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rulings can be, and often are, promulgated without a cut-off date, with the result that they can never be changed or repealed except by a subsequent resolution in respect of which each member of the Permanent Five has a veto.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

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[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).