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The Relevance of the International Order to the Internal Allocation of Powers to Use Force

BERNARD H. OXMAN*

The United States attained its independence by winning a war against a foreign power with the assistance of foreign allies. Many of the nation's founders valued liberty even more than peace. Domestic tranquility and the common defense are tangible purposes of the "more perfect union" identified in the preamble to the Constitution they drafted a few years later.¹

That Constitution neither imposes nor suggests pacifism or isolationism as the means to achieve its goals.² The President's first enumerated power is that of Commander in Chief of the Army and Navy.³ The Constitution expressly authorizes Congress to declare war, grant letters of marque and reprisal, make rules concerning captures on land and water,⁴ raise and support armies,⁵ provide and maintain a navy,⁶ provide for calling forth the militia,⁷ make rules for the governance the army and navy⁸ and of the militia when in the service of the United States,⁹ and define and punish piracies and other felonies on the high seas and other

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1. U.S. CONST. pmbl.

2. America's early leaders understood the legal and political possibilities of a foreign policy that included involvement in foreign alliances and wars. In urging the nation to avoid European politics and entangling alliances, George Washington deemed such a foreign policy unwise, but not illegal or impermissible.

Why, by interweaving our destiny with that of any part of Europe, entangle our peace and prosperity in the toils of European ambition, rivalry, interest, humor, or caprice?

It is our true policy to steer clear of permanent alliances with any portion of the foreign world, so far, I mean, as we are now at liberty to do it; for let me not be understood as capable of patronizing infidelity to existing engagements. I hold the maxim no less applicable to public than to private affairs that honesty is always the best policy. I repeat, therefore, let those engagements be observed in their genuine sense. But in my opinion it is unnecessary and would be unwise to extend them.

George Washington, Farewell Address (Sept. 17, 1796), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS 205, 215 (James D. Richardson ed., 1894).

3. U.S. CONST. art. II, § 2, cl. 1.

4. U.S. CONST. art. I, § 8, cl. 11.

5. U.S. CONST. art. I, § 8, cl. 12.

6. U.S. CONST. art. I, § 8, cl. 13.

7. U.S. CONST. art. I, § 8, cl. 15.

8. U.S. CONST. art. I, § 8, cl. 14.

9. U.S. CONST. art. I, § 8, cl. 16.

offenses against the law of nations.¹⁰ The Constitution comprehensively allocates foreign affairs and defense powers to the national government and generally denies autonomy to the states in this regard. Still, even without the consent of Congress, the states are precluded neither from engaging in war if actually invaded or in such imminent danger as will not admit of delay, nor from keeping troops and warships in time of war.¹¹

The express purpose of the Declaration of Independence was to establish independent status as part of the international community of states.¹² The Constitution makes clear that it is the national government that will function as part of that political community both in war and in peace. The Constitution also expressly identifies the major elements of the international system: it refers to kings, princes, foreign states¹³ and their ambassadors and public ministers as well as our own;¹⁴ it provides for enforcing the law of nations;¹⁵ and it speaks not only of war¹⁶ and declarations of war,¹⁷ but of international treaties,¹⁸ alliances, confederations,¹⁹ agreements, and compacts.²⁰

These extensive references to the international political and legal order suggest at least one reason for Chancellor Kent's opinion that all lawyers should study international law.²¹ Read both literally and in historical context, the provisions of the Constitution dealing with war and foreign affairs are appropriately viewed as a response to the international order.

The Constitution can be understood as creating an internal political and legal structure intended to function within the established international political and legal order. Two celebrated opinions of Chief Justice John Marshall illustrate this point. In *The Schooner Exchange v. McFadden*²² he declined to permit an otherwise routine attachment of a ship in an American port because "in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sover-

10. U.S. CONST. art. I, § 8, cl. 10.

11. U.S. CONST. art. I, § 10, cl. 3.

12. See THE DECLARATION OF INDEPENDENCE para. 23 (U.S. 1776).

13. U.S. CONST. art. I, § 9, cl. 8.

14. U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art. II, § 3.

15. U.S. CONST. art. I, § 8, cl. 10.

16. U.S. CONST. art. I, § 8, cl. 11; U.S. CONST. art. I, § 10, cl. 3; U.S. CONST. art. III, § 3, cl. 1.

17. U.S. CONST. art. I, § 8, cl. 11.

18. U.S. CONST. art. I, § 10, cl. 1; U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art. III, § 2, cl. 1; U.S. CONST. art. VI, cl. 2.

19. U.S. CONST. art. I, § 10, cl. 1.

20. U.S. CONST. art. I, § 10, cl. 3.

21. JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW *19-*20.

22. 11 U.S. (7 Cranch) 116 (1812).

eign entering a port open for their reception."²³ In *Murray v. The Schooner Charming Betsy*²⁴ he wrote that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains"²⁵

The import of Chief Justice Marshall's reasoning in *The Charming Betsy* is by no means limited to statutory interpretation. When dealing with the Constitution the choice is not between ignoring that reasoning or applying it fully to constitutional interpretation. If we presume, with little or no intrinsic evidence in most cases, that Congress normally legislates within the confines of the international system, then there is ample reason at least to consider the requirements of that system when interpreting a Constitution that expressly identifies major elements of the system and establishes the framework for our interaction with it.

In pondering the implications of this view of our constitutional order, it is important to make clear what is not being said. This view does not rest on an assertion that our constitutional order, as a matter of internal law, is subordinate to the international order. As a matter of domestic law, a constitutional impediment to fulfillment of an international legal obligation would have to be respected, even though international law would not excuse a breach of the obligation on those grounds.

This view also does not rest on an assertion that our constitutional order must yield to international *realpolitik* and concomitant demands for efficiency. It is one thing to say that complex democracies must try to find ways to deal with the tactical agility of more monolithic or authoritarian states; it is quite another to say the democracies must mimic them.

What this view means is that it is inappropriate to interpret the Constitution on questions of foreign affairs and the use of force in international settings without reference to the international political and legal system.

In order to achieve rational administration of the law, we must rec-

23. *Id.* at 144.

But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.

Id.

24. 6 U.S. (2 Cranch) 64 (1804).

25. *Id.* at 118.

ognize that we are dealing with the interaction between two different fields of law emanating from two different legal systems, namely the constitutional law of the United States on the one hand, and the law and structure of the international system on the other. In this, as in other instances of interaction between different fields of law, retreat to hierarchical norms will not work well, if at all. The legal order is such that both the Constitution and the basic principles and instruments of international law are supreme in their own systems. When those systems intersect, it is desirable to facilitate their interaction to the extent possible. Interpreting the Constitution in a manner that impairs the United States' ability to participate constructively in the international order is certainly possible, and in some instances may be preferable, but that result should not be reached without first considering the possibilities for harmonization.

This does not mean that considerations relevant to the domestic constitutional order invariably must yield to considerations relevant to the international order. Both the opinion of the Court by Justice Harlan and the dissenting opinion by Justice White in *Banco Nacional de Cuba v. Sabbatino*²⁶ examine the nature and requirements of international law and the international order as they bear upon the respective roles of the executive and the judiciary in the United States. Justice Harlan ultimately gives priority to internal structural considerations and emphasizes the constitutional underpinnings of the "act of state" doctrine.²⁷

Justice White gives more weight to considerations relevant to the international order, believing that

[t]o refuse inquiry into the question of whether norms of the international community have been contravened by the act of state under review would seem to deny the existence or purport of such norms, a view that seems inconsistent with the role of international law in ordering the relations between nations.²⁸

He would deal with the internal structural problem where necessary on a case-by-case basis. Some may see the fact that Congress expressed its

26. 376 U.S. 398 (1964).

27. The act of state doctrine does, however, have 'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

Id. at 423.

28. *Id.* at 457 (White, J., dissenting).

essential agreement with Justice White²⁹ as an affirmation that the needs of the international order are relevant to the allocation of internal competence with respect to international matters.

More broadly, *Sabbatino* demonstrates that considering the international political and legal order does not necessarily lead to a particular result on any given issue of allocating competence among the branches of government. Like other judges before him, Justice Harlan's reasoning could have relied more heavily on judicial deference to territorial sovereignty as an important value in the international legal order. In a sense he was invoking that point when he argued that the "act of state" doctrine protects international commerce by enhancing certainty and predictability of title to goods in international trade.³⁰ From that perspective, both Justices Harlan and White looked to the international legal order to inform their approach to an internal structural issue regarding allocation of competence. However, they reached different conclusions regarding the needs of that order.

If that is so, then one might ask what difference it makes. The most obvious response evinces our faith in rationality, namely the belief that our chances of reaching a sound result are enhanced if we think about the right things. But with regard to foreign affairs, and particularly the use of force, there is a more specific response. The international order has changed. That change poses profound questions about how to deal with the interaction between the international system and our constitutional order.

The framers of the Constitution unquestionably intended to establish a national government capable of exercising the rights and performing the obligations of states within the international system. The Constitution contains ample references to the elements of that system as it existed in the late 18th century. The drafters were preoccupied with that system—one in which war was a lawful instrument of national policy. They could no more envisage the many changes that occurred in the international system in the ensuing centuries than they could envisage the many changes that occurred within the United States as it grew and developed. But we can realize the framers' purpose only by ensuring that the national government is capable of exercising the rights and performing the obligations of states within the international system as it exists today.

Since the end of World War II, and especially since the end of the Cold War, constitutional interpretation with respect to the international

29. Congress partially "overruled" the "act of state" doctrine. Pub. L. No. 89-171, 79 Stat. 653 (codified as amended at 22 U.S.C. § 2370(e)(2)).

30. *Sabbatino*, 376 U.S. at 434-37.

use of force requires careful consideration of the United Nations Charter,³¹ its principles and purposes, its structure and implementation, and its successes and failures. The goal is to seek ways to harmonize the interaction between the domestic constitutional order and the international order. The Charter would be consulted in this particular context not, or at least not principally, because it is a treaty that the Constitution declares to be the supreme law of the land, but because it is the supreme instrument of the international legal order dealing with the use of force.

An examination of the Charter's text,³² and commentary of learned scholars and judges, quickly reveals that international law regarding the use of force has changed dramatically since the Constitution was drafted. War, as the term was classically understood in international law, is now widely considered illegal under the Charter³³ and international law.³⁴ In national governments, ministries of war have been superseded by ministries of defense. The international rules of warfare were extended to international armed conflict³⁵ and restyled "interna-

31. 15 U.N.C.I.O. Docs. 335 (1945); 59 Stat. 1031 (1945).

32. In particular, U.N. CHARTER art. 2, ¶¶ 3,4:

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

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 other manner inconsistent with the Purposes of the United Nations.

33. See Quincy Wright, *The Outlawry of War and the Law of War*, 47 AM. J. INT'L L. 365, 365 (1953) ("War in the legal sense has been in large measure 'outlawed'; that is, the international law conventionally accepted by most states no longer recognizes that large-scale hostilities may constitute a 'state of war' in which the belligerents are legally equal."); Thomas M. Franck & Faiza Patel, *The Gulf Crisis in International and Foreign Relations Law: UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 63 (1991) ("The United Nations system is an elegant, carefully crafted instrument to make war illegal and unnecessary."); see also *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 215-16 (June 27) (dissenting opinion of Judge Oda).

Unlike some older principles of international law, the particular principle concerning 'threat or use of force' emerged in parallel with the birth of the United Nations towards the end of the Second World War, when the move to outlaw war in general was successfully made The dual system of international law in time of peace and international law in time of war was abandoned with the emergence of the outlawry of war and the principle of non-intervention, which together with the prohibition of the threat or use of force, came to encapsulate the founding spirit of the United Nations.

Id.; see also Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113 (1986) (establishing that aggressive war is illegal as an effective rule of law in international society).

34. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 99-100 (June 27).

35. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, 6 U.S.T. 3115, 3116, art. 2, para. 1 ("In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of

tional humanitarian law."³⁶

The Charter establishes a concept of collective security unknown to the alliance structures of earlier periods. It also establishes a special organ, the Security Council,³⁷ authorized to provide security for all by using a variety of means, including armed force, if it finds a threat to the peace or a breach of the peace.³⁸ All member states, including the offending state, are legally bound by decisions of the Security Council in its exercise of these powers.³⁹ The text of the Charter essentially limits armed self-help by states to situations of individual or collective self-defense in the event of armed attack.⁴⁰ To that extent the Charter permits the classic alliance system to continue.

The central distinguishing feature of collective security is a delegation of authority to a diverse, influential, and reasonably representative group of states, empowered by all states to decide on the community's response to threats to the peace or breaches of the peace. The underlying judgment, well known to municipal legal systems, is that breaches of the peace constitute unacceptable conduct that threatens the security of the community as a whole, and may require a forcible response.

The resemblance to classic alliances is superficial. Classic alliances exist to deter outsiders, and rely on repeated tests of will and skirmishes at the margins either to maintain or to change the existing balance. The internal cohesion of the alliance may depend upon forceful reactions to threats at its periphery that transcend the military significance of those threats.

Collective security is designed to deter any misconduct on behalf of all states. Since virtually all states are members of the United Nations, the primary focus of collective security is internal, not external, to the organization. It is by no means irrelevant that, in addition to its collective security powers, the Security Council is authorized to enforce judgments of the International Court of Justice.⁴¹

the High Contracting Parties, even if the state of war is not recognized by one of them."'). This article is common to all four Conventions of 1949.

36. LOUIS HENKIN ET AL., *INTERNATIONAL LAW* 1026 (3d ed. 1993) (citing HILAIRE MCCOUBREY, *INTERNATIONAL HUMANITARIAN LAW* 1 (1990)) ("McCoubrey defines international humanitarian law as that which protects human beings during armed conflict; other writers have used the term more broadly to refer to the entire legal regime for the regulation of war.").

37. U.N. CHARTER art. 7, ¶ 1.

38. U.N. CHARTER arts. 39-42.

39. U.N. CHARTER art. 25 and 48; Questions of Interpretation and Application of the 1971 Montreal Convention Arising from Aerial Incident at Lockerbie, (*Libya v. U.K.*), 1992 I.C.J. 3 (April 14); (*Libya v. U.S.*), 1992 I.C.J. 114 (April 14) (Libyan request for provisional measures denied in light of Security Council order to turn suspects over to the U.K. or U.S.).

40. U.N. CHARTER art. 51. This is subject to Security Council measures taken to deal with the breach of the peace.

41. U.N. CHARTER art. 94, ¶ 2.

The classic alliance system represents an approach to deterrence rooted in self-help and mutual tests of power that municipal legal systems are designed to supplant and suppress wherever possible. Even today, municipal legal systems may seek to justify their existence, and their occasional harshness, as a preferable alternative to self-help and clan warfare. It is not surprising that municipal legal systems tend to view a system of international security rooted in self-help and military alliances as more political than legal.

In collective security, on the other hand, municipal law encounters at least the promising rudiments of what it recognizes as a law enforcement system empowered by all to protect the security of all. If that system is to function properly, then the domestic constitutional order of member states must interact with it in ways appropriate to the goal of collective security.

This does not mean that the practical needs of the collective security system must always prevail over other values, any more than the practical needs of local law enforcement must always prevail over other municipal law values. But just as the great judicial decisions protecting individual liberties within the context of domestic law enforcement consider carefully the effects of the decisions on the functioning of the law enforcement system, our constitutional analysis of internal allocations of competence to deal with the international order also should consider carefully the effects on the functioning of the collective security system.

Throughout much of the Cold War, the collective security system was unable to function because the five permanent Security Council members with individual veto power were locked in a struggle among themselves and their rival alliances. Because of a Soviet walk-out, and the failure to accord China's seat to the People's Republic, the Korean conflict enjoyed the juridical cover of a United Nations "police action," in which the Truman Administration believed U.S. participation did not require express congressional authorization. That reasoning strikes us as artificial because in political terms the Korean conflict was a classic military engagement between rival alliances that never in fact enjoyed the community support implicit in collective security.

During the Cold War, the argument that the Charter created new legal categories that the Constitution's provisions on war did not address took on an air of formalism unrelated to the life-and-death struggle between the West and its Communist adversaries. Particularly as seen from the United States' perspective, it was the classic alliance structure and traditional power politics, not the collective security system, that maintained or restored peace during the Cold War. And it was Vietnam—an armed conflict that explicitly grew out of the alliance struc-

ture, with no pretense of collective security—that stimulated the most ambitious efforts to date to circumscribe the President's ability to commit or use American armed forces.

With the end of the Cold War, the effective implementation of a collective security system by the Security Council became possible to imagine. That possibility was realized when Iraq invaded Kuwait. The Security Council responded with an escalating series of measures culminating in the forcible expulsion of Iraqi forces by a Security-Council-sanctioned coalition led by the United States.⁴² The collapse of responsible government in Somalia led to mass starvation, the full horror of which was averted by Security-Council sanctioned armed intervention by the United States and others.⁴³ When an oppressive military *coup d'état* ousted the freely-elected President of Haiti, a Security-Council sanctioned armed intervention by the United States and other countries returned him to office.⁴⁴

These and other Security Council measures since the end of the Cold War, the failure to achieve effective results in some places and the deployment of U.S. peacekeeping forces in Bosnia have raised new legal and political issues in the United States. The legality and wisdom of placing U.S. forces under foreign command and operating under U.N. political control are being questioned and debated.

Legislative proposals dealing with these issues are being introduced in Congress,⁴⁵ which in turn reopens the debate about the allocation of powers between the President and Congress. These new proposals simultaneously raise and obscure a basic underlying point: it is time to

42. S.C. Res. 660, U.N. SCOR, 45th Sess., 2932d mtg. at 26-27, U.N. Doc. S/PV.2932 (1990); S.C. Res. 661, U.N. SCOR, 45th Sess., 2933d mtg. at 54-55, U.N. Doc. S/PV.2933 (1990); S.C. Res. 662, U.N. SCOR, 45th Sess., 2934th mtg. at 7, U.N. Doc. S/PV.2934 (1990); S.C. Res. 664, U.N. SCOR, 45th Sess., 2937th mtg. at 7, U.N. Doc. S/PV.2937 (1990); S.C. Res. 665, U.N. SCOR, 45th Sess., 2938th mtg. at 26, U.N. Doc. S/PV.2938 (1990); S.C. Res. 666, U.N. SCOR, 45th Sess., 2939th mtg. at 37, U.N. Doc. S/PV.2939 (1990); S.C. Res. 667, U.N. SCOR, 45th Sess., 2940th mtg. at 28-30, U.N. Doc. S/PV.2940 (1990); S.C. Res. 669, U.N. SCOR, 45th Sess., 2942d mtg. at 2, U.N. Doc. S/PV.2942 (1990); S.C. Res. 670, U.N. SCOR, 45th Sess., 2943d mtg. at 26, U.N. Doc. S/PV.2943 (1990); S.C. Res. 674, U.N. SCOR, 45th Sess., 2951st mtg. at 48, U.N. Doc. S/PV.2951 (1990); S.C. Res. 677, U.N. SCOR, 45th Sess., 2962d mtg. at 22, U.N. Doc. S/PV.2962 (1990); S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. at 64-65, U.N. Doc. S/PV.2963 (1990).

43. S.C. Res. 751, U.N. SCOR, 47th Sess., 3069th mtg. at 6, U.N. Doc. S/PV.3069 (1992) (approving a U.N. force to monitor a ceasefire and distribute food).

44. S.C. Res. 867, U.N. SCOR, 48th Sess., 3282nd mtg., U.N. Doc. S/PV.3282 (1993); S.C. Res. 873, U.N. SCOR, 48th Sess., 3293rd mtg., U.N. Doc. S/PV.3291 (1993) (imposing economic sanctions on Haiti's military dictatorship); S.C. Res. 875, U.N. SCOR, 48th Sess., 3293d mtg. at 15, U.N. Doc. S/PV.3293 (1993) (increasing sanctions).

45. See, e.g., S. 1803, 103d Cong., 2d Sess. (1993) (Sen. Dole's proposal to amend the United Nations Participation Act of 1945 to force the President to consult Congress before committing troops to U.N. peacekeeping forces).

examine the full implications for our domestic constitutional structure of the changed international political and legal order established by the U.N. Charter. And it is time to do so with an eye on our plans and hopes for the future, not on the legal battles of the past.

In undertaking this reappraisal, we must recognize that the scope of permissible self-help depends upon the practical alternatives. In deciding whether to facilitate or restrain U.S. participation in collective security, we are deciding whether to encourage or discourage the emergence of a practical alternative to armed self-help and the alliance system. And we cannot hide from the significance of that decision by taking refuge in views of the Constitution formed in response to the alliance system in general, and the Vietnam experience in particular.⁴⁶

We must also recognize that discussing whether the congressional power to declare war is a purely formal one that does not affect undeclared wars may overlook a more general antecedent question. That issue is whether the references to war in the Constitution should be understood to refer to war in the international legal sense. If so, we face a logical conundrum. As a matter of international law, war is now widely regarded as illegal. Of course, it is possible to interpret the word war differently in international law than in U.S. constitutional law. But to interpret the word narrowly under international law in order to limit the right of states to use force, and then to interpret it broadly under U.S. constitutional law in order to limit the President's power to use force, may suggest to some observers a triumph of political preference over legal principle.

The Security Council's collective security powers are new and different from the right of a state or group of states to wage war under classic international law. The former entails the use of force by those the community authorizes to preserve its tranquility; the latter entails the use of force between members of the community. The former is characteristic of developed legal systems; those same systems generally prohibit the latter.

The framers of the Constitution may have contemplated classic military alliances, but they did not contemplate U.S. participation in a collective security mechanism such as the U.N. Security Council, where even large-scale international military actions take on the juridical (and now political) character of law enforcement by a universal, organized

46. Reasonably enough given the context and materials available when he undertook his work, Professor John Ely's extraordinary scholarship and analysis emphasize the issues posed by the alliance system in general and the Cold War and Vietnam experiences in particular. JOHN H. ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993). I would emphasize the new issues posed by the emergence, however haltingly, of a real collective security system since the end of the Cold War.

community of states. That of course does not mean the Constitution does not determine the allocation of competence with respect to U.S. participation in the system. The United States approved the Charter by the constitutional procedure for making treaties. The U.S. representative to the United Nations is appointed by the constitutional procedure for naming U.S. officers and ambassadors. Budgetary obligations under the Charter are met by the constitutional procedure for appropriations.

But the constitutional allocation of competence with respect to the use of armed force is less certain. The question is which category of competencies for the international use of armed force applies to U.S. participation in missions sanctioned by the Security Council: the category that permits the President to act alone, or the category that requires congressional action.

In analyzing this question, lawyers will resort to all of the traditional tools of constitutional interpretation. My basic point is that they also must consider the operation of the international political and legal order in choosing among alternative constitutional interpretations. This, in turn, requires a closer look at the United Nations Charter and the Security Council as instruments of collective security.

The Charter envisages the Security Council directly implementing the collective security system through the use of armed forces made available to the Council by prior agreement.⁴⁷ However, no state has concluded such an agreement with the Security Council under article 43, and current prospects for assembling a significant force through these agreements are not bright. Accordingly, the collective security system depends upon the willingness of individual member states to participate in particular missions. This situation is likely to continue.

The effectiveness of this system depends especially on the role of the United States, and thus on its constitutional order, particularly in a negative sense. As a legal matter, the United States can veto U.N. Security Council decisions. As a military matter, large-scale naval or military operations are likely to rely on U.S. participation. As an economic matter, the financing of collective security is dependent upon the principal financial contributors, of which the United States is the largest. As a political matter, the collective security system substantially depends upon the leadership of the United States.

The Security Council's function is to deter aggressive behavior. The effectiveness of that deterrence, indeed the effectiveness of any response to actual aggression, may depend on the speed and plausibility of a forceful reaction. Requiring congressional approval to commit U.S.

47. U.N. CHARTER art. 43.

forces each time the Security Council decides to use force may impair the effectiveness of the Security Council by delaying its forceful reaction. This, in turn, may impair the credibility of any prior Security Council warnings or orders that the United States supported. Requiring congressional approval on a case-by-case basis also may stimulate other governments, including those with constitutions modeled on our own, to take the position that they, too, will require parliamentary approval before committing forces in support of a Security Council mission.⁴⁸ This could even further weaken the credibility of Security Council warnings and orders and the speed and effectiveness of forceful reactions. Requiring case-by-case parliamentary approval would effectively convert the Security Council from a decision-making organ into a diplomatic conference authorized to propose agreements for formal approval by member governments and their parliaments.

In the case of Kuwait, President George Bush received formal Congressional support after employing U.S. naval forces to enforce the Security Council's economic embargo, but before engaging Iraqi forces on the ground. But President Bush never conceded that he needed such support or would refrain from going ahead without it. Had he conceded those points, it is likely that assembling the international coalition before the congressional vote would have proved more difficult. That, in turn, might have made Congress less likely to support the mission.

One possible response to this argument is: "Good. That keeps us out of war, at least absent a really compelling reason." Both parts of that response should be unsatisfying.

Law enforcement organs, including the United Nations Security Council, frequently must rely on the credible threat of a forcible response to deter unlawful activity. There is historical evidence to support the proposition that aggressors who are not stopped relatively early may have to be stopped later at much greater cost. Either waiting for the development of a sufficiently compelling political environment to ensure decisive parliamentary action, or manipulating events to stimulate the development of such an environment, could prove to be very costly.

Moreover, national parliaments do not necessarily provide the only or the most effective protection against rash and ill-considered behavior.⁴⁹ The need for persuasion, and presumably for reasoned debate,

48. See Lori F. Damrosch, *Constitutional Control Over War Powers: A Common Core of Accountability in Democratic Societies?*, 50 U. Miami L. Rev. 181, 183 & n. 7 (1995).

49. The members of parliament may even provoke such behavior. Professor Edwin Cohen reports his impression that, during a visit with President Lyndon Johnson at the White House shortly after the Tonkin Gulf incident in 1964, "the President was most concerned about political support for the upcoming [presidential] campaign, especially to counter Senator Goldwater's criticism [of his caution regarding Vietnam], and not about any worries that he may have lacked

inheres in all requirements for collective decision-making, including those of the U.N. Charter. The Security Council's membership and voting rules are designed to render a decision to use force unlikely absent fairly widespread support, including that of the major powers.⁵⁰ The Security Council has shown no inclination to take the decision to use force lightly, or to act as a rubber stamp for the whims of the White House.

For those who recognize that case-by-case congressional review could impair the operation of the collective security system, and who believe that this result is undesirable, there are two options. Both envisage presidential flexibility exercised in consultation with congressional leaders. The first option is to interpret the Constitution either alone, or in conjunction with the U.N. Charter, as authorizing the President to use force sanctioned by the U.N. Security Council, at least in situations where case-by-case congressional review would impair the collective security system. The second option is for Congress to enact a general statute authorizing the President to use force sanctioned by the U.N. Security Council,⁵¹ thereby accommodating the needs of the collective security system with the view that the Constitution requires congressional approval to commit armed forces.⁵² A possible middle ground

presidential authority for his actions" in the Gulf. Referring to Sen. Goldwater, the President asked, "What does he want me to do, drop an atomic bomb on a bunch of Chinese junks?" EDWIN S. COHEN, *A LAWYER'S LIFE: DEEP IN THE HEART OF TAXES* 319-20 (1994).

50. Decisions of the Security Council to use of force require an affirmative vote of nine of the fifteen members, provided none of the five permanent members objects. U.N. CHARTER art. 27, ¶ 3.

51. Thomas Franck offers a possible solution through a reform of the War Powers Resolution which enumerates the circumstances in which the President may deploy armed forces on his own authority:

The first object of Congress in revising the War Powers Resolution must therefore be to establish in law its view of when the President may use the armed forces without its consent. These circumstances should be (1) to repel an armed attack or *imminent* attack on the United States or its armed forces, (2) to effect the speedy and safe evacuation of U.S. citizens from the high seas or foreign territory if the government of a ship's flag or of a territory is unable to provide the requisite standard of protection for Americans required by international law, and (3) to permit the President to respond to a resolution of the UN Security Council under chapter VII of the Charter (citation omitted).

Thomas M. Franck, *Rethinking War Powers: By Law or By "Thaumaturgic Invocation?"*, 83 AM. J. INT'L L. 766, 772 (1989).

52. Both options refer generally to the use of force sanctioned by the U.N. Security Council. No distinction is made in this regard among decisions of the Security Council under articles 41, 42 or 51. The object of this analysis is, as the word "sanctioned" implies, a use of force affirmatively authorized, approved, or invited by the Security Council. In this connection, it is important to consider the implications of the distinction between an obligation and a right to use force drawn by Louis Henkin in his comment on this paper. Louis Henkin, *War Powers "Short of War,"* 50 U. MIAMI L. REV. 201, 206-07 (1995). Insofar as Professor Henkin seeks to exclude the use of force not affirmatively sanctioned by the Security Council from an analytical framework designed to

would be to treat the conclusion reached under the first option as a rule of federal common law.⁵³

Secretary of State Warren Christopher and Secretary of Defense William Perry pointed out that the possibility of unilateral U.S. action in response to a crisis could help persuade others that collective action is desirable.⁵⁴ For similar reasons, a good statute regulating the President's use of force is unlikely to emerge unless Congress believes that unilateral Presidential action is a plausible alternative, and not clearly illegal.

Those who support a statutory solution to this problem must control their impulses to dismiss the first option. Otherwise, they will encourage Congress to enact an unduly stingy statute. Congressional fear that a statute could be hard to repeal may, in and of itself, encourage unduly circumscribed descriptions of Presidential powers. And a bad statute either will be circumvented in practice—as with the War Powers Resolution⁵⁵—or it will frustrate the Security Council's effective implementation of the collective security system.

respond to the collective security functions of the Security Council, I fully accept the distinction. But it is not practical to extend the distinction to an obligation to use force under the relevant decision of the Security Council. As John Ely acknowledges in *War and Responsibility*, agreements under articles 43 and 45 of the Charter neither exist nor are likely at least in the near future. ELY, *supra* note 46, at 151 n.60. In their absence, whatever the authority of the Security Council to oblige member states to use or make available national armed forces (a matter that is not free from doubt), the Council has, as a practical matter, resorted to authorizing, approving or inviting rather than requiring the use of force. A domestic constitutional analysis limited to uses of force expressly required by the Security Council or article 43 agreements would be without practical object. It also would avoid the very point of the exercise, namely analyzing the implications for the constitutional allocation of competence between the President and the Congress of the collective security system as it operates today and might be expected to develop, not as it operated during the Cold War, when it was subordinated to the alliance system, and not as it might flourish in some alternative, hypothetical world under article 43 agreements. If Professor Henkin seeks a legal obligation on which to anchor the interpretive methodology, then I would look for it not in the words of the Security Council resolutions, but in the general provisions of the Charter, including in particular Article 24, paragraph 1 and Article 25. The essence of my position is that these provisions require affirmative support by all members of the community for a functioning collective security system administered by the Security Council, and that the obligation to afford such support should inform sound constitutional interpretation by all competent organs of all member states, including their courts.

53. Inspired by Justice Harlan's analysis in *Sabbatino* and borrowing from Justice Gray's analysis in *The Paquete Habana*, the conclusion would be rooted in the Constitution and the U.N. Charter, and designed to harmonize the constitutional order with the international order "where there is no treaty, and no controlling executive or legislative act or judicial decision" to the contrary. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), *The Paquete Habana*, 175 U.S. 677, 700 (1900).

54. Warren Christopher & William J. Perry, *Foreign Policy, Hamstrung*, N.Y. TIMES, Feb. 13, 1995, at A19.

55. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1988)); see also Michael J. Glennon, *Too Far Apart: Repeal the War Powers Resolution*, 50 U. Miami L. Rev. 17 (1995).

The latter result would be very sad. History suggests that the alternative to an effective system of collective security is not peace, but war in the classic sense.