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## LAW AND INTERNATIONAL AGREEMENTS:

### A FORWARD

COVEY T. OLIVER\*

The law about international agreements and the law made in them are important, especially so to American lawyers at the present time, for a number of reasons, including these:

(i) It is primarily through international agreements that international law grows. Neither international adjudication nor codification has contributed significantly to the development of international law in this century. Yet through many different types of international agreements, bilateral and multiparte, frequently negotiated for the *ad hoc* solution of a particular type of international problem, law has grown. This observation points toward the need for greater emphasis on the law *in*, as distinguished from the law *about* treaties in the literature, in the curriculum, and in the lawyer's mind.

(ii) In the United States, international agreements involve complicated problems of federalism and of inter-relationships between the executive's power to manage foreign relations and the legislative power. The American constitutional law about international agreements is still growing. "Treaty law" in this constitutional sense has been a battleground where rival viewpoints regarding the extent of this country's involvement overseas have been expressed in terms of restricting or continuing the arrangement devised in 1787. The issues have not all been settled yet.

(iii) In the United States, also, international agreements provide the relevant substantive rules for a variety of important situations. Senate-consented treaties, at least, are on a par with legislation; they *are* legislative acts in American theory going back at least to Jefferson. Yet how unlike other types of law with which the lawyer deals is the law in treaties! Elaborate digests, citation systems, syntheses, and commentaries guide the lawyer to his case law. Fairly highly developed search materials are available with respect to statutes and their histories in the courts. But when we turn to international agreements, what chaos! Executive agreements are not

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carried in the Federal Register. It is practically impossible to get the text of a treaty which has been signed but referred to the Senate for consent. The official compilations of United States international agreements sometimes run considerably behind the time of coming into effect. Except for a few types, such as tax treaties, there are no commercial services specializing in keeping up with treaty developments in particular fields. It is probably true that treaty law in the United States could be defined as "that part of Supreme Law that no one knows much about or even where to find." This is an area where *something ought to be done*. The law in international agreements is too important to leave unresearched, except by the few scholars who have developed "systems" for finding some of the law in treaties—somewhat like the private files, lists, and mnemonic devices which continental jurists have to develop, each man for himself, for all legal research going beyond the black-letter of the code book and, possibly, its annotations.

(iv) International agreements give us the principal methodology of international politics as well as of international law. It has been fashionable during the past few years (beginning before the hydrogen bomb-space satellite balance-of-power developed but, strangely, continuing thereafter) for men who should know better to play, Walter Mitty-like, at "good, old-fashioned, bilateral diplomacy" . . . to "make like" Machiavelli . . . or Tallyrand. These gentlemen seldom give us any clear picture of what they expect their unobtrusive, interest-accommodating negotiations to lead to. They do not tell us that Machiavelli and Tallyrand both achieved success in diplomacy partly because their treaty technique was good and their word reliable—well, reasonably so. But it is not hard, considering that in fact international diplomacy has sets of procedures and adjective doctrines no less highly developed than those for actions at law, for one to guess that the outcome of even this diplomacy would be international agreement of some sort. International agreements, regardless of their subject matter, immediately become "law-like" to a greater or lesser degree, when made, certainly internationally, and sometimes internally as well. Thus out of politics comes a legal ordering, a norm, a rule . . . something so normal as to make continually baffling the sharp differentiation drawn by some between international politics and law.

(v) Certain types of international agreements become something more—they become constitutionlike if they are the organic acts which create new power structures like the United Nations or

the European Coal and Steel Community. International agreements of this type may hold mankind's future, if there is to be one.

In view of the importance of international agreements on so many fronts, it is good that the *Minnesota Law Review* has planned and carried into print this special issue. Certainly the *Review* is not reworking in an over-written field. Foreign Service Officer Walker, whose paper on modern treaties of Friendship, Commerce and Navigation alone in the series deals exclusively with law in treaties, confirms in particular aspects a somewhat more general impression of mine when he says that "leading writers on international law have not commented extensively on the treaty as the medium *par excellence* through which nations have sought . . . to secure reciprocal respect for their normal interests abroad. . . ."

In the field of treaty law—a very wide field, as international agreements range from the informal trivia of daily diplomacy to the most far-reaching settlements—some topics have attracted more attention from writers than others. While containing new insights on some topics which have been treated with greater frequency than others, this issue of the *Review* also opens up new fields for exploration.

Professor Bishop's paper deals with the important problem, not much explored in the American literature, of the international consequences, if any, of national *ultra vires* in the making of an international agreement. Mr. Nelson's article brings to attention the state of American constitutional law about the location of competence to end an international agreement. His study of the legal aspects of treaty termination suggests to me the utility of a companion study on the conduct of the United States Government, *vis-a-vis* other governments, over history, with respect to *pacta sunt servanda*. Internationally has the United States lived up to the old frontier maxim, "Perform a contract even if it takes the hide off"? If so, why so? If not, why not? What have been the roles of the Congress and the Presidency with respect to the United States' performance record?

Mr. Green and Professor McLaughlin review for us, with much scholarship and helpful analysis, the basic aspects of American constitutional law about treaties. Professor Bebr shows us that treaties make constitutional law in another sense—when they are constitutive acts and have to be interpreted in the light of the nature, needs, and goals of the international organizations created by them. The process he describes is a familiar one to Americans—but then it was always understood here that it was a Constitution we were

interpreting. Considering that the starting point was somewhat different, the early work of the Court of the European Coal and Steel Community, fascinating to study, seems at least as pioneering as the work of John Marshall was with us.

Lawyers ought to know more and think more about treaties as a part of the law they are responsible for. The pages that follow are a good place to begin.