

## ARTICLE 106 OF THE UNITED NATIONS CHARTER

THEODORE M. COOPERSTEIN\*

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\* A.B., Dartmouth College, 1984; J.D., Stanford University, 1987; LL.M., *Comparative and International Law*, Georgetown University, 1999. Assistant United States Attorney for the United States Attorney's Office in the Southern District of Florida. The views expressed herein are strictly those of the author and do not reflect any official policy or views of the Department of Justice or the United States government.

## I. INTRODUCTION

Much has been and will be debated and written about the prospects for reform of the United Nations. The debate and attendant proposals focus on many aspects of the administration and function of the U.N., but they may also extend to fundamental reforms of the United Nations Charter, its structures, and its purposes. Certain portions of the Charter have been overlooked, yet they remain in effect and should be evaluated for their continuing utility, especially in light of persistent issues concerning how the U.N. and the Security Council should or might play a role in the use of force and international security enforcement as the United States pursues the global War on Terror. In prosecuting the War, the United States must confront the issue of how it can, if at all, work with the United Nations' structure to do what needs to be done and how, if at all, the U.N. can restore or attain its original purposes.

Article 106 of the United Nations Charter is an often overlooked and little-remarked provision. The Article's dormant history belies the greater expectations held for it from its creation. The persistent presence of the Article also raises the question of its continued or potential relevance to the operation of the United Nations.

Any comprehensive review and evaluation of the United Nations will necessarily entail an assessment of the original purposes and goals of the founding Great Powers and the subsequent failure or success of the U.N. to live up to its goals and intentions. The Allied Powers of World War II sought to foreclose future world wars through an international system of collective security, envisioned to retain and build upon the coordination and planning among the Four Powers that led the Second World War against the Axis Powers. Toward that end, Articles 42 and 43 of the United Nations Charter posit that member nations would train and dedicate armed forces to be placed at the disposal of the United Nations Security Council, pursuant to agreements that those member nations would reach with the Security Council.<sup>1</sup> Just as the Big Four—the United

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1. *See* U.N. Charter arts. 42–43.

States, Britain, the Soviet Union, and China—would confer and coordinate their war against the Axis, the Security Council—led by its permanent five members, the Big Four plus France—was expected to continue a combined leadership role to maintain international peace and security.

The envisioned mechanism of Articles 42 and 43 would, of course, take time to negotiate and implement. And in the meantime, even as the United Nations organizational conferences took place in 1945, the Second World War raged on. To permit the continued prosecution of the War, as well as to provide for the interim period before the fully envisioned enforcement mechanism came into operation, the United Nations Charter contained transitional or interim provisions, including Article 106.

For many reasons outside the scope of this essay, the envisioned mechanisms of Articles 42 and 43 of the Charter never came into effect.<sup>2</sup> Amidst the polarization of the Cold War, no member nations entrusted armed forces to the Security Council in accordance with Articles 42 and 43.<sup>3</sup> The stated precondition for the lapse of Article 106, therefore, never occurred, and the Article remains in place to this day.

An examination of Article 106, its origins, intentions, practice, and commentary, can therefore inform any review and reform of today's United Nations. In particular, as the United States in the twenty-first century international setting considers the use of force, this aspect of the Charter can factor into United States' consideration of the United Nations and its relevance to how the United States should approach those uses of force. Article 106 is an overlooked means by which the United States could work within the United Nations Charter while still circumventing anticipated obstacles in the U.N. Security Council; in essence, Article 106 is an established escape clause that bears notice.

This essay first examines the origins and drafting of the text of Article 106. Next, it reviews the historical practice regarding Article 106. After noting some scholarly comments on Article

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2. See LELAND M. GOODRICH, EDVARD HAMBRO & ANNE PATRICIA SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 315, 324 (3d rev. ed. 1969) (“[I]t proved impossible to reconcile the differences among the permanent members” regarding empowerment of the Security Council via the use military force).

3. Dan Arooshi, *Security Council*, GLOBAL POLICY FORUM, <http://www.globalpolicy.org/security/genesc.htm> (last visited May 8, 2007).

106, the essay concludes with a brief assessment on the potential for use of Article 106 in the future.

## II. THE TEXT

Article 106 of the United Nations Charter states:

Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Moscow, 30 October 1943, and France, 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.<sup>4</sup>

Article 106 falls within Chapter XVII of the Charter, entitled “Transitional Security Arrangements.” It shares that Chapter with only one other article, Article 107, which preserves for member nations of the United Nations the right to continue the Second World War through force against then-enemy nations.<sup>5</sup>

The United Nations Organization developed out of the alliance of countries fighting the Axis powers of Nazi Germany, fascist Italy, imperial Japan, and their allies in the Second World War. The Allies formally called themselves “the United Nations” and held periodic meetings to coordinate the war’s planning and conduct.<sup>6</sup>

Among the issues that increasingly concerned the Allies was the post-war arrangement of international affairs. As a direct result of their experiences in the Second World War, the Allies sought to create a structure for collective maintenance of international peace and security. United States President Franklin Roosevelt, for one, believed the lessons of the Second World War’s outbreak included small nations’ inability to

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4. U.N. Charter art. 106. A full and detailed analysis of military agreements under Articles 42 and 43 is beyond the scope of this essay. This essay presumes general familiarity with the broad concept of Article 43 as originally drafted and its significance to Article 106 as the intended successor provision.

5. *Id.* art. 107.

6. Declaration by United Nations, Jan. 1, 1942, E.A.S. No. 236.

defend themselves from determined aggressors.<sup>7</sup> Therefore, it would fall upon the Great Powers to enforce and maintain the international peace.<sup>8</sup> He envisioned the four largest combatant Allied nations—the United States, Great Britain, the Soviet Union, and China—as the principal actors, tempered by a “‘watch dog’ commission of neutrals.”<sup>9</sup>

British Prime Minister Winston Churchill had initially emphasized a European focus, viewing a “Council of Europe” as more central to Britain’s interests, while distrusting any future Russian intentions.<sup>10</sup> By early 1943, Churchill’s view had changed to that of a global security structure in which a European regional council and an Asian regional council could be component parts.<sup>11</sup> Most notably, Churchill reflected on the fact that “the whole will be held together by the fact that the victorious Powers intend to continue fully armed, especially in the air, while imposing complete disarmament upon the guilty.”<sup>12</sup> Churchill also stressed the need for a strong France, “for the prospect of no strong country on the map between England and Russia was not attractive.”<sup>13</sup>

Also in 1943, the Chinese government expressed an interest in beginning talks on post-war organization.<sup>14</sup> The Americans and the British agreed that it was best to develop such plans as a continuous outgrowth of wartime cooperation and planning, both for reasons of domestic popular support and to enhance the chances of Soviet agreement.<sup>15</sup> Pressures grew for an open and detailed structure of organization because the smaller allied nations were becoming anxious of rumors and suspicions that the Four Powers were seeking to arbitrarily dominate a post-war world.<sup>16</sup>

The United States proposed that the organization’s development follow a two-step procedure. First, the Four Powers

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7. RUTH B. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES, 1940–1945*, at 96 (1958).

8. GOODRICH ET AL., *supra* note 2, at 629; RUSSELL, *supra* note 7, at 96.

9. RUSSELL, *supra* note 7, at 98.

10. *Id.* at 103 (quoting 4 WINSTON S. CHURCHILL, *The Hinge of Fate*, in *THE SECOND WORLD WAR* 562 (1948–1953)).

11. *Id.* at 104 (quoting CHURCHILL, *supra* 10, at 711–12).

12. *Id.* (quoting CHURCHILL, *supra* 10, at 711–12).

13. *Id.* at 107 (quoting CHURCHILL, *supra* 10, at 712).

14. *Id.* at 108.

15. *Id.* at 109.

16. *Id.* at 109–10.

would conclude an agreement among themselves. Next, the remaining allies would join an agreement to encompass all the United Nations.<sup>17</sup> This plan had the advantage of allowing the general major-power agreement to proceed unencumbered by multiple details, while minimizing transitional steps toward the final permanent organization.<sup>18</sup>

The United States presented its Four Power draft agreement in October 1943 at the Moscow Conference of the foreign ministers of Britain, the United States, and the Soviet Union.<sup>19</sup> The Soviet Union initially objected to including a Four Power agreement on the agenda, not only because military questions were their immediate priority, but also because China would not be represented to permit a true “Four Power” agreement.<sup>20</sup> The Soviets relented after the Four Power agreement was placed second on the agenda to the military issues involved in ending the war.<sup>21</sup>

Once the Western Allies had satisfied the Soviets of their determination to open the second front in France in 1944, discussions moved to the post-war security arrangements and the draft Four Nation Declaration. With minor changes,<sup>22</sup> the three foreign ministers agreed to a declaration that stated in its fifth paragraph:

5. That for the purpose of maintaining international peace and security pending the re-establishment of law and order and the inauguration of a system of general security they will consult with one another and as occasion requires with other members of the United Nations, with a view to joint action on behalf of the community of nations.<sup>23</sup>

Once the Chinese ambassador to Moscow signed on behalf of his government, which had already approved a preview draft, the

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17. *Id.* at 110.

18. *Id.*

19. *Id.* at 128–29.

20. *Id.* at 129.

21. *Id.* at 133–34.

22. British Foreign Minister Anthony Eden, on behalf of the British Commonwealth countries, suggested the addition of the consultation requirement. Those countries had expressed concern about “an indefinite four-power dictatorship” pending the functioning of the new organization. *Id.* at 135.

23. Declaration of Four Nations on General Security, in *Moscow Conference of Foreign Secretaries*, Oct. 30, 1943, 3 *Bevans* 816 Annex 1, at 822; *see also* RUSSELL, *supra* note 7, app. D at 977.

document was issued as the Declaration of Four Nations on General Security on October 30, 1943.<sup>24</sup>

The next step toward the United Nations Organization was the beginnings of detailed proposals for the broader membership and structure. The Four Powers continued discussions of those issues during the Dumbarton Oaks Conference held in August 1944 in Washington, D.C.<sup>25</sup>

The Dumbarton Oaks discussions foresaw a creation of the new organization simultaneous with the direction and conclusion of the Second World War. The delegates addressed the anticipated overlap and attendant concern for enforcement of the final surrender terms against Germany and Japan. The consensus was that the Four Powers would retain control of the war and the surrender's enforcement until the new organization's enforcement function became routine.<sup>26</sup>

The resulting Dumbarton Oaks Proposals for the Establishment of a General International Organization included a separate Chapter XII, which not only restated the essence of paragraph 5 of the Moscow Declaration, but also added a provision for control of enemy states.<sup>27</sup> In the context of Britain's preference for regional arrangements and the Soviet Union's stated intention to conclude bilateral defense agreements with neighboring states—which, in the aggregate, could approximate a regional arrangement—the provision was designed to leave both powers free to respond to perceived threats from the Axis powers.<sup>28</sup>

The chapter in the Dumbarton Oaks Proposals read:

#### CHAPTER XII. TRANSITIONAL ARRANGEMENTS

1. Pending the coming into force of the special agreement or agreements referred to in Chapter VIII, Section B, paragraph 5, and in accordance with the provisions of paragraph 5 of the Four-Nation Declaration, signed at Moscow, October 30, 1943, the states parties to that Declaration should consult with one another and as

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24. GOODRICH ET AL., *supra* note 2, at 629; RUSSELL, *supra* note 7, at 135–37.

25. See generally RUSSELL, *supra* note 7, at 411, 421–39.

26. GOODRICH ET AL., *supra* note 2, at 629–30; RUSSELL, *supra* note 7, at 473–74.

27. Dumbarton Oaks Proposals for the Establishment of a General International Organization, Ch. XII, Oct. 7, 1944, State Dep't Publ'n No. 2257; see also GOODRICH ET AL., *supra* note 2, app. at 673–74.

28. RUSSELL, *supra* note 7, at 688.

occasion arises with other members of the Organization 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.

2. No provision of the Charter should preclude action taken or authorized in relation to enemy states as a result of the present war by the Governments having responsibility for such action.<sup>29</sup>

This chapter, as part of the Proposals in their entirety, formed the basis for the United Nations Conference on International Organization held in 1945 at San Francisco.<sup>30</sup>

The San Francisco Conference accepted this chapter of the Dumbarton Oaks Proposals with few modifications.<sup>31</sup> Although the principal means of military enforcement for the United Nations was to be member nations' forces contributed under Article 43, Conference participants recognized the potential for an open-ended interim period before that occurred.<sup>32</sup> All conferees understood that the Five Powers—the Four Powers plus France<sup>33</sup>—would form the initial basis of the system.<sup>34</sup> However, some nations objected to the potential for placing authority in the permanent members of the Security Council for too long a period.<sup>35</sup> Mexico proposed separating Chapter XII of the Dumbarton Oaks Proposals into an independent protocol.<sup>36</sup> France and the Soviet Union opposed that measure, viewing the free hand against the Axis powers as integral to restoring the world situation before the new enforcement apparatus should come into force.<sup>37</sup> The Conference defeated the Mexican amendment.<sup>38</sup>

29. Dumbarton Oaks Proposals for the Establishment of a General International Organization, Ch. XII, Oct. 7, 1944, State Dep't Publ'n No. 2257; see also GOODRICH ET AL., *supra* note 2, app. at 673–74.

30. RUSSELL, *supra* note 7, at 646.

31. See *id.* at 681–84 (“The Principle underlying [the Dumbarton Oaks] provisions [were] generally acceptable” and “the committee adopted the original text with minor language changes.”).

32. *Id.* at 680–81.

33. France was added upon its own motion to amend, which carried by acclamation. United Nations Conference on International Organization, San Francisco, Apr. 25–June 25, 1945, *Documents*, Vol. XII, at 400 [hereinafter UNCIO Docs.].

34. RUSSELL, *supra* note 7, at 646.

35. *Id.* at 682.

36. UNCIO Docs., *supra* note 33, at 614; RUSSELL, *supra* note 7, at 681–82.

37. UNCIO Docs., *supra* note 33, at 401; RUSSELL, *supra* note 7, at 681.

38. UNCIO Docs., *supra* note 33, at 401; RUSSELL, *supra* note 7, at 682.

Canada also attacked the drafted provision as too broad.<sup>39</sup> The first part of the chapter granted “temporary authority for what might be a very long period.”<sup>40</sup> The second part was “so broad as to enable any action relating to the surrender terms and peace treaties to be removed from the scope of the Organization for an indefinite period.”<sup>41</sup> The British and American delegations quelled the Canadian concerns by assuring the Technical Committee that the Five Powers would act on behalf of the Organization only until the Security Council had enough force at its own disposal to act.<sup>42</sup>

The Soviets next proposed in the drafting committee that only the “responsible powers,” and not the Security Council, should decide when to relinquish their authority versus the enemy states.<sup>43</sup> This led to an impasse with the smaller states, who opposed the Soviet proposal.<sup>44</sup> Stubbornness on both sides of the dispute prevented any amendment, and the Dumbarton Oaks text remained unchanged.<sup>45</sup>

The United States delegation worked out a revision of the text that restored the decision to the proposed Security Council.<sup>46</sup> The Soviet delegation ultimately accepted the notion that because the Moscow Declaration was a free-standing document, Chapter XII added no substantive authority to the Four Powers; the Five Powers’ position as the permanent members of the Security Council also reduced the importance of any such distinction in the provision of text.<sup>47</sup> In fact, as the United States pointed out, the provision could be deleted with little or no practical effect, but the smaller states had by then developed some psychological attachment to the provision.<sup>48</sup>

The Conference thereafter agreed on the following version of the proposal:

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39. UNCIO Docs., *supra* note 33, at 401.

40. RUSSELL, *supra* note 7, at 682.

41. UNCIO Docs., *supra* note 33, at 402; RUSSELL, *supra* note 7, at 682.

42. UNCIO Docs., *supra* note 33, at 402–03; GOODRICH ET AL., *supra* note 2, at 630; RUSSELL, *supra* note 7, at 682.

43. RUSSELL, *supra* note 7, at 682.

44. UNCIO Docs., *supra* note 33, at 558–59; GOODRICH ET AL., *supra* note 2, at 630; RUSSELL, *supra* note 7, at 682.

45. RUSSELL, *supra* note 7, at 682.

46. *Id.* at 683.

47. *Id.*

48. *Id.* at 682–83.

Pending the coming into force of such special agreements referred to in Chapter VIII, Section B, paragraph 5, as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Chapter VIII, Section B, paragraph 4, the states parties to the Four Nation Declaration, signed at Moscow, October 30, 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion arises with other members of the Organization 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.<sup>49</sup>

With the substitution of specific articles of the U.N. Charter for the prior chapters of the Dumbarton Oaks Proposals, this text became the present Article 106 of the United Nations Charter.<sup>50</sup>

### III. HISTORICAL PRACTICE

It was to be expected that Article 106 would see its greatest use in the period immediately following signature of the Charter because the Conference designed it as a transitional, interim measure. Article 106 certainly saw more frequent mention in those first years than since, but the Security Council has not formally invoked it as the legal basis for any action. Disuse and the passage of time did prompt calls to modify or repeal Article 106,<sup>51</sup> but it remains today an integral part of the United Nations Charter.

The immediate post-war enforcement concerns of the United Nations and the Five Powers centered on the defeat and occupation of the Axis powers. But those issues specifically fell outside the ambit of the Security Council under Article 107 and the general design of the San Francisco Conference.<sup>52</sup>

As a general, catch-all provision, Article 106 was deliberately broad in scope. As the first official United States interpretation described it:

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49. UNCIO Docs., *supra* note 33, at 533; RUSSELL, *supra* note 7, at 683; *see also* U.S. DEP'T OF STATE, CONFERENCE SERIES 71, PUBL'N NO. 2349, CHARTER OF THE UNITED NATIONS: REPORT TO THE PRESIDENT ON THE RESULTS OF THE SAN FRANCISCO CONFERENCE 163 (June 26, 1945) [hereinafter REP. TO THE PRES.] (attributing revision overcoming the impasse to joint Five Power proposal).

50. U.N. Charter art. 106.

51. *See infra* note 88 and accompanying text.

52. U.N. Charter art. 107.

Article 106 does not, as some delegates wished it to, define precisely the functions of the Security Council during the interim period, nor the limits of the joint action which the five powers may take. Had it done so it would have established a fixed and frozen division of responsibility, and thus defeated its own purpose, which is to provide for the orderly growth of the Security Council's functions, to permit it to take successively larger bites of responsibility. This flexibility is accomplished in two ways. First, only the power to take military enforcement action is withheld from the Security Council and that only temporarily. Secondly, the five powers which will be permanent members of the Security Council are granted authority to fill the temporary vacuum to the extent necessary by taking action on behalf of the Organization. It should be emphasized, however, that this five-power action must be joint and that consultation with other members of the United Nations is provided for. In other words, while this action may, in a formal sense, be outside the framework of the Organization, it is to be completely within the spirit of the Charter.<sup>53</sup>

It was therefore possible for Article 106 to apply to any situation involving the Security Council and the maintenance of international peace and security.

#### *A. Palestine*

In April 1947, Britain referred to the United Nations the question of the future government of Palestine.<sup>54</sup> To address the question, the General Assembly constituted a United Nations Special Commission on Palestine (UNSCOP).<sup>55</sup> Interestingly, while the United States proposed that the Commission consist entirely of countries that were not permanent members of the Security Council, a competing Argentine proposal argued for the inclusion of the Five Powers, because on them would fall the work of enforcement.<sup>56</sup> However, Britain's involvement was not thought appropriate, so adherents of the first proposal argued

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53. REP. TO THE PRES., *supra* note 49, at 163.

54. U.S. DEP'T OF STATE, PUBL'N NO. 3024, THE UNITED STATES AND THE UNITED NATIONS: REPORT BY THE PRESIDENT TO THE CONGRESS FOR THE YEAR 1947, at 44 (1948) [hereinafter PRES. REP. TO CONG.].

55. *Id.* at 46.

56. *Id.* at 45.

that if one of the Five Powers could not take part, then none of them should take part.<sup>57</sup> The United States' proposal carried.<sup>58</sup>

UNSCOP proposed a plan to partition Palestine. But in its report, UNSCOP told the Security Council that it could not carry out the General Assembly's partition resolution for Palestine unless adequate military forces were made available for the task.<sup>59</sup> In response, the United States representative stated that the United States "would be 'ready to consult under the Charter with a view to such action as may be necessary to maintain international peace,'" which the continued absence of Article 43 agreements for member states' contributions of forces "required."<sup>60</sup> But despite this use of its exact language, Article 106 was never directly cited.

Colombia took the suggestion and, upon the next meeting of the Security Council, submitted a draft resolution. The Colombian representative proposed the Council "invite" the Five Powers

according to Article 106 . . . to consult with one another with a view to such joint action on behalf of the Organization as might be necessary to prevent any threat to the peace, breach of the peace, or act of aggression arising from the implementation of the [General Assembly's] partition resolution.<sup>61</sup>

But the British were unwilling to have any part in any military action in Palestine; the precipitant of the crisis was, in fact, their desire to get their forces out of that region.<sup>62</sup> Similarly, the

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57. *Id.*

58. *Id.* at 45–46.

59. U.N. SCOR, 3d Sess., Supp. at 19–23, U.N. Doc. A/AC.21/W.25 (Feb. 3, 1948); see GOODRICH ET AL., *supra* note 2, at 631.

60. U.N. SCOR, 3d Sess., 253d mtg. at 267, U.N. Doc. S/P.V.253 (Feb. 24, 1948); see JEAN-PIERRE COT & ALAIN PELLET, *LA CHARTE DES NATIONS UNIES* 1405 (1985); GOODRICH ET AL., *supra* note 2, at 631; HANS Kelsen, *THE LAW OF THE UNITED NATIONS* 757–58 n.9 (1951) ("This statement means that the United States was ready to apply Article 106 of the Charter."); U.N., 5 *REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS* at 380, U.N. Sales No. 1955.V.2 (VOL. V) (1955) [hereinafter *REPERTORY OF PRACTICE*].

61. U.N. SCOR, 3d Sess., 254th mtg. at 293, U.N. Doc. S/684 (Feb. 24, 1948) (quotations omitted); see COT & PELLET, *supra* note 60, at 1405; GOODRICH ET AL., *supra* note 2, at 631; *REPERTORY OF PRACTICE*, *supra* note 60, at 380.

62. GOODRICH ET AL., *supra* note 2, at 632.

United States was loath to see Soviet troops in the Middle East.<sup>63</sup> Colombia withdrew its draft resolution three days later.<sup>64</sup>

The final resolution as adopted omitted any mention of Article 106, and instead called on the five permanent members of the Security Council to “consult” and to make recommendations “regarding the guidance and instructions which the Council might usefully give to the Palestine Commission with a view of implementing” the partition resolution.<sup>65</sup>

### B. *Korea*

At the outbreak of the Korean War, Soviet intransigence in the Security Council led to the General Assembly debate of the “Uniting For Peace Resolution.” In opposing the Resolution, the U.S.S.R. called many times upon Article 106 as an authority for its contention that the Resolution was unauthorized under the Charter.<sup>66</sup>

The United States placed the matter on the agenda for the General Assembly’s Fifth Session<sup>67</sup> and submitted a draft resolution, cosponsored with six other states, to the 354th meeting of the General Assembly’s First Committee.<sup>68</sup> The Resolution, designed to break the deadlock in the Security Council and permit U.N. support of the defense of South Korea, reaffirmed that the Security Council held the initiative to affect Article 43 agreements. However, in the agreements’ absence, the United Nations still needed available forces, pending the conclusion of such agreements, to maintain international peace and security.

63. COT & PELLET, *supra* note 60, at 1405; GOODRICH ET AL., *supra* note 2, at 632.

64. REPERTORY OF PRACTICE, *supra* note 60, at 380.

65. U.N. SCOR, 3d Sess., 263d mtg. at 43, U.N. Doc. S/691 (Mar. 5, 1948); see GOODRICH ET AL., *supra* note 2, at 631–32; KELSEN, *supra* note 60, at 760–61 n.4 (“This resolution cannot be interpreted to be a recommendation made to the five powers referred to in Article 106 of the Charter, to apply this Article.”).

66. COT & PELLET, *supra* note 60, at 1405–06 (“*Le but de ses démarches, dont aucune ne devait aboutir, était essentiellement de démontrer l’inconstitutionnalité de certaines propositions occidentales . . .*”) (translated as “The goal of these proceedings, none of which would succeed, was essentially to demonstrate the unconstitutionality of certain occidental propositions . . .”).

67. U.N. GAOR, 1st Comm., 5th Sess., 354th mtg., Annex 1, Agenda Item 68 at 2, U.N. Doc. A/1373 (Oct. 9, 1950); REPERTORY OF PRACTICE, *supra* note 60, at 380.

68. U.N. GAOR, 1st Comm., 5th Sess., 354th mtg., Annex 1, Agenda Item 68 at 4–6, U.N. Doc. A/C.1/576 (Oct. 9, 1950); REPERTORY OF PRACTICE, *supra* note 60, at 380.

Among the Resolution's recommendations was one that member nations train and designate portions of their armed forces that could promptly respond if the United Nations called for them.<sup>69</sup> The Soviets moved to amend that language, substituting the words "and taking into account the obligation to implement Article 106 of the Charter."<sup>70</sup>

Two days later, at the First Committee's 358th meeting, the Soviet representative submitted the following draft resolution:

The General Assembly,

Taking into account the particular importance of concerted action by the five permanent members of the Security Council in defending and strengthening peace and security among nations,

Recommends that before armed forces are placed at the disposal of the Security Council under appropriate agreements concluded in accordance with Article 43 of the Charter, the five permanent members of the Security Council—the Union of Soviet Socialist Republics, the United States of America, the United Kingdom, China, and France—should take steps to ensure the necessary implementation of Article 106 of the Charter for the purpose of taking such joint action on behalf of the Organization as may prove to be necessary for the maintenance of international peace and security.<sup>71</sup>

In support of the draft resolution, the Soviet representative argued that while Article 106 remained in force and no attempt had yet been made to comply with its provisions, any other route was improper as contrary to the Charter.<sup>72</sup> The U.S.S.R. and nations supporting its position held that the only possible alternative to Article 43 under the Charter was Article 106.<sup>73</sup>

The representative of Israel spoke in favor of a renewed effort to carry out Article 106.<sup>74</sup> But he stated that it would not be

69. U.N. GAOR, 1st Comm., 5th Sess., 354th mtg., Annex 1, Agenda Item 68 at 4–6, U.N. Doc. A/C.1/576 (Oct. 9, 1950); REPERTORY OF PRACTICE, *supra* note 60, at 381.

70. U.N. GAOR, 1st Comm., 5th Sess., 362d mtg., Annex 1, Agenda Item 68 at 9–10, U.N. Doc. A/C.1/583 (Oct. 13, 1950); REPERTORY OF PRACTICE, *supra* note 60, at 381.

71. U.N. GAOR, 1st Comm., 5th Sess., 358th mtg. at para. 75, U.N. Doc. A/C.1/580 (Oct. 11, 1950); REPERTORY OF PRACTICE, *supra* note 60, at 381.

72. REPERTORY OF PRACTICE, *supra* note 60, at 381.

73. *Id.*

74. U.N. GAOR, 5th Sess., 362d mtg., Annex 1, Agenda Item 68 at 10, U.N. Doc. A/C.1/584 (Oct. 13, 1950); REPERTORY OF PRACTICE, *supra* note 60, at 381–82.

realistic to merely reaffirm Article 106 without providing procedures to be taken in the event of failure of the Five Powers to agree under Article 106's provisions.<sup>75</sup> Israel, therefore, supported the Uniting for Peace Resolution generally but also proposed an amendment substituting these words:

and desiring to ensure that, pending the conclusion of such agreements and in case the five permanent members of the Security Council have failed to develop procedures for the taking of joint action as envisaged in Article 106 of the Charter, the United Nations have at its disposal means of maintaining international peace and security.<sup>76</sup>

The First Committee rejected the Israeli amendment by a vote of 47 to 4, with 7 abstentions.<sup>77</sup>

The sponsors of the Uniting For Peace Resolution countered the Soviet objections with their own contention that its terms conformed to the Charter.<sup>78</sup> Canada, one of the Resolution's sponsors, argued—in opposition to the Soviet proposals—that the transition period under Article 106 should not be allowed to last for so long as the U.S.S.R. could frustrate agreement.<sup>79</sup>

In the First Committee, the Soviet-proposed amendment to the Uniting for Peace Resolution failed on a vote of 45 to 5, with 8 abstentions.<sup>80</sup> The next day, the Committee also rejected by a vote of 34 to 6, with 18 abstentions, the U.S.S.R. substitute draft resolution.<sup>81</sup> At the Plenary Meeting of the General Assembly in November 1950, the U.S.S.R. reintroduced both its proposed

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75. U.N. GAOR, 5th Sess., 362d mtg., Annex 1, Agenda Item 68 at 10, U.N. Doc. A/C.1/584 (Oct. 13, 1950); REPERTORY OF PRACTICE, *supra* note 60, at 381–82.

76. U.N. GAOR, 5th Sess., 362d mtg., Annex 1, Agenda Item 68 at 10, U.N. Doc. A/C.1/584 (Oct. 13, 1950); REPERTORY OF PRACTICE, *supra* note 60, at 381–82; *see* COT & PELLET, *supra* note 60, at 1405 n.20.

77. REPERTORY OF PRACTICE, *supra* note 60, at 382.

78. U.N. GAOR, 1st Comm., 5th Sess., 354th mtg. at 64, U.N. Doc. A/C.1/SR.354 (Oct. 1950).

79. REPERTORY OF PRACTICE, *supra* note 60, at 382.

80. U.N. GAOR, 5th Sess., 368th mtg., Annexes, Agenda Item 68 at 9–10, U.N. Doc. A/C.1/583 (Oct. 18, 1950); REPERTORY OF PRACTICE, *supra* note 60, at 382.

81. U.N. GAOR, 1st Comm., 5th Sess., 369th mtg. at 164, para. 75, U.N. Doc. A/C.1/580 (Oct. 19, 1950); REPERTORY OF PRACTICE, *supra* note 60, at 382.

amendment and its substitute draft resolution.<sup>82</sup> The General Assembly rejected both Soviet proposals.<sup>83</sup>

### C. *Congo*

During the United Nations' response to the events in the Congo from 1960 to 1963, Article 106 formed the basis of some argument. Advocates of the voluntary deployment of member nations' forces, such as Pakistan, Iraq, and Ethiopia, pointed to the enhanced authority of the Five Powers under Article 106, among others, as justifying their belief that the Five Powers had a commensurately larger responsibility to underwrite United Nations' peacekeeping costs.<sup>84</sup>

For its part, the Soviet Union challenged the peacekeeping missions on the basis of Article 106, among other reasons. The U.S.S.R. cited Article 106 in support of its argument that only the Security Council, and not the General Assembly, could decide the apportionment of financial liability for those operations.<sup>85</sup> Article 106 has not recurred in official United Nations debate since.

## IV. ACADEMIC COMMENTARY

The legal scholars who made note of Article 106 wrote predominantly in the early post-war period. This reflected the greater likelihood and expectation of a role for Article 106 in the interim transition period before the anticipated entry into force of military agreements under Article 43. But as the practice of Article 106 failed to materialize, the academic focus on Article 106 also started to wane. In the decades since the Uniting for Peace Resolution, scholarly comment has only rarely touched on the topic.

From the start, Article 106 and its provision for independent, joint action by the Five Powers provoked suspicion of inequity

82. U.N. GAOR, 5th Sess., 302d plen. mtg. at 345, para. 51, U.N. Doc. A/1465 (Nov. 3, 1950); REPERTORY OF PRACTICE, *supra* note 60, at 382.

83. U.N. GAOR, 5th Sess., 302d plen. mtg. at 345, para. 51, U.N. Doc. A/1465, and 347, para. 76, U.N. Doc. A/1467 (Nov. 3, 1950); REPERTORY OF PRACTICE, *supra* note 60, at 382.

84. See COT & PELLET, *supra* note 60, at 1406 n.22 and citations therein; see also Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 249 (July 20) (Quintana, J., dissenting).

85. U.N. GAOR, 15th Sess., 2d part, 995th mtg. at 76, para. 25, U.N. Doc. A/C.15/SR.842 (Apr. 19, 1961); see COT & PELLET, *supra* note 60, at 1406 n.23.

between large and small states in the international system. As part of a “weasel-worded chapter (XVII) which has received little public attention,” Article 106 prompted speculation as to whether the Five Powers might collude outside the Security Council to fix and predetermine issues, much as ambassadors to the earlier League of Nations had done.<sup>86</sup> This view no doubt took into account the aforementioned concerns of Mexico and Canada during the San Francisco Conference.<sup>87</sup>

The commentators soon discerned the ability of a permanent member of the Security Council to block enactment of Article 43 military assistance agreements.

The Security Council may be unable to fulfill its function, not only because its decision to take the measures necessary to restore the peace broken by an armed attack within the meaning of Article 51 is subjected to the veto power of the permanent members but also because, due to the veto right of the permanent members of the Security Council, until now it has been impossible to conclude the special agreements determining the contingents of armed forces to be made available by the members to the Council.<sup>88</sup>

The same “organic imbecility of the Security Council whereby the Soviets obtained a strangle-hold on the proceedings through the veto and other tactics”<sup>89</sup> stymied organization of United Nations military forces. But underlying the Charter’s structural flaws was a more basic axiom that “there is no obligation to conclude a treaty, and the Members of the United Nations are certainly not under any obligation to conclude with the Security Council the agreements referred to in Articles 43 and 45.”<sup>90</sup>

International legal scholars noted the presence and availability of Article 106 in the absence of Article 43

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86. Herbert W. Briggs, *Power Politics and International Organization*, 39 AM. J. INT’L L. 664, 677 (1945) (“[I]n time, we may learn whether it is intended that a new Conference of Ambassadors, Paris style, is to operate alongside the Security Council.”).

87. See *supra* text accompanying notes 38–41.

88. Hans Kelsen, *Collective Security and Collective Self-Defense Under the Charter of the United Nations*, 42 AM. J. INT’L L. 783, 795 (1948).

89. L.H. Woolsey, Comment, *The “Uniting For Peace” Resolution of the United Nations*, 45 AM. J. INT’L L. 129, 129 (1951).

90. KELSEN, *supra* note 60, at 756–57.

agreements.<sup>91</sup> But at the same time, they regularly acknowledged that it had not been and likely would not be used.<sup>92</sup>

Nonetheless, the Great Powers were recognized as indispensable to any effective enforcement action taken within or without the United Nations system.<sup>93</sup> And in the political division of the Cold War, the enforcement would need to be the product of cooperation and consultation.<sup>94</sup>

Even without its formal invocation, it was possible to determine certain aspects of practice under Article 106. Professor Kelsen believed, “It is not very clear whether an agreement of all the five Great Powers is necessary in order that the ‘joint action’ can be taken, or whether two or three or four of them may take such ‘joint action’ even if . . . the others do not agree.”<sup>95</sup> Nonetheless, he concluded that “an agreement of the five Powers suffices, . . . and since the ‘joint action’ is to be taken ‘on behalf of the Organisation’ the interpretation which seems to be most plausible is that all five Powers must agree in order to make a ‘joint action’ possible.”<sup>96</sup>

Contrary to the 1945 position of the United States, Professor Kelsen read Article 106 to authorize “the five Powers not only to take an action involving the use of armed force.”<sup>97</sup> This view he based on the distinction between Articles 42 and 106. For the Security Council to use force under Article 42, it must first determine by the requisite number of members’ votes, including all of the permanent members,<sup>98</sup> the existence of a threat to, or breach of, the peace.<sup>99</sup>

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91. *E.g.*, Woolsey, *supra* note 89, at 135 n.5 (“No action appears to have been taken under this article.”).

92. *E.g.*, *id.*

93. Josef L. Kuns, *Legality of the Security Council Resolutions of June 25 and 27, 1950*, 45 AM. J. INT’L L. 137, 139 (1951) (“[N]o international enforcement action is possible in a concrete case, whatever the corresponding rules may be, if there is not a great Power able and willing to take the initiative.”).

94. Woolsey, *supra* note 89, at 132 (“[I]f an unruly great Power cannot be pressured under Chapter VII, it would seem war can only be avoided by *joint compromise* among the great Powers.”).

95. KELSEN, *supra* note 60, at 759.

96. *Id.*

97. *Id.* at 760. *Contra supra* note 53 and accompanying text.

98. As originally drafted, the Charter required seven votes of the total of eleven Security Council members. GOODRICH ET AL., *supra* note 2, at 221. Today the Charter has been amended to require nine votes of an enlarged membership of fifteen nations in the Security Council. U.N. Charter art. 27.

99. U.N. Charter art. 39.

The fact that the special agreements referred to in Article 43 are not yet in force is no reason to suspend the just-mentioned functions of the Security Council with respect to the military enforcement action to be taken by the five Powers designated in Article 106. But its wording does not exclude the interpretation according to which the five Powers in taking their joint action are completely independent of the Security Council, and their action is limited only in so far as it is, in their opinion, necessary for the purpose of maintaining international peace and security.<sup>100</sup>

Once the Five Powers have agreed and taken joint action, because that action under Article 106 necessarily is “on behalf of the Organisation,” all member nations are bound to “give the joint action taken under Article 106 every assistance and to refrain from giving assistance to any state against which the joint action is directed,” in accordance with Article 2(5) of the Charter.<sup>101</sup>

But as to which nation the Five Powers might direct joint action under Article 106, “the answer is left to the five Powers. Hence it may be directed against a state which has not violated an obligation expressly stipulated in the Charter.”<sup>102</sup> By this reasoning, Professor Kelsen concluded that the openness of Article 106, coupled with the difficulties inherent in trying to implement Article 43, meant “Article 106 confers upon the five permanent members of the Security Council, provided they agree with respect to the application of this Article, an almost unlimited power for an indefinite period of time.”<sup>103</sup> The inability of the Five Powers to agree during the Cold War foreclosed proof of this interpretation.

None of the later academic writings reviewed for this essay adds substantive comment to the scholarship on Article 106. Occasionally, critics have proposed revisions or replacement of the Charter and necessarily addressed Article 106 as part of a comprehensive rewrite.<sup>104</sup>

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100. KELSEN, *supra* note 60, at 760.

101. *Id.* at 761; *see also* U.N. Charter art. 2, para. 5.

102. KELSEN, *supra* note 60, at 761.

103. *Id.*

104. *See, e.g.*, GRENVILLE CLARK & LOUIS B. SOHN, *WORLD PEACE THROUGH WORLD LAW 188* (1958) (proposed new Charter included an Article 106 substantially the same, but adding India to the Five Powers).

More recently, in 1984, Professors Arend and Beck published their work reviewing the practice and custom of states in the Charter era regarding use of force.<sup>105</sup> In listing the Charter's possible sources of legal standards governing use of force, they include Article 106.<sup>106</sup> After noting the failure of Article 106 to serve as the cited legal basis of any use of force, Professors Arend and Beck dismiss its future use as unlikely.<sup>107</sup>

#### V. WHAT USE IS ARTICLE 106?

Article 106 remains a valid part of the United Nations Charter. It has not been repealed or amended, despite suggestions that this be done. By its own terms, Article 106 should expire upon the conclusion and entry into force of agreements by member nations under Article 43 to provide military forces at the disposal of the U.N. Security Council. The failure of member nations to do so over the past decades has left Article 106 in place without disturbing the rest of the United Nations system or the developed practice of the Security Council and member nations in addressing threats to international peace and security. This is the most probable reason Article 106 has not been repealed or amended, for the amendment process would be too much trouble merely to reach a result that does not differ from the status quo.

It remains to ask: Could Article 106 ever have a relevant application? The answer requires examination of hypothetical possibilities.

Starting with a conservative assumption about the scope of Article 106, one can limit the hypothetical situation to one of agreement among all Five Powers. That situation at least falls within Article 106's ambit.<sup>108</sup> When all five permanent members of the Security Council are in agreement, the natural assumption is that they will act through the Security Council.

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105. ANTHONY CLARK AREND & ROBERT BECK, *INTERNATIONAL LAW AND THE USE OF FORCE* (1984).

106. *Id.* at 32.

107. *Id.* Curiously, the citation to Professor Akehurst's writing allegedly supporting Professors Arend and Beck's treatment of Article 106 fails to mention Article 106 at all. *Id.* at 33. The cited passage reviews instead Articles 53 and 107, limited strictly to the issue of defeated Axis powers, but goes no further. MICHAEL AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 225–26 (5th ed. 1984).

108. *See* Kelsen, *supra* note 88 and accompanying text. Unresolved possibilities also include the agreement of fewer than Five Powers and the abstention or indifference of a power or powers not in full concurrence.

Only a permanent member has the veto in the Security Council,<sup>109</sup> and any one power can thereby protect itself and its interests. This is so regardless of the consensus within the Five Powers, and the historical practice has borne out this fact.

The negative power to prevent Security Council action is only half of the picture. Five Powers agreeing to bar United Nations' action are no different from any one Power—there is no cumulative effect. However, Five Powers in the Security Council agreeing upon affirmative measures may not always be sufficient.<sup>110</sup>

For the Security Council to act, it must have the concurrence not only of all five permanent members, but also of a certain number of the non-permanent members—seven in the original eleven-member Council, nine in the present day fifteen-member Council—must also accede to the action.<sup>111</sup> In other words, the Five Powers are necessary but not sufficient to induce the action of the Security Council. In the present composition of the Council, it is hypothetically possible that a concerted Five Power proposal could fail to attract the additional votes of four Council members. Any seven non-permanent members of the Security Council, if they were determined and united in purpose, could block Security Council action favored by the Five Powers.

Article 106 could then provide a “fail-safe” option for the Five Powers. Faced with an intransigent bloc of smaller states in the Security Council, the Five Powers might still take joint action against a threat and remain within their rights and responsibilities under the Charter. That we today have to speculate why or how the Five Powers might unanimously conflict with a significant number of other members does not assure us that it could not somehow happen in the future.<sup>112</sup>

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109. U.N. Charter art. 23.

110. Cf. John Norton Moore, *Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security, and War Avoidance*, 37 VA. J. INT'L L. 811, 855 (1997) (“removing the parking brake (i.e., the veto) does not make a car climb the hill”) (paraphrasing Prof. Inis Claude).

111. U.N. Charter art 23, para. 7.

112. One possibility lies in the threat of nuclear weapons proliferation. It is commonly noted that the five permanent members of the Security Council share unique status as sanctioned nuclear weapons states under the Nuclear Nonproliferation Treaty. One can imagine segments of the world community siding with an upstart nation defying the exclusivity of the nuclear club and provoking the united opposition of the Five Powers.

VI. CONCLUSION

Article 106 of the United Nations Charter began as an interim measure, designed to ensure that the Allies might continue to fight the Second World War and secure the post-war peace during the time it took to make the new Organization fully operational. Although the Organization never quite came into operation as expected, and Article 106 thereby remains in effect, the United Nations has not yet called upon Article 106 to justify any measure. Article 106's disappearance today would make little to no difference to the current arrangement. Its continued presence and validity, however, does hold the potential of aiding the Five Powers in the case that they unanimously agree yet fail to command a requisite majority in the Security Council.