NOTES AND COMMENTS

CORRESPONDENCE

TO THE EDITORS IN CHIEF:

Professor Michael Reisman's Comment, *The Constitutional Crisis in the United Nations* (87 AJIL 83 (1993)), is disturbing. He seems to be saying that it would be quite appropriate for the International Court of Justice to reach the conclusion that the Court ought never to challenge the legality of the actions of the Security Council. If the ICJ were to reach this conclusion, the countries that happened to be in the ascendancy on the Security Council at any particular time would be entitled to interpret chapter VII of the United Nations Charter in any way they saw fit. These countries would then be permitted to lay down the law not only for the target of their concern but also for all other members of the United Nations; and to do so without having to satisfy any requirement whatsoever, except possibly to assert that they were acting under chapter VII. This is all the more alarming when it is recalled that Security Council rulings can be, and often are, promulgated without a cut-off date, with the result that they can never be changed or repealed except by a subsequent resolution in respect of which each member of the Permanent Five has a veto.

If the UN Charter were really intended to make the Security Council a law unto itself and to authorize it to do anything it pleased as long as it remembered to cite chapter VII, I suggest that the wording would have had to be abundantly explicit on the matter. In the absence of such wording, it is hard to believe that the Court would ever reach a conclusion of this nature.

DOUGLAS SCOTT*

Professor Reisman replies:

Because the designers of the Charter appreciated that fashioning effective responses, case by case, to international security threats involved, perforce, complex political judgments, the Charter's contingencies, procedures and discretion for decision making were conceived very broadly. The constitutional challenge lies in finding systemically appropriate control mechanisms that accommodate the need for efficient performance of the basic security functions of the world community with responsible power sharing. Should our national type of judicial review be transposed to the United Nations? Would it accommodate efficient security functions and power sharing? In 1963 the General Assembly endorsed the drafters' conception and grafted on a "non-aligned veto" rather than create a judicial review as the control mechanism. In the context of world politics, the Assembly's judgment was correct. It should be made effective.

TO THE EDITORS IN CHIEF:

In his review of the latest volume of the *Fontes*,[1] H. W. A. Thirlway suggests that the volume, which "consists of extracts from the decisions of the Court, and

* President, The Markland Group, an organization of academics and other concerned citizens working for the protection and strengthening of disarmament treaties.

[1] FONTES IURIS GENTIUM. DIGEST OF THE DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE, 1976–1985 (Rudolf Bernhardt, Juliane Kokott, Werner Meng & Karin Oellers-Frahm eds., 1990).

judges' opinions, arranged analytically under headings and comprehensively indexed," may not be worth the labor that went into it, in spite of its apparent high quality.[2] The usefulness of the series, now at seven volumes, is doubtful, argues Thirlway, in view of the general availability of the official *ICJ Reports*. If one needs the *Fontes* at all, it is exclusively for its thorough index, he says, adding that "were there as good an index published separately, he would unhesitatingly urge that it, rather than this volume, be purchased."[3]

Dr. Thirlway's point is well-taken, but it calls for an additional comment. Since 1987, the ICJ documents, as they appear in the *ICJ Reports*, have been available through the WESTLAW service. The coverage begins with the 1947 *Report*. The data base includes documents as they are released by the Court even prior to their official publication. The researcher can use the terms-and-connectors search method, relying on the actual wording of the documents. But she can also use plain English, as WIN, the natural-language search method, is available in this data base.

Anyone who has access to the WESTLAW INT-ICJ data base will find the *Fontes*, even with its index, obsolete. The World Court's jurisprudence is now open to any kind of analysis, limited only by the researcher's skills and imagination.

MARIA FRANKOWSKA

TO THE EDITORS IN CHIEF:

In correspondence printed in the April 1993 issue of this *Journal* (87 AJIL 252 (1993)), Professor Jordan Paust once again argues that "international law" limits the constitutional authority of the President of the United States. Lest his argument be left unchallenged, I should like to point out to your readers that its two principal pillars rest on quicksand: (1) the phrase "law of nations" as used in the period leading to the formation of our magnificent Constitution and for about half a century thereafter is not a synonym for "international law" as that phrase is used by Professor Paust; and (2) the cases appearing to hold "international law" to be inherently part of the law of the United States, like *The Paquete Habana*, are either taken out of the special context of admiralty and prize, or overstate the effects of a normal choice-of-law referral to the rules of international law.

As to the first, ancient theories under which the general principles of municipal law were construed to be general principles of all legal orders, including the international legal order, had come under serious fire as early as the seventeenth century,[1] and by 1789 the theory had become the subject of serious and influential comment.[2] But our founding generation had been educated in the conven-

[2] *See* 87 AJIL 341 (1993).

[3] *Id.* at 342.

[1] FRANCISCO SÚAREZ, *De legibus, ac deo legislatore*, bk. II, ch. XIX, secs. 2, 6, 8, *in* 2 SELECTIONS FROM THREE WORKS (Carnegie ed., Gwladys L. Williams trans., 1944) (1612). The sharp distinction between the *jus gentium* (rules of law common to all legal orders, thus evidenced normally by private law examples) and the *jus inter gentes* (law between nations) was set out by an English admiralty scholar unmistakably in the next generation. 2 RICHARD ZOUCHE, IURIS ET IUDICII FECIALIS, pt. I, sec. I, no. 1 (Carnegie ed., J. L. Brierly trans., 1911) (1650). Actually, doubts about whether universal-uniform "justice"-based natural law existed at all were expressed even by Aristotle. ARISTOTLE, NICHOMACHEAN ETHICS, bk. V, ch. VII, at 294/295 (H. Rackham trans., Loeb Classical Library 1939) (ca. 350 B.C.).

[2] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, ch. XVII, §2, para. 25, esp. n.1, *in* A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION BY JEREMY BENTHAM 426 (Wilfred Harrison ed., 1823 ed., Basil Blackwell 1948) (1789).

tional wisdom of the time[3] under which the shift in concept and language had not yet occurred. The great shift in language began in the Marshall Court, and the "new" theory of "conflict of laws" ended the discussion by 1834, when Justice Joseph Story published his great work on the subject.[4] From that time on, the notion of the old "law of nations" was incorporated into public international law as a rarely used theoretical remnant, nowadays codified as a source of law in Article 38(1)(c) of the Statute of the International Court of Justice as "general principles of law recognized by civilized nations." It is a source of law the Court has rarely used.[5]

As to the second, it is still common in admiralty and prize cases to refer to a hypothesized uniform and universal private international law and to argue (or, more likely, merely assume) that states are bound by the structure of the international legal order to harmonize their municipal laws in order to enforce that uniform and universal overarching law. Not only has choice-of-law theory done away with that approach in other contexts, but even in the admiralty context, such municipal legislation as our own Harter Act and Jones Act[6] is law for American courts regardless of possible inconsistencies with hypothesized universal law.

It is certainly possible to construct a complex model in which the notion of a universal and uniform law survives, but models built on that notion seem to be unnecessarily complex, thus violating Occam's razor.[7] Even if adopted, the carv-

[3] The leading legal text of the time, and the one familiar to those of our constitutional generation who were lawyers, was, of course, William Blackstone, *Commentaries on the Laws of England* (1765–1769). Volume 4 (1769) is the only one pertinent to this discussion. See vol. 4, ch. V: "Of Offences Against the Laws of Nations." Blackstone defined the "law of nations" to include all rules deducible by "natural reason" and adopted "by universal consent among all the civilized inhabitants of the world." The major area for its play was in transnational trade,

> mercantile questions, such as bills of exchange and the like; in all marine causes relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; the law-merchant . . . to prizes, to shipwrecks, to hostages and ransom-bills, there is no other rule of decision. . . . But though in civil transactions and questions of property between the subjects of different states the law of nations has much scope . . . offences against the law of nations . . . are principally incident to whole states or nations: in which case recourse can only be had to war . . . .

See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: OF PUBLIC WRONGS 1474–75 (William Draper Lewis ed., Rees Welsh & Co. 1897). Is this what Professor Paust has in mind as the guiding spirit of our Founding Fathers? If so, what happened to the notion of "consent"? But there is much in Blackstone that seems self-contradictory to a modern analyst, and strains in the system that resulted from too easy an adoption of his legal model probably contributed to the massive shift in legal theory in the next generation.

[4] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES (1834). For a summary analysis of Story's role in this shift, see Alfred P. Rubin, *Private and Public History; Private and Public Law*, 82 ASIL PROC. 30 (1988).

[5] For a criticism of the Court's approach to this source of law, see Richard B. Lillich, *The Rigidity of Barcelona*, 65 AJIL 522, esp. 529–31 (1971). Lillich seems to have confused the ICJ's choice-of-law referral to municipal corporation law with what he argues should have been a referral to municipal corporation law as a source of international law dealing with stockholders' claims. Some arbitral tribunals have found general principles of law a fertile source of law in some cases. *See* Wolfgang Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 AJIL 279 (1963). The indispensable work, pointing out the limits of the approach, is still HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (1927).

[6] Harter (Carriage of Goods by Sea) Act of 1893, 27 Stat. 445 (46 U.S.C. app. §§190–195 (1988)); the Jones (Merchant Marine) Act of 1920, ch. 250, 41 Stat. 988, often supplemented and amended, now dispersed throughout 46 U.S.C.

[7] Occam's razor, otherwise called the Law of Parsimony, "Essentia non sunt multiplicanda praeter necessitatem" (Essences [assumptions] are not to be multiplied unless necessary). William of Occam

ing out of a special exception to the easier choice-of-law theories, then expanding that exception to cover constitutional law while leaving choice of law the operative theory to apply to all other cases, raises complexities of a magnitude that almost requires rejection of the basic notion of there being an international law at all. It is very hard to see a country's constitution as a document governed by international law unless it takes the form of a treaty among separate subjects of the international legal order joining together.[8] Thus, constitutions' references to international law are to be interpreted not as incorporating international law into municipal law in derogation of other provisions of the constitution, but as statements of a municipal law authority referring to a foreign legal order for whatever purposes the municipal constitutional authorities find to be the operative interpretation of their own constitutional powers.

For an example on a much simpler, practical level, consider whether an American tribunal applying French law becomes a French tribunal. Are its decisions likely to be persuasive to a proper French tribunal? Are its pronouncements on points of French constitutional law, to which its choice of law might have referred it, to be considered in any way persuasive in France? Similarly, does an American tribunal applying international law become an international tribunal? Are the decisions of American-trained jurists, selected for their expertise in American municipal law through an American political process, likely to be persuasive to a proper international tribunal beyond the sphere that international law allows to the precedents of municipal systems? Or do Professor Paust and those who agree with his analysis really propose to replace our Constitution's lawmaking and enforcing processes with the judgment of lawyers and judges who represent no popular constituencies and who disagree among themselves on most important questions of law (as Professor Paust and I seem to on this one)?

ALFRED P. RUBIN

Professor Paust replies:

Professor Rubin speaks of sand but grasps at straws. Many of the pillars that he has only a glimpse of are actually of venerable marble, are on firm American ground, and stand at the front of and within the Supreme Court of the United States. His world of multiplied assumptions is simply out of line with actual trends in U.S. judicial expectation concerning the "law of nations," "international law" and the duty of the President faithfully to execute such law.

He cites no view of a Founder, argues no specific provision of constitutional text, and cites no federal case, but by now the readers probably know why. There have been literally thousands of federal opinions using the phrases "law of nations" or "international law," and over 550 have generally used them interchangeably, whether the proceedings were civil, criminal, jurisdictional, prize or admiralty, administrative, or constitutional in focus. Need one stress, with thousands of federal cases using such law throughout our history, that it is unnecessary, if not misleading, to rest incorporation on any single or particular type of case?[1] Certainly, our courts have not generally done so, and their patterns of expectation, if

(Ockham) was an English monk and philosopher who died in 1349. *See* 19 ENCYCLOPÆDIA BRITANNICA 965–66 (11th ed. 1911).

[8] Even then, there can be problems and different interpretations. For example, was the United States Constitution, adopted as if a treaty in 1788, not to be subject to denunciation as if a treaty, by the "sovereign" states composing the legal union in 1861?

[1] Certainly, they were not merely those involving admiralty or prize, and none seem to have involved merely "choice of law" or "conflict of laws," as Professor Rubin would prefer. *See also* Alfred P. Rubin, *Professor D'Amato's Concept of American Jurisdiction Is Seriously Mistaken,* 79 AJIL 105, 106

not always perfectly rationalized, remain as facts and evident trends in expectation and decision. Importantly also, nothing in the text of the Constitution would allow the President to violate the law, including international law; no Founder is known to have declared or to have even suggested that the President could violate the law of nations or treaties; and no opinion of the judiciary or the Attorneys General in the eighteenth or nineteenth centuries expressed the view that the President could violate the law of nations, treaties or customary international law. As readers know, all relevant patterns of expectation affirmed just the opposite, Justice Story's among them. Support in the twentieth century is still overwhelming, with recognitions in Justice Sutherland's opinion in *Curtiss-Wright* and Justice O'Connor's in *Franklin Mint* among them.

Supposedly aligned against this array of text and judicial and other opinions for some two hundred years are several assumptions about the nature of international law based on portions of theories (mostly British) of Suárez, Zouche, Bentham, Blackstone and Story. However, a check of federal cases, for example, for the first one hundred years demonstrates that there was absolutely no reference to Suárez or Zouche and no relevant reference to Bentham's or Story's cited works.[2] Thus,

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(1985) ("a universal law . . . that has historically been considered *part of public international law, including* the law of belligerent prize, and . . . a universal law of nations that is defined to apply to all people, everywhere and at all times" "were popular in the late 18th century" and "are *incorporated by implication in our Constitution,*" as well as in "the Alien Tort Claims Act" of 1789 (emphasis added)). Further, no opinion that happened to involve a jurisdictional competence in admiralty or prize limited its recognition that the Executive is bound by the law of nations and/or international law to such a case. See, e.g., cases cited in Jordan J. Paust, *The President* Is *Bound by International Law,* 81 AJIL 377, 377–83 (1987); Correspondence, 87 AJIL 252, 252–54 (1993). Indeed, Justice Story in Brown v. United States, 12 U.S. (8 Cranch) 110 (1814), expressly related the "law of nations" to the President's constitutional duty faithfully to execute "the laws." *Id.* at 149; *see also id.* at 147, 153; Justice Story's opinion in United States v. The Schooner Amistad, 40 U.S. (15 Pet.) 518, 594–96 (1841) (interchangeable use of law of nations and international law in response to individual claims and prevailing argument that the "federal executive" has no "power of making our nation accessories to . . . atrocious violations of human right," *id.* at 553); Rubin, *supra.* Story's approach in *Brown,* although now anathema to Rubin, was entirely proper since such law is law of the United States. *See, e.g.,* Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States,* 12 MICH. J. INT'L L. 59, 81–86 & nn.38–39, 44–47 (1990) [hereinafter *Customary Law*]; 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 40–41, §111 (1987). On the proposition that federal courts most often thought that the "law of nations" rested upon human expectations and practice (what we recognize as the two elements of customary international law), see, e.g., Paust, *Customary Law, supra,* at 59–61, 68–72.

[2] Apparently, Bentham's *Introduction to the Principles* was not cited until 1960, and has not been cited since. Indeed, any reference to Bentham has been extremely rare. For the view that his influence is speculative, see ALFRED P. RUBIN, THE LAW OF PIRACY 119–20 n.135 (1988). Even if he originated the phrase "international law" (*cf.* Mark Janis, *Jeremy Bentham and the Fashioning of "International Law,"* 78 AJIL 405, 408–09 (1984)), the philosophical meaning of its originator(s) did not spread as its only meaning, especially in the Americas. Indeed, such control over words may not be possible. Also, Joseph Story's *Commentaries on the Conflict of Laws* (1834) was not cited often and in no known case is Rubin's assumed "role" evident. Importantly also, " 'foreign laws' " (Story), " 'the laws of one nation' " (Story), the " 'law-merchant' " (Blackstone), and the law "maritime" as such were not really customary international law. *Compare* STORY, *supra,* at 24, 33, 38, *quoted in* Alfred P. Rubin, Remarks, 82 ASIL PROC. 35 (1988) *with* Janis, *supra,* at 417; Paust, *Customary Law, supra* note 1, at 65–67 n.14, 80 n.34; HENRY J. STEINER & DETLEV F. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 579 (3d ed. 1986); JOSEPH M. SWEENEY, COVEY T. OLIVER & NOYES E. LEECH, THE INTERNATIONAL LEGAL SYSTEM 190 (3d ed. 1988). To pretend that the first three are customary international law or the "law of nations" as widely understood (*see* Rubin, Remarks, *supra;* Alfred P. Rubin, *supra* p. 590, 591 n.3 and text at notes 4–6; Rubin, *Revising the Law of "Piracy,"* 21 CAL. W. INT'L L.J. 129, 130–31 (1990) (confusing the "law of nations" with merely the domestic or "municipal law" of nations)) will deceive few others. *See also* Anthony D'Amato, *Professor Rubin's Reply Does Not Live up to Its Title,* 79 AJIL 112, 113 (1985).

they do not appear to have had any direct influence on U.S. federal judicial opinions, and any other influence is conjectural. Blackstone, of course, was denounced by Jefferson and, although he had some influence, he evidently had none of the effect that Professor Rubin might wish. The British were simply not the answer to U.S. constitutional interpretation or to U.S. thinking about international law, and at least certain British approaches to incorporation were openly disfavored.

Among the most far-fetched of assumptions, however, is that we should rename the law of nations and international law "conflict of laws" because of some conflicts theory of Story, its supposed relation to any or all of international law, and its assumed (but undocumented) peremptory and unalterable influence on all relevant federal judicial opinions after 1834—thus, thousands of U.S. cases—and that such a supposed theory must now be adopted because it is conceptually "normal" or theoretically "easier." Even an antirealist British razor cuts the other way.

Finally, these are not merely my views. They include those of Hamilton, Jay, Madison, Duponceau, Iredell, Marshall, Chase, Paterson, Story, Wirt, Curtis and countless others. In the larger scheme, the facts that a few professors hold disfavored views and wish to promote presidential illegality (largely on unsupported theoretical assumptions) and, perhaps unfortunately, that this particular exchange has occurred are relatively unimportant. Here, I agree with Professor Rubin that a few professors cannot rewrite the text of the Constitution, substitute for apparent unanimity among the Founders, or replace two centuries of judicial expectation.

Retirement of the Editor in Chief

With the publication of the July issue, Professor Thomas M. Franck retired as editor in chief of *The American Journal of International Law,* a position he had filled with dedication and distinction since 1984. At the same time, Professors Theodor Meron of the New York University School of Law and Detlev Vagts of Harvard Law School assumed the mantle of co-editors in chief. The Board of Editors wishes to express its profound gratitude to Professor Franck for his sure hand at the helm and to welcome the new co-editors in chief as they embark on their own tour of duty.