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A Primer on Articles 43-47 of the U.N. Charter: Contribution of Forces for Collective Security

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Executive Summary

The United Nations takes its name from the global military alliance that won World War II. The experience of that war inspired the drafters of the Charter of the United Nations to design a system of global collective security to prevent future aggression. Articles 43–47 of the Charter aimed to help enact that vision by creating a military force that the Security Council could employ to protect international peace and security. Under Article 43, the Council must negotiate agreements with Member States for the commitment of military forces. Article 45 requires that these forces include standby air-force contingents for emergency use. In exchange for providing military resources under Article 43, Article 44 would grant all contributing Member States the right to vote on Council decisions concerning the employment of their forces. Finally, Articles 46 and 47 establish a Military Staff Committee to assist the Security Council in commanding these military forces.

Yet this cornerstone of the Charter's military alliance was never fully implemented. Under the pressures of the Cold War, no Article 43 agreements were concluded. Following the Cold War, the Council opted to employ ad hoc coalitions to enforce its decisions. Although the Military Staff Committee meets frequently, it has never formally assisted the Security Council in commanding any military forces.

This primer reviews the historical practice and current status of Articles 43–47. It then considers how the system could be implemented today through a veto-proof procedural initiative by the Council to commence the negotiation of Article 43 agreements. Many details of this system are not specified by the Charter, bringing a degree of flexibility and uncertainty to the prospect of implementation. Finally, this primer analyzes five policy implications of fully implementing the Article 43 system today.

Irrespective of whether Member States choose to comprehensively implement Articles 43–47, these provisions serve as a reminder of the aspirations for collective security and representative decision-making that propelled the founding of the United Nations and may inform other reform efforts today.

CREDITS

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About This Primer Series

Despite the extraordinary authority placed in the United Nations Security Council, relatively little is known about its day-to-day workings outside its five permanent members and UN support staff. Indeed, the permanent members benefit from decades of continuous experience, as well as relatively large teams in New York and at their respective capitals devoted to international law and policy matters. Members elected for a two-year term at the Council often do not possess equivalent expertise, resources, and personnel. In a series of primers, HLS PILAC seeks to help fill an arguable informational gap concerning international law and the Council between the permanent and elected members. Building off a 2020 general primer for elected members published by HLS PILAC, these new analyses are intended to furnish elected members with important additional information that they can use as they see fit. The primary target audience includes current and future elected members of the Council, in particular those States' legal and policy advisers. The series' objective is not to proscribe or prescribe particular approaches but, rather, to apprise States of certain key issues that may be borne in mind in navigating engagements with and at the Security Council.

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INTRODUCTION

The Charter of the United Nations reflects a particular vision of collective security. That vision contemplates the possible application of armed force by Member States pursuant to a decision of the U.N. Security Council.[1] According to that vision, the Council determines what action is required to carry out its decisions for the maintenance of international peace and security and whether that action shall be taken by some or all Member States.[2]

To enable the Council to exercise its responsibilities in this area, the Charter requires Member States to make armed forces, assistance, and facilities necessary for the purpose of maintaining international peace and security available to the Council on its call and in accordance with agreements to be negotiated on the Council's initiative.[3] When the Security Council decides to use these military resources, it shall invite any Member State not on the Council to participate in the decisions of the Security Council concerning the employment of that Member's armed forces.[4] The Charter establishes a Military Staff Committee (the Committee), consisting of personnel from the permanent members of the Council. Plans for the deployment of armed forces are to be made by the Council with the assistance of the Committee.[5] Any Member State that is not permanently represented on the Committee shall be invited to associate with it when such representation helps the Committee efficiently discharge its duties.[6]

Since the founding of the U.N., however, core aspects of this vision of collective security have not been implemented. Not least, the agreements underpinning the provision of armed forces contemplated by Article 43 of the Charter—which the Allies saw as "one of the cornerstones" of a collective security system—have not been initiated, let alone concluded and implemented.[7] Instead, to conduct enforcement actions involving the use of armed force, the

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[1] *See* U.N. Charter art. 42.

[2] *Id.* art. 48, ¶ 1.

[3] *Id.* art. 43, ¶¶ 1–3.

[4] *Id.* art. 44.

[5] *Id.* art. 46.

[6] *Id.* art. 47, ¶ 2.

[7] Nico Krisch, *Article 43, in* II THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1351 (Bruno Simma et al. eds., 3d ed., 2012) [hereinafter "A COMMENTARY"].

Security Council has utilized ad hoc coalitions.

This primer provides information and analysis on select aspects concerning the original vision in the Charter and the alternative ad hoc system that has arisen in practice. In particular, this primer sets out the legal framework applicable to the original vision and the alternative system, the foundation and practice of the originally envisioned Article 43 agreements, and the potential benefits and drawbacks to pursuing such agreements now or in the future in light of intervening developments.

The analysis in this primer is subject to two caveats. First, this primer is based on a review of publicly available English-language sources. Second, neither the author nor the Harvard Law School Program on International Law and Armed Conflict takes a position on the merits of implementing Articles 43–47 (the Article 43 system).

1. Legal Framework

Chapter VII of the Charter, comprising Articles 39–51, establishes a system of global collective security centered on the Security Council.[8]

Articles 39–42 establish the Council's substantive powers and enforcement options. Article 39 provides that "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression".[9] If the Council makes this determination, it "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."[10]

Articles 41 and 42 provide two distinct modalities of enforcement. Article 41 authorizes the Council to decide on "measures not involving the use of armed force", such as sanctions.[11] Article 42 provides that, "[s]hould the

[8] Article 106 may form an integral aspect of this system. Article 106 provides a basis through which the Council may "exercise […] its responsibilities under Article 42," "[p]ending the coming into force of such special agreements referred to in Article 43". Under Article 106, the "parties to the Four-Nation Declaration, signed at Moscow, 30 October 1943, and France" (*i.e.,* the five permanent members) "shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security." The modality set out in Article 106 will be extinguished by the implementation of Article 43. For further discussion of Article 106, *see* Theodore M. Cooperstein, *Article 106 of the United Nations Charter*, 11 TEX. REV. L. & POL. 354 (2007).

[9] U.N. Charter art. 39.

[10] *Id.*

[11] *Id.* art. 41.

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."[12] This "action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."[13]

Whereas Articles 39–42 establish the Council's substantive powers and enforcement options, Articles 43–47 establish a mechanism through which the Council may directly employ armed forces to carry out the measures decided upon under Article 42.[14]

Article 43 provides:

> 1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
> 2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
> 3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council 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.[15]

Under Article 44, Member States that provide these armed forces are entitled, at their discretion, to participate in certain Security Council decisions:

> When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide

[12] *Id.* art. 42.

[13] *Id.*

[14] This interpretation is supported by Article 106, which contemplates joint action by the five allied powers who won World War II as an alternative means of exercising the "responsibilities under Article 42" "[p]ending the coming into force of such special agreements referred to in Article 43". *See supra* note 8 and accompanying text.

[15] U.N. Charter art. 43.

> armed forces in fulfillment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.[16]

Article 45 provides for the creation of a standby emergency force:

> In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.[17]

Articles 46–47 concern the Committee, its establishment, composition, and role. Article 46 provides that "[p]lans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee."[18] The composition and authority of the Committee are described in Article 47:

> 1. There shall be established a Military Staff Committee to

[16] *Id.* art. 44.

[17] It is not necessarily clear whether national air-force contingents are the only forces that would be held immediately available for use. Article 45's text mentions only air-force contingents, but some drafters intended that additional types of forces could be made immediately available subject to Article 43 agreements. *See* Eric Grove, *UN Armed Forces and the Military Staff Committee: A Look Back*, 17 INT'L SEC. 172, 173–74 (1993), https://www.jstor.org/stable/2539026 (discussing, in the context of Article 45, the understanding of the British Chiefs of Staff that naval bombardment could accompany arial bombardment conducted by United Nations forces) [https://perma.cc/B632-M9ZM]. As the United Kingdom's delegate to the United Nations Conference on International Organization noted in 1945, the specification of air forces in Article 45 "was intended only to put an emphasis upon the unique position of air power as a weapon of immediate availability" that could be used to rapidly respond to urgent threats to peace and security. U.N. Conf. on Int'l Org., vol. XII, at 433–44 (1945), available at https://digitallibrary.un.org/record/1300969/files/UNIO-Volume-12-E-F.pdf?ln=en [https://perma.cc/QRR3-VQC6]. The United Kingdom offered this statement because the Australian delegation objected that, under Article 45, only air forces—rather than land or naval forces—would be held immediately available. *See id.* To further address this concern, the American delegation noted that Article 45's final clause authorized the creation of additional types of rapid response forces through Article 43 agreements. *Id.* No delegation expressed a contrary interpretation, and Australia withdrew its objection on the condition that these interpretations be included in the final report of Committee 3, which reviewed the provisions of the Charter relating to the Security Council. *See id.*

[18] U.N. Charter art. 46.

> advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.
>
> 2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.
> 3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.
> 4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional sub-committees.[19]

Articles 48–50 supplement these specific provisions with rights and obligations of Member States to in relation to the execution of the Council's enforcement decisions. Article 48 provides:

> 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.[20]

Under Article 49, "[t]he Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council."[21] Article 50 provides that, "[i]f preventive or enforcement measures

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[19] *Id.* art. 47.

[20] *Id.* art. 48.

[21] *Id.* art. 49.

against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems."[22]

Notably, the Council system laid down in Articles 39–50 is not the exclusive means by which armed force may be applied under the Charter. Article 51 concerns the right of self-defense. It provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[23] Moreover, "[m]easures taken by Members in the exercise of this right of self-defence 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."[24]

The operation of this additional ground for applying armed force may be altered by the conclusion and implementation of Article 43 agreements. That is because the exercise of the right of self-defense under the Charter is terminated once the Council takes measures "necessary to maintain international peace and security."[25] If the implementation of Article 43 provides the Council with the military resources required to more frequently take such measures, it may have the collateral effect of narrowing the permissible exercise of the right of self-defense under the Charter.

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[22] *Id.* art. 50.

[23] *Id.* art. 51.

[24] *Id.* There is an ongoing debate as to whether Article 51 announces an exception to the general prohibition on the use of force or (re)states an independent customary principle (or rule) of international law. *See, e.g.*, Eugene Rostow, *Should Article 43 of the United Nations Charter Be Raised From the Dead?*, 19 McNair Paper 4 (1993), https://www.files.ethz.ch/isn/23453/mcnair19.pdf (characterizing Article 51 as an exception to the Article 43 system of collective security) [https://perma.cc/5FVC-CG3C]. The customary-law-related aspects of the right of self-defense are beyond the scope of this primer.

[25] U.N. Charter art. 51.

2. Foundation and Practice

2.1. Past Efforts to Implement Article 43

Why was Article 43 created—and why was it never fully implemented? The purpose of Article 43 was to provide the Council with a ready military force that it could use to enforce its decisions related to maintaining international peace and security. In that way, Article 43 was a centerpiece of an effort to ensure that the United Nations possessed what the League of Nations lacked: the power to maintain and restore peace and security through collective military action.[26]

Despite their importance to the Charter's design, the armed-forces provisions enshrined in Articles 43–47 were never fully implemented. In particular, no agreements envisioned by Article 43 have come into being.

Since 1946, the Council and several Member States have periodically considered implementing Article 43.[27] However, political disagreements among the five permanent members of the Council (P5) have hindered efforts to initiate the vision set out in Articles 43–47. Instead, the Council relied upon ad hoc coalitions as a substitute means of enforcement.

In the first year of its existence, the Council directed the Military Staff Committee to formulate a framework for implementing Article 43.[28] The Committee was then comprised solely of the Chiefs of Staff of the P5,[29] which were in the early days of the Cold War.[30] In 1947, the Committee reported its

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[26] *See* U.N. SCOR, 2nd Sess., 138th mtg., at 953–57, U.N. Doc. S/PV.138 (June 4, 1947) ("[T]he founders of the United Nations decided at San Francisco that the United Nations should not repeat the experience of the League of Nations, which relied solely upon the individual action of Member States to carry out the sanctions provided in the League Covenant.") [hereinafter "S/PV.138"]; Alex Morrison, *The Fiction of A U.N. Standing Army*, 18 FLETCHER FORUM, 83, 84–87 (1994) (discussing the planning for the United Nations that occurred during World War II).

[27] *See* Fredrick Burkle, *United Nations Charter Chapter VII, Article 43: Now or Never*, 38 HARV. INT'L REV. 26, 26–29 (2017), http://search.proquest.com.ezp-prod1.hul.harvard.edu/scholarly-journals/united-nations-charter-chapter-vii-article-43-now/docview/2124693555/se-2?accountid=11311 (discussing past efforts to implement Article 43) [https://perma.cc/5DE5-34US].

[28] *See* U.N. SCOR, 1st Sess., 23rd mtg., U.N. Doc. S/PV.23 (Feb. 16, 1946); Grove, *supra* note 17, at 176. The Preparatory Commission of the United Nations suggested the Council consider the implementation of Article 43 at its first meeting. U.N. Doc. PC/20, at 24 (Dec. 23, 1945).

[29] Grove, *supra* note 17, at 176. Article 47 provides for the inclusion of non-permanent (elected) members when "efficient". U.N. Charter art. 47, ¶ 2.

[30] *See Cold War*, ENCYC. BRITANNICA, https://www.britannica.com/event/Cold-War [https://perma.cc/6WHH-RUDC].

recommendations to the Council.[31] While the Committee unanimously agreed on 25 of 41 proposed articles,[32] it fractured along political lines regarding the distribution of military contributions under Article 43. Whereas the Soviet Union maintained that Member States should generally "contribute armed forces [. . .] which would be equal in strength and composition",[33] China, France, the United Kingdom, and the United States instead favored a system of "comparable contributions".[34] Under the latter proposal, each Member State would contribute different amounts and types of forces depending on its military resources and specialties.[35]

These differing views were rooted in the politics of the Cold War era:[36] the Soviet Union expressed a concern that unequal contributions would advantage its Western rivals.[37] The United States contended that a requirement of equal contributions would diminish the capacity of the Council to obtain contributions from Member States that are not part of the P5 and which, due to the smaller size of their militaries, could not contribute on an equal basis with the permanent members.[38] This divide became an intractable barrier to fully implementing Articles 43–47.[39] Although the Security Council remained seized of the matter until 1997,[40] it never took

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[31] *See* Rep. of the Military Staff Comm., U.N. Doc. S/336 (April 30, 1947); *see also Report by the Military Staff Committee to the Security Council on the General Principles Governing the Organization of the Armed Forces Made Available to the Security Council by Member Nations of the United Nations, April 30, 1947*, 1 INT'L ORG. 561 (1947) [hereinafter "*Report*"].

[32] *See Report*, *supra* note 31, at 561–71.

[33] *Id.* at 573.

[34] *Id.* at 567 (Article 28).

[35] *See* S/PV.138, *supra* note 26, at 953–67 (reproducing statement of American representative that "nations which make available a lesser proportion of the new mobile components could put up a larger portion of other components or other forms of assistance and facilities").

[36] *See* Grove, *supra* note 17, at 180–81; *but see* Jonathan Soffer, *All for One or All for All: The UN Military Staff Committee and the Contradictions within American Internationalism*, 21 DIPL. HIST. 45, 45 (1997) (identifying Member State opposition to surrendering control of national armed forces as an alternative explanation).

[37] *See Report*, *supra* note 31, at 573 ("That would lead to advantages in the positions of certain States [. . .].").

[38] *See* S/PV.138, *supra* note 26, at 953–57. The permanent members also disagreed on whether troops committed under Article 43 could be deployed to overseas bases, with the Soviet Union worrying that such deployments would facilitate its encirclement. Grove, *supra* note 17, at 178.

[39] Although the "Council adopted provisionally" the proposed Committee articles upon which there was agreement, Summary Statement by the Secretary-General on Matters of which the Security Council Is Seized and on the Stage Reached in their Consideration, U.N. Doc. S/7382 (July 5, 1966), at 11, and directed the Committee to propose specific troops numbers, Grove *supra* note 17, at 179, the Council never formally adopted the Committee's proposals for implementing Article 43, *id.* at 181.

[40] *See* Summary Statement by the Secretary-General on Matters of which the Security Council Is Seized and on the Stage Reached in their Consideration, U.N. Doc. S/1997/40 (July 29, 1997), ¶ 13; Repertory of Practice of United Nations Organs, Supp. Nos. 7-9, at 3.

further action.[41]

The end of certain Cold War divides in the 1990s brought renewed interest in implementing the Article 43 system.[42] At least six Member States, chief among them the Russian Federation,[43] voiced support in the General Assembly or the Special Committee on the Charter of the United Nations for implementing Article 43.[44] U.N. Secretary-General Boutros Boutros-Ghali identified the negotiation of Article 43 agreements as one option for promoting international security.[45] And the Special Committee on Peacekeeping "endorsed the recommendation of the Secretary-General that the Council initiate negotiations with Member States to reach agreements under Article 43".[46]

However, political fissures apparently remained. In particular, the United States and the United Kingdom did not publicly support implementing Article 43.[47] By the end of the 1990s, the Council had still taken no direct steps toward negotiating Article 43 agreements.

To this day, the Council has not implemented Article 43.[48] Instead, the Council has authorized enforcement actions carried out by ad hoc coalitions[49] (e.g., during the Persian Gulf War) and peacekeeping operations fulfilled by

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[41] *See* Repertoire of the Practice of the Security Council, U.N. Doc. ST/PSCA/1/Add.24, at 499 (2021).

[42] Repertory of Practice of United Nations Organs, Supp. Nos. 7-9, at 11.

[43] Among the permanent members, Russia was "viewed as the most enthusiastic to implement Article 43", James Rossman, *Article 43: Arming the United Nations Security Council*, 27 N.Y.U. J. INT'L L. & POL. 227, 238 (1994), perhaps because it wished "to curb what is often called America's natural tendency towards imperialism", Rostow, *supra* note 24, at 4. *See also* Burkle, *supra* note 27, at 28 ("Russian statements on various occasions also surprisingly 'endorsed [. . .] the negotiation of Article 43 agreements,' agreeing that it was now time to 'carry out the original intention' of Article 43 under Chapter VII.").

[44] Repertory of Practice of United Nations Organs, Supp. Nos. 7-9, at 7 (noting the supportive statements of Cyprus, Italy, Singapore, Sudan, and Tanzania); Rep. of the Spec. Comm. on the Charter of the U.N. and on the Strengthening of the Role of the Org., ¶ 97, U.N. Doc. A/47/33 (1992) (noting the Russian Federation proposed implementing Article 43 as part of a "wide range of measures of collective action").

[45] BOUTROS BOUTROS-GHALI, AN AGENDA FOR PEACE 56–57 (2nd ed. 1995).

[46] Repertory of Practice of United Nations Organs, Supp. Nos. 7-9, at 12, para. 38.

[47] *See* Rossman, *supra* note 43, at 244 n.54 (describing the United States and the United Kingdom as "hesitant" to implement Article 43). Although American leaders expressed some interest in creating a *voluntary* standby United Nations force, *id*., the United States resisted efforts to implement aspects of the Article 43 system. For example, during the Persian Gulf War, the United States opposed efforts to place allied forces under the command of the Miliary Staff Committee. John Quigley, *The United States and the United Nations in the Persian Gulf War: New Order or Disorder*, 25 CORNELL INT'L L. J. 1, 27 (1992).

[48] Repertoire of the Practice of the Security Council, U.N. Doc. ST/PSCA/1/Add.24 (2021), at 83.

[49] Ad hoc coalitions are expressly authorized by Article 48: "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.*" U.N. Charter art. 48 (emphasis added).

voluntary deployments of Member State contingents.[50]

2.2. The Alternative System of Ad Hoc Enforcement

Currently, the Council undertakes a range of initiatives involving armed force without utilizing the Article 43 system. These initiatives fall along a spectrum ranging from peacekeeping operations, which are generally conducted with the state parties' consent and do not involve offensive force, to peace enforcement operations, which authorize coalitions of Member States to forcibly secure compliance with Council decisions.[51] In both instances, the Council relies upon ad hoc voluntary troop contributions from Member States that are negotiated anew with every authorized mission. The Council generally authorizes the use of force without itself formally determining which Member States will participate in an ad hoc coalition;[52] instead, the Council generally invites the participation of any "Member States that have notified the Secretary-General of their participation".[53] And unless these Member States are already represented on the Council, they cannot vote on matters related to the deployment of their troops. Indeed, as of July 2024, the top seven contributors to current peacekeeping

[50] MICHAEL WOOD & ERAN STHOEGER, THE UN SECURITY COUNCIL AND INTERNATIONAL LAW 122 (2022); Rosalyn Higgins, *The UN Security Council and the Individual States, in* THEMES AND THEORIES 246 ("[T]he Secretary-General made use of peacekeeping forces as the best available substitute for the inability of the United Nations to implement Articles 42 to *47* of the Charter.").

[51] *See, e.g.*,WOOD & STHOEGER, *supra* note 50, at 122; Richard Caplan, *Peacekeeping / Peace Enforcement*, ENCYCLOPEDIA PRINCETONIENSIS, https://pesd.princeton.edu/node/561#:~:text=Peacekeeping%20forces%20are%20therefore%20usually,instance%2C%20a%20ceasefire%20has%20failed (last visited July 11, 2024) ("Peace enforcement refers to the use of military assets to enforce a peace against the will of the parties to a conflict when, for instance, a ceasefire has failed.") [https://perma.cc/57ED-Z227]; *Terminology*, UNITED NATIONS PEACEKEEPING, https://peacekeeping.un.org/en/terminology (last visited July 11, 2024) (discussing distinction between peacekeeping and peace enforcement) [https://perma.cc/VGN2-6HG5].

[52] Indeed, "[a]d hoc coalitions (AHCs) can be defined as autonomous arrangements, which are set up outside established institutions on short notice and with a task-specific mandate for a limited time." Malte Brosig and John Karlsrud, *How Ad Hoc Coalitions Deinstitutionalize International Institutions*, 100 INT'L AFFAIRS 771, 771 (2024), https://doi.org/10.1093/ia/iiae009 [https://perma.cc/H7HB-CJD7]. Because the Council does not itself authorize specific Member States to undertake enforcement action, a minority of scholars suggest that the participants in ad hoc coalitions use force pursuant to the Article 51 right of collective self-defense, rather than the Council's authorization. *But see, e.g.*, Higgins, *supra* note 50, at 245 (rejecting this view).

[53] *See, e.g.*, S.C. Res. 2699 (Oct. 2, 2023), ¶ 1 ("*Authorizes* Member States that have notified the Secretary-General of their participation to form and deploy a Multinational Security Support (MSS) mission"); S.C. Res. 1973 (Mar. 17, 2011), ¶ 4 ("*Authorizes* Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians").

operations are unrepresented on the Security Council.[54]

The precise legal basis for these peacekeeping and peace-enforcement operations is not settled,[55] but the power of the Council to authorize these missions is generally accepted.[56] The Assembly authorized the first peacekeeping operation during the Suez Crisis in 1956[57] and the Council has frequently authorized such missions in the decades since.[58] There are currently 11 active peacekeeping missions across Africa, Asia, and Europe.[59] Most recently, in 2023, the Council authorized an ad hoc coalition of interested states to deploy forces to Haiti as part of a Multinational Security Support Mission.[60]

In *Certain Expenses*, the International Court of Justice (ICJ) confirmed that the Assembly and the Council have a general implied power to authorize peacekeeping operations, but the precise source of this power in the Charter is unknown.[61] International legal scholars have identified a range of sources for the Council's authority to create peacekeeping operations, including its power to recommend conflict resolutions under Chapter VI and its power to authorize measures involving armed force under Chapter VII. U.N. Secretary-General Dag Hammarskjöld famously remarked that peacekeeping operations belonged to a so-called "Chapter Six and a Half", "placing it between traditional methods of resolving disputes peacefully, such as negotiation and mediation under Chapter VI, and more forceful action as authorized under Chapter VII."[62]

Peace-enforcement operations, by contrast, are more clearly authorized by the Council's Chapter VII powers. The Council has authorized three such

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[54] *Compare Troop and Police Contributions*, UNITED NATIONS PEACEKEEPING, https://peacekeeping.un.org/en/troop-and-police-contributors (last visited July 11, 2024) [https://perma.cc/MPS4-3SDL], *with Current Members*, UNITED NATIONS SECURITY COUNCIL, https://main.un.org/securitycouncil/en/content/current-members (last visited Aug. 12, 2024) [https://perma.cc/4MZL-FJ8T].

[55] Scott Sheeran, *The Use of Force in United Nations Peacekeeping* Operations, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 348 (Marc Weller ed., 2015) ("As a major constitutional adaptation of the UN, from its beginnings to the present day there has not been a clear legal doctrine for application of force in UN peacekeeping operations.").

[56] For an overview of the legal theories supporting peacekeeping operations, see *id.*

[57] *Id*. at 350.

[58] *See id*. at 359.

[59] *Where We Operate*, UNITED NATIONS PEACEKEEPING, https://peacekeeping.un.org/en/where-we-operate (last visited July 11, 2024) [https://perma.cc/78DP-4QQ6].

[60] S.C. Res. 2699 (Oct. 2, 2023).

[61] *See* Sheeran, *supra* note 55, at 360.

[62] *Looking Back/Moving Forward*, UNITED NATIONS, https://unis.unvienna.org/unis/en/60yearsPK/index.html (last visited Aug. 12, 2024) [https://perma.cc/87TJ-XMDL].

operations,[63] and in doing so it has rarely invoked a specific provision of the Charter to justify these missions.[64] Yet Articles 42[65] and 48[66] empower the Council—independent of Article 43[67]—to authorize an ad hoc coalition to use armed force to carry out a Council decision related to protecting international peace and security.[68] In practice, the Council has repeatedly authorized such missions without having negotiated Article 43 agreements.[69]

Within this system, the Military Staff Committee plays an important but largely informal advisory role.[70] The Committee's Revised Rules of Procedure require it to meet at least once every two weeks.[71] The Committee met 33 times in 2023.[72] At these meetings, the Committee frequently reviews active

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[63] These missions concerned armed conflicts occurring in Korea, Kuwait, and Libya, respectively. *See* Lindsay Cameron, *The Legal Basis for Peacekeeping/Peace Operations, in* THE PRIVATIZATION OF PEACEKEEPING 54 n.6 (2017).

[64] *Compare* S.C. Res. 83 (June 27, 1950) (authorizing a unified allied command to take enforcement action in Korea without invoking any particular provision of the Charter), *with* S.C. Res. 678 (Nov. 29, 1990) (generally invoking "Chapter VII authority" to authorize the use of armed force against Iraq), *and* S.C. Res. 1973 (Mar. 27, 2011) (generally invoking "Chapter VII authority" to authorize Member States to take "all necessary measures to enforce compliance with [a] ban on flights" in Libyan airspace). *See also* WOOD & STHOEGER, *supra* note 50, at 64.

[65] That provision empowers the Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security," including military operations conducted by the armed forces of Members of the United Nations, once it has determined a breach of the peace under Article 39. U.N. Charter art. 42. *See generally* Nico Krisch, *Article 42*, *in* A COMMENTARY, *supra* note 7, at 1333–35 (discussing Article 42 as the legal basis for recent military enforcement operations authorized by the Council).

[66] Article 48 empowers the Council to determine whether the action it authorizes will be taken "by all the Members of the United Nations or by some of them". U.N. Charter art. 48, ¶ 1.

[67] WOOD & STHOEGER, *supra* note 50, at 122.

[68] *Id.*

[69] Lindsay Cameron, *The Legal Basis for Peacekeeping/Peace Operations, in* THE PRIVATIZATION OF PEACEKEEPING 54 n.6 (2017).

[70] Despite the Committee's growing advisory role, it does not undertake the command-and-control function envisioned by Article 47. The Secretariat, rather than the Committee, is, in effect, the "'centre for the UN's military management activities' in connection with UN peacekeeping—a military function not anticipated by the Charter." Loraine Sievers and Sam Daws, *Subsidiary Bodies, in* THE PROCEDURE OF THE SECURITY COUNCIL 471 (4th ed., 2014) (internal citation omitted). Likewise, Member States or regional organizations retain command and control of the ad hoc coalitions undertaking peace enforcement operations. *See* Repertoire of the Practice of the Security Council, U.N. Doc. ST/PSCA/1/Add.23, at 440 (2020).

[71] *See The Military Staff Committee: Striving for Relevance in a Changing Era*, SECURITY COUNCIL REPORT (June 30, 2024) [hereinafter "*The Military Staff Committee: Striving for Relevance in a Changing Era*"], https://www.securitycouncilreport.org/monthly-forecast/2024-07/the-military-staff-committee-striving-for-relevance-in-a-changing-era.php [https://perma.cc/3GCQ-QVBW].

[72] U.N. Chair of the Military Staff Comm., Letter Dated 19 December 2023 from the Chair of the United Nations Military Staff Committee Addressed to the President of the Security Council, U.N. Doc. S/2023/1009 (Dec. 29, 2023) [hereinafter "S/2023/1009"].

peacekeeping missions,[73] and the Committee has become the Council's "main interlocutor" with the Office of Military Affairs within the Secretariat's Department of Peacekeeping Operations.[74] The Committee also conducts field missions to conflict regions—including, for example, in partnership with the African Union's Peace and Security Council—to gather information.[75] Although the Committee generally "does not provide a collective assessment [on a particular issue] to the Security Council",[76] its conclusions are frequently conveyed directly to Member States by their Committee representatives.[77]

There are two notable circumstances, however, in which the Committee has directly communicated with the Council. First, in 2012, "at the direct request of the Security Council's five permanent members", the Committee prepared and submitted to the Council written recommendations regarding a proposed expansion of the Council's support for the African Union Mission in Somalia (AMISOM).[78] The Council appeared to value the Committee's advice in certain substantial respects,[79] and it seemingly incorporated aspects of the report's conclusions into Resolution 2036, which approved increased support for AMISOM.[80] Second, since 2022, the Committee has conveyed to the Council an annual report summarizing its activities.[81]

As its advisory role has grown, the Committee has sought to become more representative. Although not all Member States that contribute forces to peacekeeping operations are represented on the Committee, the Committee recently took steps to expand the participation of elected members. Since

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[73] The records of these meetings remain confidential, but the Committee discloses the subject of their meetings in their annual reports to the Council. ALEXANDRA NOVOSSELOFF, THE UN MILITARY STAFF COMMITTEE: RECREATING A MISSING CAPACITY 126 (2018).

[74] *Id.* at 3.

[75] *See* S/2023/1009, *supra* note 72, ¶¶ 6–7.

[76] NOVOSSELOFF, *supra* note 73, at 126.

[77] *See* Sievers and Daws, *supra* note 70; *The Military Staff Committee: Striving for Relevance in a Changing Era*, *supra* note 71, (describing informal contacts between Military Staff Committee and Security Council).

[78] Sievers and Daws, *supra* note 70, at 467–68 (supplement). The Committee also prepared a report related to the Multidimensional Integrated Stabilization Mission in the Central African Republic. This report was not requested by the Council, and it does not appear to have significantly influenced the Council. *See id*. at 468–72.

[79] *Id*.

[80] S.C. Res. 2036 (Feb. 22, 2012). Although Resolution 2036 did not expressly reference the Committee's report, "[a] number of aspects [. . .] covered in the MSC Observations Paper were also addressed in the resolution". Sievers and Daws, *supra* note 70, at 467–69 (supplement).

[81] *See, e.g.*, U.N. Chair of the Military Staff Comm., Letter Dated 16 December 2022 from the Chair of the United Nations Military Staff Committee Addressed to the President of the Security Council, U.N. Doc. S/2022/1036 (Jan. 16, 2023).

February 2024, all elected members of the Council receive a standing invitation to fully participate in all of the Committee's meetings.[82]

3. Current Status of Article 43

Given the lack of full implementation of Articles 43–47, some Member States may wish to consider whether these provisions remain legally operative. Indeed, as detailed above in Section 2, Articles 43–45 have never been implemented, and Articles 46–47 have merely been partially implemented by virtue of the regular meetings of the Military Staff Committee.[83] Therefore, some Member States may wonder if incomplete implementation over eight decades has invalidated these provisions.

Although this primer cannot comprehensively address the law of treaty termination and suspension,[84] the weight of the materials reviewed for this primer suggests that, as of August 2024, Articles 43–47 of the Charter remain legally operative. The basis for this (provisional) conclusion is explained below, and the remainder of this primer will assume that Articles 43–47 remain legally binding treaty provisions.

3.1. Two Sources of Grounds for Terminating Treaty Obligations

There are two main sources of grounds for terminating or suspending an otherwise-valid treaty or treaty provision: the Vienna Convention on the Law of Treaties (VCLT) (1969) and customary international law.[85] Articles 54–64 of the VCLT enumerate grounds for terminating or suspending a treaty obligation. Under Article 42 of the VCLT, these provisions, and the provisions contained in the treaty under consideration, are the exclusive grounds for termination.[86]

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[82] *See id.*

[83] These meetings arguably constitute only partial implementation because the Committee has never assumed its command and strategic advice responsibilities under Article 47, as no forces were ever pledged to the Council under Article 43.

[84] Suspension refers to conditionally or temporarily withholding compliance with a treaty. The grounds for termination are the focus of this primer.

[85] Vienna Convention on the Law of Treaties art. 42, ¶ 2, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter "VCLT"].

[86] VCLT, *supra* note 85, art. 42, ¶ 2 ("The termination of a treaty, its denunciation or the withdrawal of a party,
[Footnote continued on next page]

These grounds apply to the 116 state parties to the VCLT as a matter of treaty law.[87] To the extent that these provisions of the VCLT reflect customary international law, they bind States that are not parties to that instrument.[88]

Second, beyond the VCLT, additional customary international legal rules regulate the termination of treaties. In particular, States continue to invoke the doctrine of desuetude to argue that treaty obligations are terminated when parties fail to comply with those obligations for long periods.[89] This ground for treaty termination may apply as customary international law to States that are not parties to the VCLT, but it is arguably unsettled whether parties to the VCLT may lawfully invoke desuetude as a ground for terminating treaties. That is because Article 42 makes the VCLT's provisions the exclusive means for terminating treaty obligations,[90] and the VCLT does not recognize desuetude as a valid ground for termination.[91] Accordingly, it is an open question whether Article 42 of the VCLT precludes parties to that Convention from invoking this customary ground for terminating treaty provisions.[92]

3.2. The VCLT Likely Does Not Authorize Terminating Articles 43–47

Based on a non-comprehensive review of practice and materials, it appears unlikely that either the VCLT's provisions or the customary doctrine of

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may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.").

[87] For a list of state parties, see *Vienna Convention on the Law of Treaties*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en (last updated Sept. 10, 2024) [https://perma.cc/2JK2-GQTH].

[88] *See, e.g.*, Anthony Aust, *Vienna Convention on the Law of Treaties (1969), in* MAX PLANCK ENCYC. OF PUB. INT'L L. ¶ 14 (Rüdiger Wolfrum ed., 2012) (noting that non-parties frequently reference the VCLT's provision in treaty negotiations, but concluding that the customary status of any particular provision of the VCLT "is likely to be an issue only if the matter is litigated, and even then the court or tribunal will take the VCLT as its starting—and probable finishing—point").

[89] Under the VCLT, treaties can be terminated only pursuant to the rules therein. As desuetude is not an enumerated rationale for termination in the VCLT, desuetude is not a "legal" ground for terminating a treaty, but rather has been described as the "factual causes for terminating treaties or conventional rules." Jan Wouters & Sten Verhoeven, *Desuetudo*, *in* MAX PLANCK ENCYC. OF PUB. INT'L L. ¶ 9 (Rüdiger Wolfrum ed., 2008).

[90] VCLT, *supra* note 85, art. 42, ¶ 2.

[91] *See id*.

[92] *See* Marcelo G. Kohen, *Desuetude and Obsolescence of Treaties, in* THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 353 (2011) ("The real question remains whether the traditional understanding of desuetude, based on the passage of a prolonged period of time without the treaty being applied, expresses the existence in international law of a ground for termination not included in the Vienna Conventions.").

desuetude would provide adequate grounds for terminating the operation of Articles 43–47 of the Charter.

Although the VCLT contains several grounds for terminating treaties, they likely would not apply to Articles 43–47. First, Article 54 of the VCLT authorizes the termination of a treaty provision "at any time by consent of all the parties after consultation with the other contracting States."[93] But no publicly available evidence indicates that Member States have consulted with one another regarding terminating the operation of Articles 43–47 of the Charter—much less that all Member States have consented to such termination. Absent such consultations, the mere failure to fully implement these provisions is insufficient to terminate them under Article 54 of the VCLT.

Second, Article 60 of the VCLT is also likely inapplicable. When "one of the parties" to a multilateral treaty commits a "material breach," Article 60 entitles the non-breaching parties "by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it"—either with respect to themselves or the breaching party.[94] Here, however, arguably no party to the Charter has committed a material breach of Articles 43–47. Article 43 obliges the Council—not Member States—to initiate the negotiation of Article 43 agreements,[95] which is a pre-requisite to the full implementation of Articles 43–47.[96] Thus, arguably, no Member State has breached a Charter obligation by failing to implement the Article 43 system. One may assert that the Council has breached its obligation to negotiate Article 43 agreements "as soon as possible". That inaction might constitute a material breach because this provision was regarded as "essential to the accomplishment of the object or purpose of the treaty"[97] to protect international peace and security.[98] But the Council, as a principal organ of the United Nations, is not a party to the Charter.[99] Thus, it is arguably

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[93] VCLT, *supra* note 85, art. 54.

[94] *Id.* art. 60.

[95] U.N. Charter art. 43, ¶ 3.

[96] Although Articles 46 and 47 have been partially implemented by virtue of the meetings of the Military Staff Committee discussed in subsequent sections, the full implementation of these provisions is not possible without the completion of Articles 43 agreements. For example, the Committee cannot fulfill its Article 47 (3) obligation to take charge of the "strategic direction of any armed forces placed at the disposal of the Security Council" until such forces are provided under Article 43.

[97] VCLT, *supra* note 85, art. 60, ¶ 3.

[98] *See* U.N. Charter art. 1, ¶ 1 (describing one of the purposes of the United Nations as protecting "international peace and security").

[99] *See* WOOD & STHOEGER, *supra* note 50, at 8; THE UN SECURITY COUNCIL AND INTERNATIONAL LAW 8 (2022).
[Footnote continued on next page]

unlikely that non-action by the Council regarding Article 43 could, under the VCLT, constitute a breach "by one of the parties".[100] In any event, even if a party committed a material breach, there is no evidence of unanimous consent to terminate or suspend Articles 43–47. Accordingly, Article 60 of the VCLT likely cannot justify terminating these treaty provisions.

Third, one may consider whether the political divide among certain Members of the Council, which contributed to the non-implementation of Article 43, constitutes an "impossibility of performance" under Article 61 of the VCLT[101] or a "fundamental change of circumstances" under Article 62 of the VCLT.[102] Neither of these provisions, however, provide grounds for terminating Articles 43–47 of the Charter. Article 61 of the VCLT does not apply because the impossibility of performance does not terminate a treaty obligation unless the impossibility is "permanent".[103] Yet, as the sudden post-Cold War cooperation of the 1990s illustrated, political divisions are not necessarily permanent. Accordingly, political barriers to implementing Articles 43–47 likely cannot constitute grounds for termination under Article 61 of the VCLT. Article 62 of the VCLT is also arguably inapplicable because the fundamental change in circumstances must have been unforeseen when the treaty was ratified. In fact, political divisions were foreseen at the time of the drafting, and disagreements between the Soviet Union and the Western allies during the Charter negotiations were the very reason that Article 43 was crafted so as to defer the negotiation of armed forces agreements.[104]

On the other hand, one might claim that the Member States serving on the Council, who are parties to the Charter, have, in effect, committed a material breach by preventing the Council from negotiating Article 43 agreements. Support for this view could be drawn from Article 59 of the 2011 Draft Articles on the Responsibility of International Organizations, which provides that Member States are responsible for "internationally wrongful acts" committed by an international organization that is under their direction and control. *See* G.A. Res. 66/100 (Feb. 27, 2012), at 16 (reproducing Article 59). Under Article 4 of those draft articles, the Council's failure to negotiate Article 43 agreements may be an internationally wrongful act because it (1) is attributable to the United Nations and (2) "constitutes a breach of an international obligation of that organization" to negotiate these agreements. *See id.* at 3 (reproducing Article 4).

[100] VCLT, *supra* note 85, art. 60.

[101] *Id.* art. 61.

[102] *Id.* art. 62.

[103] *Id.* art. 61.

[104] *See* Alistair Cooke, *Letter from America: Pursuing a Will-o-the-wisp*, BBC NEWS (June 30, 2000), https://www.bbc.co.uk/programmes/articles/1tzGfs7XgGyFxkMdFYHjZ1N/pursuing-a-will-o-the-wisp-30-june-2000 [https://perma.cc/327A-9V9H].

3.3. Articles 43–47 Likely Have Not Fallen into Desuetude

Likewise, Articles 43–47 arguably have not fallen into desuetude by virtue of their continuous lack of full implementation. Generally, international legal scholars posit that a treaty provision can fall into desuetude in one of two ways. First, desuetude occurs when parties to the treaty have engaged in conduct from which "a tacit agreement to terminate or modify the treaty [provision] may be inferred".[105] Scholars contend that such tacit agreement requires that an "unequivocal intention of the parties" to end a treaty obligation or provision be expressed by the "repeated incompatible practices of all parties".[106] This first form of desuetude is widely accepted and is reflected in Article 51 of the VCLT. Second, desuetude may occur upon the emergence of a contrary customary legal rule. Under this view, "continuous non-application over a substantial period of time, accompanied by *opinio juris*", constitutes desuetude.[107] Some scholars reject this second form of desuetude as a valid basis for terminating treaty obligations.[108]

It appears that Articles 43–47 likely have not fallen into desuetude. The first form of desuetude arguably does not apply here. Simply put, a practice of not initiating the negotiation of military agreements is not necessarily incompatible with Article 43. That is because that provision uses language like "as soon as possible" to provide a measure of latitude.[109]

On the other hand, in theory, a finding of desuetude could be supported by the practice of bypassing Article 43 agreements and instead establishing a system of ad hoc coalitions to enforce Council decisions. This practice may arguably indicate a tacit agreement to terminate Article 43. But the experience of at least one regional organization suggests that using ad hoc coalitions is

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[105] Wouters and Verhoeven, *supra* note 89, ¶ 10.

[106] *Id.*

[107] *See* Georg Witschel, *Ch. XVIII Amendment, in* A COMMENTARY, *supra* note 7, at 2205. As a corollary, other scholars note that mere non-application, standing alone, is "never sufficient to terminate or modify the treaty". Wouters and Verhoeven, *supra* note 89, ¶ 10.

[108] *See* Kohen, *supra* note 92, at 359 (rejecting this form of desuetude as a valid basis for terminating treaty obligations). Although Article 31 of the VCLT acknowledges that subsequent practice can alter the *interpretation* of a treaty, the "possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized." Int'l Law Comm'n, Rep. on the Work of Its Sixty-Sixth Session, U.N. Doc. A/69/10, at 169 (2014).

[109] U.N. Charter art. 43, ¶ 3.

not necessarily incompatible with implementing provisions similar to Articles 43–47.[110] Although the practice of a regional organization is not dispositive as to the legal status of a provision of the Charter,[111] this comparative example casts some doubt on whether an intent to terminate Articles 43–47 can be inferred from the practice of utilizing ad hoc coalitions.

Likewise, even if the second form of desuetude is a valid basis for terminating treaty provisions, it arguably does not apply here. First, it is an oversimplification to state that Articles 43–47 have continuously not been applied. In fact, Articles 46 and 47 have been at least partially implemented. The Military Staff Committee—which is formed of officers of the permanent members and, under Article 47 (3), would be responsible for the "strategic direction" of forces provided under Article 43—has regularly met since 1946 and "is the longest standing subsidiary body of the Security Council."[112]

Even if Articles 43–45, in particular, have continuously not been applied, there is little to no *opinio juris* complementing this non-application.[113] *Opinio juris* requires that a State act or speak out of a sense of legal obligations.[114] Yet the information and materials reviewed for this primer do not indicate that states have asserted the legal invalidity of Articles 43–45 to justify not implementing them. And, as explained in Section 2, there are alternative political explanations for the non-implementation of these provisions.[115]

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[110] Although the 2002 protocol that established the AU's Peace and Security Council (AUPSC) also created an African Standby Force and Military Staff Committee modeled on the Charter's Article 43 system, the AUPSC continued to deploy ad hoc coalitions of interested states in lieu of this rapid-response force. *See* Cedric de Coning, *Revitalising the African standby force: lessons from Africa's Peace operations experience*, ACCORD (Dec. 4, 2023), https://www.accord.org.za/analysis/revitalising-the-african-standby-force-lessons-from-africas-peace-operations-experience/ [https://perma.cc/QSW3-P33G].

[111] Indeed, the case of the African Union is distinguished by the fact that the AUSPC did take steps to establish the rapid-response force required by the 2002 protocol, whereas the Council did not implement Article 43.

[112] *United Nations Military Staff Committee*, UNITED NATIONS, un.org/securitycouncil/subsidiary/msc (last visited Mar. 29, 2024). Member States rejected a 2004 proposal to abolish the Committee. Witschel, *supra* note 107, at *2224*. The activities of the Military Staff Committee are discussed in Section 2.

[113] A review of the Repertoire of the Practice of the Security Council and the Repertory of Practice of United Nations Organs reveals no public commentary by Member States on Articles 43–47 within the last decade. And as Section 2 explains, there was considerable interest in implementing Article 43 in both the 1940s and the 1990s.

[114] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 207 (June 27) (quoting North Sea Continental Shelf (W. Ger./Den. & Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20)); *see also* Kohen, *supra* note 92, at 357 ("[A] state may, for political or other reasons, decide not to avail itself of the treaty, without this signifying in any way that it renounces doing so in the future.").

[115] *Cf.* Enrico Milano, *Russia's Veto in the Security Council: Whither the Duty to Abstain under Art. 27(3) of the UN Charter?*, 75 HEIDELBERG J. INT'L L. 215, 228 (2015) (relying upon alternative explanations for non-abstention by Members of the Council to reject the claim that Article 27 (3) of the Charter had fallen into desuetude).

4. Observations Concerning Certain Policy Aspects

4.1. The Logistics of Implementation

Assuming Articles 43–45 remain legally operative, how could Member States fully implement these provisions today? The full implementation of the Article 43 system might require Member States to further clarify at least three broad areas: (1) the process for concluding Article 43 agreements; (2) the content of these agreements; and (3) the mechanisms for commanding any troops pledged.

First, an initiative to implement this system might begin with creating a process for negotiating Article 43 agreements. Because these agreements are to be "negotiated as soon as possible on the initiative of the Security Council",[116] the Council would need to take the first step by designing a process to start negotiations. As noted above, the Council originally placed the Committee in charge of proposing a process for implementing Article 43, but this is not required by the Charter, and the Council would have latitude to determine how to negotiate agreements under Article 43. According to the ICJ in *Certain Expenses*: "There is nothing in the text of Article 43 which would limit the discretion of the Security Council in negotiating such agreements."[117]

The Council and Member States would also have latitude in deciding the terms of these agreements. The Charter provides some minimum requirements. The second paragraph of Article 43 requires that these agreements specify "the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided." And Article 45 contemplates that these agreements will lay down "limits" regarding the "strength and degree of readiness" of contingents held for urgent action, as well as "plans for their combined action". Beyond that, the precise content of the agreements would arguably be within the discretion of the Council and Member States. Importantly, because Article 43 agreements "shall be concluded between the Security Council and Members", both the Council and Member States would have to agree on the content of the provisions.

Third, Member States would need to clarify how forces would be

[116] U.N. Charter art. 43, ¶ 3 (emphasis added).

[117] Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151 (July 20).

governed when called into service by the Council. Although the Military Staff Committee is responsible for the "strategic direction" of these forces, Article 47 (3) provides that "[q]uestions relating to the command of such forces shall be worked out subsequently." Regarding the composition of the Military Staff Committee, although it is automatically comprised of representatives from the permanent members, another Member can be invited to be represented on it "when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work."[118]

Relatedly, if a Member State that is "not represented" on the Council pledges troops through an Article 43 agreement, Article 44 grants that Member the right to "participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces." However, the nature of this participation is not settled.

The Charter's text apparently implies that this participation includes voting rights for Member States that contribute troops. Article 44 speaks of a right to "participate in the decisions of the Security Council", whereas other provisions that concern the involvement of Member States not otherwise represented on the Council expressly invite those Member States to "participate, without vote".[119]

Assuming Article 44 grants voting rights, it is unclear whether the requirements of Article 27 (3)—which sets a minimum threshold of nine affirmative votes for enacting Council decisions—would apply in the context of Article 44 or whether the voting threshold would be proportionately raised to account for the participation of additional states in some Council decisions.[120] If the voting threshold were not raised, an increase in the total number of voting Member States might make it possible for the Council to reach a

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[118] U.N. Charter art. 47, ¶ 2.

[119] *See* Gregor Novak & August Reinisch, *Article 44*, *in* A COMMENTARY, *supra* note 7, at 1358 (interpreting Article 44 as granting "full voting powers"). *Compare* U.N. Charter art. 44, *with* U.N. Charter art. 31. However, at the 67th Meeting of the Security Council in 1946, the Egyptian representative suggested "[i]nvitations to meetings of the Security Council under Article 44 would take place after the actual decisions had been made." U.N. SCOR, 1st Sess., 1st–23rd mtgs., U.N. Doc. S/SUPP/1946/1st Series/1 (Feb. 16, 1946), at 11. But because this statement is inconsistent with the text of Article 44, it arguably does not alter the conclusion that Member States would be entitled to vote on the decision to deploy their troops.

[120] It is likely that decisions related to the deployment of troops would be considered substantive decisions subject to the veto of any permanent member. *See* U.N. Charter art. 27, ¶ 3. However, this designation will ultimately be determined by the practice of the Council, and the preliminary question of whether to classify a question as procedural or substantive is itself a substantive issue subject to the veto power. *See* WOOD & STHOEGER, *supra* note 50, at 29.

decision based on the affirmative votes of nine Member States, despite the negative votes of a greater number of Member States.

The Charter's text offers no definitive answer, but in line with the principle of majoritarian decision-making embodied in Article 27, a majority vote might still be required even when Article 44 applies. Article 27 codified the agreement reached by the Allied powers at Yalta to require a majority vote (subject to the veto of any permanent member for substantive matters) for Council actions.[121] In the 1960s, the Charter was amended to raise the voting threshold when new elected members were added to the Council.[122] On the one hand, the need for this amendment implies that—absent another amendment—the voting threshold may not be automatically raised when the number of Member States participating in a decision increases. On the other hand, the raising of the threshold also may indicate that Article 27 (3) was intended to ensure that majoritarianism dictates the outcome of Council decisions.[123] This majoritarian principle is contained in every other instance in which the Charter delineates voting procedures.[124] Accordingly, the requirements of Article 27 (3) might be interpreted in light of their object and purpose, rather than literally, to require a higher number of affirmative votes when a greater number of states are participating, so that Council decisions can be made only with majority support.

Likewise, the scope of this voting power is arguably unsettled. Article 44 speaks of matters "concerning the employment of contingents of that Member's armed forces."[125] It is plausible, though uncertain, that this language could be understood to encompass not just the decision to deploy troops but also the antecedent substantive decision which those forces would be deployed to implement. After all, that antecedent decision could "concern[]" the deployment. Moreover, some scholars hypothesize that, in practice, Article 44

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[121] *See* Francis O. Wilcox, *II. The Yalta Voting Formula*, 39 Am. Pol. Sci. Rev. 943, 949–50 (1945) (noting that the purpose of the Yalta formula was to "substitute a system of qualified majority voting for the complete unanimity which prevailed in the League [of Nations] Council").

[122] *United Nations Charter*, UNITED NATIONS (Apr. 1, 2024), www.un.org/en/about-us/un-charter [https://perma.cc/C9Q3-RFWD].

[123] It is true that a single permanent member can veto a decision, but this negative power must be distinguished from the power to make an affirmative decision, which can only be taken with at least nine votes in support.

[124] *See* U.N. Charter art. 18, ¶ 2 ("Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting."); U.N. Charter art. 67, ¶ 2 ("Decisions of the Economic and Social Council shall be made by a majority of the members present and voting."); U.N. Charter art. 89, ¶ 2 ("Decisions of the Trusteeship Council shall be made by a majority of the members present and voting.").

[125] U.N. Charter art. 44.

voting powers might extend beyond matters directly relating to the employment of a Member State's own contingents because "troops in one theatre might easily be affected by events in another."[126]

4.2. Identifying Certain Potential Advantages and Disadvantages of Implementation

For Member States considering implementing the Article 43 system, there are at least five potential considerations.

(1) Is Implementation Feasible?

As a preliminary matter, Member States may wish to consider the practicality of implementing the Article 43 system today. At least two aspects of the implementation of this system are notable. First, either a presidential note modifying the Council's working methods or an amendment to its formal rules could create a process for negotiating Article 43 agreements. As both avenues are procedural, this initiative could not be vetoed and would not require amending the Charter.[127] Second, as noted above, the details of each agreement might be tailored to each State's capacity so that each Member State can contribute according to its ability. In sum, the flexible, veto-proof process of establishing the framework for negotiating Article 43 agreements may make implementing this system more feasible than certain other reform proposals.[128]

On the other hand, even if the Article 43 system could be established, there may be practical barriers to using that system. Since the 1990s, rising tensions among certain permanent members have contributed to

[126] *See, e.g.*, Gregor Novak & August Reinisch, *Article 44*, *in* A COMMENTARY, *supra* note 7, at 1358–1359.

[127] *See* U.N. Charter art. 27, ¶ 2; *see also* Telegram from The Chairman of the United States Delegation (Stettinius) to the Acting Secretary of State (June 3, 1945) (characterizing procedural decisions as "decisions which do not involve the taking of [. . .] measures" under Chapter VII), https://history.state.gov/departmenthistory [https://perma.cc/96BF-SLHM]. However, a permanent member could dispute the procedural nature of this initiative by raising a preliminary question. *See* WOOD & STHOEGER, *supra* note 50, at 29. As the resolution of this preliminary question is subject to the veto power, *id.*, a permanent member could, in theory, use this mechanism to transform this initiative into a substantive matter subject to the veto.

[128] For example, efforts to increase the elected membership of the Security Council would require amending the Charter and could be vetoed by any permanent member or by a dissenting group of Member States. *See* U.N. Charter art. 108.

approximately a doubling in the use of the "veto" power.[129] Even if a veto-proof procedural initiative could be passed to negotiate Article 43 agreements, these tensions may make it unlikely, at least in the near term, that the Council would authorize the deployment of Article 43 forces. Deploying these forces would likely be a substantive decision, which would be subject to the veto of any permanent member.

(2) Reinforcing the Council's Representativeness and Legitimacy

Member States may also wish to consider how implementing the Article 43 system would impact the Council's legitimacy. Implementing this system could potentially increase the Council's legitimacy in at least three ways. First, the conclusion of Article 43 agreements may increase representation in certain key Council decisions. Specifically, Article 44 would grant Member States the right to participate in decisions related to the deployment of their troops. Accordingly, implementing the Article 43 system is the sole way to increase voting representation in Council decisions without amending the Charter. Implementing the Article 43 system would also extinguish the right of the P5 under Article 106 to take enforcement decisions into their own hands.

Second, the establishment of agreements under Article 43 might increase the Council's long-term effectiveness by providing it with a "standby" force with which to rapidly enforce its decisions. Historically, when the Council authorized the use of force, it relied on ad hoc coalitions to send troops.[130] The need to negotiate the terms of deployment with each Member State for every mission caused delays, while the lack of global representation has been said to have undermined legitimacy.[131] Pre-existing Article 43 agreements with diverse Member States might accelerate deployment and, potentially, deter threats to the peace, breaches of the peace, and acts of aggression by creating a more credible threat of enforcement action. Moreover, the desire to obtain voting representation in Council enforcement decisions under Article 44 might incentivize more Member States to contribute forces, and Member States who are represented in deployment decisions might be more invested

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[129] *Vetoes per year*, PEACE AND SECURITY DATA HUB, https://psdata.un.org/dataset/DPPA-SCVETOES (last visited Aug. 12, 2024) [https://perma.cc/6W3L-EBDR].

[130] Rossman, *supra* note 43, at 238.

[131] *See generally id.*

in supporting an operation's success.[132]

Third, the implementation of Articles 43–47 may create momentum for wider efforts to reform the Security Council or the U.N. more generally. While implementation of extant obligations does not in itself constitute reform, bringing to life the Article 43 system—and the principles of collective security and representative decision-making that it embodies—could galvanize further efforts to reform the Council.

While some Member States may welcome these developments, others may be reluctant to reinforce the power of the Council by giving it new resources with which to enforce its decisions. For example, because the Council is not globally representative and gives disproportionate power to the P5, Member States might believe that the Council is not an institution that should be strengthened in this respect.

Although the implementation of the Article 43 system might make the Council's decisions more democratic in one class of decisions (namely, the deployment of armed forces), it would not resolve the lack of representation in other decisions that are unrelated to the deployment of armed forces. Accordingly, some Member States may view the implementation of Article 43 as a token reform that could stymie calls for more extensive reforms by giving the Council a veneer of representativeness while simultaneously arming it with additional military resources.

(3) Respect for Treaty Obligations

Implementing Article 43 might strengthen respect for international law. One plausible reading of Article 43 is that its mandatory language ("shall") imposes a binding duty to initiate the negotiation of such agreements for the provision of forces.[133] Therefore, concluding these agreements may fulfill an international legal obligation and, accordingly, strengthen respect for

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[132] *See* ROHAN MUKHERJEE, UN SECURITY COUNCIL REFORM: WHAT THE WORLD THINKS 30 (Stewart Patrick ed., 2023), carnegieendowment.org/research/2023/06/un-security-council-reform-what-the-world-thinks?lang=en ("Extending equal veto powers for new permanent members would yield greater buy-in from traditionally excluded aspirants to global leadership.") [https://perma.cc/H3ZY-2XC8]; *cf.* Qiang Wang et al., *Participative Leadership: A Literature Review and Prospects for Future Research*, 13 FRONT. PSCYH. 1, 2 (2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9204162/pdf/fpsyg-13-924357.pdf (noting decades of research into participative leadership show that involving employees in decisions increases their sense of ownership over the decision reached) [https://perma.cc/ZD6Y-SLPU].

[133] U.N. Charter art. 43 ("The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council."), *See* Rossman, *supra* note 43, at 237.

the rule of law and the Charter's legitimacy.

(4) National Sovereignty

Member States might be reluctant to enter into Article 43 agreements that surrender a certain degree of control over their national armed forces. Although all Member States could be invited to vote on decisions related to the employment of their national troops, Article 44 does not grant a veto to states that contribute troops through Article 43 agreements. Therefore, the troops of a Member State that is not a permanent member might be deployed based on a majority vote of the Council with which a Member State disagrees. Some states might consider such an outcome inconsistent with the principle of national sovereignty.[134]

But Article 43 need not necessarily infringe—at least, not extensively—on sovereignty. The Council and Member States have the power to negotiate the terms of Article 43 agreements, and they might, for example, insert into those agreements a provision granting Member States an opt-out for objectionable deployments. Additionally, implementing Article 43 is distinct from creating an independent standing United Nations military.[135] Depending on the precise terms of each agreement, troops pledged through Article 43 agreements could remain a part of their Member State's military and would act solely by virtue of their Member State's consent to follow the directions of the Council. In this way, troops pledged under Article 43 agreements might function similarly to troops placed under a unified allied command.

(5) The Existing Peace-Enforcement System

Member States might also question whether the Article 43 system would be an improvement over the ad hoc approach that the Council currently uses to enforce its decisions.

A main advantage of this ad hoc system is that it does not restrict participation to Member States with existing agreements; any Member State can support any mission.[136] The concern, noted above, about the delay caused by

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[134] *See* Soffer, *supra* note 36, at 45.

[135] *Cf.* Burkle, *supra* note 27, at 28 (discussing such proposals).

[136] *Cf.* Yf Reykers et al., *Ad hoc coalitions in global governance*, 99 INT'L AFF. 727, 743 (2022), [Footnote continued on next page]

having to negotiate coalitions on an ad hoc basis could be remedied by the creation of a standing rapid-reaction force under Articles 43 and 45.[137]

Nonetheless, there are drawbacks to the ad hoc system. It depends on a handful of Member States choosing to take on the burden of supplying forces for these missions.[138] And because joining coalitions does not confer representation, the ad hoc system lacks the incentive that Article 44 may provide for more Member States to contribute to enforcement.

Concluding Observations

Establishing a process to negotiate Article 43 agreements is one option Member States may consider that might strengthen the enforcement of Council decisions and expand voting representation in key Council deliberations. Should Member States choose to pursue this option, they should consider that some vital aspects of this system—from the details of troop contributions to the command of pledged forces—are not set by the Charter and are, therefore, open to negotiation.

https://academic.oup.com/ia/article/99/2/727/7008755#397402636 (noting ad hoc coalitions bring "a diverse set of actors together in focusing on a specific dimension of complex cooperation problems") [https://perma.cc/7UBT-45KD].

[137] *See* Nina M. Serafino, Cong. Rsch. Serv., 95-787 F, A U.N. Rapid Reaction Force? 1 (1995).

[138] *See* Rossman, *supra* note 43, at 238.

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