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Judicial Education on International Law Committee of the Section of International Law of the American Bar Association: Final Report

COMMITTEE REPORT

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PREFACE

It is with pleasure that we submit this Report of the Committee on Judicial Education on International Law. The Committee was established because of the Section's concern that international law issues presented to the courts are often neither identified nor considered adequately. While the courts are well equipped to address domestic legal issues, they are not as familiar with those of international law, even though authoritative case law is replete with affirmations that international law is part of our law, and must be ascertained and administered by courts of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. Since questions of international law are being presented with increasing frequency, it was deemed important to organize a committee that would look for ways to enhance the capacity of the courts to recognize and address them.

Former Section Chairman Charles N. Brower emphasized this background when, in his letter inviting Chief Judge Edward D. Re to chair the Committee, he wrote:

> The view has been articulated for a long time, and increasingly, within the Section that judges in the United States as a group are not nearly as well equipped to handle the growing number of international law questions arising in litigation as they are trained to address the more conventional domestic law questions that are presented to them. Indeed, concern at the bar has grown so great that the Section . . . has been developing

> a proposal designed to permit referral of international law questions by domestic courts for an advisory opinion of the International Court of Justice. Furthermore, special efforts are being made by the Section to participate to the maximum extent possible in the formulating of the revised Restatement of United States Foreign Relations Law now being prepared by the American Law Institute, since that volume is heavily relied on by American judges whose lack of experience in the international law field precludes them from ready resort to broader sources of international law. In short, at a time when state, federal and administrative courts in the United States are increasingly faced with seemingly exotic questions of international law, the affected judiciary seems inadequately equipped, and the situation does not appear to be in the process of improving.
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> These considerations have led the Section . . . , of which I currently serve as Chairman, to establish a Committee on Judicial Education on International Law. The broad purpose of the Committee is to explore the best ways in which the need discussed above can be most promptly and economically satisfied.

In furtherance of these goals, the Committee and its several working groups have met a total of nine times: on July 28, 1982 in Washington, D.C.; on December 10, 1982 in New York City; on February 11, 1983 in Philadelphia; on June 17, 1983 in New York City; on October 1, 1983 in New York City; on February 8, 1985 in Washington, D.C.; on April 4, 1986 in New York City; on July 25, 1986 in New York City; and on February 10, 1988 in Washington, D.C.

The Committee has been aware from the outset that its task is formidable and that no one method of fulfilling it commends itself to the exclusion of all others. In fact, the question of how the Committee should go about discharging its assignment has proven to be unexpectedly unreceptive to ready consensus and, despite continuous and thoroughly congenial vetting, no format has emerged that is to everyone's satisfaction. The implications of this shortfall are apparent in the form that this Report takes, a form that represents a far more modest approach than that taken in a draft report the Committee seriously considered adopting as recently as a year ago.

Several circumstances have conspired to force us to (borrowing Professor Sohn's familiar felicity) elevate our sights a little lower than we have at times thought feasible. One is our recognition that various materials already exist and are constantly being developed that can help overcome the reluctance of judges to address issues of international law and at the same time increase their capacity to deal with these issues with the same degree of confidence that attends their consideration of legal issues of a wholly domestic origin and content. Early on, for example, we discussed the extent to which our work would or should duplicate that of the American Law Institute's then ongoing efforts to revise its Restatement of the Foreign Relations Law of the United States (the product of these efforts has now been published by the ALI and is hereinafter referred to as "Restatement Third"). We were also aware of the several sets of general and subject-specific bibliographic notes and commentaries that *inter alia* have appeared in *The International Lawyer* and other journals available to the bench and bar, and of published research materials indicating or demonstrating techniques and sources of legal research on specific questions of international law. We were

aware, finally, of the many valuable course books, primers and treatises on international law to which lawyers are able to turn both for background material and insights into specific issues of international law. In other words, we have had to contend with the availability of a great and constantly growing number and variety of materials that could be seen as accomplishing or duplicating what the Committee itself might otherwise set out to produce.

Sentiment existed, accordingly, for limiting the Committee's own work to the production of a brief introduction to international law, complemented by a more extensive bibliography. Many members of the Committee, however, felt or at least genuinely hoped that our report could and should do more; specifically, that the resources available to the Committee would enable it to fashion a new, streamlined but still comprehensive report encompassing the most desirable features of all the above-mentioned works. After a number of discussions, this view prevailed, and the Committee functioned primarily through the work of a principal draftsman and a drafting committee, respectively, charged with preparing the all-purpose report ambitiously envisioned.

In the spring of 1987, a 173 page draft report of this type was submitted to the full Committee. Several members of the Committee believed that the draft report, with a degree of editorial modification, was suitable to attain the committee objectives. Others felt unable to endorse this assessment, however, and, while admiring the evident generosity of labor and professional insight that marked various sections of the draft, felt nonetheless that, in light of shortcomings or areas upon which there was no Committee agreement, its submission to the Section without substantial revision was premature. Those who felt this way had also come to conclude that the resources available to the Committee were not sufficient to produce the comprehensive report originally envisioned, especially in light of the publication of the Restatement Third and the continuing flood of relevant cases, statutes, treaty and customary law developments.

This assessment, which ultimately has prevailed, was influenced in part by certain circumstances whose full significance has become clear only with the passage of time. The pace at which issues of international law have been argued and decided here and elsewhere in the world community, for example, has far surpassed our expectations. The draft report put before the Committee last year had been overtaken by such decisions even as it was being drafted and presented to the Committee. The likelihood now of a sustained lull in decisional development, moreover, seems too meager to support the hope that an updated version of the draft report we were then considering could remain timely long enough to justify its presentation to the Section.

Then, too, the adoption last year and publication of the Restatement Third casts the Committee's own Report in a different light than we, rightly or not, originally foresaw. That is, the debates attending adoption of the Restatement revealed differences of opinion within the ALI of far greater depth and magnitude than many anticipated. The publication of the Committee's Report, there-

fore, coming, as it will, on the heels of that of the Restatement Third, runs the risk of being construed as an endorsement or repudiation of all or parts of the Restatement by the Section, indeed perhaps by the ABA itself, at least to the extent that it goes over much of the same ground as the Restatement—as our draft report did. It strikes us now as unlikely that even an earnest disclaimer on our part would fully dispel such an implication. For obvious reasons, we are not disposed to encourage inferences of this sort—and we doubt that the Section is, either.

Earlier this year on February 10, 1988 a meeting of the drafting committee was held in Washington, D.C. to discuss the nature of the Report that should be prepared and submitted to the Section for its approval. At this meeting it was decided to submit a report with a more modest purpose than originally contemplated. After full discussion the Chairman asked Professor Edward Gordon to condense and recast the report so as to accomplish the more limited purpose of providing (a) a brief primer on some questions *about* international law that non-specialists are known to find especially perplexing, and (b) a bibliographic reference to sources to which judges can turn who need greater information about specific questions of international law. This, then, is our Report.

It represents a joint effort of the members of the Committee, all of whom contributed generously with advice and suggestions. In particular, the Committee wishes to acknowledge the indispensability to our work of the draft report produced, with his customary zeal and skill, by Professor Stefen A. Riesenfeld, and to record the special debt of gratitude we owe him. Professor Riesenfeld's contributions and vast experience played a central role in reducing the Committee's necessarily far-ranging deliberations to a focal point from which, in the end, we were able to reach consensus.

A debt of gratitude is also owed to those Committee members who attended so many of the meetings at their own expense, and at personal sacrifice of time and effort. Special mention ought to be made of Committee members Professor Margaret S. Bearn, Max Chopnick, Esq., Professor Robert B. McKay, Professor Jane M. Picker and Charles Owen Verrill, Jr., Esq., who, along with Professor Riesenfeld, served on the Committee's initial drafting subcommittee. A special word of appreciation is also due Jennifer A. Sullivan, Esq., a member of the Committee, for having greatly facilitated the work of the Committee through her contribution as Committee Executive Secretary.

The Committee wishes to commend the Section for its initiative in establishing the Committee, shaping its purpose and goals, and supporting its labors. The Committee is grateful to the Section for the financial resources that the Section has furnished. It is hoped that this Report will be deemed worthy of the support and resources contributed by the Section and the Committee members. The Chairman and all the members of the Committee are grateful for the opportunity to contribute to the ongoing work of the Section in furthering the goals of the Association in improving the administration of justice.

On a personal note, the Chairman wishes to express his own thanks to former Chairman Brower who established the Committee and to Chairmen Aksen, Joelson, Hoyt, Rovine and Rendell, who reappointed the Committee Chairman, and its members, and encouraged the work of the Committee.

Respectfully submitted,
/signed/
Edward D. Re, Chairman

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December 1988.

Part I
The Application of International Law in American Courts

With increasing frequency, the courts of the United States, federal and state courts alike, are faced with a variety of issues whose resolution calls for the application, or at least the consideration, of rules or rights derived from international law. If a matter is properly before the court, and requirements of procedure and justiciability are met, questions of international law may be raised, argued and resolved as any other legal questions would be. It is well settled in American jurisprudence that, as the United States Supreme Court declared in *The Paquete Habana,*[1]

> International law is part of our law, and must be ascertained and administered by the jurisdiction, as often as questions of right depending upon it are duly presented for their determination.

The question of why international law is regarded as part of our law does not lend itself to a single, all-purpose answer. The founding generation, influenced by eighteenth century English court decisions as recalled by William Blackstone, regarded international law (then known as "the law of nations") as a form of the common law, or as resting, like the common law, upon considerations of natural law or "right reason" or both.[2] Compliance with the law of nations was also deemed to be a condition of national sovereignty, of membership in the family of nations, an aspect of the decent respect for the opinions of mankind to which Jefferson referred in the Declaration of Independence. Evidence suggests that the Constitution itself was thought to rest upon an assumption that the law of nations was part of the law of any civilized country. In any event, the applicability of the

1. 175 U.S. 677, 700 (1900).
2. Blackstone, in 1769, wrote:
> [T]he law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land.

W. Blackstone, 4 Commentaries on the Laws of England 67 (1st ed. 1765–1769).

law of nations in U.S. courts, both to inform the content of the Constitution, statutes and the common law, and as an independent source of rights and obligations, seems never to have been doubted by the founders of the Republic.[3]

By the mid 19th century, the natural law underpinnings of international law had come under attack from such scholars as Jeremy Bentham and John Austin. Austin's impact was, and still is, especially noteworthy. Because he reasoned that all law must emanate from the command of a sovereign, and because international law was premised upon the absence of any earthly supersovereign whose commands could bind individual sovereign states, Austin relegated international law to the status of mere "positive morality," rather than law *strictu sensu*. To this day, some lawyers and judges influenced by the traditions of Austinian positivism are wont to deny a full measure of respect to international law because of the absence of a supersovereign.[4]

Whatever its origins in or common heritage with natural law or the common law, however, the status of international law as law derives principally from the consent of sovereign states to be bound by it. The absence of a supersovereign therefore is both theoretically and practically quite beside the point. The question is whether the world's sovereign states have consented to the formation of a legal norm or set of norms, or, in appropriate instances, whether such consent has been overtaken in the course of time.

Sovereign consent can be explicit or inferred, but out of respect for sovereign prerogatives—and sensitivities—courts do not infer such consent lightly. Consequently, in pleading an issue of international law, the principal task of the lawyer—even beyond that of arguing the content or applicability of a norm—is often to prove that the norm "exists" at all, that is, that both its establishment and its current status are confirmed by the requisite degree of sovereign consent. This task is complicated by the absence of an international legislature or other centralized institutions capable in all cases of authenticating the existence of a right or obligation at international law. Consequently, pleading and proof of international law is generally more difficult than pleading and proof of norms of a wholly domestic character.

Treaties are generally regarded as the best evidence of sovereign consent, for many of the same reasons that commend written contracts as evidence of a privately generated obligation. The absence of a treaty, however, does not, without more, signify a lack of sovereign consent. Other evidence may and routinely is adduced, such as state practice shown to evince a sense of legal

3. One of the earliest illustrations of the matter-of-fact application of the law of nations in U.S. courts is found in Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 116 (1784), in which the Pennsylvania Supreme Court held that an assault on the French consul general in Philadelphia was "an infraction of the law of Nations. This law, in its full extent, is part of the law of the State." See M. Janis, An Introduction to International Law 83 (1987).

4. See, e.g., Occidental of Umm al Qaywayn v. A. Certain Cargo, 577 F.2d 1196, 1204–1205 (5th Cir. 1978).

obligation to act or refrain from acting in a particular way (usually called customary law), and the resolutions and recommendations of international organizations (to the extent they manifest a sense of legal obligation or signify the emergence of a consensus on the existence of an obligatory norm).

Customary international law, though generally more difficult to prove than treaty law, is no less valid as a source of international legal norms. According to the Supreme Court, the content of customary international law is determined by:

> resort . . . to the customs and uses of civilized nations; and as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[5]

International and domestic courts have freely turned to numerous sources to determine what the practice of states actually is.

The fact that the existence or the specific content of a particular rule is difficult to prove does not preclude its application, however difficult it makes the task of the party invoking it. Drawing upon dicta contained in the Supreme Court's opinion in *Banco Nacional de Cuba v. Sabbatino,* [6] however, some courts have treated the degree of difficulty encountered in proving the existence of a norm as indicative of the presence of a nonjustifiable "political question."[7] In his dissenting opinion in that case, Justice White predicted that its effect would be to exclude a large portion of international law from its rightful place in our law. It has subsequently been suggested[8] that this indeed has been happening.

One reason is that, in originally formulating the political question doctrine for the Supreme Court in *Baker v. Carr,*[9] Justice Brennan spoke of "a lack of judicially discoverable and manageable standards for resolving" an issue as evincing the presence of nonjusticiable political question. Some judges have construed or extended this to exclude from judicial consideration any issue whose resolution turns upon a norm whose specific content is less than unambiguously clear.[10] General principles and discreetly worded obligations of the kind frequently encountered in international law are particulary vulnerable to this criterion, as indeed were and are the common law and statutes drafted more in a spirit of political compromise than in fondness for exquisite legislative

5. The Paquete Habana, 175 U.S. 677, 700 (1900).

6. 376 U.S. 398, 428 (1964). See also the references below to Baker v. Carr and Goldwater v. Carter.

7. E.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork J., concurring).

8. See Gordon, American Courts, International Law and "Political Questions" Which Touch Foreign Relations, 14 Int'l Law. 297 (1980).

9. 369 U.S. 186, 217 (1962).

10. E.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork J., concurring).

craftsmanship. As is frequently pointed out, the criterion seems at least anomalous given the courts' traditional ability to inform the content of such broad principles as due process, equal protection and free speech.

The anomaly was probably compounded when, in redefining this element of a political question in *Goldwater v. Carter,*[11] Justice Powell said the relevant question is whether resolution of an issue "demand[s] that a court move beyond areas of judicial expertise." As already noted, judges in the United States as a group are not nearly as well trained in or familiar with questions of international law as they are with more conventional domestic law questions. The unintended effect of Justice Powell's reformulation, accordingly, may be to elevate this unfortunate failing in judicial training to the level of a criterion for declining to consider an issue.

Although the political question doctrine has come under withering attack from scholars, as well as from some judges,[12] it continues to display some vitality and to be invoked by lower courts in the context of foreign affairs. Even without doctrinal structure, U.S. courts have traditionally shown a reluctance to make determinations that might be seriously detrimental to the United States in its foreign relations. As Justice Brennan himself was careful to point out in *Baker v. Carr,* however, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[13] To this we are inclined to add that it is also error to suppose that every issue that turns upon the application of international law is thereby disruptive of U.S. foreign relations.

The Supremacy Clause of the Constitution[14] establishes an independent authority in United States law for the application of international agreements to which the United States itself is a party. It provides:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

Since the early nineteenth century, American courts have amplified this provision by distinguishing between so-called self-executing treaties and non-self-executing ones. The distinction has its origin in *Foster & Elam v. Neilson,*[15] in which Chief Justice John Marshall, speaking of a treaty's domestic law effect, wrote:

> A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infra-territorial; but is carried to execution by the sovereign power of the respective parties to the instrument.

11. 444 U.S. 996, 998 (1979).

12. See, e.g., Henkin, Is There a "Political Question" Doctrine?, 85 Yale L.J. 597 (1976); and Tel-Oren v. Libyan Arab Republic, *supra,* at 808 (Bork J., concurring).

13. 369 U.S. at 710.

14. Article VI, section 2.

15. 27 U.S. (2 Pet.) 253, 313–314 (1829).

> In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.
>
> Later, in the *Head Money* cases,[16] the Court said:
>
> A treaty . . . is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

In American law, accordingly, treaties to which the United States is a party are deemed to apply in any case or controversy without further legislative endorsement or other intervention, and with the same force as legislation, as long as their provisions are construed as having been aimed directly at the courts, rather than at the political branches. Applying this seemingly straightforward doctrine has not always been easy, however;[17] in fact, not long ago the Court of Appeals for the Fifth Circuit observed that "the self-executing question is perhaps one of the most confounding in treaty law."[18]

Whether a treaty, or a particular provision in it, is self-executing is ordinarily a matter of domestic law.[19] That is, in the first instance, it is a question for the Executive Branch, which must decide whether to "take care" that the treaty is "faithfully executed" as law[20] or to seek implementation by Congress. Ultimately, though, the courts themselves may have to decide whether to give the treaty effect as law, if there has been no legislative or administrative implementation.

In doing so, courts have generally considered the question to be one of documentary interpretation, and in aid of a proper interpretation have indicated a

16. 112 U.S. 580, 598–99 (1884).

17. See 14 Whiteman, Digest of International Law 304 (1970). The literature on this subject is vast, for example, Iwasawa, The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis, 26 Va. J. Int'l L. 627 (1986); Feo, Self-Execution of United Nations Security Resolutions: United States Law, 24 U.C.L.A. L. Rev. 387 (1976); Riesenfeld, The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?, 74 Am. J. Int'l L. 892 (1980); Riesenfeld, The Doctrine of Self-Executing Treaties and Community Law: A Pioneer Decision of the Court of Justice of the European Community, 67 Am. J. Int'l L. 504 (1973); Riesenfeld, The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment, 65 Am. J. Int'l L. 548 (1971); Jackson, The General Agreement on Tariffs and Trade in United States Domestic Law, 66 Mich. L. Rev. 250 (1967).

A more complete list is provided by Professor John H. Jackson of the University of Michigan Law School in a chapter on United States practice prepared for F. Jacobs and S. Roberts eds., The Effect of Treaties in Domestic Law (1987), at 148 ff.

18. United States v. Postal, 589 F.2d 862, 876 (5th Cir. 1979).

19. See Aerovias Interamericanos de Panama v. Board of County Comm'rs, 197 F. Supp. 230, 245 (S.D. Fla. 1961), and Henkin, Foreign Affairs and the Constitution 158 (1972). But see Iwasawa, *supra* note 16, at 650.

20. U.S. Const., Art. II, sec. 3.

willingness to give the Executive Branch's construction of the negotiators' intentions considerable weight.[21] However, treaty negotiators do not always have the U.S. domestic law consequences firmly in mind when drafting these agreements, particularly multilateral ones; hence the task of interpretation may require the drawing of inferences from the text of the agreement itself, the context in which it was adopted, the effect given to similar or analogous treaties or treaty provisions, etc.[22] As a result, the construction given by the Executive Branch may weigh less heavily upon the court in some cases than in others.[23] For analogous reasons, while courts may look to congressional intent (i.e., as expressed in the course of authorizing or consenting to international agreements) to determine whether an agreement was intended to be self-executing,[24] they do not do so invariably.

It has been suggested that certain types of treaty obligations can never be self-executing, e.g., because the Constitution reserves certain powers, such as the power to appropriate funds, to Congress,[25] or because Constitutional requirements prevent any treaty definition of a crime from being self-executing as a criminal statute.[26]

The Constitution mentions only one type of international agreement, termed a "treaty,"[27] and provides for only one method of approval, i.e., the "advice and consent" by a two-thirds vote of the Senate. Virtually from the outset, however, U.S. practice has developed alternative types of international agreements, called

21. In Frolova v. U.S.S.R., 761 F.2d 370, 373 (7th Cir. 1985), for example, the Seventh Circuit considered President Ford's statement at the time of signing the Helsinki Accords (". . . the document I will sign is neither a treaty nor is it legally binding on any particular state. . .") as relevant to the question of the direct applicability of the Accords. Similarly, in Cardenas v. Smith, 733 F.2d 909, 918 (D.C. Cir. 1984), the D.C. Circuit considered the report of the U.S. delegate in determining the self-executing nature of the treaty in question. Cf. Factor v. Laubenheimer, 290 U.S. 276 (1933).

22. In Frolova v. U.S.S.R., 761 F.2d 370, 373 (7th Cir. 1985), the Seventh Circuit said that in determining whether a treaty was intended to be self-executing it would look to six factors: (1) the language and purpose of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternate enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capacity of the judiciary to resolve the dispute. See also People of Saipan v. United States Department of the Interior, 502 F.2d 90 (9th Cir. 1974).

23. See, e.g., United States v. Postal, 589 F.2d 862, 876 (5th Cir. 1979), cert. denied, 444 U.S. 832 (1979), and even more emphatically Warren v. United States, 340 U.S. 523 (1951).

24. See, e.g., Demjanjuk v. Meese, 784 F.2d 1114, 1116 (D.C. 1986); Bertrand v. Sava, 684 F.2d 204, 218–19 (2d Cir. 1982).

25. See Jackson "United States Practice," in F. Jacobs and S. Roberts eds., The Effect of Treaties in Domestic Law (1987), at 150, citing Turner v. American Baptist Missionary Union, 24 F. Cas. 344 (No. 14251) (C.C. Mich., 1852).

26. See The Over the Top, 5 F.2d 838, 845 (D. Conn. 1925).

27. The Constitution refers to "treaties" in four places: (i) in Article I, section 10, clause (1), depriving the states of the treaty-making power; (ii) in Article II, section 2, clause (2), which provides for Presidential negotiation of treaties, then advice and consent of the Senate, and finally ratification by the President; (iii) in Article III, section 2, clause (1), which stipulates that the judicial power shall extend to all cases arising under treaties made by the United States; and (iv) in the Supremacy Clause, Article VI, section 2, *supra*.

"executive agreements," that do not require such consent. That is, the President sometimes engages the United States in internationally binding agreements on the basis solely of his foreign relations authority; on the basis of consent expressed or implicit in an earlier treaty; on the basis of prior or subsequent approval by a majority of both houses of Congress; or some combination of these methods and instrumentalities of authority.[28] The choice of one technique or another is usually based upon political considerations, although the President will generally adhere to the customs and usages concerning form which have evolved in U.S. practice.[29]

The implications of the use of one or another type of executive agreement have not been fully explored by the courts. Still unsettled, for example, is whether, like a Senate consented-to "treaty," an executive agreement can prevail against an earlier act of Congress[30] or, for that matter, a prior inconsistent "treaty."

Treaties to which only two or a few states are parties seldom create generally applicable rules of international law. As Marshall's dictum in *Foster & Elam v. Neilson* indicates, they are ordinarily in the nature of contracts, in which event they prescribe obligations as between the contracting parties only. International law takes cognizance of, and generally enforces, these self-prescribed obligations by virtue of the operation of the ancient and, presumably, universal principle known to international law as *pacta sunt servanda*, which requires agreements to be carried out in good faith. As self-evident as it may appear, therefore, it is nonetheless worth noting that recognition of the principle of *pacta sunt servanda* itself may be thought of as establishing an independent authority for the application in our courts of treaties (without, of course, assuring that any particular agreement will be deemed self-executing).

A difficult question is whether, when treaties create international organs and empower them to establish or confirm the existence of rules of international law, the rules validly established or vindicated by these organs also become part of international law to which our courts should give cognizance. In practice, few such organs have been created, and those, like the UN General Assembly and the International Court of Justice (ICJ), which appear to have authority similar to that of domestic law-creating or law-validating organs in fact usually have far less. The General Assembly, for example, is empowered to make recommendations, to interpret the UN Charter, to set the budget and other priorities of the

28. The Supreme Court's decision in Dames & Moore v. Regan, 453 U.S. 654 (1981), suggests that, under certain circumstances, Congress' mere acquiescence in the making of an executive agreement may constitute sufficient authorization.

29. See U.S. Department of State, Digest of the United States Practice in International Law, 1975, at 321. These tendencies are the subject of a vast ocean of legal scholarship, most recently summarized in Jackson, *supra* note 22, at 142 ff.

30. *Compare* Restatement of the Law (Second), Foreign Relations Law of the United States (1965), note 10, § 144(1)(b), with the draft Restatement Revised, § 135, comment c, Reporters' Note 5. See Lesser, Superseding Statutory Law by Sole Executive Agreement: An Analysis of the American Law Institute's Shift in Position, 23 VA. J. INT'L L. 671, 692–94 (1983).

United Nations Organization, and to adopt or propose resolutions or codes of behavior. It has not been accorded legislative powers, however, and its recommendations and other actions therefore traditionally have been regarded as no more than evidence of the acknowledgment by the members of the world community of the existence of a particular norm or set of norms. The evidentiary value of actions taken by the General Assembly is far from conclusive, however, especially if, as is often the case, it appears that in taking such action states are acting for reasons of political expediency rather than out of a sense of legal obligation.

Similarly, while the judgments and advisory options of the ICJ are certainly entitled to the measure of respect appropriate to high courts of distinction, the instruments establishing the ICJ[31] do not empower it to create binding obligations, other than as against the states parties to cases in which the rulings are issued (and even within the instruments there is no analogous doctrine of precedent). The weight accorded by other states to rulings of the Court is thus not a matter of a second stage operation of the principle of *pacta sunt servanda,* nor of an acceptance of the ICJ's judgments as binding precedent. It is rather a matter of the respect generally shown by courts for the informed judgment of a kindred judicial body that, with good reason, has generally been regarded as expert in questions of (in this instance) international law.

It is worth recalling, finally, that international legal norms may find their way into United States law indirectly, for instance, when incorporated by reference in statutes[32] or by private parties in their dealings *inter se,* or when used by courts to inform the content of otherwise ambiguous Constitutional or statutory provisions. The latter deserves special mention, because it is a little-noted but significant contribution that international law makes to domestic law in many countries today. That is, since courts presume that statutes are to be construed in accordance with international law unless an unavoidably contrary intention appears,[33] international legal norms and standards may be helpful in informing the specific content of Constitutional or statutory provisions, or in applying such provisions to particular factual contexts.[34] In this way, international legal norms influence adjudication in domestic courts even without formal adoption or recognition.

As a final note, we observe that the applicability of international legal norms in specific cases may be, and frequently is, limited by the considerations of jurisdiction, equity and due process that bear upon all proceedings before U.S. courts. A decent respect for the opinions of mankind, however, as well as for our

31. I.e., the UN Charter and the Statute of the International Court of Justice.

32. E.g., 28 U.S.C. § 1350.

33. Like the presumption that international law is part of the land, this presumption is of vintage origin. See, e.g., The Charming Betsy, 6 U.S. (2 Cranch.) 64 (1804).

34. The Refugee Act of 1980 provides an apt illustration. See generally Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses,* 52 U. Cinn. L. Rev. 3 (1983).

own judicial traditions, demands that such considerations not be invoked merely to disguise an unwillingness to accord international legal norms their rightful place in our legal system.

Part II
Research in International Law

Researching questions of international law often confronts judges with a formidable, time-consuming and frustrating task for which even the most rigorous training in researching conventional domestic law questions may provide scant preparation. Bibliographies do exist, but are seldom cited in pleadings. Two recent publications have come to our attention that seem likely to ease this problem:

(1) a 126-page bibliography compiled by Simone-Marie Kleckner, Law Librarian of the United States Court of International Trade, entitled *International Legal Bibliography* (2d ed.), published by Oceana Publications, Inc., in 1988;

(2) John W. Williams' *Guide to International Legal Research,* a special issue (actually two issues combined) of volume 20 of *The George Washington Journal of International Law and Economics* (1986), pp. 1–413.

We would also note the publication of the bound edition of Restatement Third[35] which, unlike the above mentioned research aids, is designed in major part to provide guidance to substantive areas of international law, as well as to questions affecting its application in United States courts. It is important to bear in mind, however, that despite the absence of an international legislature or similar centralized law-making institution, international law is a dynamic process, its norms constantly changing, as do all legal norms, in response to the felt needs of the community. The Restatement Third, like the Restatement Second (there was no Restatement of United States Foreign Relations Law prior to the Second) or any other Restatement, can provide only a starting point for research into contemporary questions of international law. Moreover, the Restatement does not purport to be, and cannot substitute for, a comprehensive treatise on questions of international law, nor should it be expected to obviate the use of primary source materials.

We note, too, that international law is now characterized by a far greater degree of specialization than was the case even a decade or so ago. For this reason, specialized law journals and reporting services have proliferated and new ones appear with disarming frequency. It is a commonplace observation that this increase in the quantity of materials available to persons researching questions of international law has not yet assured a uniform increase in quality. Judgmental discretion is therefore advised.

35. American Law Institute: Restatement of the Law, Third: Foreign Relations Law of the United States, St. Paul, Minn., 1987. 2 V. (adopted and promulgated May 14, 1986).

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