veto, which he retains, any more recklessly or disgracefully under this Charter than he could do under the Covenant of the League.

Id. at 727.


123. Id.

124. Id.

125. Article 108 lays out the amendment process:

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

U.N. Charter art. 108.


127. Russell, supra note 113, at 742 (statement of Tom Connally, quoted in Tom Connally, My Name is Tom Connally 163-79 (1954)).

128. See supra note 23.
A. A Theoretical Acceptance of Collective Security

Both in the domestic and international arenas, the distinction between authorization of force and obligation to commit forces is as critical historically as it is legally. The domestic problem with these two ideas centers upon the distribution of war powers between Congress and the President. The international problem deals with collective security, a method of maintaining global peace through combining military forces of various nations.

The tension between authorizing versus obligating force began before the creation of the Charter. During the drafting of the Covenant of the League of Nations ("Covenant"), France suggested establishing an international force consisting of national troops which the Council of the League would have at the League's disposal to aid in executing its decisions and overcoming any forces opposed to it. Neither the British nor the Americans, however, wanted to form an international force to assist in keeping the peace.

The Covenant contained language suggesting that the League might obligate member states to use armed force without their specific approval. This possibility contributed directly to the Senate's rejection of the Covenant. Forces led by Senator Henry Cabot Lodge proposed a reservation that would have mandated congressional approval for any use of American forces under the League's power. President Wilson, however, opposed the Lodge reservation and, as a result of such opposition, could not gather the requisite two-thirds vote for Senate consent to join the League of Nations.

The League failed to maintain world peace primarily because the appeal of collective security was significantly less important than the individual nations' desires to protect their national interests. The

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129. See infra part II.B; supra note 22.
130. See Zeidan, supra note 6, at 2.
131. Id.; see Goodrich et al., supra note 9, at 323.
132. Zeidan, supra note 6, at 2.
134. The reservation stated:
The United States assumes no obligation to preserve the territorial integrity or political independence of any other country or to interfere in controversies between nations — whether members of the league or not — under the provisions of article 10, or to employ the military or naval forces of the United States under any article of the treaty for any purpose, unless in any particular case the Congress, which, under the Constitution, has the sole power to declare war or authorize the employment of the military or naval forces of the United States, shall by act or joint resolution so provide.

58 Cong. Rec. 8777 (1919).
135. Id.
136. See id.
137. White, supra note 88, at 3. Nations' interest or membership in the League was fleeting: U.S. Congress had no interest in the League's collective security; the Soviet Union joined in 1934, before the collapse of the League; Japan left the League after...
U.S.'s refusal to join the League exemplified this protectionism and showed, for the first time since the League's conception, that a powerful state thought that collective security did not address its needs. Such considerations of national interests resulted in the diminution of the League's power to such an extent that questions regarding the imposition of sanctions were no longer subject to consideration of the League's central governmental bodies, as had been planned, but to each individual member's concerns for its own ends. The League's inability to use collective measures against aggressors led to its collapse.

Despite the failure of the League, the victorious Allies of the Second World War attempted again to establish an international entity based on collective security. This time, the United States did not reject the resultant U.N. Charter. One of the critical components of the Charter is the Article 43 requirement that member nations make national armed forces available to the Security Council. The paradox inherent in Article 43 is precisely the same weakness that ultimately caused the downfall of the League of Nations. Many asserting its national interest by invading Manchuria, against the League's principles; Italy withdrew after asserting its national interests through the invasion of Ethiopia, also against League mandates; and Germany quit once the Nazi's began ruling. See Baehr & Gordenker, supra note 62, at 12-13. Clearly, the Nazi's expansionist plans violated the ideals of collective security and world peace. The League also could not be an effective "world" organization because of its ideological slant, resulting in the barring of the U.S.S.R. from membership. Alvin Z. Rubinstein, Soviet Foreign Policy Since World War II 271 (1985). The League founders created the organization to sustain an international system founded upon "capitalism and colonialism and epitomized the antithesis of the world revolution and anticolonialism propagated by Soviet and Comintern leaders." Id. This barring of the U.S.S.R. from the League set the tone for the Soviet attitude toward the U.N. Id. 138. White, supra note 88, at 3. Ironically, President Wilson was one of the statesmen who envisioned that the League would supplant the former balance of power system with a unified organization made of strong nations "who shall be the trustees of the peace of the world." Id. 139. Id. at 4. 140. See infra notes 58-61 and accompanying text. 141. As war and unrest began in Europe in the mid-1930's, the League became paralyzed. Patil, supra note 50, at 3-4. The League existed until 1946, when the member nations dissolved it and transferred its property and assets to the U.N. See Gas-sama, supra note 79, at 256 n.4. 142. The Senate advised and consented to the U.N. Charter on June 28, 1945. 91 Cong. Rec. 8189-90 (1945). 143. See supra note 8 (text of U.N. Charter art. 43). 144. This paradox refers to the necessity of having Article 43 in the U.N. Charter to give the Charter enforcement strength and thus, as noted below, for the passage of the Charter in 1945. Article 43, however, has never been implemented. See discussion infra part III. 145. Secretary of State Cordell Hull said, "The biggest stumbling block that sent the Wilson movement in support of the League to utter destruction in 1920 was the argument [over armed forces dedicated to an international organization], and no other political controversy during our time had been accompanied by more deep-seated antagonism." 2 Cordell Hull, The Memoirs of Cordell Hull 1662 (1948).
senators recognized, however, the importance of Article 43 in securing world peace. As one Senator noted:

"There has never been in all the history of time an article like this one. This is an innovation in the field of international law. . . . This makes the Charter more than a debating society as was the League of Nations. Here is something that has teeth to keep the peace of the world."\(^{146}\)

Thus, in theory, the Senate in 1945 accepted the idea of international collective security.

B. U.N. Article 43 Special Agreements and the Constitution

While in theory many senators may have accepted the idea of U.S. troops participating in an international military contingent, a problem arose in trying to harmonize such "special agreements" with the U.S. constitutional framework.\(^{147}\) The age-old question of the division of war powers between the U.S. executive and legislative branches reared its head during both the Charter ratification and the passage of the U.N.P.A.\(^{148}\) This tension underscored the fundamental problem: while the U.S. government may have wanted to embrace a system of collective security during this war-stricken era,\(^{149}\) American policy and history as a sovereign nation stood in the way of this legal ideal.

1. Congressional Enactment of the Charter

The U.S. Constitution confers military powers to two branches of the federal government. Congress has the power to declare war, raise and support armies, provide and maintain a navy, and make rules for the regulation of those armed forces.\(^{150}\) The Constitution also designates the President as the Commander-in-Chief of U.S. armed forces.\(^{151}\) General agreement exists that the President cannot single-

\(^{146}\) 91 Cong. Rec. 8021 (1945) (statement of Sen. Lucas). Furthermore, Senator Chavez concluded that "collective action to curb the aggressor seems to be the only answer to this problem. If we must inevitably participate in the armed settlement of international disputes, then we should certainly participate in the cooperative action to prevent them."\(^{147}\) Id. at 7958.

\(^{147}\) See id. at 7957 (statement of Sen. Vandenberg) (discussing the special agreements in light of the constitutional vesting of authority to declare war in the Congress, while at the same time vesting unlimited authority to use armed forces in the President).

\(^{148}\) See infra part II.B.1-2.

\(^{149}\) Isolationism was the United States' way of life for a century and a half. Arthur Schlesinger Jr., Whatever Happened to the New World Order?, Daily Yomiuri, May 30, 1994, at 6 ("Internationalism was a two-year Wilsonian aberration."). To avoid a relapse into isolationism, Roosevelt demanded that the U.N.'s initial meeting occur while the war was continuing, and thus, U.S. citizens would still be in an "internationalist mood."\(^{149}\) Id.

\(^{150}\) U.S. Const. art. I, § 8, cls. 11-14.

\(^{151}\) Id. art. II, § 2, cl. 1.
handedly begin a war but may use force to combat sudden attacks on
the United States or its armed forces.152

The most important issue that arose during the congressional dis-
cussions on the ratification of the Charter was the roles of the executive
and legislative branches with respect to the Article 43
agreements.153 The majority of senators affirmed their understanding
that congressional approval, and not executive agreements, would be
required to implement the special agreements committing U.S. forces
to the Security Council.154 This understanding signified the reluctance
of the senators to relinquish their control over the armed forces. As
Senator Wheeler noted, "What the people of this country want before
our boys fight all over the world is the right to say something about
where they are to fight and where they are to die."155

The nature of the special agreements also factored into the debate
on "police action"156 versus war. The language of Article 43 states
that a special agreement would designate the "numbers and types of
forces, their degree of readiness and general location, and the nature
of the facilities and assistance to be provided" to the Security Coun-
cil.157 This language led to some debate in the Senate as to the exact

152. Jane E. Stromseth, Rethinking War Powers: Congress, the President, and the
153. See 91 Cong. Rec. 7957 (1945) (statement of Sen. Vandenberg, a participant in
the U.N. Charter conference at San Francisco). Senator Vandenberg elaborated:
[The charter] says that our agreement covering the contribution of troops to
any joint action must be approved by our own constitutional process . . . .
The charter actually confirms our constitutional process. We shall decide for
ourselves where we wish to draw the line, if any, between the constitutional
authority of the President to use our armed forces in preliminary national
defense action and the constitutional authority of Congress to declare war.
Both [c]onstitutional rights have existed . . . and have stood unchallenged for
150 years. We have never thought it necessary or desirable to try to set
metes and bounds for each. I doubt if it is necessary or desirable now. We
have but to continue the constitutional practice of a century and a half.

Id.
154. Senator Vandenberg emphatically stated:
I can understand how there might be advanced a perfectly legitimate argu-
ment as to whether or not constitutional process at that point referred to a
joint resolution of Congress or a treaty action by the Senate, although it is
the latter which I favor. But I cannot understand how there could ever be
any possible defense of the suggestion that this could be done by an execu-
tive agreement which denies a partnership authority on the part of the repre-
sentatives of the American people.

Id. at 7991; see also id. at 8000 (statement by Sen. Vandenberg) ("It seems to me
that the important thing to underscore and to underline is that we all agree that this
cannot be done by executive agreement if it eliminates the voice of Congress or the
voice of the Senate from the equation.").
155. Id. at 7988 (statement by Sen. Wheeler).
156. "Police action" is a political term of art referring to a military action which
involves less forces than a war. See Stromseth, supra note 152, at 608. This term of art
has been abused, however, as exemplified by the "police action" in Korea. See infra
part III.A (discussing the military action in Korea).
157. U.N. Charter art. 43.
limits Congress could place on the special agreements. The senators could not agree on whether Congress could limit the location or participation of U.S. troops committed to the U.N. under Article 43. Senator Connally, Chairman of the Senate Foreign Relations Committee, thought that any limits on the provision of troops under the special agreements would "violat[e] the spirit of the Charter... because the assumption is that we will make agreements to furnish troops in good faith for the use of the Security Council wherever danger may be present, and wherever the threat of war may be present." While no one could predict precisely the number of troops that would be called under a special agreement, most senators thought the number would be small.

The debate between police action and war then focused on the division of war powers between the President and the Congress as it affected the maintenance of sovereignty over the U.S. forces. Several senators favored a reservation to the Charter that would mandate congressional approval for each use of American special agreement forces. One senator argued that anything less would unconstitutionally delegate congressional war powers to "one man"—the U.S. delegate to the Security Council, a presidential appointee. Senator Bushfield also objected "to a delegation of power to one man or to the Security Council... to declare war and to take American boys into war." Another congressman, however, argued that the special agreements would not impair

158. See, e.g., 91 Cong. Rec. 7987-92 (1945) (discussing Congress' ability to modify versus merely accept special agreements).

159. Id. at 7987 (statement of Sen. Connally). Note that Senator Connally assumes the use of the special agreement forces will be for a "war" or threat thereof.

160. The Charter of the United Nations: Hearings Before the Senate Comm. on Foreign Relations, 79th Cong., 1st Sess. 653 (1945) (statement of Sen. Millikin) ("[I]t seems to me that the initial force to support this plan would be nominal—let us call them—police forces."). John Foster Dulles testified for the Truman Administration: "My opinion is that the amount of military force required to make up these contingents ought to be very small for as far as anyone can predict reasonably ahead." Id. at 654.

161. See, e.g., 91 Cong. Rec. 7987 (1945) ("It seems to me that... you have... a policing problem, and later on you might come to a real war problem, and that draws a logical distinction between where the power might lie in this country to order troops into action as against one or the other of those two contingencies; in other words, it seems to me that possibly we can preserve and effectuate the constitutional power of the Congress and the power of the President depending upon the nature of the problem. The policing powers traditionally exercised by the President might possibly be kept in mind, and the war powers might be kept in Congress, thus preserving in symmetry all of the constitutional powers of the Congress and the President.") (Sen. Millikin quoted by Sen. Wheeler).

162. Id. at 7992 (statement of Sen. Wheeler) ("I am opposed to giving any one man the power to put us into war.").

163. Id. at 7156 (statement of Sen. Bushfield). The Senate finally approved a limited delegation of U.S. forces to the Security Council through Article 43 special agreements when protected by the U.S. veto. Stromseth, supra note 152, at 608. The Senators felt this was a constitutional arrangement first because Congress would ap-
our sovereignty... because the concurring vote of the United States will be required before our forces can be called upon by the Council. The power of the Congress to declare war is not impaired because only through a declaration of war can our total resources be pledged to war.164

As recent history has shown, however, the United States has not formally declared "war" since World War II and, thus, has not invoked the powers of Congress to declare war.165 Because the Senate contemplated U.N. "police action" to be premised on the passage of special agreements approved by Congress,166 "contemporary claims that American troops can be used in any U.N. authorized military action, regardless of its size, without any prior congressional approval, would have surprised the Seventy-Ninth Congress."167

Finally, many senators expressed their concern over the obligations the United States would undertake by ratifying the Charter. The senators did agree that by ratifying the Charter, the United States was entering into an international obligation.168 The senators realized that Article 43 would obligate the United States to enter into an agreement with the Security Council to designate at least a small number of troops for U.N. sanctioned enforcement action.169 The converse of prove any special agreement and second because these forces would be involved only in a limited fashion in U.N.-authorized "police actions" versus their full-scale engagement in "war." Id.

164. Id. at 8031 (statement of Sen. Lucas).
165. See discussion infra part III. Also note that this distinction between the President's police powers and Congress' war powers concerned Senators at this time:

In discussion of these subjects the question is always raised, where does the power of the President to conduct policing operations end, and where does the power of Congress to make war and to supply and maintain our military forces begin? There has been a no-man's land which has never been eliminated by an acceptable definition.

91 Cong. Rec. 8032-33 (1945) (statement of Sen. Millikin). Senator Millikin then went on to propose that as these special agreements are adopted, the Congress, through experience, will define the limits on the forces to be used for policing operations by the President. Id. at 8033. Since the Security Council has never made Article 43 agreements, Congress has not had the opportunity to make this delineation between police action and war.

166. As one Senator observed:

Enforcement action under the [Charter will involve only the forces pledged under these special agreements, while war, on the other hand, when declared by Congress, would amount to a complete break-down in international relations, and a decision to devote the total resources of the United States to securing the safety of this country.


167. Stromseth, supra note 152, at 612.

168. In response to defining the meaning of the phrase "on its call," Senator George responded, "There is the international obligation... undoubtedly... taken upon our part which cannot be whittled away or watered down by any subsequent action of Congress unless we repudiate the treaty." 91 Cong. Rec. 8024 (1945) (statement by Sen. George).

169. See, e.g., id. at 8030 (statement by Sen. Lucas) ("[W]hen the Senate ratifies this charter with article 43 contained in it, the result is to impose upon the United States
this obligation, however, is that without the agreements, no number of forces could be pledged because there would have been no consensus on the number of troops.\footnote{170}

2. Congressional Enactment of the U.N. Participation Act

To ensure that Article 43 would not override the constitutional division of war powers between the legislative and executive branches, the U.S. Senate enacted the U.N.P.A. in 1945.\footnote{171} The U.N.P.A. allowed Congress to give the U.N. Security Council a limited amount of military forces for quick action while still maintaining Congress' war powers in larger actions. The U.N.P.A. designates that the U.S. representative to the U.N. must vote according to the President's directions,\footnote{172} and the President must tell Congress about any Security Council resolutions to use military action.\footnote{173}

The Senate debates on the passage of the U.N.P.A. were more contentious than those of the Charter ratification, which occurred a few months earlier. The beginning of the Cold War led many senators to have strong apprehensions about entrusting the authority to decide the terms of deployment of U.S. armed forces to a Security Council seating a sole American ambassador amidst ten foreign representatives.\footnote{174} In addition, the debate on war powers resumed.\footnote{175} The U.N.P.A. contains a section that addresses the war powers balance.\footnote{176}
The U.N.P.A. attempts to clarify any delegation of authority to the President: "[N]othing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements." Thus, the United States could provide the U.N. with limited military force through special agreements as provided for in Article 43 of the Charter. Congress, however, would have to approve every special agreement, and, if the Security Council called for forces beyond the limits of the agreement, Congress retained its constitutional power to declare war.

Congress amended the U.N.P.A. in 1949, limiting the activities of U.S. forces by decreeing that U.S. personnel may only be used in support of U.N. activities "specifically directed to the peaceful settlement of disputes and not involving the employment of armed forces contemplated by Chapter VII of the United Nations Charter." The amended act also provided that the President may commit U.S. troops only to "serve as observers, guards, or in any non-combatant capacity." Finally, the amendment set a definitive limit on the number of troops, stating that "in no event shall more than a total of one thousand of such personnel be so detailed at any one time." Interestingly, the military actions in Korea, Kuwait, and Haiti, in which U.S. Presidents engaged American troops under the auspices of a U.N. action, do not conform to Congress' stated intentions as embodied in the U.N.P.A.

III. CASE HISTORIES AND THE NONEXISTENCE OF ARTICLE 43 SPECIAL AGREEMENTS

The opportunity to make Article 43 special agreements arose during the Cold War and post-Cold War eras in the military actions in Korea, Kuwait, Haiti, and Bosnia, but no member nation concluded any agreements. The presidents did not designate forces in conjunction with Article 43 agreements or the U.N.P.A. and thus ignored the general deployments are unconstitutional) with Franck and Patel, supra note 12 (arguing that the Senate's ratification of the U.N. Charter provides constructive consent for the President's decision, through his Security Council representative, to deploy American forces to enforce Security Council resolutions).

177. 22 U.S.C. § 287d.

178. 91 Cong. Rec. 10,965-67 (1945) (statement of Sen. Connally); id. at 10,967, 10,975 (statement of Sen. Vandenberg); see also Schlesinger, supra note 149, at 6 (noting that Congress intended all special agreements, that is, commitments of American troops for U.N. actions, to be reviewed by Congress).


180. Id.

181. Id.
desires of the Seventy-Ninth Congress for commitment of U.S. troops in U.N. enforcement actions.\textsuperscript{182}

In both eras when they felt national interests may be compromised, U.S. presidents have used the "authority" extended to them via Security Council resolutions to commit U.S. forces to military combat without Congress' prior consent. When no national interests were involved, the president did not volunteer U.S. troops for combat. This part examines the case histories of Korea, Kuwait, Haiti, and Bosnia to address why the Security Council failed to implement Article 43 special agreements.

A. The Cold War: Korea

From 1945-1953, the Cold War and the resulting polarization of political alliances dominated the world scene.\textsuperscript{183} Beginning with the first Security Council session in January 1946, the other members chastised the Soviet Union for failing to withdraw Soviet troops from Iran in accordance with a treaty among Iran, Britain, and the U.S.S.R.\textsuperscript{184} As a result, Moscow saw itself in an isolated, minority position within the U.N.\textsuperscript{185} This situation confirmed the Soviet Union's original inclinations; it had joined the U.N. as an accommodation rather than because of its belief in the organization's effectiveness as a stabilizing global entity.\textsuperscript{186} As a result, the Soviet Union vetoed anything that would compromise its hegemony.\textsuperscript{187} Because the permanent members of the Security Council, particularly the Soviet Union and the United States, could not agree on the basic principles to govern an international force, member states and the Council never concluded any Article 43 agreements. Therefore, when the Security Council determined in June 1950 that Korea had

\textsuperscript{182} See Stromseth, supra note 152, at 620. Professor Stromseth notes that almost everyone was convinced that the members of the U.N. would negotiate special agreements quickly. \textit{Id.} at 620 n.117. When one Senator raised the possibility of the absence of such agreements, 91 Cong. Rec. 8024 (1945) (statement of Sen. Tunnell), another responded, "when we ratify this Charter ... we are legally and morally bound to furnish forces of some kind or character to help keep the peace of the world." 91 Cong. Rec. 8024 (1945) (statement of Sen. Lucas).

\textsuperscript{183} Rubinstein, supra note 137, at 273.

\textsuperscript{184} \textit{Id.}

\textsuperscript{185} \textit{Id.}

\textsuperscript{186} See \textit{id.} at 272 ("[The Soviet Union's] aim was to ensure that the League's successor would not become an anti-Soviet alliance; and its participation was predicated on the assumption that the United Nations would function primarily to handle political and security problems . . . .").

\textsuperscript{187} \textit{Id.} at 273. The U.S.S.R. approved the Charter only after the inclusion of the veto power in the Security Council. \textit{Id.} at 272. As of April 1987, the veto was used 56 times by the United States, 114 times by the Soviet Union, 29 times by Britain, 16 times by France, and three times by China. Franck, supra note 1, at 177. By 1992, the member states employed the veto another 61 times. \textit{See Agenda for Peace, supra note 16, \S 14; see also infra part IV (discussing the effects of the veto power).}
breached the peace, the U.N. did not have military forces immediately available.\textsuperscript{188}

The military forces the U.N. needed to intervene in Korea became available, however, when the Soviet Union made the tactical error of walking out of the Security Council, the General Assembly, and other U.N. bodies in protest over the seating of the Republic of China as the Chinese representative.\textsuperscript{189} The Soviet Union incorrectly felt that its absence prevented any Security Council actions on substantive matters. This belief proved to be without foundation, and the Korean police action represented a "historical aberration" that will never be repeated.\textsuperscript{190}

The Soviet Union's absence made the U.N.'s first enforcement action possible, enabling the United States to use the Security Council to legitimize its goal of containing communism wherever it threatened to expand. The Truman Administration's claim that the Security Council justified the American decision to use force was circuitous. Professor Jane Stromseth recognized this problem: "Truman decided to take military action in response to the North Korean attack and announced his decisions before the Council even voted to authorize force, both to avoid a Soviet veto and to assure the Council that its resolution would be implemented."\textsuperscript{191} Thus, the Security Council declared North Korea's aggression illegal and "recommended" that members should help South Korea.\textsuperscript{192} Resolution 84 then followed, specifically recommending that member states allocating forces make them "available to a unified command under the United States of America."\textsuperscript{193}

Even if the climate was conducive for employing Article 43, such agreements were not necessary because the United States, at the command of its executive branch, preempted any collective security by its unilateral actions. The United States controlled almost the entire action under the auspices of U.N. approval.\textsuperscript{194} The resolutions passed,

\textsuperscript{188} See Zeidan, \textit{supra} note 6, at 7-8.

\textsuperscript{189} See White, \textit{supra} note 88, at 86; Rubinstein, \textit{supra} note 137, at 72 (noting that the Soviet Union's absence allowed the Security Council to act in Korea based on U.S.'s requests).

\textsuperscript{190} See White, \textit{supra} note 88, at 86 (quoting J.F. Murphy, \textit{The United Nations and the Control of International Violence} 124 (1985)).

\textsuperscript{191} Stromseth, \textit{supra} note 152, at 638.


\textsuperscript{193} White, \textit{supra} note 88, at 86 (quoting S.C. Res. 84, 5 U.N. SCOR Resolutions 5 (1950)).

but the Security Council did not claim to bind members to render military aid, a requirement which in the absence of Article 43 agreements is practically impossible.\textsuperscript{195} Thus, the wording of these nonbinding resolutions did not qualify as the equivalent of the “on call” phrase of Article 43 requiring military troops.\textsuperscript{196} As a consequence, in the domestic arena, the U.N. resolution did not trigger a congressional response under the U.N.P.A. because the U.N.P.A. is contingent on the making of the special agreements in the U.N., the international arena.\textsuperscript{197}

The failure in Korea revealed the inability of the U.N. to enforce military action.\textsuperscript{198} Member states other than the United States moved slowly in providing military aid to the U.N. mission in Korea.\textsuperscript{199} Thus, the West, and particularly the United States, manipulated the Security Council and the Assembly in the Korean action,\textsuperscript{200} furthering the U.S.’s agenda to protect their national interest from the spread of communism. Although the General Assembly had “authorized” action in Korea, the U.S.’s actions went beyond the requirements of enforcing the peace between North and South Korea and amounted to “an attempted United Nations’ conquest” and the enforcement of a settlement upon an unwilling nation.\textsuperscript{201} President Truman claimed authority under this Security Council “recommendation” to achieve the objectives of the United States, which used its superiority in the U.N. at the time to effectuate the Korean War.\textsuperscript{202} Thus, the Soviet Union’s absence and the threat of its veto did not prevent action under the guise of the U.N.; it only prevented the conclusion of Article 43 agreements.

B. The Post-Cold War

Three significant military actions sponsored by the U.N. occurred after the Cold War ended. The actions that took place during the Gulf War and in Haiti exemplify the United States’ willingness to become involved when its interests are at stake. In contrast, the current con-
Conflict in Bosnia-Herzegovina exemplifies the limited, if any, U.S. involvement in U.N. missions when U.S. interests are not at issue. 203

1. The Persian Gulf War

During the forty years after the Korean involvement, the ideological tensions of the Cold War preempted any effective use of collective security under the U.N. Charter. In the late 1980's, however, the Cold War began to thaw, and at the beginning of the next decade, Iraq invaded Kuwait. This act triggered the Security Council to adopt several noncombative measures to force Iraq to withdraw from Kuwait. 204

When Iraq refused to respond to these measures, the Security Council adopted Resolution 678, "authorizing" the use of force. 205 This authorization occurred because most of the Security Council felt that the economic sanctions already imposed against Iraq would be or had demonstrated to be inadequate to force Iraq out of Kuwait. 206 As one scholar pointed out, Article 42 207 did not appear to be the legal foundation for the resolution even though Article 42 empowers the Security Council to use military force if economic sanctions "would be inadequate or have proved to be inadequate." 208 Article 42 was inoperative due to the article's dependent relationship with Article 43, which calls for member states to "provide armed forces to effectuate article 42." 209

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203. Note that at the time of publication of this Note, the United States was involved in air attacks in Bosnia. These attacks were launched by NATO, however, and not the U.N. Furthermore, the NATO ground forces currently in Bosnia do not contain U.S. troops. See Elaine Sciolino, NATO Raids Against Serbs Are Increased, N.Y. Times, Sept. 8, 1995, at A14 ("Mr. Clinton and his aides are eager to limit the number of American ground troops involved in enforcing a settlement in Bosnia.").

204. See William J. Durch, The Iraq-Kuwait Observation Mission, in The Evolution of UN Peacekeeping: Case Studies and Comparative Analysis 258, 259 (William J. Durch ed., 1993). The Security Council acted gradually. First, the U.N. demanded Iraq withdraw from Kuwait. Id. The Security Council then imposed an embargo and froze Iraqi and Kuwaiti international funds, "condemned and rejected Iraq's 'annexation' of Kuwait," and ordered Iraq to release the diplomats, consular officials, and other foreign nationals who were hostages. Id. When Iraq did not respond, the Security Council asked for navies to enforce its embargo, which eventually the U.N. extended to air traffic. Id. Finally, the Security Council authorized Member States cooperating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements ... the foregoing resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.


205. See id.


207. See supra note 85 and accompanying discussion.

208. Weston, supra note 206, at 519.

209. Id.; see also supra note 8.
The members failed once again to implement Article 43 for two reasons: (1) due to the Cold War, Article 42, and respectively Article 43, had become a "dead letter," and (2) the United States again preempted the need for collective security action by taking unilateral charge of the military enforcement under a U.N. guise. The United States publicly declared four U.S. objectives for sending the massive military forces into Kuwait: (1) the immediate and unconditional withdrawal of all Iraqi troops from Kuwait; (2) the restoration of Kuwait's previous government; (3) security and stability of Saudi Arabia and the Persian Gulf; and (4) the protection of American citizens abroad. An unofficial, but publicly-recognized, reason for involvement of U.S. troops was to protect the region's oil supply and prevent any ramifications to the U.S. financial markets stemming from disturbances to that supply.

Thus, just as in Korea, the Gulf War was a U.S. action under the "fig leaf" of U.N. approval. Evidence of this can be found in the fact that the Security Council never met between November 29, 1990, and February 16, 1991, the period of the worst violence.

Thus, instead of creating special agreements, the Security Council chose merely to say that it was "[a]cting under Chapter VII of the

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211. As one congressman recognized, "We keep talking about the Persian Gulf as a U.N. success, but it was really a U.S. success. Had it not been for the determination of the United States to organize collective action under U.N. auspices, which was very important, Iraq today would be in control of Kuwait and probably of Saudi Arabia." House Comm. on Foreign Affairs, 103rd Cong., 1st Sess., Collective Security in the Post-Cold War World 166 (May 3, 1993) (statement by Rep. Tom Lantos).

212. Scheffer, supra note 210, at M2.

213. See Kevin Phillips, Bush Faces Quagmire of Presidents Past: Part Vietnam, Part Hostage, L.A. Times, Aug. 26, 1990, at M4. The Iraqi invasion of Kuwait could have affected U.S. economic interests in two ways: (1) the direct impact of oil price increases; and (2) the indirect effect of the impact on inflation, interest rates, bond prices, real estate, and the stock market. Id. According to one source, higher oil prices might have cost the United States $50 billion worth of growth in the next year following the invasion. Id. ("For the international financial community to keep its 1980s speculative balls in the air, any renewal of inflation and commodity politics had to be beaten down. Oil could not be allowed to rise again. Hussein [has] threatened this balance . . . ").

214. Regarding the national tension of the war powers balance: although the U.S.-led coalition was "authorized" by the Security Council to take such measures, and Bush was prepared to act without the approval of Congress, he did seek and receive the formal backing by vote of the lawmakers. See Saul Friedman, Clinton's Tough Sell For Invasion, Newsday, Sept. 12, 1994, at A4, A12; Charles Krauthammer, Clinton's Little War, Wash. Post, Sept. 16, 1994, at A27. As already mentioned, the failure to conclude special agreements led to the nonuse of the U.N.P.A. See supra note 197 and accompanying text.

Charter generally." 216 Article 51 of the Charter, affirming each nation's right to individual or collective self-defense, formed the basis of the U.N.'s, or more accurately the U.S.'s, response to Iraq's invasion of Kuwait. 217 Such an action was possible because "no explicit language in Article 42 or in Articles 43, 44, and 45... preclude[d] states from voluntarily making armed forces available to carry out the resolutions of the Council adopted under [Chapter VII]." 218 To prevent the members of the Security Council at the time from using their veto to block this "U.N." action, the United States promised incentives to other member nations in exchange for their votes. 219 Thus, regardless of the Cold War's effect on the conclusion of Article 43 agreements, such agreements were not called upon because the United States was willing to shoulder the burden unilaterally. 220

2. Haiti

In 1991, a military junta, led by General Raoul Cedras and Police Chief Lieutenant General Michel Francois, ousted Haitian president Jean-Bertrand Aristide, who fled to the United States accompanied by an exodus of boat people. 221 For the next three years, Cedras and Francois fluctuated on promises to step down and reinstate Aris-

217. Will, supra note 192, at C7. But see Weston, supra note 206, at 518-20 (arguing that neither Article 51 nor any part of Chapter VII forms a basis for the U.N. actions in Kuwait).
219. The United States guaranteed long-sought financial aid to many Latin American and African delegations to ensure their votes. Weston, supra note 206, at 523. The United States also sought to win Soviet support. News accounts reported that the United States consented to help keep Estonia, Latvia, and Lithuania out of the November 1990 Paris summit conference and also promised to convince Kuwait and Saudi Arabia to give Moscow, which they did, the hard currency that Moscow required to pay outstanding bills to commercial creditors. Id. at 524. To ensure that China "voluntarily" abstained, versus threatening to veto, the United States ignored a crackdown on political dissidents, agreed to lift trade sanctions existing since the Tiananmen Square massacre of pro-democracy protesters, backed a $114.3 million loan from the World Bank to China, established a visit by the Chinese Foreign Minister to Washington, and resumed normal diplomatic exchange between the two countries. Id. at 523-24. Finally, due to Yemen's opposition and negative vote, the United States "rewarded" Yemen by cutting off American aid of $70 million annually. Id. at 524.
220. The U.N. Security Council abstained from direct UN responsibility and accountability for the military force that ultimately was deployed, favoring, instead, a delegated, essentially unilateralist determination and orchestration of world policy, coordinated and controlled almost exclusively by the United States.... As a consequence, it set a dubious precedent, both for the United Nations as it stands today and for the "new world order" that is claimed for tomorrow.
Id. at 517.
The junta ignored democratic principles and engaged in human rights abuses, which the U.N. condemned. Finally, in 1994, the U.N. Security Council authorized the use of force to restore Aristide, who was elected by an overwhelming majority in democratic elections.

The military action that the United States undertook in Haiti further exemplified the U.S.’s history of protecting national interests under the guise of a U.N. “mandate.” The U.N. Security Council had found a “threat” to the peace and mandated sanctions against the Haitian dictators until Aristide was returned to power. Interestingly, the Haitian regime did not pose a threat to international peace; however, many Haitian refugees did flee to the United States.

In regard to Haiti, yet again, the member states failed to conclude special agreements with the Security Council pursuant to Article 43. This time, however, the Cold War, which had ended four years prior, was no excuse for this failure. Furthermore, the Haitian conflict occurred after Secretary General Boutros-Ghali’s call to revive Article 43 agreements.

Just as in Korea and the Gulf War, the U.N. resolution against the military dictators in Haiti did not mandate that member states commit troops. Such an action would not be possible without Article 43 agreements. Rather, the resolution only “authorized” the use of action. In this case, the individual member nations had to decide whether to act on their own.

The Clinton administration claimed that the Security Council “authorized” the use of force in Haiti to protect “human rights.” The administration, however, could not seriously classify the Haitian inva-

222. During these three years, several nations united to impose embargoes on Haiti. See id. Cedras and Francois signed an accord promising to step aside in favor of Aristide but never heeded the accord. Id.
224. Haiti’s Troubled History, supra note 221, at A19. A brief history of the 1994 action in Haiti is as follows: the U.N. Security Council extended the embargo to a blockade (May 6); United States stopped commercial flights between the United States and Haiti (June 10); Haiti expelled U.N. human rights advisers (July 11); Jean-Bertrand Aristide, Haiti’s president, wrote the U.N. Secretary General, asking for “swift and determined action” to restore democracy (July 29); and finally, the U.N. Security Council unanimously authorized use of force in Haiti, with only Brazil and China abstaining (July 31). Id.
226. Id.
229. See Charles Krauthammer, Our Sphere, Their Sphere: The United States Has Some Areas of Influence it Shouldn’t Give Up, Wash. Post, Oct. 7, 1994, at A25 (“President Clinton points to Security Council Resolution 940 and a paper coalition of
sion as a true U.N. police action because the United States asked the Security Council for its "blessing" to resolve a situation that was, in fact, a thinly disguised attempt to protect U.S. national interests. The U.S. interest at stake was the fall of a democracy in the U.S. sphere of influence: "The whole justification of the Haiti operation is that this is trouble 'in our backyard.' What does 'our backyard' mean, if not 'our sphere of influence?'"

Once again, in the Haitian action, the Security Council did not "need" Article 43 special agreements, because one country was acting unilaterally. The failure to implement Article 43 agreements was due to the Clinton administration's ability to push the resolution through the Security Council with promises of U.S. enforcement, thus preempting the need for the Security Council to make formal agreements. The U.S. intervention was approved due to deal making among the Security Council members. In this case, Russia threatened to veto U.N. approval of a Haiti invasion if anyone refused to endorse Russian freedom of action in its former colony. The U.N., therefore, quietly approved Russian "peacekeeping" troops in formerly Soviet Georgia. Thus, in Haiti, the "veto" threat, which prevented special agreements from being concluded during the Cold War, still existed. Russia, however, had learned its lesson from the Korean War; rather than allowing their absenteeism to facilitate the passage of Security Council resolutions, it used its veto as a tool to secure U.N. "approval" for actions in their own sphere of influence.

The U.S. domestic tension over the constitutional balance of war powers appeared in the Haitian crisis just as it did in the U.N.-authorized actions in Korean and Kuwait. The Clinton administration believed that congressional approval was not required for the Haiti invasion. Some administration officials told members of Congress that under the Charter and the U.N.P.A., the President does not need congressional approval to partake in actions authorized or required by the Security Council. One administration official even

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230. See id.; see also Gordon, supra note 225, at 574 (noting that Haiti was an "attempt to assist regional efforts" (emphasis added)).
232. See supra notes 229-31 and accompanying text.
233. Lally Weymouth, Yalta II, Wash. Post, July 24, 1994, at C7 ("[A]t least one UN diplomat compares [this compromise] with the controversial 1945 'spheres of influence' Yalta pact.").
234. Id. As one commentator noted, however, Russia's "role is less to keep peace than to restore a small piece of the old Soviet empire and signal Russia's intent to reestablish hegemony over the rest." Charles Krauthammer, Goodbye, Monroe Doctrine, Wash. Post, Aug. 2, 1994, at A15.
236. Note that once again, because Article 43 agreements were not made in the international arena, the U.N.P.A. was not triggered on the domestic front.
237. See Friedman, supra note 215, at A12.
told Senate Minority Leader Robert Dole that "'the UN Charter . . . was never a means of eliminating the constitutional role' of the Congress." After the loss of twenty-six U.S. troops in the U.N. Somalia operation, however, Clinton promised fuller consultation with Congress. Ironically, as Arkansas governor, Clinton had pressed President Bush to seek congressional approval for the Gulf War. Although Bush was ready to use military force in Kuwait without Congress' approval, he did ask for and receive Congress' formal backing by vote for the Desert Storm mission.

3. Bosnia-Herzegovina

The former Yugoslavia has dissolved into an area fraught with ethnic tension, civil war, and disregard for international authority. The Bosnian conflict revolves around ethnic clashes among Bosnian Serbs, Croats, and Muslims. The Serbs have engaged in a program of "ethnic cleansing" to rid themselves of Muslims. This has lead to appalling human rights abuses, including rape camps, concentration camps, and large bombardments of civilian targets.

The U.N. initially attempted to stop the human rights abuses by sending peace-keeping troops to the Balkans. As Serbian aggression continued and escalated, the Security Council tried to contain the hostilities through several measures. The Bosnian Serbs, however, rejected every U.N. demand.

Recently, France, Britain, and the Netherlands planned to contribute a rapid reaction force to protect U.N. peacekeepers in Bosnia. The Security Council, however, has not recommended that Article 43 govern these forces, which are intended to do no more than protect

238. Id. (quoting Louis Fisher, senior specialist on presidential powers for the Congressional Research Service, an arm of the Library of Congress). About 140 members of Congress in both parties urged Clinton to seek congressional approval for the Haiti operation, even though he never did. Id.

239. Id.

240. Id.

241. Id. at A12.

242. See, e.g., Robert Kagan, Truce? Expect a Wider War, N.Y. Times, Dec. 20, 1994, at A23 (noting that U.N. peacekeepers have been harassed); Morgenthau et al., supra note 17, at 19 ("The Serbs have been devious and defiant in Bosnia, calculating correctly that the Western Alliance is all talk and no action.").


244. See Morgenthau et al., supra note 17, at 19. In May 1992, the U.N. Security Council demanded the Serbian army to withdraw from Bosnia; the army simply united with local Serb nationalists. Id. The U.N. did not respond. Id. In August 1992, Western nations ordered that Serbs relinquish their weapons to the U.N. and stop the siege of Sarajevo. Id. The Serbian president said he had no control of the Bosnian Serbs; the West again did not respond. Id. In March 1993, the U.N. Security Council passed a resolution to enforce a no-fly zone over Bosnia; the Serbs violated the ban almost 800 times. Id. The West never attempted to enforce the ban. Id.

245. Id. at 17-18.

the U.N. peacekeepers who are under a mandate to deliver food and other aid to U.N. safe areas.\(^\text{247}\) The proposal to create this rapid reaction force is seen as a test of Europe's ability to handle problems of aggression within its sphere of influence without U.S. military aid.\(^\text{248}\) While President Clinton initially was willing to aid the operation financially, Congress has refused to approve the funds.\(^\text{249}\)

Some argue that the atrocities, and the length and the intensity of the conflict, in Bosnia are as bad, if not worse, than those committed in Haiti.\(^\text{250}\) Because Bosnia is not an area within the U.S.'s sphere of influence, however, President Clinton has refused to contribute U.S. forces to a permanent standby force in accordance with Article 43 special agreements.\(^\text{251}\) Such a U.S. stance would translate into a veto of Article 43 special agreements, if another member nation were to propose concluding such agreements.\(^\text{252}\) The Security Council, however, has learned from history and has not proposed to make Article 43 agreements for a standby force to combat aggression beyond the calls for peace-keeping units. Thus, because the United States has neither backed nor become involved in a U.N. military action, the U.N. has been unable to effectively control the tragedy occurring in Bosnia.\(^\text{253}\)

IV. THE POLITICAL REALITY OF SOVEREIGNTY IN CONFLICT WITH LEGAL IDEALISM

The forces used in the military actions which the U.N. authorized in Korea, Kuwait, Haiti, and Bosnia were not provided by Article 43, the mechanism to provide troops for collective international action against violators of international law.\(^\text{254}\) The drafters in San Francisco


\(^{248}\) Id.

\(^{249}\) Military Moves in Bosnia, N.Y. Times, June 17, 1995, § 1, at 18.

\(^{250}\) See Gordon, supra note 225, at 573 (noting that the human rights abuses in Haiti were not the focus of the U.N. resolution finding a "threat" to the peace and not on the level of those committed in Somalia, where the intensity of the abuses is analogous to those committed in Bosnia).

\(^{251}\) See Jim Hoagland, A Breakthrough for Clinton Too, Wash. Post, Sept. 14, 1993, at A21. President Clinton does not see Bosnia as an area where the United States can have a conclusive impact. Id. He believes that the United States should only get involved where the United States has an opportunity to solve the problem. Id.

\(^{252}\) See, e.g., Roger Cohen, The World: Withdrawal Symptoms; Honor, Too, Is Put to Flight in Bosnia, N.Y. Times, July 16, 1995, § 4, at 1 (noting that "American commitment to European security" has died or been seriously compromised); Kagan, supra note 242, at A23 (stating that the United States has an "irresolute Balkan policy" and "[t]wo Administrations have declared the crisis beyond [the U.S.'s] responsibility").


\(^{254}\) See supra part I.C (discussing collective security under Chapter VII of the U.N. Charter).
had envisioned that the U.N. Security Council ideally would employ this legal measure so that its members would act jointly when international peace proved elusive by other means.

The Cold War, however, prevented unified action between the member states in the Security Council. The superpowers used the veto in the Security Council as a sword, slashing at any action that would undermine or interfere with their national interests. Once the Cold War ended, the world had renewed hopes of finally using the Charter mechanisms that provide for cohesive international action to create a truly global environment free of spheres of influence. The reality, however, is that after years of hard work and sacrifice to gain hegemony, the United States controls several spheres of influence that many think it should not readily relinquish. Both the United States and other member states have used the veto and the guise of a "U.N. peace-keeping" action as a shield to hide behind, while maintaining control over its spheres of influence.

This part rationalizes the historical trend depicted in part III with a legal analysis of the Charter and policy analysis of "sovereign nations" by examining the two common reasons behind the Security Council's failure to make Article 43 special agreements in the Cold War period and post-Cold War periods. These common factors are political realities—the desire to maintain spheres of influence and sovereign identity—and the legal mechanism of the U.N. veto, which nations have used as a sword during the Cold War and as a shield today. Both of these factors have precluded unified collective action under Article 43 throughout its history, and unless the U.N. takes some corrective action, any use of Article 43 remains dim. This part concludes with a proposal that would remove the obstacle created by the collision of these factors through the adoption of a qualified majority vote, such as the one that the European Community has implemented which would more easily allow collective action under Article 43.

A. The Legal Idealism: The Veto and Special Agreements

The Charter states in Article 2 that the system "is based on the principle of the sovereign equality of all its Members." This principle is codified in Article 18 by the rule that "[e]ach member of the General
Assembly shall have one vote."261 and by Article 27's rule that "[e]ach member of the Security Council shall have one vote."262 Article 27 adds the proviso, however, that most substantive decisions of the Security Council require not only the support of a majority of nine members, but "the concurring votes of the permanent members."263 This "veto" seems to undermine the coherence of the general principle of "sovereign equality" established in Article 2. The Charter appears to deprive the nonveto-endowed states of equality, a deprivation that these states have considered demeaning in the past and even more so today.264

The Big Five265 agreed on two compromises at the Charter drafting. First, they would use their veto only in situations having the most consequential impact on their basic interest.266 Second, if one of the Council members were a party in a dispute, that member would abstain from voting.267 At the time, these compromises seemed significant enough to convince the hesitant majority that the veto, although inconsistent with state equality, still maintained coherence and legitimacy within the Charter.268 Unfortunately, changes in the global system and in the way the veto has been used in practice no longer justify the idealistic legal mechanisms proposed by the Charter drafters.

In 1945 and during the Cold War, the Big Five were the world's major powers,269 and as the victors of the Second World War, had a special authority in world affairs.270 In today's post-Cold War era, however, Britain, France, and China are no longer "super" powers

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261. Id. art. 18, ¶ 1.
262. Id. art. 27, ¶ 1.
263. Id. art. 27, ¶ 3.
264. Franck, supra note 1, at 176. Even in 1945, at the drafting of the Charter, the smaller nations, a majority at the time, opposed this distinguished treatment. Back then, however, the Big Five paid most of the organization's costs and were expected to assume most of the military and financial obligations for fulfilling the Charter's mandate. Id. Thus, logically they should have had a greater say in key decisions. More importantly, "since the fledgling organization could not expect to compel any of the 'Big Five' to act against its will, the veto merely acknowledged an obvious reality." Id. (emphasis added).
265. The "Big Five" refers to the permanent members of the U.N. Security Council: Britain, France, China, the Soviet Union (now Russia), and the United States. See supra note 3.
266. Franck, supra note 1, at 177.
267. Id.; see also U.N. Charter art. 27, ¶ 3.
268. Franck, supra note 1, at 177. Franck defines legitimacy as "an independent variable, one which controls the extent to which a rule is perceived to exert a powerful pull toward compliance on those to whom it is addressed." Id. at 25.
269. "Major powers" refers to countries possessing (1) military strength—those countries who displayed military prowess through the victory over the Axis powers in World War II and thus, became the postwar leaders and (2) economic strength. Id. at 177.
270. Id.
and are economically inferior to resurgent Germany and Japan.\textsuperscript{271} Thus, the once rational justification for Big Five privileges has lost its plausibility.

Moreover, the permanent members have not used the veto sparingly.\textsuperscript{272} "Great Power unanimity collapsed almost immediately" with the Iranian crisis during the first few days of the Council's agenda in January of 1946.\textsuperscript{273} During the Cold War, both the Soviet Union\textsuperscript{274} and the United States wielded their vetoes in the Security Council to prevent U.N. interference in their spheres of influence.\textsuperscript{275} Thus, the geopolitical division of the world into competing power blocs severely limited the areas in which the Security Council could properly carry out its function of maintaining international peace and security.\textsuperscript{276}

The permanent members also have not practiced self-restraint in abstaining when one is a "party to a dispute" as originally promised.\textsuperscript{277} For example, in 1986 the United States did not abstain from vetoing a U.N. resolution requesting the United States to carry out the judgment against it by the World Court in a dispute with Nicaragua.\textsuperscript{278} Thus, the permanent U.N. members have not upheld the promises that their representatives made at San Francisco. Consequently, the veto has slowly but surely undermined the coherence and legitimacy of the Charter.\textsuperscript{279}

\textsuperscript{271.} \textit{Id.} India, Brazil, and Nigeria now probably can claim a preferred status equal to Britain and France's based on geographic and demographic grounds, if not on a purely economic or military basis. \textit{Id.}

\textsuperscript{272.} \textit{See supra} note 187 and accompanying text.

\textsuperscript{273.} White, \textit{supra} note 88, at 15.

\textsuperscript{274.} The Soviet Union's Security Council member, Foreign Minister Andrei A. Gromyko, was nicknamed "Mr. Nyet" because of the many vetoes he cast in the Security Council over a short period of time. \textit{See} Baehr & Gordenker, \textit{supra} note 62, at 150.

\textsuperscript{275.} Gary Younge, \textit{Everybody's Talking About... Peacekeeping}, The Guardian, Nov. 25, 1994, at T3; White, \textit{supra} note 88, at 5 ("Collective security was subservient to the national interests of the Great Powers, particularly the superpowers, who protected those interests by the power of veto."). Because the United States and the U.S.S.R. had most of the world divided between them, U.N. peacekeeping was minimal—amounting to no more than overseeing stalemates in such areas as Cyprus and Kashmir. Younge, \textit{supra} at T3. Note however that while Korea was considered to be in the U.S.S.R.'s sphere, the U.S.S.R. was absent from the Security Council, thereby allowing the United States to assert its national interest in combating communism throughout the world. \textit{See supra} part III.A (discussing the U.N. action in Korea).

\textsuperscript{276.} \textit{See} Younge, \textit{supra} note 275, at T3.

\textsuperscript{277.} Franck, \textit{supra} note 1, at 177-78.

\textsuperscript{278.} \textit{Id.} at 178; \textit{see also} Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

\textsuperscript{279.} \textit{See} Franck, \textit{supra} note 1, at 178. While the Charter has not been amended, Britain, China, and France, with a few exceptions, have vetoed actions only when accompanied by a majority of the Council, the United States, or the U.S.S.R. Thus, effectively, these three permanent Security Council members "have voluntarily contributed to the \textit{de facto} remission of their veto power." \textit{Id.}
The U.N.'s weakness "as a charter-enforcing organization is incurable because of the Security Council veto."\textsuperscript{280} Ironically, however, the U.N. would be nonexistent without the veto.\textsuperscript{281} Yet, the veto also signifies that the U.N. can never replace individual or collective self-defense.\textsuperscript{282} Inevitably, the Charter leaves its members with two grim choices: "chaos" or "great-power unanimity," which is a rarity at best.\textsuperscript{283}

B. The Political Reality: Sovereignty and National Interests

The permanent members of the Security Council can wield the legal weapon of the veto to enforce their policy goals as sovereign nations desiring to protect their national interests. For the United States, this desire has taken two forms: internationalism,\textsuperscript{284} as recognized during the Cold War, and isolationism,\textsuperscript{285} as evidenced by Bosnia and the aftermath in Somalia.\textsuperscript{286} Although the United States pledged to uphold the U.N.'s ideal of maintaining global peace and security, it historically has conducted its foreign policy, including the commitment of forces for combat as per Article 43, based solely on its needs and not those of nations in distress.\textsuperscript{287} This historical tension was illustrated most recently by President Clinton, who stated in the same address that although the United States must be "the world's leader," it must not be "the world's policeman."\textsuperscript{288}

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\textsuperscript{281} See id.; supra part I.D (commenting on the need for the veto to ensure the membership of the five permanent members).

\textsuperscript{282} Rostow, supra note 280, at A21.

\textsuperscript{283} Id.

\textsuperscript{284} See infra note 290 (defining internationalism).

\textsuperscript{285} See infra note 295 (defining isolationism).

\textsuperscript{286} The U.N. action in Somalia, where non-Americans headed U.S. forces, has led to a reluctance within the Clinton administration to commit forces to foreign conflicts. The administration has not forgotten that eighteen American servicemen were killed in the streets of Mogadishu in October 1993. Julia Preston, \textit{U.S. Troops May Aid in U.N. Withdrawal from Somalia}, Wash. Post, Sept. 16, 1994, at A29. These deaths forced the Clinton administration to immediately withdraw U.S. troops from Somalia. Id. The Somalia disaster "illustrates the unacceptable danger to U.S. military personnel of serving with multinational units with different equipment and levels of expertise, under U.N. tested command structures." See 140 Cong. Rec. S177-03, S181 (daily ed. Jan. 26, 1994) [hereinafter \textit{UN Peacekeeping}] (statement of Sen. Dole) (discussion on a bill to amend the U.N.P.A.).

\textsuperscript{287} Rostow, supra note 280, at A21 ("This view of the national interest has been the basic theme of American foreign policy since the time of President Truman, and it is so still.").

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1. Internationalism and National Interests

The United States displayed fervent internationalism\(^{289}\) during the Cold War due to the perception of an immediate Soviet danger to U.S. security.\(^{290}\) The Cold War gave the appearance that traditional U.S. isolationism had completely died.\(^ {291}\) Many believed that Americans finally had made the great transition and would forever after accept the global responsibilities that accompany global power.\(^ {292}\) To a large extent, this was true; the United States has played, and will continue to play, a role of world leadership. It has accepted international economic, political, and military obligations to an extent unprecedented in American history.

Thus, it is in this "global" mode that U.S. presidents have acted under the guise of a U.N. "authorization" for "peacekeeping" purposes to actualize American agendas overseas, as evidenced in the recent exploits in Kuwait and Haiti. These one-sided actions are limited, however, as "[i]ntervention in Haiti and Iraq, however successful, is the exception, not the rule."\(^ {293}\) The success of the Haiti intervention was made possible only by the abstention from the use of the veto, most notably by Russia.\(^ {294}\) The possibility that one of the permanent members still may use its veto probably will prevent the conclusion of Article 43 agreements. Rather than risk embarrassment, losing time in getting a military action assembled, and losing national impetus and backing, a nation would rather employ its own forces, under its own command, with a U.N.-backed authorization to accomplish its agenda.

2. Isolationism\(^ {295}\) and National Interests

At the same time, protecting national interests also can take an "isolationist" mode; that is, not sending "our boys" into areas that are not vital American interests, even though the U.N. may "call" for action.\(^ {296}\) U.S. citizens greatly detest the "acid test" of collective security—sending U.S. troops on peacemaking missions not involving vital U.S. interests.\(^ {297}\) The public and congressional clamor resulting from

\(^{289}\) For purposes of this Note, "internationalism" refers to a nation's involvement in world affairs by accepting international economic, political, and military responsibilities. See Schlesinger, supra note 149, at 7.

\(^{290}\) Id.

\(^{291}\) Id.

\(^{292}\) Id.

\(^{293}\) Sciolino, supra note 288, at E4.

\(^{294}\) See supra notes 233-35 and accompanying text (noting that Russia backed down from using its veto when it benefited from a deal with the U.N.).

\(^{295}\) For purposes of this Note, "isolationism" refers to a nation's unwillingness to become involved in the affairs of other nations, whether economically, militarily, or politically. Cf. supra note 289 (defining "internationalism").

\(^{296}\) See infra part IV.C.

\(^{297}\) Schlesinger, supra note 149, at 7.
the death of U.S. troops in distant areas not only prevents U.S. ground force activity in peacemaking missions but also makes any participation in peacekeeping difficult.298

When faced with these sentiments, the U.S. representative to the U.N. has never agreed, and will not agree, to committing U.S. troops to a military contingent under Article 43.299 Because the U.N. is not a sovereign body, nothing forces the United States to conclude Article 43 agreements. As one legal scholar stated, however, "[D]ream must encounter reality."300 The prevention and punishment of aggression require military enforcement. Thus, sending in troops for any international effort is a "dream," as exemplified by the U.N.-backed actions in Bosnia and Somalia, while the reality is that the United States will use only U.S. troops for military enforcement in its own sphere of influence.301 Although "loose constructionists" of the Charter believe the existence of such problems justifies expanding U.N. jurisdictions to deal with these problematic areas, such a concerted action under the U.N. umbrella, for example under Article 43 agreements, will not happen if a permanent member of the U.N. Security Council can effectively block action with a veto.302 As Jeane Kirkpatrick stated, "We are slipping into practices which enhance only the power of the strongest."303

298. Id.
299. See George W. Ball, Personal Perspectives on the Day the War Began January 16, 1991, L.A. Times, Jan. 20, 1991, at M1, M8 (concluding that Article 43 agreements are basically a lost cause and that the world will have to be satisfied with a large nation flying the U.N. flag, possibly accompanied by smaller nations, as peace-keeping forces ("As long as the world remains fragmented into nation-states, there will be conflicts, and it will be hard to raise substantial bodies of troops to fight for an abstraction without the galvanizing inducement of national loyalty.").
300. Schlesinger, supra note 149, at 5.
301. Id. The military action in Bosnia exemplifies U.S. reluctance to act outside of its sphere of influence:

The tragedy of Bosnia has confronted all democracies with a drastic question: how can a government, whose political position may already be precarious for domestic reasons, explain to its people why their husbands, fathers, brothers or sons should die in battle in remote lands where the local outcome makes no difference to the homeland?

Id. at 5-6; see also note 286 (noting that especially after Somalia, the United States is reluctant to commit American troops to an internationally-commanded force, as would be required under Article 43 special agreements).
303. Id. Jeane Kirkpatrick further commented:

If international force is necessary to stop human rights abuses in Haiti then, [the loose constructionists] say, use it. But what about human rights abuses in China? Use of force there is unthinkable. China would block action with its veto and, if necessary, with military force. But expansion of international force and jurisdiction into the internal affairs of states applies to major powers; to Russia, not to the associated nations of the Commonwealth of Independent States; to the United States, not to Haiti; to the developed states, not the undeveloped.

Id.
C. The Legal Future

Recently proposed legislation in the United States would curb U.S. military activity in the U.N., further reducing what remains of the U.N.'s effectiveness in controlling aggression through nonforce measures. Other member nations have also begun to focus more on their internal affairs and less on those of the U.N., which struggles to handle the current international problems. The result of this trend towards isolationism is that the future of using Article 43 agreements remains dim.

1. The National Arena

Senators from both parties recently endorsed a Peace Powers Act that would amend the U.N.P.A. to provide a statutory congressional role in the relationship between the United States and the U.N. The bill requires congressional consultation fifteen days before any Security Council vote on peacekeeping. The purpose of the bill is to "restore the primacy of U.S. national interests by placing limits on our involvement in U.N. peace operations abroad."

Ironically, the President also has introduced a new proposition, the Presidential Decision Directive 25, which states that "[t]he United States does not support a standing U.N. army, nor will we earmark specific U.S. military units for participation in U.N. operations." The directive sets forth a series of new and restrictive criteria for U.S. participation in collective security operations. Thus, Presidential Decision Directive 25 reflects growing disenchantment with the Wilsonian dream even at the executive level.

This directive, however, still does not satisfy the neo-isolationists. The Speaker of the House of Representatives, Newt Gingrich, called it "a profound mistake" and reproached the President for still revering the "multinational fantasy." The directive, according to Gingrich, "continues to subordinate the United States to the United Nations." Under the new Republican leadership, headed by Congressman Gingrich himself, Congress will most likely head in the isolationist direction with respect to collective security—the opposite position from the ideal toward which the U.N. drafters aimed.

304. See UN Peacekeeping, supra note 286, at S181 ("[T]his Act would not limit presidential power to act under Article 43 or article 51 of the U.N. Charter in defense of American interests—in Somalia, in Bosnia, in Haiti or anywhere else—unless the President chooses to involve U.S. forces in a U.N. peacekeeping operation.").
305. Schlesinger, supra note 149, at 7.
306. Id. at 5.
307. Id.
308. See supra notes 54-56 and accompanying text (defining the Wilsonian dream).
309. Schlesinger, supra note 149, at 7.
310. In the congressional leadership, Speaker Gingrich will be joined by another Republican leader, Jesse Helms, the Chairman of the Senate Foreign Relations Committee. Before succeeding to his new post, Senator Helms had already denounced
In early 1995, the House approved the National Security Revitalization Act, which would cut U.S. funding of U.N. peacekeeping actions and give Congress stronger control over U.S. troop participation in U.N. actions. The Republicans, who sponsored the bill, feel that "[i]t is high time that we rein in U.N. peacekeeping, which is out of control." The sponsors' main concern is to control the increasing demands of the U.N. on American forces and money. To ensure that the executive would not commit American troops to U.N. actions which Congress did not approve, Congress would require the president to base his decision on a national security need. Critics who decry the bill argue that it would cripple U.N. peacekeeping efforts, such as the mission in Haiti.

In conclusion, the current Clinton administration bluntly stated that whether the United States will enter into Article 43 agreements at the call of the Security Council "is of course a policy, rather than a legal, question. As Secretary Christopher stated, 'We do not exclude the possibility of an Article 43 type of force down the road but at this point it seems quite remote.' The result of both the Presidential Decision Directive and the National Security Revitalization Act will be further restrictions on U.S. action within the U.N. Such a result is consistent with the wishes of the American populace, which fear a "loss of U.S. sovereignty to the U.N." Without U.S. backing, however, the U.N. will be able to conduct little more than peacekeeping missions far from the military action the framers envisioned.

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312. Id. at A1.
313. Id. (statement of Republican Majority Leader, Senator Robert Dole).
314. Id. at A9 ("The nation has gone too far in the direction of globalism and lost sight of its essential footings, and we intend to correct that." (statement of House Majority Leader, Rep. Dick Armey)).
315. Id.
316. See id. (noting that this bill would cut the U.S.'s expenditures for U.N. peacekeeping from 31.7 percent to 20 percent).
319. See John Walker, UN Standby Force a Worthy Proposal, Edmonton Journal, Oct. 9, 1994, at C8 available in WESTLAW, 1994 WL 8519558 ("The Americans are going to be one of the big questions in [devising a plan to provide for U.N. standby forces, permanently committed to the U.N.], since they absolutely refuse to work under UN command, and have to date shown little talent for the less warlike aspects of peacekeeping or peace enforcement."); see also, Glennon, supra note 133, at 19 ("Few Americans are likely to take comfort knowing that Finland, Zaire, and Colombia have approved risking tens of thousands of American casualties.").
2. The International Arena

Other countries have recognized the self-serving actions of the United States in the international sphere. Some believe that with the Cold War over, the Council should use Article 43 to develop the standby peace-enforcement troops envisioned in the Charter, arguing that after the Persian Gulf war, "it is no longer acceptable that international action is taken only when a situation threatens the interests of the most powerful nations."\textsuperscript{320} In light of recent Security Council activity in "the zones of influence of the . . . superpowers, it is still true to say that their interests represent a vast limitation on the Council's operative area."\textsuperscript{321}

The United States is not the only Big Five power capable of using the veto to protect its interest. As previously mentioned, Russia recently has threatened to veto actions to protect its area of hegemony.\textsuperscript{322} Even China, which has used the veto sparingly in the past, currently views as its main concern sovereignty and protection of its freedom to act without U.N. intervention.\textsuperscript{323} Thus, as before, the permanent members' "interests and influences have become so pervasive in the post-war world that the veto has effectively debarred the Security Council from taking action or recommending measures of any sort in many areas of the globe."\textsuperscript{324}

The end of the Cold War was supposed to free the U.N. to do what its founders intended in keeping the peace through collective security. Unfortunately, this has not occurred. Despite his attempts to revitalize the U.N. peace-keeping efforts and the use of Article 43 special agreements\textsuperscript{325} after the Cold War,\textsuperscript{326} the Secretary General has realized reluctantly that such efforts\textsuperscript{327} are not consistent with the political reality of sovereign nations. The Secretary General now seems to be


\textsuperscript{321} White, \textit{supra} note 88, at 14.

\textsuperscript{322} \textit{See infra} part III.B.2 (discussing Russia's threat to veto U.S. operations in Haiti if the other member states denied a Russian free hand in certain of their former colonies).


\textsuperscript{324} White, \textit{supra} note 88, at 9.

\textsuperscript{325} \textit{See Agenda for Peace, supra} note 16, \textit{infra} 42-44.

\textsuperscript{326} \textit{See Barbara Crossette, U.N. Chief Ponders Future of Peacekeepers}, N.Y. Times, Mar. 3, 1995, at A3 ("Today, on the day the last United Nations peacekeeping troops left Somalia, Secretary General Boutros Boutros-Ghali suggested that the hopes for a new international order that blossomed at the end of the cold war has evaporated.").

\textsuperscript{327} \textit{Id.} ("I thought Boutros-Ghali's comments were very much in line with a new realistic approach to peacekeeping based on what has happened since that ebullient moment two years ago when he put forth his Agenda for Peace and everything seemed possible. . . . We now realize how difficult certain peacekeeping operations are and that they should be restricted in scope." (statement of Rita Hauser, an international lawyer and former U.S. representative to the U.N.).)
redirecting his expectations more realistically; he anticipates "the need to 'contract out' more operations to regional organizations or multinational forces led by major powers with special interests in the disputes—like the . . . United States forces in Haiti." 328

Every nation, preoccupied with its own domestic troubles, is inclined to dump international problems on the U.N. 329 Unfortunately, the U.N. cannot handle those problems due to a stifling bureaucracy and a lack of resources, power, personnel, funds, training, and equipment. 330 Moreover, the U.N. does not have the framework and coercive ability 331 to demand collective security through the implementation of Article 43 agreements. Fifty years ago, the U.N. framers envisioned an international organization that had military strength to combat aggression through standing forces provided by Article 43. Unfortunately, the reality is that the U.N. has become an entity capable of only peace-keeping missions and a messenger of "admonitions or demands with little or no impact." 332

D. A Proposed Amendment to the U.N. Charter

The European Community 333 ("Community") is probably the only international organization operating under a multilateral agreement whereby the member nations have transferred some portion of their sovereign jurisdiction to an overriding governmental body. 334 The Community twice has made major modifications to its empowering

328. Id. This possibility has aroused much trepidation that "old spheres of influence are being reasserted in a new guise." Id.

329. Schlesinger, supra note 149, at 7.

330. Id.

331. The U.N. Secretary General has maintained that under the present U.N. Charter provisions, he is extremely limited in his peace-keeping abilities. To amend the Charter's operational mandates allowing the use of force would "now mean 'that nobody would send troops.'" See Crossette, supra note 326, at A3 (quoting Secretary General Boutros Boutros-Ghali).

332. Hoffmann, supra note 253, at A28 (quoting Brian Urquhart); see, e.g., Stanley Meisler, 50 Years Ago, Hopes Soared as U.N. Began Life, L.A. Times, June 26, 1995, at A1 ("The almost naive enthusiasm with which Americans regarded the United Nations in 1945 has given way to a more skeptical—some would call it merely realistic—view of what the world body can accomplish."); Walker, supra note 319, at C8 ("A recent UN task Force [sic] could not come up with any new way to expand the use of UN forces, because its members could not widen their view beyond the peacekeeping roles now established.").

333. The European Community is an organization of European nations that supports a common economic market free of trade barriers. The Community has four political organs: the Council of Ministers, the decision-making branch; the Commission, the executive organ; the European Parliament, the representative, advisory body; and the Court of Justice, the Community's main judicial arm. See George A. Bermann et al., Cases and Materials on European Community Law 50-73 (1993).

The most important effect of the Single European Act was the elimination of the unanimity requirement in many significant areas of legislation. With the removal of unanimity and the substitution of qualified majority voting, the Community was able to overcome the previous blockage of legislation that it had faced.

A modification of the voting scheme similar to that in the Community's Treaty could be made to the U.N. Charter. Eliminating the veto only for concluding Article 43 agreements would still allow the permanent members of the Security Council to retain this power in all other areas. Restricting the elimination of the veto only to Article 43 agreements, for the purpose of finally fulfilling the U.N.'s goal to maintain peace, may lead to acceptance of this proposal because it only affects one article. If the elimination of the veto in this manner is successful, then the U.N. may wish to expand the elimination to other areas through subsequent modifications to the Charter, as occurred in the Community.

To safeguard abuse by the permanent members and ensure geographical and ideological balance, a two-step process should be implemented. First, the Security Council should take a preliminary vote to consider whether special agreements should be made at all. Second, if this process results in a majority, the issue then should be transferred to the General Assembly in which each nation would have a vote. This second phase would involve a qualified majority vote based on troop contributions. Such a formula would safeguard the permanent

335. The first transition was from the original European Economic Community Treaty to the Single European Act ("SEA"). See Bermann, supra note 333, at 14-15. The second transition was from the SEA to the Maastricht Treaty which now governs the European Union ("EU"). See id. at 16-19.

336. See Completing the Internal Market: White Paper from the Commission to the European Council, COM(85)310 final at ¶ 13, reprinted in Bermann, supra note 333, at 434-35 [hereinafter Completing the Internal Market] (stating that "action under this Article would be . . . more effective if the Council were to agree not to allow the unanimity requirement to obstruct progress where it could otherwise be made").


338. See Bermann, supra note 333, at 432-42.

339. See supra note 335 and accompanying text. From the beginning, certain issues in agriculture, transport, competition law, and commercial policy were voted on by qualified majority. See Bermann, supra note 333, at 52. The SEA widely increased the use of qualified majority voting to the harmonization of national laws for the internal market. Id. The Treaty on European Union further extended qualified majority voting to most measures in environmental and consumer protection, public health, and education. Id.

340. Note that in the Community each nation has a seat on the Council of Ministers, the collective head of state. Id. at 15.

341. See EEC Treaty art. 148 (outlining qualified majority voting). Qualified majority is a weighted system of voting which assigns each nation a certain number of votes based on its population. This method is analogous to the U.S. electoral college system of voting.
members' concern over having only a few small nations dictate military actions for which the permanent members would bear the burden.\textsuperscript{342}

\textbf{Conclusion}

Most observers of the U.N. have found consensus on one thing: "the U.N. has not found an effective role for itself since the fall of the Berlin Wall and needs radical reform."\textsuperscript{343} The U.N. Charter, though noble in its attempt to provide armed forces under a "sovereign" U.N. command through the conclusion of Article 43 special agreements, has so far failed as miserably as the League of Nations failed in this area. In the United States, the problem that existed in the Wilsonian era—the desire only to protect recognized spheres of influence—still exists today.\textsuperscript{344} While the U.S.'s global commitment may change with a radical, new president willing to take matters into his own hands, or an enlightened Congress not overly obsessed with polls, the near future does not look promising for a revitalization of the Article 43 agreements or the use of the U.N.P.A. If Congress does pass the proposed measures concerning the U.N.P.A., such measures would limit the role of the United States, the only real remaining superpower, even further in the U.N. This domestic tension within the United States affects international prospects for peace-keeping actions by creating a scenario where the United States would be forced to veto actions not authorized by Congress, thus perpetuating the history of the failure to conclude Article 43 agreements.

The Security Council has never made Article 43 special agreements because the permanent members, especially the United States, have never wanted to relinquish sovereignty or control of their troops. Big Five unanimity is not an impossibility, but as history has shown, it is an improbability when widely varying national interests can be protected by a veto. The only way to assure that the Security Council will conclude Article 43 agreements is to eliminate the veto power over such agreements and implement a system of qualified majority voting comparable to that of the European Community.

\textsuperscript{342} See supra note 116 and accompanying text (discussing the permanent members' concern about shouldering the burden of the military forces).

\textsuperscript{343} Younge, supra note 275, at T3. "Both Bush and Clinton spoke of the new world order as if it were just around the corner. In fact, it is still in a period of gestation, and its final form will not be visible until well into the next century." Schlesinger, supra note 149, at 8 (statement of Henry Kissinger). Wilson's dream of collective security is as far from realization now as it was three quarters of a century ago. \textit{Id.}

\textsuperscript{344} See Schlesinger, supra note 149, at 6 ("[There has been an] argument that has been going on all this century in the United States—an argument between those, like Theodore Roosevelt, who would base foreign policy on national interest and the preservation of a balance of power, and those like Woodrow Wilson, who dream of a new world order based on collective security.").