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[The following essay has been submitted by the author in lieu of a transcript of his remarks from the Colloquium presentation.]

U.N. PEACE AND SECURITY POWERS AND RELATED PRESIDENTIAL POWERS

The competencies and responsibilities of the United Nations concerning peace are varied and complex. Clearly the Security Council has a primary competence under Article 39 with respect to threats to the peace, breaches of peace, and acts of aggression; however, efforts to assure the full meaning of peace can implicate each entity within or connected with the United Nations and a whole panoply of general purposes, principles, competencies, rights, and obligations found in the United Nations Charter and authoritative practice.

While the reach of Security Council peacekeeping and peacemaking powers is quite extensive, it is limited by the U.N. Charter.[1] Each limitation must be kept in mind not merely as a constitutional limitation on Security Council power, but also as a limitation relevant to U.S. involvement in peace and security operations and to the retained competence of the United States to act alone or with others. Some limitations also provide, as Professor Gabriel Wilner might state, "legal . . . criteria for involvement."[2] The first such limitation can be found in paragraph 2 of Article 24, which assures a constitutional limit on power when directing that the Council, in discharging its duties with respect to the maintenance of international peace and security, "shall act in accordance with the Purposes and Principles of the United Nations." As noted in Article 1 of the Charter, such Purposes and Principles include human rights and self-determination. Thus, the constituted authority of the Security Council is conditioned by the need to serve, among other

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[1] Jordan J. Paust, *Peace-Making and Security Council Powers: Bosnia-Herzegovina Raises International and Constitutional Questions*, 19 SO. ILL. U. L.J. 131, 137-42 (1994). Here, I borrow extensively from the prior study. For a critique of expanding Security Council powers, *see, e.g.*, Jose E. Alvarez, *The Once and Future Security Council*, 18 WASH. Q. 2, 5 (1995).

[2] Gabriel Wilner, letter to colloquium participants, Feb. 27, 1995.

goals, human rights and self-determination of peoples.[3]

Second, these limitations are implicit in Article 25, since Members agree merely to carry out "decisions of the Security Council [made] in accordance with the . . . Charter," and, thus, decisions made in accordance with the Purposes and Principles of the United Nations as well as other Charter-based limits and duties.[4] Third, Article 55(c) provides a general duty of the United Nations (and, thus also, the Security Council) to promote "universal respect for, and observance of, human rights and fundamental freedoms for all . . . ."[5] Fourth, customary *jus cogens* prohibitions, such as the prohibitions of aggressive force and genocide, should condition and limit U.N. peace and security powers.[6] In particular, Security Council actions under Chapter VII of the Charter generally must not serve to encourage aggression and genocide, as some actions apparently have with respect to Bosnia-Herzegovina. To the extent that they do, Members should not be bound to participate. Fifth, as most writers recognize, Article 51 of the Charter affirms "the inherent right of individual or collective self-defense if an armed attack occurs," at least "until the Security Council has taken the measures *necessary to maintain* international peace and security" (emphasis in original) and those measures prove to be generally effective.[7]

An interesting question involves the relationship between Security Council competence and the right of the United States to engage in defensive uses of force when its military, embassy personnel, or other nationals are under armed attack. While Security Council measures are taking place but not yet effective, even if U.S. troops are participating in a U.N. operation, the United States should not be precluded from using armed force where reasonably needed to respond to an attack on U.S. military or other U.S. nationals abroad. Article 51 of the Charter should still allow an Entebbe-type rescue

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[3] *See* Paust, *supra* note 1, at 131, 139-41. Recently, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia recognized that Article 24(2) of the Charter limits Security Council powers. *See* International Criminal Tribunal for the Former Yugoslavia: Decision in Prosecutor v. Dusko Tadic, *reprinted in* 35 I.L.M. 32, 42 (1996).

[4] *See id.* at 141-42.

[5] *See id.* at 140-42.

[6] *See id.* at 138-40.

[7] *See id.* at 137-38; James W. Houck, *The Commander in Chief and United Nations Charter Article 43: A Case of Irreconcilable Differences?*, 12 DICK. J. INT'L L. 1, 13-14 (1993); Nicholas Rostow, *The Seamless Web: Foreign Policy and International Law*, 88 AM. SOC. INT'L L. PROC. 356, 360 & n.23 (1994).

or protective mission,[8] as well as other defensive uses of force reasonably

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[8] On the lawfulness of Entebbe-type rescue or defensive missions, *see, e.g.*, RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905, cmt. g (1985) (not violation of U.N. Charter, art. 2(4)); BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 1305-06, 1314, 1358 (2d ed. 1995); LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY ORIENTED PERSPECTIVE 331 (1989); RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 614-16, 622-24, 628 (2d ed. 1991); MYRES S. MCDOUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 868-69, 876-78, 1419 (defense of forces) (1981); Christopher C. Joyner, *Reflections on the Lawfulness of Invasion*, 78 AM. J. INT'L L. 131, 133 (1984); John Norton Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145, 153-54 (1984); Jordan J. Paust, *Entebbe and Self-Help: The Israeli Response to Terrorism*, 2 THE FLETCHER FORUM 86 (1978); Jordan J. Paust, *Responding Lawfully to International Terrorism: The Use of Force Abroad*, 8 WHITTIER L. REV. 711, 728-29 & n.60 (1986); *but see* Louis Henkin, ASIL NEWSLETTER, (June-Aug. 1993), at 3 (addressed in Paust, *Response to President's Notes on Missile Attack on Baghdad*, ASIL NEWSLETTER, (Sept. - Oct. 1993), at 4).

On the President's powers to protect U.S. nationals abroad, *see, e.g.*, Cunningham v. Neagle, 135 U.S. 1, 64 (1890); Durand v. Hollins, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860); E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 125-26 (1963); J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 213-14, 217-18 (3d ed. 1986); U.S. Dep't State Legal Adviser Monroe Leigh, remarks, War Powers: A Test of Compliance: Hearings Before the Subcommittee on International Security and Scientific Affairs, House Committee on International Relations, 94th Cong., 1st Sess. (1975) (Executive has power "to rescue American citizens abroad, to rescue foreign nationals where such action directly facilitates the rescue of U.S. citizens abroad, to protect U.S. embassies and legations abroad. . . ."), *reprinted in* THOMAS M. FRANCK, MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 603, 606 (2d ed. 1993); Report of the Senate Foreign Relations Committee on the War Powers Act, S. Rep. No. 220, 93rd Cong., 1st Sess. (1973), *reprinted in id.* at 570, 574 (attack on U.S. forces), 577 (protection of American lives); Marian Nash, *Contemporary Practice in the United States Relating to International Law*, 89 AM. J. INT'L L. 96, 122 (1995); Statement of Conrad K. Harper, Legal Advisor, Department of State on Legal Authority for U.N. Peace Operations Before the Legislation and National Security Subcommittee of the House Government Operations Committee, March 3, 1994, *reprinted in* 33 I.L.M. 821, 827 (1994) (President has constitutional authority to "take part in or support UN peace operations, when he considers that to be necessary to protect U.S. nationals or other U.S. national security interests."). *See also* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 263, 269-74 (1990); LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 54, 308 n.47 (1972). Article 51 powers under the U.N. Charter, as treaty-based powers, should also enhance presidential power. *See infra* note 12 and accompanying text. On defense of a nearly-national abroad, *see* Jordan J. Paust, *On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543, 566 & n.156 (1989) (discussing the Koszta matter). It is also recognized that an attack "on the land, sea or air forces, or marine and air fleets of another State" can constitute an act of aggression. Resolution on the Definition of Aggression, Dec. 14, 1974,

needed under the circumstances. It might be useful to coordinate U.S. actions with U.N. operations. Article 49 of the Charter requires "mutual assistance in carrying out the measures decided upon by the Security Council," but defensive measures under Article 51 of the Charter need only be "reported" to the Security Council.

Peace and security powers are also enhanced by the many purposes and principles contained in the U.N. Charter. For example, paragraph 1 of Article 1 addresses the related purpose of the U.N. "to take effective collective measures for the prevention and removal of threats to the peace." As in the past, peacekeeping and peacemaking operations might involve various peace-enhancing components. The prevention of threats to the peace can involve authorized self-determination assistance and the promotion of human rights,[9] thus implicating other purposes outlined in Articles 1 and 2 of the Charter. The recent U.N. efforts concerning Haiti provide an example of the conjoining of these purposes.[10] Similarly, efforts to stop Iraqi aggression also promoted self-determination and human rights.

Future efforts authorized by the Security Council might more openly involve human rights enforcement, including enforcement of relevant international criminal laws beyond merely the establishment of international criminal tribunals (perhaps even authorizing operations to capture alleged international criminals[11] and to end related threats to peace and security). Future operations might also involve the recovery of stolen nuclear or

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art. 3(d), U.N. G.A. Res. 3314, 29 U.N. GAOR, Supp. No. 31, 142, U.N. Doc. A/9631 (1975).

[9] *See also* U.N. G.A. Res. 39/2 of Sept. 28, 1984, 39 U.N. GAOR, Supp. No. 51, 14-15, U.N. Doc. A/39/51 (vote: 133-0-2) (condemning the illegal regime in South Africa and urging assistance to the people in their legitimate struggle for national liberation and a democratic society based on majority rule); U.N. G.A. Res. 2625, 25 U.N. GAOR, Supp. No. 28, 121, U.N. Doc. A/8028 (1971) (re: self-determination assistance); U.S. Administration Policy on Reforming Multilateral Peace Operations, 33 I.L.M. 795, 803 (1994) ("sudden interruption of established democracy or gross violation of human rights coupled with violence, or threat of violence"); *infra* notes 10, 42.

[10] *See, e.g.*, U.N. S.C. Res. 940 (July 31, 1994) (characterizing the junta as an "illegal de facto regime," reaffirming the "goal of the international community" to restore "democracy in Haiti and the prompt return of the legitimately elected President," welcoming the report of the Secretary-General and his support "for action . . . to assist the legitimate Government of Haiti," acts under Chapter VII to authorize states "to use all necessary means to facilitate the departure from Haiti of the military leadership . . . [and] the prompt return of the legitimately elected President and the restoration of the legitimate authorities. . . ."); Christian Tomuschat, *International Criminal Prosecution: The Precedent of Nuremberg Confirmed*, 5 CRIM. L.F. 237, 239 & n.5 (1994). *See infra* note 42.

[11] *See* JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 79 (1996).

biological weapons, efforts to counter international terrorism, and hostage rescue or protective missions as well as more general forms of humanitarian intervention.

DOMESTIC PEACE AND SECURITY POWERS AND THE CHARTER

What power does the President of the United States possess to assure adequate U.S. participation in U.N. operations such as those mentioned above? First, in view of the President's duty under Article II, section 3 of the U.S. Constitution faithfully to execute the laws and the fact that the United Nations Charter is treaty law of the United States, it is evident that the Charter can enhance presidential powers.[12] In this respect, there is a conjoining of the faithful execution of the laws power and the treaty power. Also relevant are the Executive power,[13] the President's foreign affairs power[14] and, in time of hostilities at least, the commander in chief power.[15] Importantly, only the commander in chief power is addressed in Section 2(c) of the War Powers Resolution.[16]

Counterposed to these are the various powers of Congress under Article I, section 8 of the Constitution, including its share of the war power[17] and the far-reaching, but not all-encompassing, "necessary and proper" clause.[18] Additionally, Congress clearly has the potentially inhibiting power of the

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[12] *See, e.g.*, Paust, *supra* note 1, at 142 & n.34, 144, 146-50. *See also* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 14-15, 155-56 nn.19-20 (1993); *infra* note 30 and text accompanying note 34.

[13] Paust, *supra* note 1, at 144, 148; Harper, *supra* note 8 (In addition to statutory authority in the U.N. Participation Act, the Foreign Assistance Act and various authorization and appropriations acts, "the President has independent constitutional authority, as Commander-in-Chief of the Armed Forces and as Chief Executive with responsibility for the conduct of U.S. foreign affairs. . . .").

[14] *See generally* Johnson v. Eisentrager, 339 U.S. 763, 789 (1950); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Harper, *supra* note 8; *infra* note 34.

[15] *See, e.g.*, Paust, *supra* note 1, at 144, 148; Harper, *supra* note 8; *infra* note 34.

[16] *See, e.g.*, Paust, *supra* note 1, at 144. Thus, the WPR does not seem to regulate other presidential powers under the Constitution. *See also* Section 8(d)(1) of the Resolution. 50 U.S.C. §§ 1541-48 (1982 & Supp. IV 1986); *cf id.* § 2(a). Moreover, the fact that only the commander in chief powers are addressed is relevant to interpretation of war-related phrases contained in the WPR such as "hostilities" and "combat". *See also infra* note 50. Indeed, the name of the resolution also points to the fact that these terms are related to war.

[17] Paust, *supra* note 1, at 147-48 & n.56.

[18] U.S. CONST. art. I, § 8, cl. 18. See also Paust, *supra* note 1, at 148.

purse string. With respect to restraints on the treaty power, Congress has the power to pass legislation that can bind the President domestically to act inconsistently with a treaty if: (1) the legislation is last-in-time;[19] (2) the legislation is unavoidably inconsistent with the treaty; (3) there is a clear and unequivocal evidence of congressional intent to supersede the treaty;[20] (4) none of the various exceptions to the last-in-time rule apply;[21] and (5) the legislation is not unconstitutional (for example, as an impermissible infringement on the constitutional separation of powers).

With respect to new efforts in Congress and the so-called National Security Revitalization Act,[22] it is evident that the effect of such a legislative scheme might involve the weakening of U.N. peacekeeping and peacemaking by significantly limiting or jeopardizing U.S. participation. U.N. peace and security operations should be responsive to various crises as they arise, and so should U.S. participation. In my opinion, the legislative scheme would impermissibly interfere with presidential powers and needed flexibility in the area of foreign affairs and national and international security, especially with respect to (1) congressional waivers or approval for joint or foreign commands, and (2) ad hoc congressional waivers or approval for monies for special operations beyond those previously authorized or within a normal budget.[23] Congress should tolerate greater Executive control of the details of command and the power of the United States to respond to threats to peace and national and international security. When

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[19] *See generally* Jordan J. Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT'L L. 393 (1988).

[20] *See generally* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963); Cook v. United States, 288 U.S. 102, 120 (1933); United States v. Payne, 264 U.S. 446, 448 (1924); Chew Heong v. United Sates, 112 U.S. 536, 539-40, 549-50 (1884); United States v. The Palestine Liberation Org., 695 F. Supp. 1456, 1465, 1468 (S.D.N.Y. 1988); Paust, *supra* note 19, at 400 n.9.

[21] *See* Paust, *supra* note 19, at 398-419, 447-48; JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 99 (1996).

[22] *See* Eric Schmitt, *House Votes Bill to Cut U.N. Funds for Peace Keeping*, N.Y. TIMES, Feb. 17, 1995, at A6; Steven A. Dimoff, *New Congress poses tough challenges for U.N. and UNA*, THE INTERDEPENDENT, Winter 1994-95, at 1.

[23] *See also supra* note 22. On related presidential commander in chief powers, *see, e.g.*, United States v. Sweeney, 157 U.S. 281, 284 (1895); *Ex parte* Milligan, 71 U.S. 2 (4 Wall. 2), (1866); Fleming v. Page, 50 U.S. (9 How.) 603, 615, 618 (1850); Swaim v. United States, 28 Ct. Cl. 173, 221 (1893), *aff'd*, 165 U.S. 553 (1897).

war is at stake Congress admittedly has a greater need to participate, but even then the sharing of the war power involves several complexities and separations of power and responsibility.

New legislation might require reports to Congress that contain too many details, such as the size, composition and objectives of U.S. forces, and information concerning reliance on foreign troops for security and support as well as the ability of such forces to perform.[24] Such detailed reports could seriously jeopardize both U.S. force and U.S. national security as well as the security of others. In terms of separation of powers, such details are best left with the commander in chief.

With respect to the legislation, if it is finally enacted and can pass constitutional muster, it might have only a limited effect. A 1996 act may be last-in-time with respect to the U.N. Charter as such, but there is no guarantee that it would prevail over a subsequent Security Council resolution[25] or a new Executive agreement made pursuant to the Charter and/or a new resolution of the Security Council.[26] As the *Restatement of the Foreign Relations Law of the United States* affirms, "binding resolutions such as those of the Security Council pursuant to Chapter VII of the United Nations Charter, . . . have the effect of law."[27] Judicial opinions confirm that Security Council resolutions have such an effect[28] and are even relevant to application of the last-in-time rule.[29] Accordingly, a 1996 act might be trumped by a latter-in-time Security Council resolution, and the President will have the power as well as the duty to follow the prevailing law.[30]

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[24] *See supra* note 22.

[25] *See, e.g.*, Paust, *supra* note 1, at 144-45, 148-50.

[26] *See, e.g., id.* at 146-50; RESTATEMENT, *supra* note 8, § 115 cmt. c, § 303 cmt. f.

[27] RESTATEMENT, *supra* note 8, § 102, cmt. g and reporters' note 3.

[28] See Paust, *supra* note 1, at 144 n.47.

[29] *See, e.g.*, Diggs v. Schultz, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

[30] *See generally* ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY 87-92 (1991); Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 63, 72, 74 (1991); Houck, *supra* note 7, at 15-16 & ns.65-66 (*cf. id.* at 17); Paust, *supra* note 1, at 144-45, 148-50; Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 VA. J. INT'L L. 903, 920 n.76, 958-59 (1994); text accompanying note 34 *infra*; *see also* Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 92 MICH. L. REV. 1364, 1372, 1390-91 & n.78, 1394 (1994); Frederic Kirgis, remarks at the Colloquium (binding resolutions can be

Indeed, more generally the President has the power and duty to execute a Security Council resolution, as any law, unless an exclusive congressional power is directly at stake or per terms of a particular resolution it requires prior legislative implementation. In fact, one of the express presidential powers, the "Executive" power, is close in name and meaning to the word "execute." The Constitution confirms that the President has the power (Article II, § 1) and the duty (Article II § 3) to execute law.[31] Thus, unless

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self-executing and relevant); Leigh, *supra* note 8 (Executive has power "to carry out the terms of security commitments contained in treaties"); Dellinger, *supra* note 8, at 125 n.7 ("Moreover, the deployment accorded with United Nations Security Council Resolution No. 940 (1994)"); John W. Davis, W. W. Grant, Philip Jessup, George Rublee, James T. Shotwell, Quincy Wright, "Our Enforcement of Peace Devolves Upon the President," letter, N.Y. TIMES, Nov. 5, 1944 (President has "powers to carry out a commitment for participation in international policing such as that" under U.N. S.C.); *cf.* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 190-92 (1972) (U.N. Charter duties and undertakings with respect to war and peace are "consistent with the Constitution" and the place of treaties "in the constitutional pattern," especially since "Security Council orders" are subject to the President's concurrence or veto and the President acts also "pursuant to a treaty . . . implemented by Congress."); *but see* ELY, *supra* note 12, at 11, 151-52 n.60; Lori Fisler Damrosch, *The Constitutional Responsibility of Congress for Military Engagements*, 89 AM. J. INT'L L. 58, 67 (1995); letter by Professors Bruce Ackerman, Abram Chayes, Lori Damrosch, John Hart Ely, Gerald Gunther, Louis Henkin, Harold Hongju Koh, Philip B. Kurland, Lawrence Tribe, William Van Alstyne, to Assistant Attorney General Walter Dellinger, Aug. 31, 1994, *reprinted in* 58 AM. J. INT'L L. 127 ("In *Dellums*, as here, the United Nations Security Council had issued a resolution authorizing member nations to 'use all necessary means' to drive Iraq from Kuwait. In our judgment, that resolution does not absolve Congress of its constitutional obligation to approve military action or the President of his constitutional obligation to seek and obtain that approval. To the contrary, the wording of Security Council Resolution 940 respecting Haiti 'authorizes,' but does not require, member nations to take military action, and expressly leaves each member nation, according to its own constitutional processes, to decide whether warmaking is 'a necessary means' to carry out its international obligations."); Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74, 75, 81, 88 (1991).

[31] The RESTATEMENT also recognizes that even a non-self-executing agreement can be executed by "appropriate executive or administrative action." RESTATEMENT, *supra* note 8, § 111 cmt. h; *see also id.* § 303 cmt. g. Moreover, treaties have been implemented by executive agreements. *See, e.g.*, Wilson v. Girard, 354 U.S. 524, 526-29 (1957); Reid v. Covert, 354 U.S. 1, 15 (1957); Coplin v. United States, 6 Ct. Cl. 115 (1984) *rev'd on other grounds*, 761 F.2d 688 (Fed. Cir. 1985), *aff'd*, 479 U.S. 27 (1986); RESTATEMENT, *supra* § 115 cmt. c, § 303(3) cmt. f and Reporters' Note 6; LOUIS HENKIN, *supra*, note 30, at 176. On the President's duty to execute, *see generally* Paust, *supra* note 19, at 423-25 & ns.59-61; Jordan J. Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377 (1987); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988); A. HAMILTON

a matter lies directly within the exclusive prerogative of Congress, it is otherwise constitutionally precluded, or legislation is required by the international instrument, the President must faithfully execute even an otherwise non-self-executing law. Further, whether a resolution is "self-executing" domestically should not inhibit any effect it may have abroad. Thus, even a "non-self-executing" resolution should be binding on the United States in its actions abroad or at the international level if such an effect is consistent with the terms of the resolution considered in context,[32] and the President's powers and responsibilities would thereby be enhanced.

An interesting question arises when the Security Council resolution is not strictly "mandatory" but "authorizes" states to participate in a military action, especially in the context of a "decision" of the Security Council under Chapter VII of the Charter. Such was the case with respect to Iraq and Haiti.[33] Further, this is what the Executive utilized in the case of Bosnia-Herzegovina, the President stating in 1994 that military actions were taken pursuant to his "constitutional authority to conduct foreign relations and as Commander-in-Chief" and as measures taken as part of a "NATO enforce-

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Pacificus No. 1, *in* 15 THE PAPERS OF ALEXANDER HAMILTON 33, 35, 38, 40, 43 (H. Syrett ed. 1969) (President "is charged with the execution of all laws," ["duty to enforce the laws"] including treaties and the law of nations [", the laws of Nations, as well . . . [i]t is consequently bound. . . ."], and since "[o]ur Treaties and the laws of Nations form a part of the law of the land," the President has both "a right and . . . duty, as Executor of the laws. . . ."); J. Madison, *Helvidius*, 2 WRITINGS OF JAMES MADISON 107 (G. Hunt ed. 1906) ("That the executive is bound faithfully to execute the laws of neutrality . . . is true. . . . It is bound to the faithful execution of these as of all other laws, internal and external, by the nature of its trust and the sanction of its oath. . . ."); 6 ANNALS OF CONG. 613-14 (1800) (Representative Marshall in 1800: "He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he, . . . possesses the means of executing it . . . [and he] is accountable to the nation for the violation of its engagements with foreign nations, and for the consequences resulting from such violation. . . ."); THE FEDERALIST NO. 3 (J. Jay) ("the laws of nations, *will always be* expounded in one sense and *executed* in the same manner . . ." (emphasis added)); P. DUPONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 3 (1824) quoted at 11 F. Cas. at 1120 n.6 (law of nations "acts everywhere proprio rigore" and "is binding on every people and on every government. It is to be carried into effect at all times . . . [e]very branch of the national administration . . . is bound to administer it . . . [i]t can never cease to be the rule of executive and judicial proceedings. . . .").

[32] *See* Theodor Meron, *Extra-territoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78, 78 n.5 (1995).

[33] *See, e.g.*, Paust, *supra* note 1, at 145 n.51.

ment effort . . . under the authority of U.N. Security Council Resolutions."[34]

An Executive claim might be that even an authorizing resolution, as part of a treaty process, is still an authorizing law which the Executive has discretion to execute or comply with on behalf of the United States—that even if the Executive is not bound to implement the resolution, executive power is enhanced because treaties which have the effect of authorizing action (or treaties plus resolutions thereunder which do the same) are laws of the land. The President's duty faithfully to execute legal "mandates" also reaches, and is enhanced by, treaty law and the President's duty is one involving the good faith exercise of discretion conferred by a Security Council resolution.[35] Moreover, such authorizing resolutions are evidently "decisions"[36] of the Security Council (and, in context, not mere "recommendations") within the meaning of Articles 25 and 48 of the U.N. Charter.

The President might also have the power to circumvent such legislation by an Executive agreement made pursuant to the U.N. Charter. For example, an Executive agreement pursuant to Article 43 of the Charter to supply U.S. military forces for U.N. peacekeeping and peacemaking operations, as a treaty-executive agreement, might well prevail over previous and inconsistent federal legislation, including the War Powers Resolution and the United Nations Participation Act.[37]

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[34] *See id.* at 144 n.45.

[35] *See supra* notes 30, 34; PAUST, *supra* note 21, at 444, 464-65. As in the case of any treaty, a conferred discretion must be exercised in good faith and not in a manner thwarting of the overall object and purpose of the treaty. Such is an obligation relevant to the President's duty faithfully to execute the law.

[36] *But see* Houck, *supra* note 7, at 6.

[37] *See, e.g.*, Paust, *supra* note 1, at 146-50. An executive agreement that attempts to implement a treaty is considered to be one made "pursuant to a treaty" and to have the status of a treaty. *See, e.g.*, RESTATEMENT, *supra* note 8, §§ 115 cmt. c, 303 cmt. f. The RESTATEMENT recognizes that the last-in-time rule does not apply in the case of a clash between certain "sole" executive agreements and an act of Congress and that inconsistent legislation prevails. *See* § 115 cmt. c and Reporters' Note 5; *see also* American Cetacean Society v. Baldridge, 768 F.2d 426, 444 (D.C. Cir. 1985), *rev'd on other grounds*, 106 S. Ct. 2860 (1986) (statute and executive agreement interpreted consistently); United States v. Guy W. Capps, Inc. 204 F.2d 655, 659-60, *passim* (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955); Swearingen v. United States, 565 F. Supp. 1019, 1021 (D. Col. 1983), *aff'd*, 479 U.S. 27 (1986); JOHN E. NOWAK, RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 6.9 at 220 (4th ed. 1991) ("If the President's authority to promulgate an executive agreement does not derive from his exclusive presidential powers . . . then the executive agreement should

not be able to override an earlier enacted federal statute."); COVEY T. OLIVER ET AL., THE INTERNATIONAL LEGAL SYSTEM 1078 (4th ed. 1995) ("The basic rationale of *Youngstown* is that a president has no inherent power to repeal or suspend an act of Congress."); DANIEL G. PARTAN, THE INTERNATIONAL LAW PROCESS 644 (quoting former Judge Bork: "it is certain . . . that the President could not make substantive law in direct opposition to legislation by Congress. This is the lesson of *Youngstown Sheet & Tube Co.* . . ."), 647 ("it seems equally clear that executive agreement law must be subordinate to both statutes and self-executing treaties.") (1992); PETER M. SHANE, HAROLD H. BRUFF, THE LAW OF PRESIDENTIAL POWER 543-44 (1988) ("Unless an executive agreement may be connected to at least implicit statutory authorization, it is probable that, unlike a treaty, it may not override prior statutes."); BURNS H. WESTON, RICHARD A. FALK, ANTHONY D'AMATO, INTERNATIONAL LAW AND WORLD ORDER 195 (2d ed. 1990) (last-in-time rule not applicable to executive agreements); *cf.* Coplin v. United States, 6 Ct. Cl. 115 (1984) (treaty-executive agreement), *rev'd on other grounds*, 761 F.2d 688 (Fed. Cir. 1985), *aff'd*, 479 U.S. 27 (1986). Only a sole executive agreement within an exclusive Executive power (such as recognition of foreign states or governments and armistice agreements) should prevail over legislation, but it would be the separation of powers and not the last-in-time rule that compels such a result. *See* HENKIN, *supra* note 30, at 177-78, 186; Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 317 (1945). Of course, a treaty-executive agreement or a congressional-executive agreement at least has the status of its coordinate legal base (*i.e.*, a treaty or a statute). *See* RESTATEMENT, *supra* § 115 cmt. c.

The same result follows even more logically with respect to a clash between a mere executive regulation (not within an exclusive Executive power) and an act of Congress. *See* The Confiscation Cases, 87 U.S. (20 Wall.) 92, 112-13 (1874) ("No power was ever vested in the President to repeal an act of Congress" and presidential proclamations of amnesty did not have such an effect); Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246, 330-33 (1818) (statute controls presidential instructions regarding: seizure of vessels); The Flying Fish, 6 U.S. (2 Cranch) 170, 177-79 (1804) (statute prevails over presidential orders); United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson J., on circuit) ("The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure, which is a doctrine that has not been set up, and will not meet with any supporters in our government."). Moreover, the last-in-time rule does not apply to a clash between a constitutionally valid treaty and a mere executive regulation, since only federal statutes (and possibly some executive agreements) are generally coequal with treaties as domestic law and the Executive is bound by treaty law while it remains extant. *See* Taylor v. Morton, 23 F. Cas. 784, 786 (C.C.D. Mass. 1855) (No. 13,799) (Curtis, J., on circuit) ("treaties must continue to operate as part of our municipal law, and be . . . executed by the President, while they continue unrepealed, . . . no body other than Congress possesses [the power to] refuse to execute a treaty."), *aff'd*, 67 U.S. (2 Black) 481 (1862); Paust, *supra*, note 19, at 423-25 & ns.59-61; *supra* note 31; *but see* Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 936-37 & ns.19-20 (1986) (addressed in Paust, *The President Is Bound*, *supra* note 31, at 384). This should especially

The U.S. deployment of troops in Haiti has raised related issues. When one reads recent communications on the constitutionality of the planned U.S. military operation in Haiti, one is struck by the seeming manipulation of several terms. Assistant Attorney General Walter Dellinger's letter prefers "operations," "measures," and "deployment" in justifying presidential prerogatives short of "war,"[38] whereas Professor Lori Damrosch favors "hostilities," "invasion," "a shooting war," and "combat" while arguing for congressional primacy[39] (although she nearly acknowledges a presidential power to initiate 'certain . . . low-level engagements').[40]

What would the planned use of our military against a resisting force of the illegal regime in Haiti actually have involved? Certainly, this would not entail a "war" or international "armed conflict" in the traditional sense (*i.e.*, a use of armed force between states or nations under the authority of their respective governments or leaders)[41] if the U.S. use of force had been authorized by the legitimate governmental leader of Haiti and the illegal regime had failed even to acquire the status of a "belligerent." As Professor Michael Reisman suggests, it would not have been armed force against Haiti, the *de jure* government, or the Haitian people, but force with the consent of Haiti's elected President clearly consistent with self-determination of the Haitian people and their human right to participate in a process of "authority" involving "legitimate" government,[42] a point supported by legal

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be true with respect to the U.N. Charter. *See* Paust, *supra* note 1, at 149 & n.72.

[38] *See* Dellinger, *supra* note 8, at 122, 125-26.

[39] *See* Damrosch, *supra* note 30, at 61-67.

[40] *See id.* at 67. *See also* Phillip R. Trimble, *The President's Constitutional Authority to Use Limited Military Force*, 89 AM. J. INT'L L. 84 (1995).

[41] *See, e.g.*, Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40 (1800) (Washington, J.) ("hostilities" occur when "authorized by the legitimate powers.").

[42] W. Michael Reisman, *Haiti and the Validity of International Action*, 89 AM. J. INT'L L. 82, 82-84 (1995); *see also* Universal Declaration of Human Rights, art. 21(3) *reprinted in* INTERNATIONAL HUMAN RIGHTS INSTRUMENTS OF THE UNITED NATIONS 1948-1982 (1983); Western Sahara Advisory Opinion, 1975 I.C.J. 12, 31-33, 36; American Convention on Human Rights, preamble and art. 29(c), O.A.S. Treaty Ser. No. 36, *reprinted in* 65 AM. J. INT'L L. 679 (1971); American Declaration of the Rights and Duties of Man, art. XX (1948), OEA/Ser.L./V/I.4 Rev. (1965); Thomas M. Franck, *The Democratic Entitlement*, 29 U. RICH. L. REV. 1 (1994); Moore, *supra* note 8, at 154 (if consent of the legitimate authorities, not impermissible); Jordan J. Paust, *Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights*, 18 CASE W. RES. J. INT'L L. 283, 297-98 (1986); Jordan J. Paust, *International Legal Standards Concerning the Legitimacy of Governmental Power*, 5 AM. U. J. INT'L L. & POL. 1063 (1990); Theo van Boven, General

principles that seem to have escaped Professor Michael Glennon.[43] It is also evident that in such a circumstance use of the word "invasion" would not be appropriate.

If the resisting military of the illegal regime had not even achieved the status of an "insurgent" under international law (which would implicate common Article 3 of the 1949 Geneva Conventions and words such as 'armed conflict,' 'hostilities,' and possibly 'noncombatants'), then use of words such as "hostilities" and "combat" would have been improper. Appropriate determinations of the status of belligerency or insurgency involve contextual inquiry and, thus, implicate general matters such as the "nature" and "scope" of deployments. One critical element concerning each status involves the requirement of adequate control of significant territory,[44] a matter that must be tested contextually. Thus, when the U.S. declared that it would "apply all of the provisions of the Geneva Conventions . . . [i]f it becomes necessary to use force and engage in hostilities,"[45] the U.S. conditioned application on the existence of actual "hostilities" and did not even admit that all provisions, even then, would be technically applicable.[46] Clearly, not every use or projection of military power is entwined in a belligerency or an insurgency, and the existence of an insurgency seems to pose the minimum threshold for "hostilities" or "combat." Nonetheless, if an insurgency had occurred, Security Council authorization of military force and direct U.S. participation would have internationalized the armed conflict, at least in terms of Geneva law.[47]

Moreover, if an insurgency was not likely but a quick, overwhelming use

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Course on Human Rights, 4 *Collected Courses of the Academy of European Law* bk. 2, 1, 26 & n.37 (1995) (democracy); *supra* notes 9-10. On U.S. efforts in Haiti, *see also* Stephen J. Schnably, *The Santiago Commitment as a Call to Democracy in the United States: Evaluating the OAS Role in Haiti, Peru, and Guatemala*, 25 U. MIAMI INTER-AM. L. REV. 393, 418-60 (1994).

[43] *See* Michael J. Glennon, *Sovereignty and Community after Haiti: Rethinking the Collective Use of Force*, 89 AM. J. INT'L L. 70, 71-72, 74 (1995).

[44] *See, e.g.*, Jordan J. Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. U.J. INT'L L. & POL. 499, 506 & n.27 (1994).

[45] *See* U.S. Permanent Mission in Geneva, Diplomatic Note to the International Committee of the Red Cross (Sept. 19, 1994), *reprinted in part* in Meron, *supra* note 32, at 78.

[46] Consider also Geneva Convention Relative to the Protection of civilian Persons in the Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (1950). *Cf id.* art. 16. *See generally* Paust, *supra* note 44, at 512-13.

[47] See Paust, *supra* note 44, at 507-10.

of military power with only sporadic and ineffective resistance, one could not logically conclude that U.S. troops would have been "equipped for combat" unless the words "for" and "combat" lose any common meaning. Certainly troops are not equipped "for" combat if no "combat" is contemplated or likely to take place.[48] Therefore, I disagree with Professor Damrosch on proper classification of the "Somalian experience"[49] and affirm Professor Glennon's recognition that in Somalia there were no "hostilities" (nor an 'armed attack'), but some uses of force by "brigands."[50] The question shifts to whether international law addressing some of these very terms is relevant to interpretation of the WPR and constitutional powers. Presumably it is.[51]

In conclusion, it is evident that Congress seeks involvement in overall decisionmaking concerning U.S. participation in peace and security operations. If legislation goes too far it may lawfully be bypassed even if it is not unconstitutional. The difficulty, it seems, will involve selection of agreed criteria and procedures that provide sufficient flexibility and restraints.

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[48] *See also* U.S. Dep't State Legal Adviser Abraham Sofaer, The War Powers Resolution and Antiterrorist Operations, U.S. Dep't State, Current Policy No. 832, at 2, *reprinted in part in* 80 AM. J. INT'L L. 636 (1986) (doubts whether WPR applies to use of antiterrorist units "where no confrontation is expected between our units and forces of another state," since likely that such action is outside language referring to "hostilities" or "forces equipped for combat").

[49] *See* Damrosch, *supra* note 30, at 64-65.

[50] *See* Glennon, *supra* note 43, at 70-71.

[51] *See also* The Prize Cases, 67 U.S. (2 Black) 635 (1862); Brown v. United States, 12 U.S. (8 Cranch) 110, 125 (1814); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 41 (1801); Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800) (and *supra* note 41). *See also supra* note 16; 1973 Senate Committee Report, *supra* note 8, *reprinted in* FRANCK & GLENNON, *supra* note 8, at 570, 577 (" 'acts of war' in the sense of large-scale military operations against sovereign states . . . involving full-scale warfare against a foreign power. . . ." [and] "hostilities in Vietnam, Laos and Cambodia"); BLACK'S LAW DICTIONARY, "hostility," 872 (4th ed. 1968) (addressing "war" and the law of nations); *see generally* Weinberger v. Rossi, 456 U.S. 25, 32 (1982); United States v. Flores, 289 U.S. 137, 159 (1933); The Charming Betsy, 6 U.S. (2 Cranch) 64, 117-18 (1804); 1 Op. Att'y Gen. 26, 27 (1792).