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# Individual Responsibility Under a Disarmament Agreement in American Law

*Enforcement of individual compliance with a nation's treaty obligations is normally the sole responsibility of the nation having jurisdiction over the particular individual. However, any proposal for international disarmament, hopeful of gaining acceptance by the world, will likely have to provide greater guarantees of compliance by individuals than enforcement subject to the changing moods of national governments would ensure. In the United States any extra-national enforcement or rulemaking authority regulating citizens, even though accomplished through existing national institutions, may raise substantial constitutional questions. This article concludes that the present constitutional framework quite possibly allows participation in such a disarmament agreement, but recommends that in several respects the Constitution should be amended to remove doubt as to the authority of the United States in this area.*

Daniel G. Partan\*

This report is primarily concerned with the legal and constitutional problems that are presented by alternative methods of translating the international law obligations of a disarmament agreement into domestic law applicable to the activities of persons subject to the jurisdiction of the United States. It is necessary first, however, to place the question discussed in context by means of some more general comments.

## I. INTRODUCTION

One major barrier to the achievement of a general and complete disarmament agreement has been our inability to foresee

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in any concrete sense the extent to which the agreement will prove possible of enforcement, and to assess the dangers that are likely to be presented if enforcement fails. Several factors contribute to uncertainty as to the enforcement potential of a disarmament agreement. First, we do not yet have an adequate picture of the type of sanctions or of enforcement machinery that is likely to form part of the agreement.<sup>1</sup> Second, we are not able to judge the extent to which human ingenuity will be able to circumvent any conceivable or politically possible enforcement mechanism. Finally, and no doubt most important, the major official disarmament proposals offer no clear practical or theoretical concept of the ways in which international society is likely to change either as a precondition for or as a result of general and complete disarmament.<sup>2</sup> For example, disarmament

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1. The official disarmament proposals advanced by the Soviet Union and by the United States in 1962, as amended through March 1, 1964, have been published by the World Law Fund in *CURRENT DISARMAMENT PROPOSALS* (preliminary ed. 1964) [hereinafter cited as *CURRENT DISARMAMENT PROPOSALS*]. References in this report to the "Soviet Plan" mean the Soviet "Draft Treaty on General and Complete Disarmament Under Strict International Control," *id.* at 1-28, and to the "United States Plan" mean the United States "Outline of Basic Provisions of a Treaty on General and Complete Disarmament in a Peaceful World," *id.* at 29-59.

One example of lack of clarity as to enforcement machinery is article 40 of the Soviet Plan which provides that the International Disarmament Organization (IDO) "shall deal with questions pertaining to the supervision of compliance by States with their obligations under the present Treaty," but that all questions "connected with the safeguarding of international peace and security . . . , including preventive and enforcement measures, shall be decided by the Security Council in conformity with its powers under the United Nations Charter," which apparently means that the veto would apply to enforcement measures. *Id.* at 25. Under the United States Plan, stage I, part G, paragraph 6(b), the Control Council of the IDO would adopt "rules for implementing the terms of the Treaty," but no specific enforcement powers are proposed. *Id.* at 42. Stage I, part H, paragraph 5(c), of the United States Plan calls for conclusion of an agreement for the establishment of a United Nations Peace Force in stage II, which would include "definitions of its purpose, mission, composition and strength, disposition, command and control . . . ," all open questions under the present United States proposals. *Id.* at 44.

2. The United States Plan, being only an "Outline of Basic Provisions," does not cover all of the areas that may be thought necessary in a treaty establishing the legal framework for a disarmed world. A more thorough presentation is the Clark & Sohn, *Draft of a Treaty Establishing a World Disarmament and World Development Organization Within the Framework of the United Nations*, in *id.* at 61-178 [hereinafter referred to as the Clark and Sohn proposals]. See also CLARK & SOHN, *WORLD PEACE THROUGH WORLD LAW* at xv-xlii (2d ed. 1960); and A *WARLESS WORLD* (Larson ed. 1963), discussing the problems and opportunities of a disarmed world under law.

will most probably be accompanied by vigorous and comprehensive peaceful settlement procedures, by some form of international or supranational legislative authority, and by some form of international force possessing sufficient armed forces and armaments so that its rule could not be challenged militarily. We have little or no guidance, however, on the precise character of the likely developments in any of these areas, and yet, as uncertain as we are, we must still deal in a meaningful way with the major unanswered question, "How will these factors affect the structure of the international community in a disarmed world?"

Each of the uncertainty factors mentioned above has a great bearing on possible alternative blueprints for the role of the individual under general and complete disarmament. If, for example, disarmament obligations are to be directed only to governments, as seems to be the present intention, presumably individual conduct will be regulated by the national government concerned. Will this suffice to ensure compliance in normal government-to-government relations, or will individuals be pressed into international service, as it were, to ensure that their governments faithfully implement the agreement? Will the end result of imposing even this measure of compliance responsibility on individuals be a transfer of individual loyalties from national governments to some form of "world government"? In choosing to place obligations to achieve or to maintain warlessness in the disarmed world order directly on individuals as well as on their governments, some judgment must be made as to the impact of such a process on the continued vitality of the nation-state system as we know it today.<sup>3</sup>

The general and complete disarmament proposals advanced by the United States and by the Soviet Union envisage the continuance of the nation-state system. As to individual respon-

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3. The Clark and Sohn proposals would give the General Conference of the World Disarmament and World Development Organization power to adopt regulations binding on all member states to enforce disarmament, to control nuclear energy and the use of outer space, and to define "what acts or omissions of individuals or private organizations . . . shall be deemed violations of this Treaty for which such individuals or organizations shall be held personally responsible . . ." Arts. 7-8, CURRENT DISARMAMENT PROPOSALS 68-69. See also article 66, providing for the establishment of United Nations regional courts and the appointment of an Attorney-General of the United Nations whose function would be to prosecute individuals and private organizations accused of offenses against the Treaty. *Id.* at 127. The same article provides for a "United Nations civil police force" which would investigate offenses and apprehend accused individuals. *Id.* at 129.

sibility, neither set of proposals offers any explicit change in the present system, in which individuals are represented at the world level by their national governments, and in which the responsibilities of the individual with regard to disarmament norms would be channeled through national governments. The United States *Outline of Basic Provisions of a Treaty on General and Complete Disarmament in a Peaceful World*,<sup>4</sup> for example, provides in stage II for the enactment by each party of national legislation to impose legal obligations on individuals subject to the jurisdiction of that party to comply with disarmament measures adopted by states at the international level. The Soviet *Draft Treaty on General and Complete Disarmament Under Strict International Control*<sup>5</sup> contains an apparently similar provision in its article 2 "Control Obligation" on states parties "to ensure the implementation in their territories of all control measures" set forth in the treaty. Although in each draft proposal it therefore seems to be considered that it will be necessary to take steps to ensure that individuals comply with the obligations of the disarmament agreement, neither draft goes beyond traditional national enforcement to propose some form of international or supranational control over the actions of individuals.

Would national control over individual action suffice? It might be argued that national enforcement would mean nothing

4. The United States Plan contains a general provision on "National Legislation" in stage II, part G, paragraph 5, which reads as follows:

Those Parties to the Treaty which had not already done so would, in accordance with their constitutional processes, enact national legislation in support of the Treaty imposing legal obligations on individuals and organizations under their jurisdiction and providing appropriate penalties for noncompliance.

CURRENT DISARMAMENT PROPOSALS at 51.

5. Soviet Plan, art. 2, para. 1, *id.* at 3. In one instance the Soviet Plan clearly calls for national legislation making specified acts criminal. Article 22 (3) of the Soviet Plan provides that each party shall, "in accordance with its constitutional procedures, enact legislation completely prohibiting nuclear weapons and making any attempt by individuals or organizations to reconstitute such weapons a criminal offence." *Id.* at 16. Article 34 requires the parties to "enact legislation prohibiting all military training," but does not specify that "military training" engaged in by individuals shall be a criminal offense punishable under national law. *Id.* at 21-22. Articles 9(3) and 10(3) provide that the parties "shall enact legislation and issue regulations to ensure that no military bases to be used by foreign troops are established in their territory," which laws and regulations shall also prohibit citizens "from serving in the armed forces or from engaging in any other activities serving military purposes in foreign States." *Id.* at 8-9. Like article 2(1), these articles do not make entirely clear that the treaty obligations shall be implemented by national laws making the prohibited acts criminal.

more than control of such individual action as is contrary to national policy, where national policy may or may not be in conformity with the requirements of the disarmament agreement.<sup>6</sup> In other words, if national governments are likely to be prepared to sanction activity in violation of the norms contained in the disarmament agreement, some might question whether the system of national enforcement would supply adequate assurance of compliance with the disarmament agreement, and conclude that the only workable alternative is some form of international enforcement directly applicable to individual action.

The answer to this question may depend upon the degree to which it is possible to visualize independent action by various branches within a national government. If, for example, a national legislature would be prepared to violate the disarmament agreement, might the executive stand in the way? Or, would the judiciary be able to act to carry out the policy of a disarmament agreement where the executive or the legislature had become less than enthusiastic about implementation? In view of the differences between national governments both in structure and in the degree to which it is reasonable to expect different branches of a particular government to be capable of holding different views on matters of high national importance, it is likely that differing assessments of the efficacy of national enforcement would be made for each national context.<sup>7</sup> In addition, the uncertainty of such an assessment is compounded by our inability to foresee even in broad outline the extent to which the assessment would be affected by changes in the national and international system brought about by the disarmament agreement.

A national government need not forever be regarded as a monolithic structure capable of taking only one view of a particular situation. In any normally functioning national society as we conceive of it today, no doubt it would not be expected that any branch of the government would faithfully comply with the strictures of a disarmament agreement much beyond the point at which that agreement had lost its support in public

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6. See HENKIN, *ARMS CONTROL AND INSPECTION IN AMERICAN LAW* 123 (1958), quoted in text accompanying notes 15-16 *infra*.

7. Testing the efficacy of national enforcement schemes in particular national contexts would require a thorough understanding of the national legal system and of the ways in which law is brought to bear on individual action within that system. All facets of national enforcement would not necessarily be workable in each system, however. For example, if the national courts are to be relied upon to issue injunctions, etc., that may run counter to the short-run interests of the national government in power, such a system would not work unless the courts are reasonably independent of the executive.

opinion as a result, for example, of perceived significant and threatening violations on the other side.<sup>8</sup> Such extreme situations excepted, however, even today it should not be inconceivable to expect honest and effective disagreements to exist within a national government on the proper course to follow in a particular context. In the United States, for example, unless a measure has overwhelming popular support, either the President or the Congress is usually able to block its adoption. Disagreement within the government is usually more effective where inaction rather than action is the sought end, however.<sup>9</sup> In the disarmament context, therefore, a distinction might be drawn between the effectiveness of dissent when the object of the dissenters is to oppose threatened affirmative action that would violate the disarmament agreement, and the effectiveness of dissent when the object of the dissenters is to induce the government to take some action required by the agreement or to halt conduct carried on in apparent violation of the agreement. It may be easier to prevent government action than it would be to induce a government to act.

These considerations have peculiar application to the problem of securing individual compliance with the norms established by the disarmament agreement. To take one example, if it is envisaged in the disarmament agreement that its application to individual activity would be by national legislation, it would no doubt also be provided that the required national legislation must have been enacted prior to completion of the disarmament process so that the ground rules are set before all arms have been destroyed. Assuming that adequate legislation has been adopted at the outset, however, might the legislature change the

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8. The Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, art. IV, [1963] 2 U.S.T. & O.I.A. 1319, T.I.A.S. No. 5433, for example, provides that in the exercise of its "national sovereignty," each party has "the right to withdraw from the Treaty if *it decides* that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country." CURRENT DISARMAMENT PROPOSALS 194. [Emphasis added.] This clause clarifies the situation where a violation is perceived but cannot be proved, but does not replace the usual international law right of a state to avoid a treaty that has been breached by the other party. See Opinion of the Legal Adviser, in *Hearings on the Nuclear Test Ban Treaty Before the Senate Committee on Foreign Relations*, 88th Cong., 1st Sess. 37-40 (1963).

9. One example is the constitutional barrier to exercise of the treaty power, requiring that treaties have the "Advice and Consent" of "two thirds of the Senators present . . ." U. S. CONST. art. II § 2. Another example is the difficulties facing the Department of Defense in its effort to close \$500 million worth of obsolete defense installations.

national law in the future, thereby placing the state in violation of the agreement? As a matter of domestic law, would the executive or the courts have power to override the new legislation in order to carry out the disarmament agreement? Or, if the executive should decline to enforce the national implementing legislation, does national law permit the legislature or the courts to override executive inaction? Or, if the courts should prove a stumbling block to enforcement of national implementing legislation, to what extent might the other branches of the national government take independent action to apply such legislation to individual conduct?<sup>10</sup>

Each of these questions normally turns on national law, and it is therefore of primary importance to measure the capacity of each relevant national legal system to permit effective expression of dissenting views supporting compliance with the disarmament agreement. One must also consider the extent to which it would be either possible or desirable to provide answers to these questions in the disarmament agreement. If as to any particular state it should appear that the national legal framework might be inadequate to assure full play for effective expression of dissenting views, national enforcement of individual responsibilities under a disarmament agreement might not be regarded as adequate to ensure compliance. The further question is then reached of the extent to which the particular inadequacies of a particular national legal system might be dealt with in the disarmament agreement by, for example, providing for constitutional amendments so changing the structure of the national government as to enable dissent to be effective. If changes of this nature cannot be brought about by the agreement, and if enforcement against individuals is regarded as essential, then it would appear that the only alternative is some form of international enforcement machinery to supplement enforcement by national action.

This report is confined to a consideration of the first two questions, namely the extent to which national enforcement of individual responsibilities might be effective within the United States, and the extent to which the inadequacies found might be remedied by appropriate national action provided for in the disarmament agreement. The question of international enforcement machinery is not considered, and, it must be emphasized, even the first two problems are taken up only in the United

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10. The problem of legislative nullification of the domestic effect of a disarmament agreement is discussed in part IV *infra*.



States context. Before national enforcement should be relied upon as adequate on a world scale, similar studies must be made of the legal systems of every other relevant state.

## II. THE REALITY OF INDIVIDUAL RESPONSIBILITY

Not too many years ago, international law was thought of as applying almost solely to the affairs of states. States were regarded as the subjects of international law; international organizations with independent "personalities" were of little significance, and individuals fell within the ambit of international law only on such rare occasions as when they were accused of piracy or of assault upon an ambassador. Two world wars and increased interdependence among states destroyed the basis for this ancient learning. International organizations, chief among them being the United Nations, are today commonly endowed by their creators with "international personality," that is, with a capacity to act as entities apart from their constituent states. Subsequent to the Second World War, individuals were held accountable under international law for war crimes, crimes against peace, and crimes against humanity. Individuals and private business associations have also sometimes been given access to international tribunals in controversies arising under international agreements.<sup>11</sup> Finally, a great movement is under way in the United Nations and elsewhere to secure international protection of individual human rights under international law standards laid down and enforced by action of international organizations.<sup>12</sup>

Increased recognition of the individual as a proper subject of rights and duties under international law has not extended to official disarmament proposals, however. As has been noted, with regard to individual responsibility both the Soviet and the United States proposals seem to adopt the approach of limiting enforcement as to individuals to national action against individuals

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11. One example is the Court of Justice of the European Communities. Private parties (persons and business associations) may appeal directly to the court to contest decisions of the executive authorities of the three communities. See, *e.g.*, Treaty Establishing the European Coal and Steel Community, April 18, 1951, art. 33, 261 U.N.T.S. 140, 167; Treaty Establishing the European Economic Community, March 25, 1957, art. 173, 298 U.N.T.S. 11, 75-76 (English text).

12. See, *e.g.*, the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; and the substantive articles of the United Nations Draft International Covenants on Human Rights adopted by the Third Committee of the General Assembly from 1955 through 1963, U.N. Doc. No. A/5705 (1964).

whose acts violate national law, and thereby conflict with national government policy. There is no provision in either plan for international criminal laws having direct application to individuals or for an international criminal court in which individuals may be brought to trial for engaging in activities prohibited by the disarmament agreement. The national legislation referred to in each plan may be argued to reach only individual action that runs counter to government policy. Responses to the initiation or the implementation of government policies allegedly contrary to the disarmament agreement are left to the arena of disputes between states and to the mechanisms contained in the draft proposals for the settlement of disputes between the states parties to the agreement, possibly culminating in international adjudication and international enforcement action by some international agency.<sup>13</sup>

The question of establishing an international tribunal for the trial of individuals charged with violation of a disarmament agreement is not discussed in this report, but it is treated extensively by Louis Henkin in *Arms Control and Inspection in American Law* (1958). Henkin's view, which is borne out by recent official proposals, is that arms control plans are unlikely to rely on international enforcement against individual violators. Serious violations might be declared "war crimes" and national leaders might be brought to trial on such charges in an international court, but that is likely to happen only after military defeat at the hands of the world community, possibly acting through the United Nations or through an International Disarmament Organization.<sup>14</sup>

As regards enforcement of individual responsibility by national action under national legislation, Henkin observes:

The individual violating arms control for private purposes contrary to the wishes of his government would be tried by his government in its own courts. The violations of arms control which would be of most serious international concern—government circumvention or violation of treaty obligations—would also involve individuals, official or private. These individuals, of course, would not be tried and punished by their government.<sup>15</sup>

Relating this comment to the situation within the United States, Henkin points out that, as no doubt will be required by the disarmament agreement, an individual subject to United States

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13. The United States proposal for the conclusion of an agreement establishing a United Nations Peace Force is quoted in note 1 *supra*. The Soviet enforcement proposals are also quoted in note 1 *supra*.

14. HENKIN, *op. cit. supra* note 6, at 122-23.

15. *Id.* at 123.

jurisdiction who acts on his own in violation of disarmament rules would be treated by United States authorities as a violator of United States law. But, writes Henkin, if an individual acts in collusion with United States authorities, "he would hardly be prosecuted, even though arms control might still remain officially part of the nation's criminal law."<sup>16</sup> Henkin continues in part as follows:

The purposes of the criminal law — whether prevention, or deterrence, or rehabilitation, or even a measure of retribution — are not relevant in those circumstances, and would not be served by punishment of the individual. And this nation, like other nations, would not agree to his punishment by others for such "violations" reflecting the highest national policy.<sup>17</sup>

Accepting, for the moment, the view that states cannot be expected to punish individuals guilty of unlawful acts "in collusion" with governmental authorities when the "highest national policy" intervenes, might there not be an important middle ground between cases of individual violation for private purposes and cases of individual acts in furtherance of a coordinated national policy involving disregard of the disarmament agreement? Depending upon the degree to which the need for a disarmament agreement has actually been accepted within a state, it certainly is to be expected that a sizeable portion of the public would endorse compliance, and, depending upon the nature of the government system, that public backing might translate into effective support for elements within the government seeking to oppose efforts to undercut or to violate the agreement. There might exist, therefore, a class of cases in which the availability of national enforcement measures might turn the tide against violation and prevent the crystallization of a firm high national policy either calling for or condoning the violation of the agreement.

Henkin's view of the application of national enforcement measures within the United States can be accepted in full only if the national government is considered as a monolithic creature, fully in the control of a group of men having a fairly uniform assessment of the world and of the best interests of the United States. This view may be accurate as of today with regard to some events and to some national courses of action, but it is submitted that a nation may not speak with so uniform a voice under less than clear-cut circumstances. In addition, acceptance

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16. *Ibid.*

17. *Ibid.* The texts of the United States and of the Soviet proposals calling for the enactment of national criminal laws are reproduced at notes 4-5 *supra*.

and implementation of general and complete disarmament has the potential of so altering the basis for international relationships as further to destroy the supposed monolithic character of the state. What might not be possible today in the way of national enforcement of individual responsibilities under a disarmament agreement may become a political necessity in the future as experience with and confidence in the agreement increases.<sup>18</sup>

Regardless of the circumstances prompting violation, it remains true that a disarmament agreement can be violated by states only if individuals act to produce results prohibited by the agreement. Although today it may be accurate to say that beyond the case of private violation for private purposes there is little scope for national action against individuals whose acts contribute to the violation,<sup>19</sup> that scope, as has been observed, can be expected to increase, and the expected rate of increase would itself be an important factor in inducing states to include some national punishment scheme in the agreement. Ultimately it is to be expected that successful practice will generate effective public support for the agreement on all sides, thereby decreasing the likelihood that any government would be able to construct or carry out a high national policy contrary to its obligations under the agreement.

In addition, a national enforcement scheme might prove highly useful in the early stages of disarmament by providing a mechanism for removing points of intergovernmental conflict that otherwise would be likely to jeopardize the success of the disarmament agreement. If individuals guilty of conduct prohibited by the agreement were punished by their own government, or by the government within whose jurisdiction the prohibited conduct had occurred, and if that government takes such other action as may be necessary to nullify the effects of the individual violation, then the other parties to the agreement might regard the violation as erased, and the matter might be dismissed without resort to formal action at the international level. Such a sequence of events could result either from unauthorized private conduct or from partially authorized semi-official conduct. In each case the discovery of the violation might be regarded by the other states party to the agreement as potentially serious and perhaps as signalling the beginning of a pattern of extensive violation that might ultimately result in the destruc-

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18. See, e.g., Moch, *Increasing Security Through Disarmament*, in *A WARLESS WORLD 11* (Larson ed. 1963).

19. See the comments by Henkin quoted in text accompanying notes 15-16 *supra*.

tion of the agreement. The growing crisis could be overcome only by the most persuasive showing that the government concerned had repudiated those responsible and had taken every measure possible to prevent its recurrence. National enforcement potential might increase in such a case since the need to punish to save the agreement might become apparent, and swift implementation of existing measures calling for national punishment of guilty individuals might become a real possibility. If suitable procedures had not been provided in the treaty and in national law, however, time and the pressure of events might outrun *ad hoc* action.

Beyond the question of the extent to which national governments can be expected to act to suppress individual violators of a disarmament agreement, there remains the questions of the circumstances under which it would be appropriate to apply sanctions to suppress violators and of whether the sanction should be criminal punishment or some other form of national government action.

A recent report by Roger Fisher<sup>20</sup> deals with these questions in the context of taking punitive action against individual government officials responsible for noncompliance with arms limitations. Fisher's conclusions are that sanctions against government officials are not likely to be effective in producing compliance with "primary" rules of conduct, but that some sanction system might be effective to ensure compliance with decisions of tribunals entrusted with authority to decide claims of alleged violation of "primary" rules. A primary rule, as that term is used by Fisher, means the substantive limitations contained in the treaty, such as rules prohibiting the production, retention, or deployment of specified types of weapons. Fisher's recommendation is that sanctions ought not to be threatened or imposed against government officials for violations of this type of primary rule, but only for a subsequent failure or refusal to carry out an institutional decision that the original conduct had in fact been contrary to the requirements of the agreement.<sup>21</sup>

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20. The report was prepared for the United States Arms Control and Disarmament Agency. Fisher, *Enforcement of Arms Control & Disarmament Measures by the Imposition of Sanctions on Individual Officers* (Harvard Law School, March 1964).

21. Fisher comments as follows:

In view of the inherent ambiguity which all rules have, the very concept of compliance is imprecise unless there is an institutional and authoritative means of defining the rule from time to time and applying it to particular facts. Necessarily, any such decision is to some extent *ex post facto* as to a particular violation. An operating law enforcement scheme is apparently less concerned with the question of whether

Fisher's analysis rests on the proposition that a sanction system cannot be expected to operate as an effective deterrent to action by government officials mainly for the reasons that punishment will not in fact be routinely imposed and that considerations other than the fear of criminal punishment are likely to be controlling unless the rule is clear and explicit.<sup>22</sup> Fisher also argues that imposing sanctions for first-order violations would be an unwise policy mainly for the reasons that to the extent that fear of punishment might prove effective, it would tend to deter "permitted conduct in the penumbra of the rule," and would also tend to deter officials from disclosing acts feared to be in possible conflict with the rules emanating from the disarmament agreement.<sup>23</sup>

In measuring the efficacy and wisdom of applying national sanctions for violations of primary rules, a distinction must be drawn between the reasonableness and potential of such sanctions in cases of gross violation and in cases of arguable violation. As Fisher points out, for example, within national governments "those responsible for enforcement are reluctant to impose punishment on an officer for 'doing his duty' no matter how mistaken

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or not the original rule was violated than with the desirability that in the future there be compliance with this particular decision. Ought sanctions to be threatened or imposed against government officers as a means of producing compliance with particular institutional decisions interpreting and applying arms limitations?

The answer to this question seems to be "yes". But the effectiveness of a sanction system in support of a decision depends primarily not upon the sanction itself but upon getting into a position where a sanction could be imposed.

*Id.* at 10.

22. See *id.* at 13-26. Fisher notes that officials are usually given a wide range of freedom to interpret laws when penal sanctions are imposed, and that, in any event, officials have powerful legal defenses, such as lack of *mens rea*, official advice, superior orders, etc. *Id.* at 14-21. See also note 27 *infra*.

23. *Id.* at 30-33. Fisher notes that secrecy will be a problem in enforcement of disarmament, and that disclosure should be encouraged rather than deterred; but:

Although a government official might not be deterred from engaging in some activity which he thought the circumstances required, fear of personal punishment might deter him from public disclosure of what he was doing. Because of the vagueness or ambiguity in the rule an official could believe that he was behaving properly, but since a mistake in his judgment might result in criminal punishment, he could be expected to keep the facts as much in the dark as possible.

*Id.* at 30. Fisher also argues that to the extent that punishment is effective as a deterrent, "officials might be influenced by personal concern rather than public policy," and might therefore not make the wisest choice among permitted courses of conduct. *Id.* at 31.

he may have been."<sup>24</sup> Fisher also notes, however, that

The popular reluctance to punish officers for doing their duty as they saw it apparently covers all conduct short of that which offends natural law notions of morality. For such conduct as brutal third degree tactics by police, or participation in programs of human slaughter by concentration camp officials, there is far less reluctance to impose punishment, whether or not the conduct was in the performance of official duty.<sup>25</sup>

Reluctance to punish does have limits, and the limits are related to the type of factors discussed by Fisher, such as the need to interpret unclear rules, ignorance or mistake of law, and acting under official advice as to the meaning of the applicable rule.<sup>26</sup> To note these limits in detail does not, however, meet the case of a clear violation as to which, as has been said, it may be useful to take sanction action to reassure the other parties to the agreement, if for no other reason.

The disadvantages found by Fisher to imposing sanctions for first-order violations are likewise more applicable to the close case than to the case of gross misconduct. If, for the reasons outlined by Fisher, sanctions are understood to be effective only as to gross violations, Fisher's disadvantages appear to lose reality. Fisher notes that sanctions would tend to deter disclosure of questionable conduct, but, conversely, first-order sanctions would also tend to deter permitted conduct in the penumbra of the rule. Each effect is conceivable as to different officials in a sanctions system designed to reach and to punish even questionable conduct when later determined to have been contrary to the rules,<sup>27</sup> but surely such pressures would be minimal if sanctions existed or were known to be applied only in cases of gross violation. In the latter case the "penumbral" deterrent effect is not likely to "spill over and affect conduct that was on the per-

24. *Id.* at 14.

25. *Id.* at 23.

26. See *id.* at 13-26.

27. One may agree with Fisher that the sanctions system need not go so far as to punish officials acting within what they regarded as the law. Fisher comments that:

Underlying the whole notion of a deterrent system is the idea that an individual at some point has a choice, and that a threat of punishment causes him to make the "good" rather than the "bad" choice. Punishment is imposed upon the man who culpably makes the wrong choice in order to deter him and others from doing so in the future. The requirement of *mens rea*—a guilty state of mind—reflects the unwillingness of courts to inflict punishment upon the man who did not know he was acting improperly.

*Id.* at 16.

mitted side of the rule."<sup>28</sup> Although there may be no such thing as a crystal clear rule, there certainly are fact situations as to which it is entirely clear that the normally vague rule applies.

Cases of gross violation excepted, however, Fisher may be accurate in arguing that sanctions ought to be confined to efforts to secure compliance with authoritative decisions that a certain course of conduct violates the disarmament agreement. As discussed below,<sup>29</sup> sanctions to secure such "second-order compliance" might also form part of the national enforcement system, and the capacity of the national legal system to accommodate second-order compliance sanctions must be evaluated in the assessment of national enforcement of individual responsibility under a disarmament agreement.

### III. THE SOURCE OF SUBSTANTIVE RULES AND REMEDIES

As has been mentioned above, the disarmament proposals advanced both by the Soviet Union and by the United States envisage their application to individual conduct only through national action. That principle as phrased in the proposals does not foreclose the question of the source from which substantive rules are to be derived in particular cases, however. The basic obligation under the United States proposals, for example, would be for the states parties to the agreement to "enact national legislation in support of the Treaty imposing legal obligations on individuals and organizations under their jurisdiction and providing appropriate penalties for noncompliance."<sup>30</sup> Presumably national legislation "in support of the Treaty" might mean anything from a point-by-point enactment of appropriate treaty provisions as national criminal law, to the enactment of one or more civil or criminal statutes which, in the judgment of the enacting state, both translated the essential treaty obligations into national law applicable to individuals and organizations, and imposed "appropriate penalties" for noncompliance. In addition, it is not clear whether the national legislation called for by the quoted United States proposal would include national legislation to implement as against individuals such decisions as may be taken by the International Disarmament Organization or by some other body established by the agreement.

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28. See note 23 *supra*.

29. Part III(C) *infra*.

30. United States Plan, stage II, pt. G, para. 5, CURRENT DISARMAMENT PROPOSALS 51, quoted in note 4 *supra*.



The United States proposals are of course only an "Outline of Basic Provisions" that might provide the framework of a general and complete disarmament agreement. In national enforcement, as in many other respects, the proposals need considerable fleshing out before their full reach will become apparent. The Soviet proposals, although cast as a "Draft Treaty," are at least as vague, requiring only that the states parties to the treaty "ensure the implementation in their territories of all control measures. . . ."<sup>31</sup>

The basic question at issue, however, on the assumption that the enforcement of individual responsibilities under the agreement will be left to national action, is, to what extent will the treaty rather than national law serve as the source and definition of individual obligations in particular cases? Will states be required to enforce individual obligations as defined in the treaty, or by international legislation adopted pursuant to the treaty, or will states be required only to take whatever action they may decide is both necessary and appropriate in order to apply the obligations arising under the agreement to individuals within their jurisdiction? If the latter, to what extent would other states and the international community have an effective opportunity to contest the judgment of the enacting state?

The latter course would raise fewer practical and constitutional problems for the United States. If the United States' obligation were limited to making a judgment as to what national legislation is required by the treaty, and to implementing that judgment by national legislation adopted in the normal course, few, if any, substantial constitutional questions would be raised. As to practical political problems, according full scope to the political process within each state with minimal interference by

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31. Soviet Plan, art. 2, para. 1, CURRENT DISARMAMENT PROPOSALS 3, provides as follows:

1. The States parties to the Treaty solemnly undertake to carry out all disarmament measures, from beginning to end, under strict international control and to ensure the implementation in their territories of all control measures set forth in parts II, III and IV of the present Treaty.

The Soviet Plan also specifies that the states parties to the agreement shall enact national legislation prohibiting their citizens from serving foreign military purposes, which may mean that such activities are to be punished under national criminal law. See *id.* arts 9(3), 10(3), at 8, 9, quoted at note 5 *supra*. The Soviet Plan makes plain, however, that attempts by individuals "to reconstitute" nuclear weapons shall be made a criminal offense under the national law of each party to the disarmament agreement. See *id.* art 22(3), at 16, quoted at note 5 *supra*.

any international authority would of course be more acceptable to any society than would the opposing alternative of delegating extensive rulemaking and supervisory powers to an international authority. The fewer the international controls, however, the less likely it would be that each side would have confidence that the other is in fact observing the agreement. The final judgment must, therefore, weigh both elements in the changed circumstances that might be expected should disarmament become a present possibility. This report is limited, however, to a discussion of the constitutional problems that would be presented by the alternatives as to the treaty framework within which national action might apply the treaty obligations to individual action.

#### A. THE CONSTITUTIONALITY OF A DISARMAMENT AGREEMENT

Before considering the constitutional problems that might be raised by the alternative methods of providing substantive rules for national application to individual conduct, it is useful to dispose of some general aspects of the constitutionality of a disarmament agreement and of its application to individual conduct.

The basic question is the power of the federal government to control arms transactions that involve persons subject to the jurisdiction of the United States, and to agree with other countries to limit or to abolish armaments under international controls. Does the treaty power of the United States as established under the Constitution extend to international agreements to prohibit the manufacture, sale, transfer, possession, and use of the types of armaments that might be reached by a disarmament agreement? If such an agreement is permitted by the Constitution, may it be assumed that Congress has power under the Constitution to adopt the necessary legislation to implement the agreement?

The United States Supreme Court has never held an international agreement unconstitutional, and there is little reason to suppose that a general and complete disarmament agreement would be held to go beyond the treaty power. In a much quoted statement as to the scope of the treaty power under the Constitution, Mr. Justice Field wrote in *Geofroy v. Riggs*, decided by the Supreme Court in 1890:

That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. . . . The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or

of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.<sup>32</sup>

That the limitation or the elimination of armaments is "matter which is properly the subject of negotiation with a foreign country" is quite clear. As Louis Henkin has pointed out, the "size of our armies, the character and extent of our armaments, [and] whether we are or are not manufacturing weapons, are questions of deep interest to other nations on which they may wish to bargain."<sup>33</sup>

United States practice over the past 150 years demonstrates conclusively that the United States regards arms control as a matter of international concern. There are numerous occasions on which the United States participated in arms control negotiations, some of which led in fact to the conclusion of arms control agreements accepted by the United States. Examples include the 1817 Great Lakes naval disarmament agreement,<sup>34</sup> naval limitations following the First World War,<sup>35</sup> and the 1963 multilateral Test Ban Agreement.<sup>36</sup> Every President of the United States since World War II has sought some measure of arms control through international agreement. And, as early as 1948, the United States Senate endorsed these efforts by urging the President to exert a maximum effort "to obtain agreement . . . upon universal regulation and reduction of armaments under adequate and dependable guaranty against violation."<sup>37</sup>

More recently, the United States explicitly adopted the goal of general and complete disarmament, and has concluded a "Joint Statement of Agreed Principles for Disarmament Negotiations"

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32. 133 U.S. 258, 266-67.

33. HENKIN, *op. cit. supra* note 6, at 28.

34. The Rush-Bagot Agreement With Great Britain, April 18, 1817, 8 Stat. 231, T.S. No. 110½.

35. The Washington Naval Treaty, Feb. 6, 1922, 43 Stat. 1655, T.S. No. 671.

36. The Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, [1963] 2 U.S.T. & O.I.A. 1313, T.I.A.S. No. 5433, in CURRENT DISARMAMENT PROPOSALS 193-95.

37. The Vandenberg Resolution, S. Res. 239, 80th Cong., 2d Sess., para. (5), (1948), 94 CONG. REC. 6053, quoted from BECHHOEFER, POSTWAR NEGOTIATIONS FOR ARMS CONTROL 100 (1961).

with the Soviet Union which provides that the goal of the current disarmament negotiations is general and complete disarmament "accompanied by the establishment of reliable procedures for the peaceful settlement of disputes and effective arrangements for the maintenance of peace . . ."<sup>38</sup> United States participation in this statement and in the Geneva meetings of the Eighteen-Nation Committee on Disarmament leave no doubt that present and past administrations have regarded a general and complete disarmament treaty as within the treaty power under the Constitution.

Considering the history of post-war disarmament negotiations, in which disarmament clearly is treated as a matter of international concern by most states of the world, and considering the practical requirements of the thermonuclear age, it would be a novel and unwarranted construction of the treaty power to hold that, absent some conflict with a particular provision of the Constitution, the treaty power would not extend to a general and complete disarmament agreement. No court could be expected to reach such a result.

Although it is therefore clear that generally speaking a general and complete disarmament agreement is a "proper subject" for the exercise of the treaty power, it is also clear, as seen in the quoted passage from Mr. Justice Field's opinion in *Geofroy v. Riggs*<sup>39</sup> that in some respects the treaty power may be limited by "restraints" found in the Constitution. Mr. Justice Black recently emphasized this proposition in *Reid v. Covert*,<sup>40</sup> decided by the Supreme Court in 1957, where he wrote that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."<sup>41</sup> After quoting article VI, the supremacy clause of the Constitution, which provides in part that "all Treaties made . . . under the Authority of the United States, shall be the Supreme Law of the Land,"<sup>42</sup> Mr. Justice Black continued as follows:

There is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. . . . It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who

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38. Sept. 20, 1961, para. 1, U.N. Doc. No. A/4879 at 190 (1961), in CURRENT DISARMAMENT PROPOSALS 189-91.

39. 133 U.S. 258 (1890); see text accompanying note 32 *supra*.

40. 354 U.S. 1.

41. *Id.* at 16.

42. U. S. CONST. art. VI.

were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. . . . The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.<sup>43</sup>

Would any of the specific “prohibitions” or “restraints” in the Constitution be thought to stand in the way of some necessary aspect of a general and complete disarmament agreement? Louis Henkin considered this question in the context of his projection of the provisions that would be likely to be included in a disarmament agreement.<sup>44</sup> Henkin’s assumption was that the agreement would oblige the United States and other parties to control, reduce, or eliminate research, testing, manufacture, and possession of described types of arms, munitions, and related materials. In addition, the agreement would establish some form of inspection to give assurance that the parties actually honored their disarmament and control obligations. Henkin postulated that the inspectors might be foreign nationals responsible to an international organization or to a foreign government, and that the inspectors would need freedom of access to all relevant military and industrial installations, and might also need the right to require reports from government officials, corporations, and individuals, and the right to examine books, records, and other relevant documents.

Against this background, Henkin discussed the possible impact of the following constitutional provisions: the clause of article I, section 8, relating to the organizing, arming, and disciplining of the Militia; the second amendment, relating to the “right of the people to keep and bear Arms”; the fifth amendment provision that no person shall “be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation”; and the tenth amendment, which reserves to the states, or to the people, the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States. . . .”<sup>45</sup> Henkin’s general conclusion is that the constitutional issues that might be presented under these provisions by an arms control agreement are “small”<sup>46</sup> and that none presents “a serious obstacle to foreseeable plans for

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43. 354 U.S. at 16–17. (Footnotes omitted.)

44. HENKIN, *op. cit. supra* note 6, at 18–24.

45. *Id.* at 33–45.

46. *Id.* at 45.

the control of arms."<sup>47</sup>

Need this conclusion be changed in the light of the official proposals that have been advanced subsequent to Henkin's study? Or, are there any elements in some more comprehensive disarmament plan that might become realistic possibilities, and yet might present more substantial constitutional questions?<sup>48</sup>

The latter is an open-ended question that is not susceptible of categorical response, due both to the uncertainty factors mentioned at the outset, and to our chronic inability to see even five years into the future, and so to judge what might become a practical possibility with the passage of time. As to present proposals and reasonable extrapolations from present proposals, however, there appears to be no need to qualify Henkin's judgment. Insofar as is relevant, the current official proposals do not differ materially from the assumptions made by Henkin.<sup>49</sup>

The provisions of the fifth and tenth amendments are likely to present no problems in any event. Since a disarmament agreement would most probably be found to relate to a matter of international concern, and therefore to be within the treaty power, both the agreement and any implementing legislation adopted by Congress would be adopted in exercise of powers "delegated to the United States by the Constitution," and hence would fall outside of the tenth amendment. As to the fifth amendment, Henkin has documented the present unwillingness of the Supreme Court to find that federal laws regulating economic activity are unconstitutional as a deprivation of property without due process of

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47. *Id.* at 46.

48. See, e.g., Nathanson, *The Constitution and World Government*, 57 Nw. U.L. Rev. 355 (1962), discussing constitutional problems presented by the Clark and Sohn proposals. See note 2 *supra*.

49. Henkin's study is not directed to the alternative means of enforcing individual responsibility under the disarmament agreement in American law, however, which may raise some particular problems discussed in this report. Henkin explains that:

The principal consequences of violation, on the other hand, are not mentioned above; they are hardly considered in this study. Primarily these are international and governmental in character and present few problems in domestic law. The emphasis on a control system as a source of early warning of a major violation, rather than a system designed to prevent or punish such violations, suggests that the chief consequence of a serious breach of the agreement will be that the other parties may feel freed from the limitations of the control treaty, take steps provided in the treaty for this contingency, bring the matter before appropriate United Nations organs, or adopt various measures of self-help.

HENKIN, *op. cit. supra* note 6, at 19.

law.<sup>50</sup> Federal law now forbids, limits, or regulates dealings in narcotics,<sup>51</sup> fissionable materials,<sup>52</sup> firearms,<sup>53</sup> liquor,<sup>54</sup> inferior or deceptive food products,<sup>55</sup> and a host of other subjects of commerce despite incidental private loss or deprivation of private property, as to which there is no compensation unless the property is found to have been "taken for public use."<sup>56</sup> There is no reason to suppose that these precedents would not also extend to a general and complete disarmament agreement and to implementing legislation that prohibited the development, testing, manufacture, possession, etc., of defined classes of weapons, munitions, and related material, even though such a requirement might result in loss to private persons.

The difficulties presented by the constitutional provisions relating to the militia and to the right to bear arms may be more substantial, however. Under article I, section 10, the states are forbidden to "keep Troops, or Ships of War in time of Peace," without the consent of Congress, but under article I, section 8, Congress is given power:

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . . .

Opinions differ as to the effect of the latter clause.<sup>57</sup> May Congress abolish the militia, or does the Constitution reserve to the states a right to maintain a militia? In the latter event, the Constitution would have to be amended to accommodate a disarmament agreement that sought to limit or to abolish state militia forces or, as is more likely, to require that such forces be counted

50. See *id.* at 39-45, 180-85 nn.47-74.

51. See, *e.g.*, Opium Poppy Control Act of 1942, 56 Stat. 1045, 21 U.S.C. §§ 188-88n (1958), as amended, 21 U.S.C. § 188k (Supp. V, 1964).

52. See, *e.g.*, Atomic Energy Act of 1954, 68 Stat. 919, 42 U.S.C. §§ 2011-296 (1958), as amended, 42 U.S.C. §§ 2021-241 (Supp. V, 1964).

53. See, *e.g.*, Federal Firearms Act, 52 Stat. 1250 (1938), as amended, 15 U.S.C. §§ 901-09 (1958), as amended, 15 U.S.C. §§ 901-02 (Supp. V, 1964).

54. See, *e.g.*, The Federal Alcohol Administration Act of 1935, 49 Stat. 977, as amended, 27 U.S.C. §§ 201-11 (1958).

55. See, *e.g.*, The Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, as amended, 21 U.S.C. §§ 301-92 (1958), as amended, 21 U.S.C. §§ 321-81 (Supp. V, 1964).

56. The fifth amendment provides that private property shall not "be taken for public use, without just compensation."

57. See HENKIN, ARMS CONTROL AND INSPECTION IN AMERICAN LAW 34-39, 177-80 nn.30-46 (1958).

part of, and kept within the permitted strength of internal police forces.<sup>58</sup>

As regards the impact of a disarmament agreement on individuals, however, the second amendment right "to keep and bear Arms" may be of greater significance. The second amendment provides as follows: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

The second amendment has been construed by the Supreme Court, in a case involving federal firearms regulation, as limited to the types of arms that might be required by the state militia.<sup>59</sup> The amendment would therefore give individuals no constitutional right to keep other kinds or quantities of arms, and, if Congress has the power to abolish the state militia, Congress might also be able to abolish even this limited individual right to keep and bear arms. If, however, article I, section 8, is construed to give the states a right to keep a militia, the state might also have the right to decide what arms are necessary for the militia, and what arms might therefore be kept by individuals, despite the delegation to the Congress of power to arm the militia.<sup>60</sup> In these circumstances, the Constitution would have to be amended to preserve to the national government the power to prohibit the states from acquiring types or quantities of arms prohibited by the disarmament agreement.

The problem of state versus federal control over the size and armaments of state militia is important even if militia are to be regarded as permitted under the disarmament agreement. The outline of the United States plan, for example, provides that one objective is to ensure that after disarmament each party retains "only those non-nuclear armaments, forces, facilities and establishments as are agreed to be necessary to maintain internal order

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58. Article 36 of the Soviet Plan provides that after armed forces are abolished, states shall have "strictly limited contingents of police (militia), equipped with light firearms, to maintain internal order . . . ." CURRENT DISARMAMENT PROPOSALS 23. The United States Plan provides that one of its objectives is to ensure that after disarmament, "states would have at their disposal only those non-nuclear armaments, forces, facilities and establishments as are agreed to be necessary to maintain internal order and protect the personal security of citizens." *Id.* at 30.

59. *United States v. Miller*, 307 U.S. 174 (1939), discussed by HENKIN, *op. cit. supra* note 57, at 37-39.

60. If article I, section 8, preserves to the states the right to keep a militia, and therefore results in preserving to individuals a right to bear arms, that latter right would still be controlled by the state by its decision as to what arms are necessary for the militia.



and protect the personal security of citizens."<sup>61</sup> The agreement as to what is to be regarded as necessary for these purposes is to be reached at the international level in negotiations over which the constituent states of the United States ought to have no control.<sup>62</sup>

Apart from the basic questions as to the constitutionality of a disarmament agreement discussed above, additional questions might be presented by particular inspection and verification provisions. These questions may bear heavily on the legal framework within which the obligations of the disarmament agreement are to be enforced against individuals, and as appropriate they are discussed in the sections that follow.

#### B. CONGRESS AS THE SOURCE OF SUBSTANTIVE RULES

The broad outlines of the constitutionality of a general and complete disarmament agreement having been set forth in the preceding section, we may now consider the additional constitutional problems that might be raised by the several alternative means of applying the requirements of the disarmament agreement to individuals subject to United States law.

To begin with the least complicated case, would any substantial constitutional problems be presented if the substantive rules to be applied by the federal government to individual action were to be provided by an Act of Congress? Under such a scheme, the basic disarmament and control obligations would be determined at the international level both in the treaty and in subsequent action to be taken pursuant to the treaty by such inspection and control organizations as might be established.<sup>63</sup> Each party to the treaty would, of course, assume an obligation to carry out these international law obligations within its own territory; but the international authority, or other states parties to the treaty, would have no right to take independent or direct action in the territory of another party except as explicitly provided in that state's national law. Complaints or allegations of noncompliance would have to be dealt with at the international level by such peaceful settlement and enforcement procedures

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61. CURRENT DISARMAMENT PROPOSALS 30.

62. The Soviet Plan would include specific strength figures for the remaining "contingents of police (militia)" for each state. See art. 36, *id.* at 23. The United States Plan would limit strength to what was "agreed to be necessary."

63. See Soviet Plan, arts. 40-42, *id.* at 25-27, and United States Plan, stage I, pt. G, *id.* at 39-43.

as might be accepted in the treaty.<sup>64</sup>

Assuming that the disarmament treaty is within the "treaty power" under the Constitution, and that it does not violate any express constitutional "restraints" or "prohibitions," a pure national enforcement system as described above raises no particular constitutional problems. As has been noted, if the treaty is constitutional, then the Congress has power to enact "necessary and proper" legislation to translate the treaty requirements into domestic law, and this legislative power would apply even in areas in which, in the absence of the treaty, Congress might have had no power to legislate.<sup>65</sup> Thus, although the treaty may not "authorize what the Constitution forbids,"<sup>66</sup> the adoption of the treaty may enlarge the scope of the legislative power of the Congress so as to encompass whatever legislation might be necessary to carry out United States national enforcement obligations under the treaty.

Pure national enforcement is the normal method by which the United States has sought to carry out its international obligations, and it is unexceptionable under the Constitution within the limits on the treaty power that have been described. Is it likely, however, that such a system would be regarded as adequate in the case of a general and complete disarmament agreement? In particular, although it no doubt would be provided in the agreement that the basic framework of national enforcement legislation must be in existence prior to completion of the disarmament process, what guarantee might be sought by the international community that this legislation would be in fact carried out, and that it would not be amended or abolished at some later date?<sup>67</sup> A similar problem is presented by national enforcement of the decisions of the international organization established to administer disarmament. Would it suffice to rely

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64. The United States Plan provides in stage I, part H, for studies of "rules of international conduct related to disarmament" and of measures to make existing peaceful settlement procedures more effective, and to institute new procedures where needed. *Id.* at 43-44. The results of these studies would be acted on in stage II, and states would accept "without reservation" the compulsory jurisdiction of the International Court of Justice to decide "international legal disputes." *Id.* at 50-51.

65. See *Missouri v. Holland*, 252 U.S. 416 (1920); HENKIN, *op. cit. supra* note 57, at 33-34.

66. *Geoffrey v. Riggs*, 133 U.S. 258, 267 (1890); see text accompanying note 32 *supra*.

67. On the power of the Congress to nullify the domestic effect of treaties, see part IV *infra*.

upon national governments to adopt the necessary legislation to carry out in their territories whatever additional rules might be found to be necessary by the international disarmament organization.<sup>68</sup> In addition to these questions relating to the interests of all states in receiving adequate assurance that the agreement was in fact being carried out within each state, some states might wish to provide in the agreement some procedures whereby compliance complaints might be resolved within each state in the first instance, to avoid a situation in which states are forced to rely on the international enforcement procedures in all cases.<sup>69</sup>

Although an assessment of the practical value of the alternative methods of national enforcement is beyond the scope of this report, enough has been said to indicate that states are likely to desire some more active role in supervising or policing the application of the norms of a disarmament agreement to individuals by national action within each state. The following sections deal with the main elements that might be added to a national enforcement scheme, and with the constitutional problems that each might raise.

### C. ACCESS TO UNITED STATES COURTS BY ACT OF CONGRESS

As a first step in introducing an international element into the application of disarmament obligations to individuals in the United States, it might be suggested that under some circumstances international officials, or officials of other governments, should be given access to United States courts to aid in the enforcement of the United States law implementing the disarmament agreement. For example, federal law implementing the disarmament agreement might require some classes of business enterprises to make reports to international inspection officials, or to cooperate with an international inspection by giving the inspectors full and free access to the premises and to the firm's business records.<sup>70</sup> Normally such a requirement would be enforced by injunction or penalty sought by some instrumentality of the federal government. Situations might arise, however, in which the federal official concerned declined to use his statutory power to enforce this rule in a particular case, and it might be considered useful to avoid this potential obstruction by permitting the international official to apply directly to the federal courts for an injunction. A court order issued at the request of the

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68. See part III(F) *infra*.

69. See the discussion in part I *supra*.

70. See the discussion in HENKIN, *op. cit. supra* note 57, at 61-83.

international official might then be enforced by criminal punishment in the normal manner. Would this procedure raise any substantial constitutional problems?

If the inspection, and requests for court orders to enforce the rights of the inspectors, were to be carried out by federal officials, no special constitutional problem would be presented. For the reasons stated earlier, agreements to limit arms are within the treaty power, and control and inspection of the arms industry, or of potentially related activities, would fall within the power of Congress to implement the treaty. Henkin concludes, for example, that:

As far as the Constitution is concerned, the United States could agree and Congress could require, that reports be made and books be kept by those engaged in arms and related industries; that these reports be made available for international inspection at all times; that international inspectors be permitted to come at any time, without warrant, to any industrial establishment within the framework of the arms control regulation scheme, including mines, factories, and depots, to inspect such reports and records, as well as to check operations and inventory. The inspectors might make spot-checks, or inspectors might be stationed permanently in a factory or other installation. Congress could make it a crime punishable in the courts of the United States to falsify records or reports required to be kept or to interfere with inspection. And the inspectors could be authorized to use force to carry out inspection were it resisted.<sup>71</sup>

The above assessment should be the same even if the inspectors were to be empowered to bypass United States officials in carrying out their duties to the extent, at least, of making application to a United States court for orders running to private individuals.<sup>72</sup> As to delegating power to international officials to compel testimony, for example, Henkin writes:

There would seem to be no strong basis for doubt, for example, that international officials may be authorized to require testimony. Since by law or by treaty the testimony of Americans, official or private, can be compelled, in appropriate situations, there would seem no fundamental "due process" objection to requiring that such testimony be given in the presence of international officials or even in their exclusive presence where this would be necessary to implement the effective operation of an arms control treaty. And there would seem to be no objection to allowing the international inspecting body to issue subpoenas enforceable by criminal penalties in United States courts. True, it would be the international inspectors who decided, in the first instance at least, who should be interrogated and on what subjects relevant to the arms control plan; and if a witness refused to answer or answered falsely, he would be subject to contempt proceedings or criminal conviction in

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71. *Id.* at 68.

72. See part III(E) *infra*.

the federal courts. Nevertheless, whatever "delegation" to the international officials this involves would appear to be minor, and does not do violence to accepted principles and standards.<sup>73</sup>

As Henkin has pointed out, United States practice includes several instances in which functions similar to the ones discussed here have been delegated to international officials or to officials of foreign governments.<sup>74</sup> One example is the United States-Canadian International Joint Commission, which is authorized by treaty and by act of Congress to administer oaths and to take evidence in proceedings held in the United States. Where necessary, the commission may also apply to a United States court for orders to compel the attendance of witnesses and the production of evidence. Failure to comply with the court's orders is punishable as contempt of court.<sup>75</sup>

Similar powers have been delegated by act of Congress to any international tribunal or claims commission considering claims in which the United States or its nationals have an interest.<sup>76</sup> The act gives these international bodies power to administer oaths and hear testimony, and to require the attendance of witnesses and the production of evidence without the need to apply for an order of a United States court. Failure to comply with a subpoena issued by such a tribunal is made contempt of the tribunal, punishable in federal courts in the same manner as contempt of court. Nothing new would be added, so far as concerns the Constitution, by giving similar powers to an international inspection organization for the purpose of implementing the disarmament agreement within the United States.<sup>77</sup>

The basic constitutional problems in the area of reporting, interrogation, and inspection of facilities and records appear to be the same whether the inspection tasks are carried out by national or by international officials. In each instance the substantive law governing the obligations of the individual would derive from an act of Congress adopted in implementation of the treaty,

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73. HENKIN, *op. cit. supra* note 57, at 56.

74. *Id.* at 56-58, 190-91 nn.24-28.

75. The United States-Canadian International Joint Commission was established by the Boundary Waters Treaty with Great Britain, Jan. 11, 1909, art. VII, 36 Stat. 2448, T.S. No. 548, as implemented by the Act of March 4, 1911, 36 Stat. 1364, as amended, 22 U.S.C. § 268 (1958).

76. Act of July 3, 1930, § 1, 46 Stat. 1005, as amended, 22 U.S.C. §§ 270-70g (1958).

77. See also part III(E) *infra* on access to United States courts by treaty. In 1945 Congress adopted the International Organizations Immunities Act, 59 Stat. 669, 22 U.S.C. §§ 288-88f (1958), which empowers the President to designate international organizations in which the United States participates

and the statute would therefore be subject to the limitations on federal action contained in the Constitution, but those limits should be the same regardless of whether the individual is directed by a United States court to comply with the lawful request of a national or of an international official. There is no reason to give the individual concerned any greater protection against an international official acting through United States courts under United States law, than would now be given to that same individual against a federal official acting through the same courts under the same law.

The precedents considered up to this point have been concerned with applications for injunctions or for other forms of equitable relief made by an international official to a United States court acting under United States law. Would the constitutional problems be any different if the international official were also given the power to initiate criminal prosecutions under United States law of individuals subject to United States jurisdiction?

If the appropriate international officials are to be given power to issue subpoenas, etc., and to apply for injunctions and enforcement orders in United States courts, there would probably rarely be a need to seek criminal punishment for past acts as well. For

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as being entitled to the privileges, exemptions, and immunities provided in the act. These privileges, etc., include capacity to contract, to acquire and dispose of real and personal property, and to institute legal proceedings. 59 Stat. 669 (1945), 22 U.S.C. § 288a (1958). In *International Refugee Organization v. Republic S.S. Corp.*, 189 F.2d 858, 860 (4th Cir. 1951), Chief Judge Parker held that this provision means "by necessary implication, that Congress has opened the doors of the federal courts to suits by such [designated] international organizations; for the right to institute legal proceedings means the right to go into court, and the federal courts are the only courts whose doors Congress can open." Compare *Testa v. Katt*, 330 U.S. 386 (1947), in which the Supreme Court held that the Rhode Island courts, having adequate and appropriate jurisdiction under established local law, could not refuse to enforce a federal claim on state public policy grounds. See also *Balfour, Guthrie & Co. v. United States*, 90 F. Supp. 831 (N.D. Cal. 1950), in which the district court held that the United Nations had capacity to sue the United States under the Suits in Admiralty Act in cases in which the United States had consented to be sued by other litigants. This result was derived from the designation of the United Nations as an organization entitled to the benefits of the International Organizations Immunities Act by Exec. Order No. 9698, 11 Fed. Reg. 1809 (1946), but the court also commented that the same result would follow directly from the Charter of the United Nations, art. 104, June 26, 1945, 59 Stat. 1053, T.S. No. 993, which provides that the United Nations "shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes."

the reasons stated in part I of this report, however, some states might insist that a capacity to take punitive action of this character be built into the disarmament agreement, and it is therefore useful to ask whether under the Constitution the power to prosecute might be delegated to international officials.<sup>78</sup>

United States practice has been to give the Attorney General exclusive control over the initiation of criminal proceedings in United States courts for violations of United States law.<sup>79</sup> As unbroken as this practice may have been, however, it is submitted that it need not be viewed as constitutionally required.

Almost certainly the delegation to international officials of power to prosecute would substantially alter the realities of political power in federal criminal prosecutions in cases that arouse great public interest. If power to prosecute is delegated to international officials, public opinion either for or against prosecution in particular circumstances would have to be directed both towards federal officials, as it is today, and towards international officials, and this fact would certainly tend to dilute the impact of public opinion at least where the object sought was to prevent prosecution. It is not considered, however, that the accused would have any constitutional right to protect whatever political power he might have had to prevent prosecution through mobilization of public opinion.<sup>80</sup>

The constitutional rights of the accused would be the same whether the prosecution was initiated by a national or by an international official. Our assumption is that the trial would be in a United States court under United States law and therefore subject to the limits and guarantees of the United States Constitution, even if the prosecutor were an international official. The constitutional defects seen by some writers as to the establishment of international courts for the trial of offenses committed within the jurisdiction of the United States, or as to the delegation of legislative power to an international organization,<sup>81</sup> are

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78. See also part II *supra*, on the reality of individual responsibility.

79. See HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1137-38 (1953), where it is noted that "Congress has thus far maintained unimpaired the Attorney General's control of the initiation of criminal proceedings."

80. For a discussion of the prosecuting attorney's discretion not to prosecute, see HART & SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1078-91 (Tentative ed. 1958); Schwartz, *Federal Criminal Jurisdiction and Prosecutor's Discretion*, 13 *LAW & CONTEMP. PROB.* 64 (1948).

81. See, e.g., HENKIN, *op. cit. supra* note 57, at 122-52; Nathanson, *supra* note 48, at 369-78.

not presented if the international element is limited to prosecution by the international official. The accused would, therefore, have as full a measure of constitutional protection as he would have had were the prosecutor to have been a United States official. The constitutional problems presented by the delegation to international officials of power to prosecute should therefore be no more substantial than those presented by the delegation to international officials of power to subpoena witnesses and evidence, to take testimony, and to apply for injunctions and for court orders to punish for contempt or for failure to comply with a court order.<sup>82</sup>

The power to apply for injunctions, or to initiate criminal prosecutions, and the other powers that might be delegated to international officials as part of a national enforcement scheme in the United States, would, it is assumed, rest on United States statutes enacted in fulfillment of the obligations of the disarmament agreement. Being founded on an act of Congress, each instance of delegation of powers to international officials presents the question of the extent to which it might remain within the power of the Congress to take away by statute that which it has given by statute, thereby placing the United States in breach of the disarmament agreement. This question is discussed in a separate section below.<sup>83</sup>

#### D. THE TREATY AS THE SOURCE OF SUBSTANTIVE RULES

In the preceding sections it was assumed that the substantive rules to be applied to individual action in the national enforcement scheme would be fashioned by national legislatures in fulfillment of the obligation assumed by each party to the agreement to ensure the implementation of the agreement within their territories. It might be desirable, however, to provide that at least as regards some particular rules contained in the agreement, the rules would apply directly to the acts of individuals and of organizations within each state without their prior adoption by the national legislature. It might also be desirable to give the international disarmament organization some authority to adopt additional particular rules which would also apply directly to individual action within each state without explicit adoption by the national legislature. Would such a procedure be consistent with the United States Constitution?

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82. See the passage from Henkin quoted in text accompanying note 73 *supra*.

83. See part IV *infra*.



The assumption here is that the enforcement of the substantive rules prohibiting or requiring certain conduct on the part of individuals subject to the jurisdiction of the states parties to the agreement would be carried out within the national framework, but that some of the substantive law applied would be international in origin. For example, the treaty might provide that no individual or organization within a state may possess certain specified weapons or related materials. The treaty might also provide that the prohibition shall be directly applicable within each state without further action by the government of that state, and that officials of the international disarmament organization shall act to enforce the prohibition through civil and criminal proceedings brought in the national courts of each state party to the agreement.<sup>84</sup> Would action by Congress be necessary to carry out such a procedure under the Constitution, and what would be the result if Congress failed to pass the appropriate legislation, or withdrew its consent at a later date? In addition, would it be possible under the Constitution to provide in the treaty that an international disarmament organization might expand or interpret the rules set forth in the treaty, and that the new rules made or developed by the international organization shall also be directly applicable to individual action within the United States?

The extent to which it may be necessary to obtain the concurrence of the Congress to apply internationally developed rules to individual action within the United States is considered in this section. The further problem of the effect of a later modification or withdrawal of congressional concurrence is considered in part IV below.

### 1. *Rules Contained in the Treaty*

It would be no novelty under United States law to conclude a treaty that contained substantive rules intended to apply directly to individuals within the United States without having first been adopted or enacted by the Congress. Contrary to the practice of many states, in the United States a treaty may be "self-executing" in the sense that, if intended to do so, rules contained in the treaty may take effect as internal law enforceable in United States courts without implementation by act of Congress.

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84. Compare the Clark and Sohn proposals, providing for enforcement by trial in United Nations regional courts. Arts. 63-66, CURRENT DISARMAMENT PROPOSALS 126-30; see note 3 *supra*.

The Supreme Court has said that although treaties are primarily compacts between nations depending for their enforcement on political acts and intentions of the contracting governments, treaties may also contain provisions that confer rights "which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country."<sup>85</sup> In the United States this result derives from the provision of article VI of the Constitution that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ." The Supreme Court has read the quoted portion of article VI to mean that 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."<sup>86</sup> When rights contained in treaty provisions "are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision . . . as it would to a statute."<sup>87</sup> Treaty provisions having this character are termed "self-executing."

The test in deciding whether a treaty provision is self-executing or not is one of construction of the treaty based on the intent of the parties.<sup>88</sup> The question is, did the states party to the treaty intend that the provisions of the treaty, or the particular provision in question, shall have immediate effect on private relationships coming within the scope of the treaty, or only that each state shall enact such legislation as may be necessary to give effect to the treaty norms within its boundaries? In a case presenting the question of whether a particular treaty provision applied directly to private rights even though not implemented by an act of Congress, Chief Justice Marshall of the Supreme Court phrased the test as follows:

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85. *Head Money Cases*, 112 U.S. 580, 598 (1884) (Miller, J. writing for a unanimous Court).

86. *Id.* at 598-99.

87. *Id.* at 599.

88. The RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES § 157, at 569 (Proposed Official Draft, 1962), provides as follows: "Whether an international agreement of the United States is or is not self-executing is finally determined as a matter of interpretation by courts in the United States if the issue arises in litigation." The rule is based on the Supreme Court's holdings in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), and *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833), in which the same treaty was at first held not self-executing based on the English text which read that the land grants in question "shall be ratified and confirmed" but was later held to be self-executing when the Court was informed that the equally authentic Spanish text read "shall remain ratified and recognized." See Henry, *When Is a Treaty Self-Executing*, 27 MICH. L. REV. 776 (1929).

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 into execution by the sovereign power of the respective parties to the instrument.

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.<sup>89</sup>

So phrased, the self-executing character of treaty provisions would appear to be limited only by the intent of the makers of the treaty. Exceptions are usually asserted to exist, however. It is said that a treaty cannot be self-executing to the extent that its terms would require the Government to take some action that under the Constitution can be taken only by the Congress.<sup>90</sup> The basis for such an exception is the theory that the Constitution reserves certain powers exclusively to the Congress as a whole, and that, therefore, it would be unconstitutional to accomplish domestic results in these areas through use of the treaty power which involves obtaining the consent of only one branch of the Congress.

The only firm example of this asserted exception to the self-executing treaty doctrine is that treaty provisions calling for the payment of public money may be carried out only pursuant to legislation adopted by the Congress. Article I, section 9, of the Constitution provides in part that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ." Only Congress is given the power to "pay the Debts . . . of the United States. . ."<sup>91</sup> In an early federal case involving the proceeds from the sale of public lands, the Court held that:

A treaty under the federal constitution is declared to be the supreme law of the land. This, unquestionably, applies to all treaties, where the treaty-making power, without the aid of congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of congress is necessary to give it

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89. *Foster v. Neilson*, *supra* note 88, at 314.

90. See *e.g.*, RESTATEMENT, *op. cit. supra* note 88, § 144(3), at 515. *Id.* comment f, at 519, states that a treaty is not self-executing "if it deals with a subject matter that by the Constitution is reserved *exclusively* to Congress." (Emphasis in original.)

91. U. S. CONST. art. I, § 8.

effect. Until this power is exercised as where the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of the constitution, as money cannot be appropriated by the treaty-making power. This results from the limitations of our government. The action of no department of the government, can be regarded as a law, until it shall have all the sanctions required by the constitution to make it such. . . . It cannot bind or control the legislative action in this respect, and every foreign government may be presumed to know, that so far as the treaty stipulates to pay money, the legislative sanction is required. Without a law the president is not authorized to sell the public lands, so that this treaty, though so far as the Indians were concerned, was the supreme law of the land, yet, as regards the right to the proceeds of the above tract, an act of congress is required.<sup>92</sup>

A similar result might be reached as to other types of treaty provisions that were thought to call for action by the Government that under the Constitution can only be taken by the Congress. For example, a second type of treaty provision that might be an exception to the self-executing treaty doctrine is a treaty provision that would require a change in the revenue laws for implementation. Article I, section 7, of the Constitution provides in part that "All Bills for raising Revenue shall originate in the House of Representatives. . . ." In the view of one commentator,<sup>93</sup> this clause means that legislation by Congress would be necessary to give effect to a treaty provision providing for changes in existing revenue laws since to hold otherwise would be to deprive the House of Representatives of the role given to it by the Constitution in the enacting of revenue laws. The House insists on this interpretation. In 1880, for example, the House of Representatives adopted a resolution in which it declared that the conclusion by the Executive of commercial treaties purporting to establish rates of duty on foreign imports without an act of Congress would, "in view of the provision of section 7 of Article I of the Constitution of the United States, be an infraction of the Constitution and an invasion of one of the highest prerogatives of the House of Representatives."<sup>94</sup> No doubt because of the existence of the special responsibilities of the House under article I, section 7, the practice of the Executive has been to seek an act of Congress to implement treaties calling for changes in the

92. *Turner v. American Baptist Missionary Union*, 24 Fed. Cas. 344, 345-46 (No. 14251) (C.C.D. Mich. 1852).

93. Anderson, *The Extent and Limitations of the Treaty-Making Power Under the Constitution*, 1 (pt. 2) AM. J. INT'L L. 636, 648-53 (1907).

94. H. Res. of Jan. 26, 1880, 46th Cong., 2d Sess., 10 CONG. REC. 532, quoted from CRANDALL, *TREATIES: THEIR MAKING AND ENFORCEMENT* 196 (2d ed. 1916).

revenue laws. The theoretical question of the possible self-executing character of such provisions has, therefore, not been decided.<sup>95</sup> A leading work on the United States law of treaties concludes:

It appears that whatever may be the ipso facto effect of treaty stipulations, entered into on the authority of the President and Senate, on prior inconsistent revenue laws, not only has the House uniformly insisted upon, but the Senate has acquiesced in, legislation by Congress to give effect to such stipulations . . .<sup>96</sup>

A distinction is drawn, however, between treaties that require a "change" in the revenue laws, such as a treaty fixing tariff rates or providing for a reduction in tariff rates for particular classes of goods, and treaties that provide for unconditional most-favored-nation treatment. United States practice has been to give effect to most-favored-nation clauses without seeking supplementary legislation on the theory that such clauses do not "change" the revenue laws by fixing rates of import duties or by limiting the rate that may be established by the Congress, but only extend to the parties to the treaty the most favorable rate fixed for any class of goods imported from any country.<sup>97</sup> Since most-favored-nation clauses are intended to prevent discrimination in rates of import duties and therefore are intended to take future changes into account, they must be self-executing as their purpose would be defeated if they could not operate without supplementary legislation.<sup>98</sup> For this reason the courts have held that unconditional most-favored-nation clauses are intended to be, and are, self-executing, even where the result is to avoid a tariff act provision that conditions the lowest rate on reciprocity from the exporting country.<sup>99</sup> In other words, an unconditional most-favored-nation clause will give the contracting state the benefit of the lowest rate fixed by the Congress even if the tariff act provides that the lowest rate shall be available only where that

95. See the discussion in CRANDALL, *op. cit. supra* note 94, at 183-99.

96. *Id.* at 195.

97. See the opinion expressed by the Solicitor for the Department of State in 1928 that "Most favored nation clauses . . . do not fix or limit the rates of duty which Congress may impose . . ." and therefore do not "in terms operate to increase, reduce or fix rates of duty," and can be implemented without legislation. Quoted from 5 HACKWORTH, INTERNATIONAL LAW 180 (1943).

98. The RESTATEMENT, *op. cit. supra* note 88, § 158, at 572, provides that most-favored-nation clauses are interpreted as self-executing unless the agreement specifically indicates otherwise. This rule is based on the need for automatic application of tariff reductions. See *id.* at 573-74.

99. See *John T. Bill Co. v. United States*, 27 C.C.P.A. (Customs) 26, 104 F.2d 67 (1939).

rate does not exceed the rate charged by the exporting country on American imports in the same class. Giving self-executing effect to a most-favored-nation clause under these circumstances would appear to change the revenue laws, since it provides an exception to a rate fixed by the Congress, but this constitutional argument apparently has not been pressed upon the courts.<sup>100</sup>

Each of the two possible exceptions to the self-executing treaty doctrine discussed above, namely treaty provisions that require either the payment of money from the United States Treasury or a change in the revenue laws, is based on a specific provision of the Constitution that would appear to be bypassed if a treaty provision in these areas were to be regarded as self-executing. For that reason there is substance to the view that in these areas a treaty provision cannot be self-executing even though the Constitution states with generality that all treaties made under the authority of the United States shall be the "supreme Law of the Land." There may also be other areas in which it might be argued that the exclusive delegation to the Congress of some particular power precludes the conclusion of a self-executing treaty.<sup>101</sup> These areas, including the two that have already been mentioned, will no doubt be of some importance in the entire context of a disarmament agreement, but they do not appear to be of great importance for present purposes. For example, while it will no doubt be necessary to provide a stable source of funds to finance an international disarmament organization, and to do so it may be necessary to provide some form of automatic payment out of national treasuries or through the national revenue collections,<sup>102</sup> these points are not directly related to the concept of enforcing individual responsibility for acts or omissions contrary to norms established by the disarmament agreement.

Whatever the precise limits of the "exclusive delegation" exception to the self-executing treaty doctrine, it seems clear that the exception does not apply to the usual case of delegation to the Congress of power to act in specified areas. The Congress acts only on the basis of delegated powers, including the power

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100. See Catudal, *The Most-Favored-Nation Clause and the Courts*, 35 AM. J. INT'L L. 41, 53-54 (1941). The court in the *Bill Co.* case, *supra* note 99, held that the clause in question was self-executing, but did not mention the constitutional question, and that question was not raised by the parties.

101. One example is the acquisition of territory. See CRANDALL, *op. cit. supra* note 94, at 200-29.

102. See, *e.g.*, the Clark and Sohn proposed "Revenue System" for the World Disarmament and World Development Organization, arts. 82-89, CURRENT DISARMAMENT PROPOSALS 157-61.

to "make all Laws which shall be necessary and proper" to carry out all powers vested by the Constitution in the Government of the United States.<sup>103</sup> If treaties, which are declared by article VI to be the "supreme Law of the Land," were to be self-executing only in areas outside of the specific powers delegated to the Congress, little scope would be left in which treaties would in fact be the "supreme Law of the Land."<sup>104</sup> Indeed, such a broad rule would require considerable change in existing practice, some of which has been sanctioned by the courts.<sup>105</sup> To take one example, article I, section 8, of the Constitution gives the Congress power to "regulate Commerce with foreign Nations," but, as has been noted, certain types of provisions in commercial treaties have been held to be self-executing, and the usual practice is to consider many other types of commercial treaty provisions to be self-executing.<sup>106</sup> Mere delegation of power to act does not mean exclusive delegation in the sense of excluding lawmaking by treaty.

The exceptions noted deal with areas in which the language of the Constitution leads to the result that only Congress shall take certain action: "All Bills for raising Revenue shall originate in the House,"<sup>107</sup> and "No Money shall be drawn from the Treasury," except by appropriation by Congress.<sup>108</sup> It is sometimes asserted that other particular powers are also exclusive in this sense, however.<sup>109</sup> For example, Chief Justice Fuller expressed the view in a 1901 case concerning the collection of import duties on goods brought into the United States from Puerto Rico, that "it certainly cannot be admitted that the power of Congress to lay and collect taxes and duties can be curtailed by an arrangement made with a foreign nation by the President and two thirds of a quorum of the Senate."<sup>110</sup> The

103. U.S. CONST. art. I, § 8.

104. Under article VI, a treaty supersedes a prior act of Congress and all inconsistent state law, whether enacted before or after the treaty. See 2 SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 124-25 (1963); part IV *infra*.

105. In *Cook v. United States (The Mazel Tov)*, 288 U.S. 102 (1933), for example, the Supreme Court held that a treaty with Great Britain had superseded a prior inconsistent act of Congress relating to the power of the Coast Guard to board, search, and seize vessels beyond the territorial waters of the United States. See also part III(D) 2 *infra*.

106. See RESTATEMENT, *op. cit. supra* note 88, § 144, comment f, at 519-20.

107. U.S. CONST. art. I, § 7 (Emphasis added.)

108. U.S. CONST. art. I, § 9 (Emphasis added.)

109. See, e.g., CRANDALL, *op. cit. supra* note 94, at 119-20.

110. *Downes v. Bidwell*, 182 U.S. 244, 370 (dissenting opinion).

Chief Justice may have meant to "imply" that no treaty could alter arrangements established by the Congress under its article I, section 8, power to "lay and collect Taxes, Duties, Imposts and Excises," but he gave no reasoning that would conform this result to the supremacy clause provisions of article VI.<sup>111</sup>

It has also been suggested without specific constitutional foundation that treaties cannot be self-executing to the extent of creating criminal law without an act of Congress.<sup>112</sup> In a case arising under the 1924 liquor treaty with Great Britain,<sup>113</sup> a United States district court held that the seizure provisions of the liquor treaty were not self-executing and went on to say:

Now the grant by one sovereign to another of the right to seize its nationals upon the high seas without process and by force majeure for crimes committed by those nationals against the offended sovereign, by no means declares that those acts when committed on the high seas constitute such crimes. If, before this treaty was contracted, the unloading of merchandise by a ship of British registry at a point more than four leagues removed from the coast of the United States did not constitute a crime against the United States (and there appears to be no contention that it did), then the treaty could not and did not make it a crime.

. . . As a treaty, there was no need of congressional legislation to make it effective, and in this sense all treaties are self-executing. But if it was the intent of the government to make it a crime for a ship of British registry to unlade liquor within a sea zone on our coast, traversible in one hour, then that intent was not effectuated by the mere execution of the treaty. It is not the function of treaties to enact the fiscal or criminal law of a nation. For this purpose no treaty is self-executing. Congress may be under a duty to enact that which has been agreed upon by treaty, but duty and its performance are two separate and distinct things. Nor is there any doubt that the treaty making power has its limitations. What these are has never been defined, perhaps never need be defined. Certain it is that no part of the criminal law of this country has ever been enacted by treaty.<sup>114</sup>

In arriving at the above quoted conclusion, the district court cited no precedent or provision of the Constitution. The court

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111. Chief Justice Fuller cited only 2 TUCKER, *THE CONSTITUTION* §§ 354-56 (1899).

112. See WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 356 (1922).

113. The Liquor Treaty With Great Britain, Jan. 23, 1924, art. II, 43 Stat. 1761, T.S. No. 685, provided that Great Britain would not object to the boarding of private British-flag vessels within one-hour's sailing distance of the United States coast for the purpose of determining whether liquor on board was intended to be imported illegally into the United States. See Dickinson, *Are the Liquor Treaties Self-Executing?*, 20 AM. J. INT'L L. 444 (1926).

114. *The Over the Top*, 5 F.2d 838, 844-45 (D. Conn. 1925).



also failed to consider that the question presented was not whether the liquor treaty purported to make acts defined in the treaty punishable as crimes in United States courts, and for that reason conflicted with the Constitution, but whether the effect of the treaty was to extend United States territorial waters from three marine miles to one-hour's travel so as to bring acts committed within the new limit also within the existing framework of crimes defined and punished by act of Congress. Viewed in the latter terms, the question of constitutional limits on self-execution of the liquor treaty provisions becomes one of extending United States jurisdiction, and therefore of extending the substantive framework of United States criminal law, to additional geographic areas, rather than of creating new criminal law by treaty. The Supreme Court later read the liquor treaty as self-executing to the extent of modifying the existing statutory provisions as to the area within which ships and individuals could be seized for violation of the existing liquor laws, but in so holding, the Court apparently did not consider that the treaty had changed the area within which the existing criminal law of the United States might be applied to define the substantive offense for which the individuals so seized might be prosecuted.<sup>115</sup>

At least one Supreme Court case holds that the area within which substantive criminal law enacted by Congress applies may be defined by treaty, however.<sup>116</sup> An Indian treaty concluded in 1863 ceded land to the United States, but sought to preserve the character of the ceded land as "Indian country" for purposes of prohibiting and punishing the sale of alcoholic beverages under existing federal law. The clause in question, article 7 of the treaty, read as follows:

The laws of the United States now in force, or that may hereafter be enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect throughout the country hereby ceded, until otherwise directed by Congress or the President of the United States.<sup>117</sup>

The Court held that Congress, under its article I, section 8, power to "regulate Commerce . . . with the Indian Tribes" would

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115. See *Cook v. United States*, 288 U.S. 102 (1933); *Ford v. United States*, 273 U.S. 593 (1927); Nathanson, *The Constitution and World Government*, 57 *Nw. U.L. Rev.* 355, 362-64 n.16 (1962).

116. *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876).

117. *Id.* at 191, quoting from Treaty With the Red Lake and Pembina Bands of Chippewa Indians, Oct. 2, 1863, art. VII, 13 Stat. 667.

have had power to prohibit the sale of liquor not only in existing Indian country, but also in areas that have ceased to be Indian country because of cession to the United States. Turning to the question of achieving the same result by treaty rather than by act of Congress, the Court concluded:

It is true, Congress has not done this: but the Constitution declares a treaty to be the supreme law of the land; and Chief Justice Marshall, in *Foster and Elam v. Neilson*, 2 Pet. 314, has said, "That a treaty is 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." No legislation is required to put the seventh article in force; and it must become a rule of action, if the contracting parties had power to incorporate it in the treaty of 1863. About this there would seem to be no doubt.<sup>118</sup>

The effect of the treaty provision was to redefine the term "Indian country" as used in existing federal statutes so as to retain the benefits of these statutes in the areas ceded by the Indians to the United States. The result, therefore, was to continue the existing federal criminal law in the territory, rather than to extend that law to additional areas or to create new crimes by treaty. One commentator has concluded that:

. . . the effect of the treaty provision was not actually to create a new crime, but rather to prevent the treaty itself from operating so as to remove the territory from the application of existing criminal law. Regarded in this light the decision seems to be a long way from holding that the United States, acting through treaty alone, may create new criminal law applicable within the territorial jurisdiction of the United States.<sup>119</sup>

In no case is it clear that the United States has sought to make domestic criminal law by self-executing treaty,<sup>120</sup> except to the extent that an analogous result may have been achieved by the

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118. 93 U.S. at 196.

119. Nathanson, *supra* note 115, at 363 n.16.

120. The following two holdings do not entirely accord with this view however:

In *Ex parte Toscano*, 208 Fed. 938 (S.D. Cal. 1913), the court held that the provision of the Hague Convention on Neutrality in Land Warfare, Oct. 18, 1907, art. 11, 36 Stat. 2324, T.S. No. 540, that neutral powers shall intern troops belonging to belligerent armies if such troops cross into neutral territory, was self-executing, and gave the President power to detain troops involved in a civil war in Mexico that had crossed over into the United States. See McClure, *WORLD LEGAL ORDER* 109-11 (1960), for a discussion of this case.

In *United States v. Kearny*, 2 Extraterr. Cas. 665 (1923), the defendant was charged with traffic in arms and munitions in violation of treaties with China, and tried for these treaty crimes in an extraterritorial court. The court upheld

liquor treaties and by the Indian treaty discussed above. The fact that there has been no practice in this area does not demonstrate that the treaty power may not be used to create criminal law, however, and, as has been noted, no specific constitutional provision settles the point.<sup>121</sup>

The discussion thus far has centered on the extent to which treaty provisions may be considered as self-executing under United States law. Although the precedents are few, and no bright line emerges to define the area in which action by Congress is necessary to implement treaty provisions to translate them into internal law of the United States, two tentative conclusions may be stated: First, the appropriations and revenue laws precedents indicate that some constitutional provisions give exclusive powers to the Congress as a whole that may not be bypassed by the treaty device. Second, in the generality of cases in which some legislative power has been delegated to the Congress, that fact standing alone is not enough to withdraw these subjects from the area in which self-executing treaty provisions may make domestic law. These two conclusions may lead to the result that the supremacy clause (article VI) means that treaty provisions may be self-executing unless some specific constitutional provision makes clear that the action sought may be taken only by the Congress as a whole, and therefore may not be taken by the President and the Senate acting through the treaty power.<sup>122</sup>

If, as suggested, the proper approach would be to permit self-executing treaty provisions so long as no specific constitutional clause stands in the way, most of the norms to be applied to individual action by a disarmament treaty might become part of domestic law as self-executing treaty provisions. The treaty

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the prosecution on the following grounds:

It is claimed that these treaty provisions are not self-executing; but we are unable to see why not. They prohibit contraband trade in China on the part of American citizens, define its scope and impose penalties for carrying it on. These provisions appear to us practically equivalent to the ordinary penal statute and we see no reason why they could not be enforced by an ordinary criminal prosecution. True, the penalties are somewhat unusual—leaving the offender “to be dealt with by the Chinese government” and, later, confiscation—but this Court is given discretion to impose additional ones.

*Id.* at 669. (Footnote omitted.)

Neither of these cases involved the creation of criminal law by treaty applicable within the United States to United States citizens, however.

121. See text accompanying note 112 *supra*.

122. Compare note 90 *supra*.

might, for example, supersede federal statutes regulating manufacture, transport, possession, and use of weapons, fissionable material, and related items. It might also place a duty on individuals to cooperate with international inspectors within the boundaries mentioned above<sup>123</sup> in such matters as making reports on manufacturing activities, etc., and permitting inspection. Each of these areas would be within the legislative power of Congress, but no specific constitutional provision appears to withdraw these areas from lawmaking by self-executing treaty.

The available precedents would uphold the making of substantive rules applicable to individual action by self-executing treaty provision, but it is not entirely clear that these precedents would also extend to implementing or enforcement measures made domestic law by self-executing treaty. As noted above, the theory discernible in the precedents should permit self-execution of enforcement measures as well as of substantive rules, but other particular problems have been thought to exist in the enforcement area along two lines that are discussed in separate sections below: the necessity for a statute as the basis for a criminal prosecution; and access to United States courts by treaty.

## 2. *The Necessity for a Statute as the Basis for a Criminal Prosecution*

As has already been mentioned, some authorities have expressed the view that domestic criminal law may not be created by self-executing treaty.<sup>124</sup> No constitutional provision explicitly dictates this result, however, and, due to the fact that no clear cases exist in which it has been sought to use the treaty power to create criminal law applicable directly within the United States, no clear precedents exist.

Three distinct lines of reasoning might be used to lead to the result that criminal law may not be created by self-executing treaty: First, that the making of domestic criminal law is not within the treaty power since that power is limited to matters of "international concern"; second, that there is some constitutional barrier to applying the self-executing treaty doctrine in the area of substantive criminal law established by treaty; and, third, a variant of the second argument, that by the process of interpretation and settled practice, it has become established

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123. See the discussion in part III(A) *supra*.

124. See text accompanying note 114 *supra*; WRIGHT, *op. cit. supra* note 112. Compare Dickinson, *supra* note 113, at 449-50.

that all federal criminal law in the United States must be founded on some statute, and that neither treaty crimes nor common law crimes may be punished in the United States unless incorporated in an act of Congress.

The first argument, relating to the subject matter that legitimately falls within the scope of the treaty power, has been answered above.<sup>125</sup>

The second argument, relating to the application of the self-executing treaty doctrine to criminal provisions, ought to depend upon whether some exclusive power has been delegated to the Congress under the Constitution to define and punish crimes against the United States.<sup>126</sup> No explicit constitutional provision gives Congress exclusive power over the definition and punishment of crimes, however. In fact, with some exceptions<sup>127</sup> the general power of Congress to define and punish crimes against the United States derives from the general delegation of power to the Congress to "make all Laws which shall be necessary and proper" for carrying out the powers delegated to the Congress and all the powers of the United States.<sup>128</sup>

In the particular area at issue, crimes arising under a treaty, the Constitution provides that the Congress shall have power: "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations . . ." <sup>129</sup> The explicit delegation to the Congress of power to define and punish "Offenses against the Law of Nations" certainly includes the areas under discussion here,<sup>130</sup> but equally as certainly the particular delegation in this instance is no more "exclusive" than it is in the normal case in which a particular legislative power is delegated to the Congress. Domestic law in these areas is usually supplied by act of Congress, but, if the supremacy clause of article VI is to have any meaning in the federal sphere, that clause must mean that domestic law for these areas may also be created through use of the treaty power.

As to the third argument, namely that despite the lack of clarity on the point in the Constitution it has become clear through practice that criminal law may be made only by statute,

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125. See part III(A) *supra*.

126. See part III(B) *supra*.

127. Particular power to punish crimes is given to the Congress in article I, § 8, as regards "counterfeiting the Securities and current Coin of the United States," and in article III, § 3, as regards treason.

128. U.S. CONST. art. I, § 8.

129. *Ibid.*

130. See part I *supra*.

the crux of the argument is that years of failure to do otherwise have established this rule as a binding gloss upon the Constitution.

It may be admitted that the precedents already discussed, namely those relating to the liquor treaties and to the definition of "Indian country,"<sup>131</sup> are distinguishable on their facts from a true assertion of power to create criminal law by self-executing treaty. The conclusion sought to be drawn<sup>132</sup> in these circumstances need not be accepted, however; the absence of practice does not demonstrate the absence of power. The Constitution as a whole, and the treaty power in particular, were intended to serve the changing needs of the nation over the centuries, and this end would be defeated if the mere failure to exercise constitutional powers to their fullest resulted in their loss on the theory that "practice" had become "settled."

Early practice discloses several instances in which individuals were prosecuted for crimes not founded on an act of Congress, but the net result of this early practice is far from clear. The earliest cases arose out of the Washington government's concern to remain neutral in the 1793 hostilities between Great Britain and France.<sup>133</sup> Washington's Neutrality Proclamation of April 22, 1793,<sup>134</sup> was followed by efforts to prosecute individuals for acts in violation of the neutrality policy, construed to be acts in violation of the law of nations and of the treaties and laws of the United States. No federal criminal statutes existed punishing acts in violation of neutrality, hence the prosecutions presented the following questions: "Could a person who violated the law of nations or the provisions of a treaty be punishable criminally in the Federal Courts? Did the common law afford a basis for a criminal indictment in these Courts?"<sup>135</sup> These questions were answered affirmatively in charges to juries that the law of nations requires that a citizen of the United States is "bound to keep the peace in regard to all nations with whom we are at peace";<sup>136</sup> that:

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131. See part III(D) 1 *supra*.

132. Nathanson, *supra* note 115, at 363-65, states that "any attempt to establish domestic criminal law by treaty at this late date carries the heavy burden of upsetting a practical construction of government gradually developed as a viable compromise between possible extremes."

133. See 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 105-23 (1922).

134. See *id.* at 105.

135. *Id.* at 112.

136. Judge Wilson's charge to the jury, as quoted in 1 WARREN, *op. cit. supra* note 133, at 114.

The peace, prosperity, and reputation of the United States, will always greatly depend on their fidelity to their [treaty] engagements; and every virtuous citizen (for every citizen is a party to them) will concur in observing and executing them with honor and good faith . . . ;<sup>137</sup>

and that:

a citizen, who in our state of neutrality, and without the authority of the nation, takes an hostile part with either of the belligerent powers, violates thereby his duty and the laws of his country. . . .<sup>138</sup>

The prosecutions failed, however, as the juries were unwilling to convict defendants who had violated neutrality principles for the purpose of aiding France against Great Britain, and the question of the constitutionality of prosecutions for international law crimes or for treaty crimes did not reach the appellate courts.

The early neutrality prosecutions demonstrate that the Washington government, and some judges, including Mr. Chief Justice Jay and several justices of the Supreme Court,<sup>139</sup> considered that acts may be made criminal by treaties or by the law of nations and punished in the federal courts even though Congress had not by statute made the acts crimes against the United States. At least one state court case,<sup>140</sup> arising prior to the adoption of the Constitution, resulted in the conviction of an individual for an act considered criminal under international law even though no statute had made the act a crime. In that case, the defendant was charged with assault upon an ambassador "in violation of the laws of nations, against the peace and dignity of the United States and of the commonwealth of Pennsylvania." The Court considered that the case "must be determined on the principles of the law of nations, which form a part of the municipal laws of Pennsylvania; and if the offenses charged in the indictment have been committed, there can be no doubt that those laws have been violated."<sup>141</sup>

There was little or no opportunity for a similar practice to develop in other areas of importance at the time, however, be-

137. Chief Justice Jay's charge to a grand jury, as quoted in WHARTON, *STATE TRIALS OF THE UNITED STATES* 52-59 (1849).

138. Judge Wilson's charge to a grand jury, as quoted in WHARTON, *op. cit. supra* note 137, at 60-65.

139. See 1 WARREN, *op. cit. supra* note 133, at 433, noting that in the early years of the Court, Chief Justices Jay and Ellsworth, and Judges Cushing, Iredell, Wilson, Paterson, and Washington had each expressed the view that "United States Courts had jurisdiction to try persons indicted for offenses, criminal at common law but not made criminal by any specific Federal statute."

140. *Republica v. Longchamps*, 1 U.S. (1 Dall.) 111 (Penn. Sup. Ct. 1784).

141. *Id.* at 113.

cause Congress began to adopt criminal statutes punishing acts that might have been regarded as in violation of international law, and prosecutions were founded on the new acts of Congress, rather than on international law.

One example is piracy. Piracy was made a crime against the United States by an act of Congress adopted in 1790, which prescribed the death penalty for persons convicted of "any piracy or robbery . . . upon the high sea . . ." The act defined "piracy" in part as any "murder or robbery" committed on the high seas by any person, or as a crime committed by "any captain or mariner of any ship . . . [who] shall piratically and feloniously run away with such ship . . . or any goods or merchandise to the value of fifty dollars . . ."<sup>142</sup>

The current statutory crime of piracy invokes the "law of nations" for its definition. The statute provides as follows: "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life."<sup>143</sup> The earliest version of the present piracy statute was attacked as being unconstitutionally vague in its definition of the crime, but the Supreme Court held in 1820 that the law of nations defined piracy with reasonable certainty.<sup>144</sup> Mr. Justice Story, writing for the Court, said:

What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law. There is scarcely a writer on the law of nations, who does not allude to piracy, as a crime of a settled and determinate nature; and whatever may be the diversity of definitions, in other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy.<sup>145</sup>

The statutory punishment of piracy therefore left the prosecutions for violation of the neutrality policies as the only instances in which a pressing need for government control over individual action led to prosecution for international law crimes or for treaty crimes. The failure of the Government to prosecute on these theories in other areas therefore ought not to be construed as having been based on an understanding that there may be no federal criminal prosecution for acts not made criminal by a statute of the United States.

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142. Act of April 30, 1790, ch. IX, §§ 8-9, 1 Stat. 113.

143. 18 U.S.C. § 1651 (1958).

144. *United States v. Smith*, 18 U.S. (5 Wheat.) 153.

145. *Id.* at 160-61.



An analogous question was raised by the early practice of the federal courts of entertaining indictments founded on the common law, a practice that aroused a good deal of popular opposition.<sup>146</sup> In 1806, a series of criminal indictments under the common law were found against Federalist spokesmen for libelous attacks on President Jefferson and on the Congress. Jefferson ordered the indictments dismissed, but one case<sup>147</sup> based on such an indictment was argued in the lower courts and reached the Supreme Court in 1812, presenting the question of whether the federal courts had jurisdiction to hear prosecutions based on common law crimes. The Attorney General declined to argue the case due to the view then taken by the Government, and no counsel appeared for the defendants. In writing for the Court, Mr. Justice Johnson stated:

Although this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted; and the general acquiescence of legal men shews the prevalence of opinion in favor of the negative of the proposition.<sup>148</sup>

The Court viewed the case as turning on the extent to which Congress had in fact given criminal jurisdiction to the federal courts, rather than on the extent to which Congress might give such jurisdiction should it so choose. The Court's opinion states:

It is not necessary to inquire whether the general Government, in any and what extent, possesses the power of conferring on its Courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those courts as a consequence of their creation.

. . . [T]he power which congress possess to create Courts of inferior jurisdiction, necessarily implies the power to limit the jurisdiction of those courts to particular objects . . .<sup>149</sup>

The result reached by the Court is a holding that the federal courts had been given no power by the Congress, and had no implied power under the Constitution, to exercise common law criminal jurisdiction. As Mr. Justice Johnson put it in a much quoted sentence, for an act to be punished as a crime in a United

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146. See 1 WARREN, *op. cit. supra* note 133, at 433-42; 2 CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 767-84 (1953). Common law crimes were punished in some state courts, however, and some states still recognize common law crimes where not foreclosed by statute. See 1 ANDERSON, *WHARTON'S CRIMINAL LAW AND PROCEDURE* § 14 (1957).

147. *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812).

148. *Ibid.*

149. *Id.* at 33.

States court, the "legislative authority of the Union must first make . . . [the] act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence."<sup>150</sup>

The Supreme Court's 1812 view was in essence a construction of the Judiciary Act of 1789,<sup>151</sup> which set up the inferior federal courts and defined their jurisdiction. It was therefore a holding that Congress had excluded common law crimes from the jurisdiction of the federal courts, rather than a holding that under the Constitution there may be no federal common law crimes.

Even as a narrow holding on the meaning of the Judiciary Act, the Court's 1812 opinion may well have been in error, however. Subsequent research<sup>152</sup> has shown that the original draft of the Judiciary Act would have given the federal district courts "cognizance of all crimes and offences that shall be cognizable under the authority of the United States and *defined by the laws of the same.*" The italicized words would have made it clear that the act was intended to confine criminal jurisdiction to crimes specifically defined by Congress. The italicized words were stricken out by an amendment in the Senate, however, which, a leading scholar concludes, must have meant "that Congress did not intend to limit criminal jurisdiction to crimes specifically defined by it."<sup>153</sup>

Whatever may be the truth as to the accuracy of the Court's reading of the intent of Congress in adopting the Judiciary Act of 1789, it seems clear that the Court's 1812 holding did not decide the constitutional questions as to the existence of federal common law crimes or as to the scope of the judicial power if Congress were to permit the federal courts to hear cases based on common law crimes. A clear constitutional holding on either of these points might imply that the same rule ought to apply to the question of creating domestic criminal law by self-executing treaty. Certainly if common law crimes may be punished in the federal courts there should be no constitutional barrier to punishing treaty crimes in the federal courts as well.

If, on the other hand, the Constitution is to be read as prohibiting punishment for federal common law crimes, this result

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150. *Id.* at 34. The *Hudson* case was followed in *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816), which is interpreted as having finally settled the question of federal common law jurisdiction. See *United States v. Eaton*, 144 U.S. 677, 687 (1892); 1 WARREN, *op. cit. supra* note 133, at 433.

151. 1 Stat. 73.

152. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

153. *Id.* at 73.

would probably be derived from the character of the federal government as one of delegated powers and from the conclusion that therefore acts ought not to be punished as crimes against the United States unless Congress has made them criminal under the powers delegated to it by the Constitution. The common law crime doctrine may therefore extend to prohibiting punishment for treaty crimes unless they have been incorporated into a statute. Treaties are concluded pursuant to delegated powers, and, under article VI of the Constitution, treaties are made legislative acts having domestic effect, but treaties are legislative acts in which the House of Representatives, the branch of the Congress that is closest to the people, does not participate. For this reason it may be argued that treaties ought not to result in the criminal punishment of individuals unless the treaty crimes have been incorporated into an act of Congress.<sup>154</sup> As persuasive as this argument may be from the point of view of the need to secure the political acceptability of crimes defined by treaty, the argument has no direct foundation in the terms of the Constitution, and the result is not a necessary consequence of the view that punishment for federal common law crimes would violate the Constitution. Unlike common law crimes, treaties are provided for in the Constitution, and, where the problem solved by the treaty is within the scope of the treaty power under the Constitution,<sup>155</sup> treaties are specifically given domestic "Law of the Land" effect without limitation as to subject matter.

There remains the problem of including specific punishment provisions in the treaty. Courts in the United States are not accustomed to fashioning their own penalties for crimes, and, even though it might not be unconstitutional to leave the penalty up to the court,<sup>156</sup> it would be advisable to include a specific range of penalties in the treaty whenever criminal provisions are intended to be self-executing.

Would the definition of criminal penalties by treaty be unconstitutional? No cases have been found in which a criminal punish-

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154. See Nathanson, *supra* note 115, at 365-66.

155. See part III(A) *supra*.

156. See the language quote in note 120 *supra* from the court's opinion in the United States v. Kearney, 2 Extraterr. Cas. 665 (1923). It is questionable, however, whether providing the court with no penalty guidelines would not be held to violate due process. The due process standard striking down, "vague and indefinite" statutes for failure "to give fair notice of what acts will be punished," see, *e.g.*, Winters v. New York, 333 U.S. 507, 509-10 (1948), apparently has not been extended to require fair notice as to the extent of the

ment has been defined in a treaty to have domestic effect within the United States,<sup>157</sup> no doubt because United States practice has been to leave implementation of treaty provisions to the Congress insofar as criminal punishment may be necessary.<sup>158</sup> One commentator has expressed the view, however, that:

So far as penalties are concerned, treaties do not carry provisions for the punishment of treaty violations. It would be quite inappropriate for governments to stipulate what penalties should be imposed upon their respective nationals within their own jurisdiction for treaty violations.<sup>159</sup>

This view expresses an opinion as to the wisdom of providing punishments in treaty provisions rather than in congressional legislation, and not an opinion as to the constitutionality of such a practice. If, as has been argued, the Constitution would permit the definition of crime by self-executing treaty, no additional constitutional problems would be presented by defining the punishment in the treaty as well, so long as the eighth amendment provisions barring "excessive fines" and "cruel and unusual punishments" were observed.<sup>160</sup>

#### E. ACCESS TO UNITED STATES COURTS BY TREATY

The "judicial power" of the United States is dealt with in article III of the Constitution, which provides that the judicial power extends to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties . . ." and that the judicial power is vested "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The Supreme Court therefore is established directly by article III, but the establishment

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punishment. The eighth amendment prohibition of "cruel and unusual punishments" has been held to place an upper limit on punishment in terms of the seriousness of the offense, but would probably not condemn provisions giving the courts a wide range of discretion as to punishment. See *Weems v. United States*, 217 U.S. 349 (1910); *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting).

157. See the exceptional cases discussed in note 120 *supra*.

158. See the discussion in part III(D) 1 *supra*.

159. Anderson, *Treaties as Domestic Law*, 29 AM. J. INT'L L. 472, 475 (1935).

160. The eighth amendment to the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." See note 156 *supra*. The punishment problem might also be handled by the enactment of a federal statute providing specific penalties for acts made criminal by the disarmament agreement.

of inferior federal courts depends upon action by the Congress.<sup>161</sup> Article I, section 8, gives the Congress the specific power to "constitute Tribunals inferior to the supreme Court."

Article III gives the Supreme Court original jurisdiction in "Cases affecting Ambassadors, other public Ministers and Consuls," and appellate jurisdiction in all other cases within the judicial power, but gives to Congress the power of defining the Supreme Court's appellate jurisdiction in these other cases, "with such Exceptions, and under such Regulations as the Congress shall make." No provision is made in the Constitution for the jurisdiction of the "inferior Courts" to be established by the Congress under articles I and III, with the result that the jurisdiction of the inferior federal courts is wholly defined by the Congress.<sup>162</sup>

It is clear from the language of article III that cases arising under treaties concluded by the United States are within the judicial power of the United States, and that Congress might constitutionally include such cases in the original jurisdiction of the inferior federal courts and in the appellate jurisdiction of the Supreme Court. Existing federal legislation in fact gives the United States district courts original jurisdiction of "all civil actions wherein the matter in controversy . . . arises under the Constitution, laws, or treaties of the United States."<sup>163</sup> The parallel statutory provision giving the district courts general criminal jurisdiction is limited, however, to "original jurisdiction . . . of all offenses against the laws of the United States."<sup>164</sup>

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161. See 1 SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 327-30 (1963). Mr. Justice Story argued to the contrary in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 331-32 (1816). His argument was that the language of article III, that the "judicial power of the United States shall be vested," requires "that congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is *exclusively* vested in the United States, and of which the supreme court cannot take original cognizance." And see *Eisentrager v. Forrestal*, 174 F.2d 961, 966 (D.C. Cir. 1949), in which Judge Prettyman read *Martin v. Hunter's Lessee*, *supra*, as meaning that article III was "compulsory upon Congress to confer the whole of the federal judicial power upon some federal court."

162. See 1 SCHWARTZ, *op. cit. supra* note 161, at 350-59.

163. 28 U.S.C. § 1331(a) (1958). The amount in controversy must exceed \$10,000, exclusive of interest and costs.

164. 18 U.S.C. § 3231 (1958). The criminal jurisdiction of the district courts is exclusive in the sense that offenses against the United States may not be tried in state courts. Civil actions arising under the Constitution, laws, or treaties of the United States may normally be brought in state courts as well as in the federal courts.

If a disarmament treaty were to give to international disarmament organization officials some authority, however limited, to seek injunctive relief or criminal punishment as a means of enforcing duties placed directly upon individuals within the United States by the disarmament treaty,<sup>165</sup> there is no doubt that such cases would be "Cases . . . arising under . . . Treaties" within the meaning of article III, and that therefore Congress could constitutionally provide that the United States district courts shall have jurisdiction of all such cases. May the same result be accomplished by self-executing treaty?

The judicial power provisions of article III quoted above might be thought to pose serious constitutional barriers to the creation by a disarmament treaty of new tribunals without action by the Congress, and to the vesting in these non-article III tribunals of some part of the judicial power of the United States.<sup>166</sup> Analogies would be available in the congressional practice of creating so-called legislative courts, and in certain exceptional treaty situations,<sup>167</sup> but these analogies might be held inapposite, and for this and other reasons, a separate treaty court system might be regarded as unconstitutional. A different question is presented here, however. Here we are considering only whether the treaty power might constitutionally be used to give to tribunals already established by the Congress a new class of cases, some part of which may fall outside of the existing statutory jurisdiction of the federal courts, but all of which clearly falls within the judicial power of the United States as defined in the Constitution. United States treaty practice provides no clear answer to this question.

Insofar as civil actions arising under treaties are concerned, the question has not arisen because the general jurisdictional statute quoted above has been held to give the federal district courts jurisdiction whenever the "correct decision" of a case depends upon a construction of a treaty of the United States.<sup>168</sup> In this sense, therefore, if the plaintiff demonstrates that "some right, title, privilege or immunity dependent upon the treaty is set up or claimed so as to require the Court to apply, construe or pass upon the treaty in determining the right asserted,"<sup>169</sup>

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165. See part III(C) *supra*.

166. See HENKIN, *ARMS CONTROL AND INSPECTION IN AMERICAN LAW* 122-52 (1958); Nathanson, *supra* note 115, at 369-78.

167. See note 120 *supra*.

168. See *Hidalgo County Water Control & Improvement Dist. No. 7 v. Hedrick*, 226 F.2d 1, 6 (5th Cir. 1955), *cert. denied*, 350 U.S. 983 (1956).

169. *Ibid.*

then the federal courts have jurisdiction under existing federal statutes. So also, if a treaty purports to give a "right of action" to individuals, the right of action may be implemented by suit in the federal courts, which have jurisdiction of the case as one that "arises under the . . . treaties of the United States."<sup>170</sup>

The existence of the general jurisdictional statute is not a complete answer, however. That statute requires that the matter in controversy exceed "the sum or value of \$10,000, exclusive of interest and costs," as well as that it arise under a treaty of the United States. Plainly the jurisdictional amount might not be satisfied in all cases sought to be brought under the treaty.<sup>171</sup>

Criminal actions would pose an even greater problem. As has been noted, the jurisdictional statute in criminal matters extends only to "all offenses against the laws of the United States" in line with the prevailing philosophy that there are no federal common law crimes and that criminal law cannot be created by treaty without incorporation in an act of Congress. Leaving aside the question of delegating the power to prosecute to international officials, mentioned earlier,<sup>172</sup> and the question of creating criminal law by treaty, discussed in the preceding section, there remains the question of enlarging by treaty the jurisdiction of the federal district courts to hear criminal actions brought directly under the treaty.

As was developed in the preceding section, this question, and all questions of the scope of the power to legislate by self-

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170. See *Seth v. British Overseas Airways Corp.*, 329 F.2d 302, 305 (1st Cir. 1964), where the court held that an airline passenger on an international flight may sue in United States courts under the International Air Transportation (Warsaw) Convention, Oct. 12, 1929, art. 30(3), 49 Stat. 3021, T.S. No. 876, which provides that in cases of transportation by successive carriers, the passenger "shall have a right of action against the last carrier." The court's holding is a construction of 28 U.S.C. § 1331(a) (1958), quoted in the text accompanying note 163 *supra*, rather than a holding that access to United States courts had resulted directly from the treaty. See also *International Refugee Organization v. Republic S.S. Corp.*, 189 F.2d 858, 861 (4th Cir. 1951), discussed in note 77 *supra*, where the court held that 28 U.S.C. § 1331(a) (1958) gave the federal courts jurisdiction over suits brought by an international organization established by a treaty to which the United States is a party, basing its holding on *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

171. The usual case in which international officials seek an injunction, for example, is unlikely always to involve a matter in controversy exceeding \$10,000 exclusive of interest and costs under 28 U.S.C. § 1331(a) (1958). In injunction cases the amount in controversy is measured by the "value of the right to be protected or the extent of the injury to be prevented." WRIGHT, *FEDERAL COURTS* 98 (1963).

172. See part III(C) *supra*.

executing treaty, ought to be approached by asking whether any specific provision of the Constitution would stand in the way. Article III might bar the creation of new courts by treaty because article III vests the judicial power only in the Supreme Court and "in such inferior Courts *as the Congress may . . . establish*" (emphasis supplied), but no such exclusive language is attached to the power of the Congress to limit or define the jurisdiction of the Supreme Court.<sup>173</sup>

The power of Congress to define the jurisdiction of the lower federal courts is derived from the general power to establish "inferior" courts, and is not explicitly stated in the Constitution. As to the Supreme Court, article III directly vests appellate jurisdiction in that court of all cases to which the judicial power extends, subject only to the stated power of the Congress to make "Exceptions" and "Regulations" limiting that jurisdiction.

There would, therefore, appear to be no reason to hold that a self-executing treaty provision may not extend the original jurisdiction of the lower federal courts, and the appellate jurisdiction of the Supreme Court, to all cases arising under a disarmament treaty, even though such a rule might alter the statutory arrangements made by the Congress. Whatever might be the position if Congress thereafter sought by statute to avoid this result by excluding all cases, or criminal cases, arising under the disarmament treaty from the original jurisdiction of the inferior federal courts and from the appellate jurisdiction of the Supreme Court,<sup>174</sup> the initial vesting of such jurisdiction pursuant to the treaty, and within the bounds set for the judicial power by article III, would be nothing more than the normal result of a self-executing treaty provision within the meaning of the supremacy clause of article VI.

#### F. DELEGATION OF RULEMAKING POWER TO AN INTERNATIONAL DISARMAMENT ORGANIZATION

At several points in the preceding discussion it was suggested that in addition to including self-executing rules and remedies in the disarmament treaty, it may prove desirable to delegate some measure of rulemaking power to the international disarmament organization established under the treaty. If implementation of the treaty within the territory of each party is to be left to the national governments concerned, which would adopt legislation

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173. See the discussion at the beginning of this section and part III(D) 1 *supra*.

174. See part IV *infra*.



in fulfillment of obligations assumed in the agreement, it may be necessary to give the international disarmament organization power to interpret the treaty obligations, or to legislate new international obligations in limited areas, but it would not be necessary to give the international organization power to make rules having self-executing effect within the territory of the states concerned.<sup>175</sup> If, however, self-executing effect is to be given to rules and remedies contained in the treaty in order to provide for direct national enforcement of treaty obligations against individuals, it may be necessary to adopt the same principle for interpretations of the treaty rules by the international organization, or for additional rules that the organization found to be needed in order to implement the agreement.<sup>176</sup> National governments would of course be reluctant to give up rule-making power of this kind to an international organization, but it is not beyond the realm of the possible that governments will recognize that certain kinds of problems will have to be resolved directly at the international level without seeking ratification according to the constitutional processes of each member of the disarmament organization.

The type of rulemaking power under discussion here would be power to interpret, or to expand upon, the substantive rules contained in the disarmament agreement, or to formulate regulations for designated areas or problems according to standards laid down in the agreement, or to fulfill a particular policy defined by the agreement. Violation of the regulations issued by the international disarmament organization might be enjoined or punished by actions brought in United States courts in the same manner as would be provided for violations of the substantive rules contained in the treaty. It is not contemplated, however, that the international organization would be given power either to prescribe penalties for violations of the rules or regulations, or to try or otherwise to determine the guilt or innocence of individuals charged with violations.<sup>177</sup>

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175. See parts I, II *supra*.

176. If enforcement is to rest on some combination of national action and of international action through national law enforcement institutions, and if no provision is made to permit the international organization to modify those portions of the enforcement scheme entrusted to it, there would be a danger that the purpose of the system could be defeated by changes in the national legal framework undertaken for that purpose. One example might be the development of new sources of power with possible military application, as to which the international organization ought to have the same type of regulatory function as it is given over existing power sources.

177. See parts III(C), III(E) *supra*. 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 2.13, at 133 (1958), comments:

Accepting the possible need for delegating some measure of self-executing rulemaking power to an international disarmament organization, would such a treaty provision be consistent with the Constitution? No precedents are available,<sup>178</sup> but the question presented is essentially the same as that presented within the United States by the delegation of legislative power to an executive agency or to an independent regulatory commission. If it would be appropriate and within the treaty power to make domestic law, and to provide domestic remedies, by self-executing

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One kind of power of adjudication which clearly cannot be conferred upon an administrative agency is the power to determine guilt or innocence in criminal cases. The reason is that the criminal defendant is entitled to special procedural protection of the kind that is given neither in civil proceedings in court nor in administrative proceedings.

178. A 1953 decision of the Federal Communications Commission may be read as giving self-executing effect pursuant to an act of Congress to interpretations made by the Executive Directors of the International Bank for Reconstruction and Development (IBRD or Bank) and of the International Monetary Fund (IMF or Fund) of a term contained in the treaties establishing each of these international organizations. *IBRD v. All American Cables & Radio, Inc.*, 8 PIKE & FISCHER, RADIO REGULATION 927 (FCC 1953). Each of the treaties involved provides that the official communications of the organization "shall be accorded by each member the same treatment that it accords to the official communications of other members." Articles of Agreement of the IBRD (Bank Agreement), Dec. 27, 1945, art. VII, sec. 7, 60 Stat. 1458, T.I.A.S. No. 1502; Articles of Agreement of the IMF (Fund Agreement), Dec. 27, 1945, art. IX, sec. 7, 60 Stat. 1414, T.I.A.S. No. 1501. Each treaty also provides that questions of interpretation of the provisions of the Agreement "shall be submitted to the Executive Directors for their decision," which is final subject to appeal to the Board of Governors of the organization. Article IX of the Bank Agreement, 60 Stat. 1460, and article XVIII of the Fund Agreement, 60 Stat. 1423. Pursuant to these sections the Executive Directors were asked in 1950 to decide whether the word "treatment" applied to rates charged for transmission of the official communications of the Bank and of the Fund, a question which the Executive Directors answered in the affirmative without dissent, and from which decision no appeal was taken to the respective Boards of Governors. Against this background the FCC decided that the question had been "conclusively determined" by the decision of the Executive Directors of the Bank and the Fund, and that this decision bound the United States and must be put into effect by the FCC. 8 PIKE & FISCHER, *op. cit. supra*, at 944, 951. The FCC pointed out, however, that the relevant provisions of article VII of the Bank Agreement and of article IX of the Fund Agreement had been explicitly given "full force and effect in the United States" by § 11 of the Bretton Woods Agreements Act, 59 Stat. 516 (1945), 22 U.S.C. § 286h (1958), and that by §§ 12 and 13 of that act, 59 Stat. 516 (1945), 22 U.S.C. §§ 286i,j (1958), Congress had recognized the binding authority of decisions by the Executive Directors under the respective articles of agreement. The FCC therefore concluded that although the rate privilege of the Bank and Fund is "enforceable without further legislative action," the case does not present the question of "whether an executive agreement or treaty

treaty in the disarmament area, this would amount to an exercise of legislative power by treaty that would be equivalent to an exercise of legislative power by Congress, and the same considerations should govern the delegation of this power by treaty to an international disarmament organization as would govern the delegation of a similar legislative power of the Congress to an agency of the executive.<sup>179</sup> So long as the implementation is accomplished through United States courts, no additional problems should be presented simply because the delegation is to international rather than to national officials.<sup>180</sup> In both cases other requirements of the Constitution would be observed and Congress would retain ultimate control, or a veto, over what is sought to be done as domestic law pursuant to the delegation of legislative power, so that the only constitutional question would be the extent to which the legislative power in question may be delegated.<sup>181</sup>

The Supreme Court has in the past frequently said that "the legislative power of Congress cannot be delegated";<sup>182</sup> yet, as

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is self-executing or requires domestic legislative implementation." 8 PIKE & FISCHER, *op. cit. supra*, at 950. The Bretton Woods Agreements Act, as construed by the FCC, means at least that Congress has accepted a process whereby the meaning and application of treaty rules would be decided with finality for international law purposes by the international organization concerned, and that the decision of the international organization would have immediate effect within the United States as part of United States domestic law. The result in this case, therefore, is derived from the delegation of this form of legislative power to an international organization by act of Congress, rather than by treaty. The author is indebted to Louis B. Sohn for drawing attention to this decision. See also Hexner, *Interpretation by Public International Organizations of Their Basic Instruments*, 53 AM. J. INT'L L. 341, 354-56 (1959).

179. See Nathanson, *The Constitution and World Government*, 57 NW. U.L. REV. 355, 366-69 (1962). In discussing the Clark and Sohn proposals, Nathanson notes that the General Assembly as revised by Clark and Sohn would have power to define obligations and offenses applicable to individuals, and to determine punishments. Thus, he concludes, "essentially the same constitutional problem would be presented as that presented by delegations of legislative power." *Id.* at 367.

180. HENKIN, *ARMS CONTROL AND INSPECTION IN AMERICAN LAW* 114-16 (1958), notes that it might be argued that delegations of power under the Constitution may be made only to "United States officials, appointed by the President, confirmed by the Senate, and taking an oath to support the United States Constitution." *Id.* at 115. Yet, he points out, many acts are now done on behalf of the United States by persons not officers of the United States, and therefore "No definite conclusion is possible." *Ibid.*

181. See the discussion in part IV *infra*.

182. *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932).

observed by Davis, a leading authority on administrative law, "the Supreme Court has specifically upheld scores of delegations of legislative power, and no congressional delegation to a regularly constituted administrative agency has ever been held invalid."<sup>183</sup> Davis also observes:

The non-delegation doctrine is wholly judge-made. The Constitution provides merely: "All legislative Powers herein granted shall be vested in a Congress of the United States . . ." The power is also granted "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Some congressional powers must obviously be delegated, including the powers "to . . . collect taxes," "to borrow Money," "to coin Money," and "to raise and support Armies." Delegation was not discussed at the Constitutional Convention, except that a motion by Madison that the President be given power "to execute such other powers . . . as may from time to time be delegated by the national Legislature" was defeated as unnecessary.<sup>184</sup>

Adequate standards may still be a problem. It is sometimes said that legislative power may not be delegated unless "standards" are set for the guidance of the administrative agency,<sup>185</sup> but delegations have been upheld where the only standard set is the "public convenience, interest, or necessity,"<sup>186</sup> or "unfair methods of competition,"<sup>187</sup> and in some cases delegations have been upheld where no standard is set at all. Davis concludes that in the final analysis delegation is a problem "of determining what organs of the government are best qualified to determine particular policies," and that this question frequently "is not simply whether the policies should be framed by the agency or by Congress but whether the policies initiated by the agency should become effective with or without running the legislative gauntlet."<sup>188</sup>

In the foreign affairs field, cases exist in which legislative powers have been delegated by act of Congress to the executive,

183. 1 DAVIS, *op. cit. supra* note 177, § 2.02, at 77. Only two delegations to public authorities have been held unconstitutional, and neither "was to a regularly constituted administrative agency which followed an established procedure designed to afford the customary safeguards to affected parties." *Id.* § 2.01, at 76.

184. *Id.* § 2.02, at 79. (Footnotes omitted.)

185. See, *e.g.*, the cases quoted by 1 DAVIS, *op. cit. supra* note 177, § 2.04.

186. *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933).

187. *FTC v. Gratz*, 253 U.S. 421 (1920).

188. 1 DAVIS, *op. cit. supra* note 177, § 2.16, at 153. Davis notes that policies written into regulatory statutes "usually emanate in part from the agency concerned. . . ." *Ibid.*

but no case has been found in which similar powers have been delegated by treaty to an international organization.<sup>189</sup> Henkin points out, for example, that:

The regulations of existing international bodies do not control or directly affect the rights and interests of individuals in the United States. In some instances . . . this is so because the United States Government stands between the international body and the American citizen and itself determines whether it will make a regulation proposed by the international body applicable in the United States. Or, in other instances, the character of the regulation is such that it applies to the action of the Government of the United States, not to the actions of private persons.<sup>190</sup>

The evidence cited by Henkin amply demonstrates that there has been no willingness in the history of the United States to delegate to international agencies legislative functions that fall within the scope of the treaty power, but in this, as in other areas, that fact alone ought not to imply that delegations of treaty powers would be unconstitutional. Early writers, drawing on the then settled doctrine that legislative powers may not be delegated, concluded that for the same reasons treaty powers may not be delegated.<sup>191</sup> To the extent, therefore, that the non-

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189. For a possible case of delegation of legislative power to an international organization by act of Congress, see *IBRD v. All America Cables & Radio, Inc.*, 8 PIKE & FISCHER, RADIO REGULATION 927 (FCC 1953), discussed in note 178 *supra*. For a case of delegation of legislative power to the President by act of Congress, see, *e.g.*, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), in which the Court upheld a delegation to the President of power to make regulations controlling the sale of arms to any country engaged in an armed conflict. The Court stated, *id.* at 319-20:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.

190. HENKIN, *supra* note 180, at 109. (Footnotes omitted.) Compare the FCC decision in *IBRD v. All America Cables & Radio, Inc.*, *supra* note 189.

191. See, *e.g.*, CRANDALL, *TREATIES: THEIR MAKING AND ENFORCEMENT* 119-20 (2d ed. 1916). Nathanson, *supra* note 179, at 369, concludes that “even if the treaty power itself includes the power to create new criminal offenses,

delegability doctrine has given way to delegability subject to the tests suggested by Davis, the same criteria should apply to delegations by treaty. As noted above,<sup>192</sup> the fact that the delegation is by treaty to an international organization, rather than by statute to a domestic agency, should make no difference as the nature of the powers delegated is the same in both cases, and as it is here assumed that the self-executing character of the rules made would present no constitutional difficulties under the treaty power.

Even granting all that has been said, however, the problems involved in any delegation of legislative power may not be simple, and the final answer has not been given. Davis observes, for example, that:

Delegation is only a means to an end. The non-delegation doctrine has been to a considerable extent a judge-made corollary of *laissez-faire*, inconsistent with positive government. If comprehensive regulation can succeed only through broad delegation, the handiest judicial weapon to kill such regulation is often the non-delegation doctrine. The ultimate determination of desirable boundaries for delegation must therefore depend in part upon conceptions about the proper role of government in society.<sup>193</sup>

In becoming party to a general and complete disarmament agreement, the President and the Senate would be speaking for the people of the United States and giving their view of the proper scope of international governmental authority, and that expression ought to be given great weight by national courts. There can be no guarantee, however, that the national courts will produce the most appropriate rule from the world point of view, and it would therefore be useful to settle the point by amendment of the Constitution.

#### IV. THE POWER OF CONGRESS TO NULLIFY THE DOMESTIC LAW EFFECT OF TREATIES

The assumption up to this point has been that, where necessary, Congress would enact legislation to implement United States obligations under the disarmament agreement, that such legislation would be kept in force as required by the agreement, and that, where particular provisions of the agreement would be self-executing under United States law, Congress would not

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there is at least a serious constitutional doubt as to whether such power might constitutionally be delegated to an international assembly in the manner provided for in" the Clark and Sohn proposals, note 3 *supra*.

192. See text accompanying note 180 *supra*.

193. 1 DAVIS, *op. cit. supra* note 177, § 2.16, at 157. (Footnotes omitted.)

seek thereafter to avoid the self-executing effect of these treaty provisions by adopting inconsistent legislation. It must be assumed that, at the outset, Congress will be ready to implement the disarmament agreement, or at least that Congress will not seek to prevent the internal application of the obligations of the agreement. No agreement is likely to be entered into without this measure of congressional support. It cannot be assumed, however, that Congress will necessarily continue in its willingness to live with the agreement, and it is therefore important to ask what the result would be if Congress amended or repealed the implementing legislation, or sought to nullify by statute the domestic effect of the self-executing treaty provisions.

Where the disarmament agreement is clear in leaving its enforcement to national legislation, and the only obligation assumed by the United States is to adopt appropriate legislation, it would of course be clear that amendment or repeal of that legislation would end its application as domestic law, even though the United States may thereby be placed in violation of its international law obligations under the treaty.

The situation is no different where a treaty provision is self-executing and therefore has direct domestic effect. Self-executing treaties are made the "Law of the Land" under article VI of the Constitution, and therefore supersede preexisting inconsistent federal statutes, but such treaties are not given any greater standing than federal statutes and may be superseded by a subsequent inconsistent federal statute.<sup>194</sup> Article VI makes the "laws of the United States," as well as treaties, the supreme law of the land, and the courts have held this to mean that treaties and statutes are on the same plane in the sense that neither is more "supreme" than the other. As put by Hackworth, the accepted reading of article VI is that:

Where a treaty and an act of Congress are wholly inconsistent with each other and the two cannot be reconciled, the courts have held that the one later in point of time must prevail. While this is necessarily true as a matter of municipal law, it does not follow, as has sometimes been said, that a treaty is repealed or abrogated by a later inconsistent statute. The treaty still subsists as an international obligation although it may not be enforceable by the courts or administrative authorities.<sup>195</sup>

The domestic or municipal law effect of treaties is of course

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194. See the cases cited in 2 SCHWARTZ, *A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES* 124-26, 404 (1963); *RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES*, § 144, at 515, comments, at 516-21, § 148, at 532 (Proposed Official Draft, 1962).

195. 5 HACKWORTH, *INTERNATIONAL LAW* 185-86 (1943).

what concerns us here, and, as has been said, the accepted rule is that treaties and statutes have equal domestic effect under article VI of the Constitution. The Supreme Court has said that both treaties and statutes "are declared . . . to be the supreme law of the land, and no superior efficacy is given to either over the other."<sup>196</sup> Treaties have been held to supersede prior acts of Congress, and, where Congress has shown a clear intention to do so, subsequently enacted statutes have been held to supersede the domestic law effect of self-executing treaties.<sup>197</sup>

It is not clear on the face of article VI that the language of the supremacy clause dictates this conclusion, however. Article VI merely enumerates three sources of United States domestic law, the Constitution, "the laws of the United States which shall be made in Pursuance thereof," and "Treaties made, or which shall be made, under the Authority of the United States," and provides that each "shall be the supreme Law of the Land." Article VI certainly implies that the Constitution is controlling, since laws are to be made "in Pursuance" of the Constitution, and treaties are to be made "under the Authority of the United States" derived since 1789 from the Constitution,<sup>198</sup> but that article does not in so many words stipulate that laws and treaties shall be of equal weight. Considering this omission, and considering that treaties are legislative acts entered into by more than one state, and increasingly by nearly all the states of the world,<sup>199</sup> it has been argued that for domestic law purposes treaties ought to be regarded as a higher type of law than statutes, and that therefore the courts ought not to read article VI as permitting Congress by statute to supersede a treaty as domestic law.

This argument has been advanced by Dr. Wallace McClure of the Rule of Law Research Center, who writes that:

. . . any consideration of treaties or other international acts should begin with recognition that they are joint enactments and hence obligations of the people of the United States to other peoples and of other peoples to the people of the United States. If there is law that is binding upon nations, international acts are equally binding under that law upon all peoples that enter into them. In their aspect as contracts these facts are clear: both peoples are bound; neither can withdraw without the consent of the other; unilateral alteration would disrupt the basic legal conception of contracts, the meeting of the minds of the parties.

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196. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

197. See the authorities cited in note 194 *supra*; note 105 *supra*.

198. Treaties made prior to 1789 were intended to be reaffirmed by the Constitution. See McCLURE, *WORLD LEGAL ORDER* 42-43 (1960).

199. A general and complete disarmament treaty would necessarily have to include all the major states of the world.



Is any other conclusion any less incongruous with respect to the concept of joint legislation? Can one branch of a legislature (in this case two peoples acting in unison) undo what both have jointly enacted? Does it not follow, inescapably, that, once accepted, treaties leave no discretion—save as their stipulations expressly indicate—to any of a people's servants with respect to their fulfillment?<sup>200</sup>

If the result sought in concluding a general and complete disarmament agreement will be to give that agreement self-executing effect within the territory of the parties, and to rely on a combination of national and international action to enforce the agreement through national law-enforcement institutions, it may be regarded as inadmissible to continue the established rule that Congress may upset the domestic effect of the treaty arrangement. A treaty of this type would in effect lay the framework for a regime of law in world affairs, a framework that must have the promise of stability if it is to be acceptable to the peoples of the United States and of the world. In order to provide the requisite stability it would be useful, and perhaps essential, to secure a new rule in the United States on the relative position of treaties, or at least of the disarmament treaty, and of statutes in American law.

The clearest route to the new rule would of course be by constitutional amendment giving a special status to at least some portions of the disarmament agreement. The present rule, namely that as between treaties and statutes the later in time prevails, is a judge-made rule, however, and it is at least arguable that the courts need not follow the old rule, established in cases concerning relatively minor treaty arrangements,<sup>201</sup> in the new circumstances in which the treaty power would be used to establish a basic world order intended to endure. United States courts have abandoned old law when confronted by the changed needs of the people in other cases<sup>202</sup> in which, as here, the language of the Constitution has no clear, plain, and compelling meaning. It should not be assumed, therefore, that the same result may not be achieved in dealing with a disarmament agreement that is clearly intended to establish domestic law. But, so long as there is no appeal from national court decisions to an international court, national courts cannot be relied upon to construct the rule most appropriate from the world view, and

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200. McCLURE, *op. cit. supra* note 198, at 39-40.

201. See *id.* at 71-104.

202. The most famous recent examples are *Brown v. Board of Education*, 347 U.S. 483 (1954) (reversing the "separate but equal" doctrine), and *Baker v. Carr*, 369 U.S. 186 (1962) (reversing the "political questions" doctrine as applied to legislative reapportionment).

it would be a greater guarantee of stability to achieve the desired rule in this, as in other unsettled areas, through amendment of the Constitution.

## V. CONCLUSION

This report is primarily concerned with the constitutional problems that would be presented by one aspect of a disarmament agreement, namely the alternative methods by which the obligations of the agreement might be brought to bear upon individual action by persons subject to the jurisdiction of the United States.

Current thinking in the general and complete disarmament area, as embodied in the official proposals advanced by the United States and by the Soviet Union, seems to envisage that the terms of the agreement will be applied to individuals solely through national government action taken in fulfillment of obligations assumed in the agreement. The Soviet Plan would oblige the states parties to the agreement to ensure its implementation in their territories; the United States Plan calls for national legislation to impose legal obligations on individuals and to provide appropriate penalties for noncompliance.<sup>203</sup> Neither plan would give individuals clear obligations to look beyond the commands of their national governments for substantive rules governing individual conduct or for authoritative procedures to interpret or apply the substantive rules to individual conduct. Both plans would preserve the present framework of the international system in which treaty obligations, including the obligations of the disarmament agreement, usually fall on states rather than on individuals, and in which the national government as a unit, rather than the individual or some branch of the national government, has the ultimate responsibility for carrying out the obligations imposed by the agreement.

If nothing more is added, no substantial constitutional problems are likely to be presented by the internal enforcement aspects of a disarmament agreement. In this light, the agreement would not differ in kind from the ordinary case of an international agreement on a subject appropriate for international negotiation, which was then enforced within the United States by legislation adopted by the Congress either under its delegated powers, or under its general power to adopt legislation that is

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203. The United States Plan is quoted at note 4 *supra*. The Soviet Plan is quoted in the text accompanying note 5 *supra*. See also the discussion in part I *supra*. Compare the Clark and Sohn proposals discussed in note 3 *supra*.

necessary and proper for the implementation of a treaty.<sup>204</sup>

Difficulties arise, however, when it is considered that a general and complete disarmament agreement should not only impose the ordinary type of legal obligations on the states parties to the agreement, but should also serve as the legal framework for a warless world. Disarmament can succeed only if it is understood and accepted by the governments and the peoples of the world, but it will be accepted only if governments and peoples can have confidence that the legal system sought to be established by the disarmament agreement cannot easily be defeated by a change of heart in any one government or combination of governments. The security sought through armaments will not be abandoned to vague and formless hopes for a better world.

Seen in this light, it is doubtful that the usual means of internal implementation of treaty obligations would be regarded as sufficient to enforce the new world legal framework to be established by a general and complete disarmament agreement. International procedures would no doubt be provided to meet the extreme case in which unlawful state action threatened to upset the disarmed world order, but the stakes in disarmament are too great to expect governments and peoples to be willing to place their entire reliance on ultimate sanctions of this type. The disarmed world order would be more secure, and therefore more acceptable, to the extent that threatening conduct can be countered, and perhaps ended, before it solidifies into a national pattern disruptive of the disarmament agreement.

This is the end that would be sought by placing substantive responsibilities directly on individuals under the agreement, and by giving enforcement powers directly to national institutions, with perhaps some international element through the vesting in international officials of the power to initiate enforcement procedures through national law enforcement institutions. Other and more powerful procedures to the same end may be suggested, such as the regional international courts and the Attorney-General of the United Nations proposed by Clark and Sohn,<sup>205</sup> but this report has been limited to the constitutional problems raised by the middle ground proposals in which individual responsibility would exist, but would be enforced only through existing national institutions.

If it is accepted that in a disarmed world individual responsibility must extend beyond the national government to embrace

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204. See parts III(A), (B) *supra*.

205. See note 3 *supra*.

the fundamentals of the world legal order,<sup>206</sup> the question is presented of the extent to which the internal impact of this new view of the international order would be consistent with the Constitution. This question has two basic aspects that are considered in this report, namely, the source of substantive rules applicable to individual conduct,<sup>207</sup> and the use by international officials of domestic law enforcement institutions to enforce the individual obligations.<sup>208</sup>

In neither of these areas is there sufficient precedent to arrive at a firm judgment as to the constitutionality of various alternatives, but the precedents that do exist, and the interpretive approach likely to be taken if a national consensus on disarmament is achieved, point to the conclusion that most of what might be sought could be accomplished under the Constitution as it now stands. United States practice includes numerous areas in which treaties have had direct effect on individual action, and the constitutional limits that have been thought to exist need not be read so broadly as to impair the objective sought here.<sup>209</sup> As to international involvement in national enforcement procedures, the precedents are even less plentiful, but nothing in constitutional theory ought to prevent international officials from being accorded access to United States courts by statute or by treaty for the purpose of enforcing individual obligations under a disarmament agreement.<sup>210</sup>

Perhaps the most serious constitutional questions are presented by the suggestions that some measure of rulemaking authority must be delegated to an international disarmament organization,<sup>211</sup> and that the basic framework of rules and remedies contained in the disarmament agreement must be placed beyond the normally accepted power of the Congress to nullify the domestic effect of treaties by enacting inconsistent legislation.<sup>212</sup> In each of these areas, a substantial argument might be made that the end sought might be achieved within the present language of the Constitution, but the argument would be so highly disputed, and the end result so essential to the legal framework of the disarmed world, that the most appropriate procedure would be to settle these points by amendment of the Constitution.

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206. See parts I, II *supra*.

207. See parts III(B), (D) *supra*.

208. See parts III(C), (E) *supra*.

209. See part III(D), 2 *supra*.

210. See parts III(C), (E) *supra*.

211. See part III(F) *supra*.

212. See part IV *supra*; McCLORE, *op. cit. supra* note 198, at 71-104.

