

AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 83

October 1989

NO. 4

CONTENTS

PAGE

SPECIAL ISSUE

THE UNITED STATES CONSTITUTION IN ITS THIRD CENTURY: FOREIGN AFFAIRS

Edited by Louis Henkin, Michael J. Glennon & William D. Rogers

Preface

The Constitution for Its Third Century: Foreign Affairs *Louis Henkin* 713

History

**"Advice" from the Very Beginning, "Consent" When the End Is
Achieved** *Arthur Bestor* 718

The Marshall Court and International Law: The Piracy Cases
G. Edward White 727

Distribution of Constitutional Authority

Checks and Balances in Foreign Relations *Elliot L. Richardson* 736

President, Prime Minister or Constitutional Monarch?
Eugene V. Rostow 740

The President's Foreign Affairs Power *Phillip R. Trimble* 750

How Tightly Can Congress Draw the Purse Strings? *Louis Fisher* 758

Rethinking War Powers: By Law or by "Thaumaturgic Invocation"?
Thomas M. Franck 766

War Powers: The Operational Code of Competence *W. Michael Reisman* 777

Nuclear War Powers *Peter Raven-Hansen* 786

Covert Operations *Lori Fisler Damrosch* 795

Judicial Deference in Foreign Relations *Jonathan I. Charney* 805

Foreign Affairs and the Political Question Doctrine *Michael J. Glennon* 814

The Role of States and Cities in Foreign Relations *Richard B. Bilder* 821

Preemption of State Law: A Recommended Analysis *Harold G. Maier* 832

Rights—Here and There

Foreign Affairs and Civil Liberties *Norman Dorsen* 840

The Constitution and International Human Rights *Richard B. Lillich* 851

Federal Regulation of Aliens and the Constitution

T. Alexander Aleinikoff 862

The Constitution Abroad *Jules Lobel* 871

Constitutional Law—International Law

**U.S. Law Enforcement Abroad: The Constitution and
International Law** *Andreas F. Lowenfeld* 880

Epilogue

The Constitution and Foreign Affairs: Two Hundred Years
William D. Rogers 894

Notes and Comments	
Anne Patricia Simons (1923–1989)	Marian Nash Leich 901
Correspondence	901
Contemporary Practice of the United States Relating to International Law	
	Marian Nash Leich 905
International Decisions	
	Peter D. Trooboff 918
Current Developments	
The Forty-first Session of the International Law Commission	Stephen C. McCaffrey 937
Book Reviews and Notes	
	<i>Edited by Detlev Vagts</i>
Janis, Mark W. <i>An Introduction to International Law</i> (Lori Fisler Damrosch)	946
Ott, David H. <i>Public International Law in the Modern World</i> (Lori Fisler Damrosch)	946
Wallace, Rebecca M. M. <i>International Law: A Student Introduction</i> (Lori Fisler Damrosch)	946
Remiro Brotons, Antonio. <i>Derecho Internacional Público. II. Derecho de los Tratados</i> (Laura Bocalandro)	949
Mann, F. A. <i>Foreign Affairs in English Courts</i> (John H. Jackson)	951
Cassese, Antonio. <i>Violence and Law in the Modern Age</i> (Charles L. Kent)	953
Mikus, Joseph A. <i>Beyond Deterrence: From Power Politics to World Public Order</i> (Gabe Shawn Vargas)	956
Falk, Richard. <i>Revolutionaries and Functionaries: The Dual Face of Terrorism</i> (Daniel G. Partan)	957
Levitt, Geoffrey M. <i>Democracies against Terror: The Western Response to State-Supported Terrorism</i> (Daniel G. Partan)	957
Bush, W. M. <i>Antarctica and International Law: A Collection of Inter-state and National Documents. 3 vols. and Index</i> (Christopher C. Joyner)	959
Martínez Puñal, Antonio. <i>Los Derechos de los Estados sin litoral y en situación geográfica desventajosa en la Zona Económica Exclusiva (Participación en la explotación de los recursos vivos)</i> (Domingo E. Acevedo)	964
Miatello, Angelo. <i>La responsabilité internationale encourue en raison des activités liées à l'utilisation de l'énergie nucléaire</i> (Jay G. Polach)	965
Merryman, John Henry, and Albert E. Elsen. <i>Law, Ethics, and the Visual Arts</i> (2d ed.). Vols. 1 and 2 (James A. R. Nafziger)	967
Sauvant, Karl P. <i>International Transactions in Services: The Politics of Transborder Data Flows</i> (Klaus W. Grewlich)	968
———. <i>Trade and Foreign Direct Investment in Data Services</i> (Klaus W. Grewlich)	968
Forsythe, David P. <i>Human Rights and U.S. Foreign Policy: Congress Reconsidered</i> (Diane Orentlicher)	972
Farer, Tom J. <i>The Grand Strategy of the United States in Latin America</i> (Jorge I. Domínguez)	974
Ben-Tov, Arieh. <i>Facing the Holocaust in Budapest: The International Committee of the Red Cross and the Jews in Hungary, 1943–1945</i> (Benjamin B. Ferencz)	977
<i>Foreign Relations of the United States, 1952–1954. Volume IX: The Near and Middle East</i> (Elmer Plischke)	978
Reams, Bernard D., Jr. (ed.). <i>American International Law Cases. Second Series. 1979–1986. Vols. 1–8 and Index</i> (L. C. Green)	980
Briefer Notices: Hamalengwa, Flinterman and Dankwa (comps.), 982; Plender (ed.), 982; <i>Assessing the Status of Women</i> , 982.	
Collected Essays: <i>South African Yearbook of International Law. Vol. 13, 1987–1988, 983; Netherlands Yearbook of International Law. Vol. XIX, 1988, 983.</i>	
Books Received	983
International Legal Materials. Contents, Vol. XXVIII, No. 4 (July 1989)	987
Table of Cases	989
Index	992

BOARD OF EDITORS

Editor in Chief

THOMAS M. FRANCK

New York University School of Law

- | | |
|--|---|
| GEORGE H. ALDRICH
The Hague, Netherlands | FREDERIC L. KIRGIS, JR.
Washington and Lee University
School of Law |
| RICHARD B. BILDER
University of Wisconsin Law School | CYNTHIA C. LICHTENSTEIN
Boston College Law School |
| JONATHAN I. CHARNEY
Vanderbilt University School of Law | RICHARD B. LILLICH
University of Virginia Law School |
| ANTHONY D'AMATO
Northwestern University
School of Law | ANDREAS F. LOWENFELD
New York University School of Law |
| RICHARD A. FALK
Princeton University | THEODOR MERON
New York University School of Law |
| TOM J. FARER
University of New Mexico
School of Law | BERNARD H. OXMAN
University of Miami School of Law |
| MICHAEL J. GLENNON
University of California, Davis
School of Law | W. MICHAEL REISMAN
Yale Law School |
| EDWARD GORDON
Albany Law School,
Union University | WILLIAM D. ROGERS
Washington, D.C. |
| KEITH HIGGETT
The Fletcher School of Law and
Diplomacy, Tufts University | PETER D. TROOBOFF
Washington, D.C. |
| JOHN H. JACKSON
University of Michigan Law School | DETLEV F. VAGTS
Harvard Law School |
| HAROLD K. JACOBSON
University of Michigan | EDITH BROWN WEISS
Georgetown University Law Center |
| | BURNS H. WESTON
University of Iowa
College of Law |

JOHN LAWRENCE HARGROVE, *Ex Officio*
Washington, D.C.

Honorary Editors

- | | |
|--|---|
| HERBERT W. BRIGGS
Cornell University | COVEY T. OLIVER
University of Pennsylvania Law
School |
| LEO GROSS
The Fletcher School of Law and
Diplomacy, Tufts University | STEFAN A. RIESENFELD
University of California, Berkeley
School of Law |
| JOHN N. HAZARD
Columbia University School of Law | SEYMOUR J. RUBIN
Washington College of Law,
American University |
| LOUIS HENKIN
Columbia University School of Law | OSCAR SCHACHTER
Columbia University School of Law |
| MONROE LEIGH
Washington, D.C. | LOUIS B. SOHN
University of Georgia Law School |
| OLIVER J. LISSITZYN
Columbia University School of Law | ERIC STEIN
University of Michigan Law School |
| MYRES S. MCDUGAL
Yale Law School | RICHARD YOUNG
Van Hornesville, N.Y. |

Associate Editor

ANNA ASCHER

Editorial Assistant

VIRGINIA CORNETT

Assistant Editor Emerita

ELEANOR H. FINCH

The American Journal of International Law

The views expressed in the articles, editorial comments, book reviews and notes, and other contributions which appear in AJIL are those of the individual authors and are not to be taken as representing the views of the Board of Editors or the American Society of International Law.

Manuscripts in triplicate may be sent to the Editor in Chief of AJIL, Professor Thomas M. Franck, New York University School of Law, 40 Washington Square South, New York, N.Y. 10012. All footnotes should be typed double space at the end of the manuscript. Please do not make multiple submissions to other journals. Persons making submissions are invited to indicate whether their manuscript is available on an IBM-PC diskette. AJIL uses WordPerfect 4.2. Subscriptions, orders for back numbers, correspondence with reference to AJIL and books for review should be sent to the AMERICAN JOURNAL OF INTERNATIONAL LAW (ISSN 0002-9300), 2223 Massachusetts Avenue, N.W., Washington, D.C. 20008-2864.

Authorization to photocopy items for internal or personal use, or the internal or personal use of specific clients, is granted by the American Society of International Law for users registered with the Copyright Clearance Center (CCC) Transactional Reporting Service, provided that the base fee of \$5.00 per copy, plus 25¢ per page is paid directly to CCC, 27 Congress St., Salem, MA 01970. For those organizations that have been granted a photocopy license by CCC, a separate system of payment has been arranged. The fee code for users of the Transactional Reporting Service is: 0002-9300/89 \$5.00 + .25.

The American Society of International Law

The American Society of International Law was organized in 1906 "to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice."

Society membership is open to all persons of whatever nationality and profession who are interested in its objectives. Dues are: regular, \$80; special category, \$40 for persons *not* resident in a member country of the Organisation for Economic Co-operation and Development; intermediate, \$35; student, \$20. Membership application form is printed at the back of each issue of AJIL.

OFFICERS OF THE SOCIETY, 1989-1990

<i>Honorary President</i>	EDWARD DUMBAULD
<i>President</i>	LOUIS B. SOHN
<i>Vice-Presidents</i>	GOLER BUTCHER, LOUIS HENKIN, PETER D. TROBOFF
<i>Executive Vice-President and Executive Director</i>	JOHN LAWRENCE HARGROVE
<i>Honorary Vice-Presidents:</i> HERBERT W. BRIGGS, MAXWELL COHEN, DAVID G. GILL, LEO GROSS, RITA HAUSER, JOHN N. HAZARD, KEITH HIGHET, MONROE LEIGH, CYNTHIA LICHTENSTEIN, MYRES S. MCDUGAL, LEONARD MEEKER, COVEY T. OLIVER, FRANZ M. OPPENHEIMER, ELLIOT L. RICHARDSON, STEFAN A. RIESENFELD, WILLIAM D. ROGERS, SEYMOUR J. RUBIN, DEAN RUSK, OSCAR SCHACHTER, STEPHEN M. SCHWEBEL, ERIC STEIN, JOHN R. STEVENSON	
<i>Secretary</i>	MICHAEL H. CARDOZO
<i>Treasurer</i>	JAMES C. CONNER
<i>Assistant Treasurer</i>	JOSEPH GUTTENTAG