THE INTERNATIONAL LAW STANDARD IN STATUTES OF THE UNITED STATES

The relation of municipal law to international law is properly a subject of inquiry by both practitioners and theoreticians. That all the questions which arise in this connection have not been settled will appear from continuing discussions concerning monism and dualism, the concept of domestic jurisdiction questions, and the doctrine of self-executing treaties. Cases of clear conflict between national law in the form of statutes and that which comprises international obligations tend to receive much publicity, and properly so. The extent to which there has been conformity of national legislation to customary international law and treaties seems to have received less attention. Techniques used to secure such conformity will appear to some extent from the manner in which statute-makers have by express provisions taken cognizance of the law of nations in written or unwritten form.

The present comment is based on illustrations to be found in the national statutes of the United States over the century and a half beginning with the organization of the National Government and extending through the public laws of the 76th Congress, *i.e.*, to 1941. (New problems that have marked the decade from 1941 to 1951, particularly in connection with the growth of public international organizations, seem to justify the devotion of a separate discussion to this period.) The limitations of a brief comment preclude more than a classification of provisions. No effort has been made to trace the legislative history of provisions, or to study their actual administration by executive agencies or interpretation by the courts. Nor, for the present purpose, has it seemed necessary to indicate which ones are now in force and which are not. As a further limitation, statutory references to the laws and usages of war have been omitted.

In the following sections, for the sake of convenience, mentions of international law in the statutes have been separated from mentions of treaties and conventions, although in the enactments the two are frequently referred to in the same contexts.

I

Provisions making reference to international law or to the "law of nations" may be grouped into those relating to (1) jurisdiction of domestic courts, (2) claims awards or payments, (3) commerce and navigation, (4) seamen's rights, (5) piracy, (6) diplomatic and consular matters, (7) retaliation, (8) neutrality, (9) advancement of international law, and (10) miscellaneous matters.

Within the first of these groups are provisions giving the Federal courts in the United States competence to hear cases involving "tort only in violation of the law of nations."[1] and to hear, "consistently with the law of na-

[1] 1 Stat. 73, 77; 36 Stat. 1087, 1093.

tions," cases involving ambassadors; also the authority to punish as "violations of the law of nations" actions by persons who "infract" the law relating to ambassadors.[2] Likewise included are provisions giving jurisdiction to Federal courts in a case where an individual is held for committing an act which he claims to have done for a foreign state and the validity and effect whereof "depend upon the law of nations."[3] The Court of Claims has on occasion been authorized to hear claims based upon the allegedly "unlawful" detention of vessels.[4]

It is natural that there should be frequent references to international law in acts concerning the settlement of claims, whether the latter be single claims or groups of them to be adjudicated by national claims commissions.[5] The language varies. There may be a reference to the law (and pertinent treaties),[6] or to the law along with the "principles of justice,"[7] or to "justice and equity,"[8] or to the determination of whether the claims are "just," without direct mention of the law,[9] or to "laws, usage and customs."[10]

Most of the direct references to the law of nations in connection with commerce and trade appear to have had relation to neutral rights.[11] In other contexts there are inferences with respect to the law, as, for example, in an early statute concerning registration of vessels, which mentioned vessels "lawfully condemned as prize,"[12] and in legislation concerning the Panama Canal, which sought to protect rights that the United States had by treaty "or otherwise" over that waterway.[13] An enactment of June 9, 1910, referred to Congressional legislation "embodying or revising international rules for preventing collisions at sea."[14]

The practice of impressing American seamen provided occasion for legislation authorizing the appointment of agents to inquire into the situation of

[2] 1 Stat. 73, 80; 36 Stat. 1087, 1156.

[3] 5 Stat. 539.

[4] 49 Stat. 2368, 2369. For another authorization for adjudication by the same court on the basis of "rules of law, municipal and international," as well as treaties, see 23 Stat. 283.

[5] The law of these commissions is discussed in Robert R. Wilson, "Some Aspects of the Jurisprudence of National Claims Commissions," this JOURNAL, Vol. 36 (1942), pp. 56–76.

[6] 4 Stat. 446, 447.

[7] 11 Stat. 408. See also 20 Stat. 171 (Caldera claim). For an authorization to settle in accordance with the principles of equity and of international law, see 31 Stat. 877 (Spanish Treaty Commission legislation).

[8] 22 Stat. 697 (General Armstrong claim).

[9] 13 Stat. 595, 596.

[10] 12 Stat. 838 (Repentigny claim). Concerning the claim of La Abra Mining Company, the Congress, after the Mexican Government had drawn attention to the possibility of fraud, requested the President to investigate charges of fraud brought by the Mexican Government and, if he should be of opinion that the "honor of the United States, the principles of public law or considerations of justice and equity, require," to withhold payment of the award (20 Stat. 144, 145).

[11] See notes 27, 30, *infra*.

[12] 1 Stat. 287, 288.

[13] See note 85, *infra*.

[14] 36 Stat. 462, 463.

American citizens or others "sailing, conformably to the law of nations, under the protection of the American flag. . . ." [15] Later (1855) legislation related to consular officers' functioning in connection with the discharge of mariners who might be entitled to discharge "under . . . the general principles of maritime law as recognized in the United States." [16] A later revision added the words "or usages" after "principles." [17]

Piracy as defined by the law of nations has been specified in the criminal law of the United States (as also in many of the country's extradition treaties).[18] A statute of 1900 included piracy as thus defined in provision for delivery (for trial) to United States authorities in American-occupied territory, of persons charged with listed crimes.[19]

Diplomatic privileges are recognized in an early statute which provides for punishment as "violators of the law of nations" and "disturbers of the public repose" of those who prosecute any writ or allow process to issue against any ambassador or public minister of a foreign state. A separate section provides for fine and imprisonment of one who may "assault . . . or in any other manner infract the law of nations" by offering violence to the person of an ambassador or other public minister.[20] Consular officers' functions have been provided for by statutes which may in exceptional cases refer to usage,[21] although more specific instructions are the rule.[22]

Congressional authorization to the President to take retaliatory action, or to discontinue such action, has sometimes been phrased in terms of international law. Examples are at hand in early legislation with reference to France. That of June 13, 1798, referred to French action "in violation of . . . the laws of nations"; the Act of June 25 set forth that when the French Government and those under its authority should "cause the laws of nations to be observed" by the French armed vessels, commanders and crews of American merchant ships might be instructed to "submit to any regular search" by the French, and to refrain from any "force or capture to be exercised by virtue hereof." [23] In 1822 the President was conditionally authorized to suspend temporarily the operation of an Act imposing certain tonnage duties on French ships.[24] Nearly a hundred years later (in 1916, this time without directing the legislation at any specific foreign country) Congress authorized the President to forbid the importation to the United States of goods from countries which denied entry to American goods "contrary to the law and practice of nations." [25]

[15] 1 Stat. 477.
[16] 10 Stat. 619, 625.
[17] 11 Stat. 52, 62.
[18] 3 Stat. 510, 513, 514; 12 Stat. 314; 35 Stat. 1145.
[19] 31 Stat. 656.
[20] 1 Stat. 112, 118.
[21] *Cf.* 11 Stat. 52, 65.
[22] See, for example, 54 Stat. 758, in relation to the disposition of the estates of Americans dying abroad.
[23] 1 Stat. 565, 566; 572, 573. See also *ibid.*, 561.
[24] See note 61, *infra*.
[25] 39 Stat. 756, 799.

A relatively large number of references to international law occur in statutes concerning neutrality. In the basic law of 1794 and in later enactments there is mention of "cases in which, by the laws of nations . . ." vessels ought not to remain within the United States.[26] Legislation of 1917 contained a proviso that nothing in it should interfere with any trade in arms and munitions ". . . lawfully carried on before the passage of this title, under the law of nations. . . ." [27] A joint resolution of March 4, 1915, authorized the denial of clearance to vessels believed to be about to carry arms, fuel, men or supplies to a ship of a belligerent nation "in violation of the obligations of the United States as a neutral nation." [28] In this period came also legislation to prevent the sabotage or misuse of vessels in United States ports in violation of "obligations of the United States under the law of nations." [29] The procedure of internment, both of vessels and of persons, was authorized by statutory provisions. The internment to which these penal provisions had reference was that "in accordance with the law of nations"; there were regulations applicable to vessels which "by the law of nations . . ." were not entitled to depart, and authorizations for the seizure of arms and other articles intended for export "in violation of law"; but, by the terms of the enactments, no interference was intended with trade that might have been lawfully carried on "under the law of nations or under the treaties or conventions. . . ." [30] As is well known, the United States in its "neutrality" legislation of the period from 1935 through 1937 placed greater limitations upon its citizens than international law required. The Joint Resolution of November 4, 1939, however, stated in the preamble that in amending its neutrality legislation the United States waived none of its rights or those of its nationals "under international law," but expressly reserved such rights.[31]

Classifiable as enactments looking to the general advancement of international law are provisions for participation in the work of the International Commission of the American Republics on Public and Private International Law (pursuant to the Convention of August 23, 1906),[32] in a conference on maritime law and the laws of war,[33] and in the codification effort under auspices of the League of Nations.[34] Also included would be the Joint Resolution of April 28, 1904, looking to an understanding among the principal maritime Powers "with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by

[26] 1 Stat. 381, 384. See also 3 Stat. 447, 449; 40 Stat. 217, 220.
[27] 40 Stat. 217, 225.
[28] 38 Stat. 1226.
[29] 40 Stat. 217, 220.
[30] *Ibid.*, 223, 225.
[31] 54 Stat. 4.
[32] 38 Stat. 312, 313, 451, 1126; 39 Stat. 260, 1056.
[33] 42 Stat. 599, 609.
[34] 46 Stat. 85. *Cf.* 52 Stat. 1114, 1146.

belligerents,'' [35] and a similar expression in a naval appropriation bill of Dec. 13, 1929.[36]

In a miscellaneous category fall references to the law of nations as a basis for valid claims to land,[37] and a provision for protection of an invention ''where such protection is afforded by . . . international law.'' [38] There are, in a number of instances, indirect references to the law of nations in provisions for payment by the United States, as acts of grace, ''without reference to the question of legal liability.'' [39] There have at times been mentions of ''illegal'' acts against foreign ships,[40] an expression which in this context would presumably or conceivably reach to more than municipal law. An unusual wording is that in legislation of 1940 which, in a proviso, directed that the Export-Import Bank should not make loans ''in violation of international law as interpreted by the Department of State.'' [41] In a resolution approved on June 13 of the same year, authorizing the Secretary of War and the Secretary of the Navy to assist governments of American republics to increase their military and naval establishments, the Congress included the proviso that nothing in the resolution would authorize the violation of ''any established principles or precedents of international law.'' [42]

II

Much more numerous than the statutory references to international law are those to treaties. Here classification according to subject-matter of the statutes is less feasible or useful. By far the greater number of provisions are in appropriation bills or other measures for carrying the treaties into effect. In some instances a single treaty may occasion a number of such legislative provisions.[43] The method is too well known to require extensive illustrative citations. The technique of harmonizing statutory with treaty law by specific language in the former is perhaps less familiar and, therefore, deserving of consideration.

[35] 33 Stat. 592.

[36] 45 Stat. 1165.

[37] 3 Stat. 709, 717; 4 Stat. 52, 53. Compare wording in 9 Stat. 631, 633, which refers to ''equity,'' and in 12 Stat. 71, which mentions ''the law of nations'' and ''the principles of equity.''

[38] 40 Stat. 435, 436. There is also, along with mention of the law, reference to treaty obligations and ''diplomatic representation.''

[39] See, for examples, 42 Stat. 1154, 1161; 45 Stat. 483, 484; 46 Stat. 827.

[40] See 4 Stat. 619, 625; 16 Stat. 649; 23 Stat. 15. The wording varies to some extent. See, for example, an appropriation to cover ''wrongful'' seizure of a foreign vessel, in 12 Stat. 903.

[41] 54 Stat. 38, 961.

[42] 54 Stat. 396. An unusual provision was that in the resolution of April 17, 1866, protesting against foreign states' pardoning convicted persons on condition that the persons go abroad (the fact apparently being that many such persons came to the United States). The reference in this instance was not to the law of nations, but to acts inconsistent with the comity of nations (14 Stat. 353).

[43] See, for example, on the Treaty of Washington, 1871, 17 Stat. 24, 422, 598; 18 Stat. 66, 71; 129; 20 Stat. 206, 240.

At the outset it may be noted that many of the statutory references to international law, as mentioned in the preceding section, are not references to that law alone, but also to treaties.[44] Other situations which seem to merit consideration even in a brief comment are: (1) those in which the statutes provide that in their application there shall be no contravention of treaties; (2) those in which the authorization of some action is conditioned upon the terms of treaties; (3) those in which there is authorization for payments to indemnify for what has been done contrary to treaties; (4) those looking to termination or revival of treaties; (5) those in which there is provision for the replacement of treaties applicable to territory acquired by the United States; and (6) those in which statute-makers have sought to avoid the waiving of any rights under treaties.

The first of these categories finds illustration in references to commercial treaties, *e.g.*, that in a Tariff Act of Feb. 5, 1816, which provided that "Nothing in this act contained shall be so construed as to contravene any provision of any commercial treaty or convention, concluded between the United States and any foreign power or state. . . ."[45] A Revenue Act of March 3, 1883, without specifically referring to commercial treaties, provided that "Nothing in this act shall in any way change or impair the force or effect of any treaty between the United States and any other government . . . so long as such treaty shall remain in force. . . ."[46] When, by a subsection of an Act of Oct. 3, 1913, Congress authorized a discount of five per cent on duties imposed by the Act if imported goods were carried in American vessels, a proviso directed that "nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."[47] Some statutory provisions of the general type under consideration reach not to "any treaty" but to specified ones. The 1902 Treaty with Cuba[48] has frequently been a subject of reference in this connection.[49] Treaties other than those on commerce and navigation which have been referred to in statutes for the purpose of making clear that their provisions are not intended to be impaired include those dealing with Indian affairs,[50] seamen,[51]

[44] See, for example, note 30, *supra*.

[45] 3 Stat. 253.

[46] 22 Stat. 488, 525–526.

[47] 38 Stat. 114, 197.

[48] See, for example, 38 Stat. 114, 192; 42 Stat. 858, 947; 46 Stat. 590, 695; 48 Stat. 943, 944.

[49] For a statutory statement as to the part of the House of Representatives in changing a rate of duty, see 33 Stat. 3.

[50] 10 Stat. 172, 173. In this case a proviso made clear that the statute would not be construed to affect the authority of the Government to regulate Indian affairs by treaty or otherwise.

[51] 30 Stat. 755. However, the language in this (1898) legislation on this point ("Provided, That treaties in force between the United States and foreign nations do not conflict") was not included in later (1915) legislation on the subject (38 Stat. 1169).

prize proceedings,[52] protection of seals,[53] postal matters,[54] export licenses in relation to neutrality,[55] issuance of bonds,[56] and inspection of vessels.[57]

The authorization of public action to be performed in such a way as to preserve harmony with treaties may be accomplished in terms somewhat less general than those noted in the preceding paragraph. Thus, early legislation required that before any commission of letters of marque and reprisal could be issued, owners and commanders of vessels should give bond to assure that owners, officers and crew would "observe the treaties . . . of the United States." [58] The method of authorizing the President to enter into international agreements for tariff reductions was used long before 1934,[59] but has found special illustration since that time. The plan of the "treaty-merchant" clause of the Immigration Act of 1924, and its broadening to permit rights and privileges not merely under "existing" commercial treaties, but also under those that might be concluded subsequent to the legislation, has been discussed elsewhere.[60] The application of a discriminatory tonnage duty against France was, by legislation of May 6, 1822, made suspensible at the discretion of the President in the event there should be signature of a treaty of commerce or navigation with the French.[61] Congress has provided that Federal courts shall have cognizance of cases, *inter alia,* arising under treaties made or which shall be made under the authority of the United States.[62] Directions as to consular functions have in terms been integrated with what treaties may provide,[63] and the Anti-Smuggling Act of 1935 was integrated with the so-called "liquor" treaties made in the previous decade.[64] Other subject-matters in which there are illustrations of the general method are load lines,[65] foreign-trade zones,[66] radio,[67] salvage,[68] extradition,[69] rule-making by a claims commission,[70] and duties of the International Joint Commission (United States-Canada).[71]

[52] 13 Stat. 306, 315.
[53] 36 Stat. 326–327.
[54] 17 Stat. 283, 308.
[55] 49 Stat. 1081, 1082.
[56] 54 Stat. 516, 520. By sec. 8, no amendment made by the title was to apply in any case where its application would be contrary to any treaty obligation of the United States.
[57] 48 Stat. 1889.
[58] 2 Stat. 759.
[59] See, for example, 30 Stat. 204–205.
[60] 43 Stat. 153; 47 Stat. 607–608. See Robert R. Wilson, " 'Treaty-Merchant' Clauses in Commercial Treaties of the United States," this JOURNAL, Vol. 44 (1950), pp. 145–149.
[61] 3 Stat. 681.
[62] 2 Stat. 89; 4 Stat. 164, 165.
[63] See, for example, 1 Stat. 254; 9 Stat. 276; 54 Stat. 758.
[64] 49 Stat. 517, 518, 523.
[65] In this case (49 Stat. 888), while the legislation was integrated with the treaty of 1930, the Secretary of Commerce was given discretion, as to vessels on the Great Lakes, to vary the loadline marks from those established in the treaty when in his opinion the changes made by him should not be above the actual line of safety.
[66] 48 Stat. 998, 1001–1002.
[67] 37 Stat. 302, 307.
[68] 37 Stat. 242; 54 Stat. 305.
[69] 9 Stat. 302, 303; 45 Stat. 440, 442.
[70] See, for example, 4 Stat. 446, 666.
[71] 46 Stat. 1020, 1021.

The Act of June 23, 1938, for the creation of a Civil Aeronautics Authority provided (in Section 1102) that the Authority should exercise its powers and duties "consistently with any . . . treaty, convention or agreement that may be in force between the United States and any foreign country or foreign countries." [72]

Congress has at various times authorized payments of money, not merely to carry out the provisions of treaties,[73] but also to persons entitled to it because of non-observance of a treaty by the United States. Payment may, for example, take the form of refund of tonnage duties,[74] or of customs duties.[75]

The Constitutional method of terminating a treaty has frequently been the subject of discussion in the United States. Congress has sometimes, as in connection with the Rush-Bagot Agreement,[76] and the Russian commercial treaty of 1832, [77] "adopted and ratified" a notice of termination after it has been given by the President. On other occasions Congress has authorized the President to give notice of termination,[78] or "authorized and directed" him to do so,[79] or provided in a resolution that he was "charged with the communication" of termination notice.[80] The legislative body may express its judgment that certain types of treaty provisions "ought to be terminated" and request and direct that notice be given to foreign governments concerned in accordance with the terms of the treaties.[81] On at least one occasion Congress requested that the President open negotiations with a foreign government looking to revival of certain stipulations of an international agreement.[82]

In the case of certain changes of sovereignty resulting in additions of territory to the United States, legislation has provided that treaties formerly applicable to such territory shall be replaced by treaties of the United States.[83] In making law as to the nationality of inhabitants of acquired territory, Congress has sought to harmonize its actions with the requirements of a treaty of peace.[84]

Some language in statutes is directed to the retention of rights already possessed under treaties. For example, the Act of June 15, 1914, amending earlier legislation concerning the Panama Canal, set forth in a proviso that "the passage of this Act shall not be construed or held as a waiver or relinquishment of any right the United States may have under the treaty with Great Britain, ratified the twenty-first of February, nineteen hundred

[72] 52 Stat. 973, 1026. See also Sec. 602(b), *ibid.*, 1008.
[73] See, for example, 11 Stat. 319, 325.
[74] 18 Stat. 678; 20 Stat. 171.
[75] 9 Stat. 8.
[76] 13 Stat. 568.
[77] 37 Stat. 627.
[78] 18 Stat. 287; 36 Stat. 83.
[79] 41 Stat. 988, 1007.
[80] 13 Stat. 566.
[81] 38 Stat. 1164, 1184, 1185.
[82] 22 Stat. 643.
[83] See, for example, 30 Stat. 750. *Cf.* 47 Stat. 761, 768, Sec. 10 (4).
[84] 31 Stat. 77, 79; 32 Stat. 691, 692.

and two, or the treaty with the Republic of Panama, ratified February twenty-sixth, nineteen hundred and four . . . to discriminate in favor of its vessels by exempting the vessels of the United States or its citizens from the payment of tolls . . . or as in any way waiving, impairing or affecting any right of the United States under said treaties or otherwise. . . ."[85]

III

The foregoing would seem to show a fairly common practice of referring in statutes to the standard which is international law, and a much more common practice of integrating statute law with treaty law. The value of this type of evidence is, of course, limited, since it does not reflect instances in which statute-makers have directed their enactments to ends which are consistent with the law of nations and with treaties without making the latter the subject of specific references. Nor does it take into account the cases in which conflicts between, or harmonization of, municipal statutes and international obligations may have been worked out in the realm of diplomacy. In any case, the record seems to suggest that, so far as the United States is concerned, the principle of legality, interpreted broadly and not in a restricted, municipal sense, has figured importantly in certain parts of the law of the land. Without the concession of the reality of international law and of a degree of ascertainability for its provisions, many statutory provisions (including some provisions of the penal law) which incorporate it by reference would not be completely meaningful.

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FOURTH MEETING OF CONSULTATION OF MINISTERS OF FOREIGN AFFAIRS OF AMERICAN STATES

The Fourth Meeting of Consultation of Ministers of Foreign Affairs of American States took place in Washington from March 26 to April 7, 1951. This meeting, reasonably successful, again reflected the general world situation, the status of development of the Pan American idea and the crucial problem of the relations, within Pan America, of this country toward Latin America.

The present Pan Americanism, founded in 1889 by the United States, was originally a modest venture on a pragmatist, primarily commercial, basis, whereas, as far as political relations are concerned, this country stood firm on the Monroe Doctrine, and on international isolationism. The United States emerged by 1900 as a great Power politically and economically and entered a period of imperialism *vis-à-vis* Latin America. The first World War interrupted the development and showed also Latin-American suspicions and objections. Practically all Latin-American States joined the

[85] 38 Stat. 385. Compare 50 Stat. 750, 751.