Fall 1974

Security Council Resolutions in United States Courts

Janis P. Bianchi
Indiana University School of Law

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj
Part of the Courts Commons, and the International Law Commons

Recommended Citation
Available at: http://www.repository.law.indiana.edu/ilj/vol50/iss1/6
Security Council Resolutions in United States Courts

Domestic suits based on United Nations Security Council resolutions should increase in number over the next few years especially if the definition of mandatory obligations of the United Nations Charter, adopted by the International Court of Justice [I.C.J.] in the 1971 South West Africa litigation, gains increased acceptance. Diggs v. Shultz is the only case to date which has raised the issue of the force of mandatory Security Council resolutions in courts of the United States. Diggs was brought to compel the Secretary of the Treasury to prevent the importation into the United States of Rhodesian metallurgical chromite, a commodity subject to a mandatory embargo imposed by the Security Council.

Recently a California district court had the opportunity to rule on the significance of the General Assembly and Security Council termination of South Africa's Mandate over Namibia (South West Africa). Stockholders of American Metal Climax were seeking an injunction against the corporation's payment of taxes to South Africa for its Namibian mining operations. The grounds for the action were that such taxes are illegal in light of the termination of South Africa's Mandate over Namibia, and that such payment therefore constitutes waste. While

---

3 See text at notes 37-40 infra.
5 After World War I the League of Nations placed the former German territory of South West Africa under the administration of the Union of South Africa. At the inception of the United Nations all the other Mandatories arranged to place their territories under the nominal supervision of the United Nations. South Africa refused, arguing that its international responsibilities regarding the Mandate ceased upon the dissolution of the League of Nations. After two decades of legal skirmishes over the status of South West Africa, the General Assembly, the successor to the League of Nations Council, withdrew the Mandate from South Africa in 1960. For a history of the South West Africa litigation see J. DUGARD, THE SOUTH WEST AFRICA/NAMIBIA DISPUTE (1973).
6 South West Africa's name was changed to Namibia in 1966.
8 The case was dismissed for failure to state a cause of action and the plaintiffs elected not to appeal. However, the complaint, aside from listing the United Nations resolutions on the subject, made no attempt to show how those resolutions could be binding on a U.S. court, either through treaty law or customary international law.
the case was summarily dismissed the court did not explain why the resolutions did not give rise to an action for waste.

The force of Security Council resolutions could also be raised if an action were brought by the United Nations itself to claim title to Namibian products exported to the United States.\(^7\) Also presently feasible would be suits to enjoin, or compel disclosure of, a financial institution's investments in the huge Portuguese hydroelectric project in Mozambique which is expected to benefit substantially Southern Rhodesia in violation of the Rhodesian sanctions.\(^8\)

This note will examine the effect of mandatory Security Council resolutions in U.S. law and the impact of those resolutions on domestic litigation involving national and international human rights problems. The subject will be dealt with in two parts. The first will examine the legal character of Security Council resolutions under the United Nations Charter and under U.S. treaty law in order to develop an analysis which strengthens the position of Security Council resolutions in U.S. law. The second part of the discussion will be devoted to the relationship of mandatory resolutions to United States domestic doctrines regarding self-executing treaties and political questions. Here it will be necessary to review briefly the history of Charter litigation in the United States. Throughout the note, the Security Council resolutions which imposed the economic embargo on Rhodesia and which terminated South Africa's Mandate over South West Africa will be examined for their potential impact on current and future cases.\(^9\)

**Juridical Nature of Security Council Resolutions**

A mandatory resolution consented to by a U.S. representative in

---


\(^8\) Recent events in Portugal and the anticipated succession to power of FRELIMO in Mozambique may obviate the need for such action. However, a substantial segment of the white Portuguese settlers there have been involved in an attempt to partition Mozambique along the northern bank of the Zambezi thereby to retain the Cabora Bassa dam for White Southern Africa. If, with the probable support of South Africa, such partition should occur, the issue will remain pertinent.

\(^9\) This note will be limited to the legal effect of Security Council resolutions, except where the legislative competence of the General Assembly to bind individual states is relatively clear, as in the termination of the Mandate over South West Africa. This note argues that a mandatory Security Council resolution has domestic force primarily because it is an extension of a treaty. If, however, the content of the resolution expresses prior legal expectations the resolution is binding both through treaty law and customary international law. Cf. Bleicher, *The Legal Significance of Re-Citation of General Assembly Resolutions*, 63 Am. J. Int'l L. 444 (1969); Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 Am. J. Int'l L. 782 (1966). Most General Assembly resolutions, on the other hand, are binding only through the latter approach and thus are juridically dissimilar.
the Security Council is not a statute. Nor is it an Executive order or policy statement since its force comes from the fact that other nations were involved in its creation. Even though a necessary implication of the D.C. Circuit's holding in *Diggs* is that such a resolution is a treaty obligation,¹⁰ no attempt was made to demonstrate the juridical connections between the two. The court, without explanation, assumed that a resolution could be a treaty commitment of the United States binding on domestic courts even though it was clearly not part of the original charter which is the operative treaty. Absent also were any distinctions which would distinguish a resolution having the force of a decision from one raising only a recommendation.

The Charter as the constitutive document of the United Nations has constitutional force within the organization. Resolutions enacted under it bind the organization. It obligates member states, however, as a treaty,¹¹ not as a constitution. Resolutions obtain their mandatory character over member states by their promulgation under the authority of a Charter provision which is itself mandatory, owing either to the intention of the framers or to the legal expectations¹² which arise around Charter provisions. The resolution amounts to an application of the treaty itself under which the power of the organization to adopt resolutions is established.¹³

¹¹ J. *Castaneda*, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 6 (1969). The Charter was submitted to the Senate on July 2, 1945, as a treaty and was so considered during the debates. 91 CONG. REC. 7119 (1945) (remarks of Senator Barkley).
¹² Modern international law rejects positivistic definitions which would restrict legal content to international custom or treaty. Instead international law is conceived of as a pattern of expectations concerning the way governments or international organizations will react to political, economic and social problems. If such expectations are normally satisfied a pattern emerges sufficiently stable to be called law. For further discussion, see Falk, *The Interplay of Westphalia and Charter Conceptions of International Legal Order*, in 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 32 (R. Falk & C. Black eds. 1969).
¹³ *Castaneda*, supra note 11, at 2.

Clive Parry suggests that the tendency to treat the products of international organizations as treaties is an outgrowth of the practice of international conferences from which such organizations arose. The decisions of the conferences were not binding unless treaties were concluded there and afterwards ratified. In searching for the source of legal obligations Parry prefers to approach the products of international organizations as examples of state practice rather than treaty law. SOURCES AND EVIDENCES OF INTERNATIONAL LAW 110, 113 (1965). There is much merit in this position, even as applied to the special situation of the Security Council. It provides a comprehensive juridical framework for all resolutions, allowing their binding effect to be determined by the strength of the custom they generate. *See note 9 supra.*

There are, however, two problems with applying this approach to Security Council resolutions. First, the customary law-making theory of resolutions of international organizations is based on the fact that nearly all nations are members and thus the resolution reflects the will of most world governments. Since only 15 countries sit on the
Because the Charter is a treaty and resolutions are extensions of it, governments are bound vis-à-vis the organization and other governments through the general principle of international law, *pacta sunt servanda*, to resolutions enacted under articles of the Charter which authorize mandatory action.

If the Charter is to be applied in a domestic court, its authority in domestic law should also be examined. It has been argued that in U.S. domestic law the legal character of a resolution promulgated by an international organization is simply that of an executive agreement enacted under the Executive's own constitutional powers. The organization itself is merely a forum for negotiating the agreement. This analysis best applies to mandatory Security Council resolutions which become binding after the United States has had the opportunity to veto them. If the United States vetoes the resolution, no agreement would be made. The executive agreement analysis, however, could not apply to a recommendatory resolution which could come into force without the United States's consent.

Security Council at any given time, no international consensus can be claimed for a proposition arising from the Security Council without its subsequent invocation by the General Assembly. In terms of U.S. courts the customary law analysis of Security Council resolutions is not as strong as the treaty analysis because of the Supreme Court's reluctance to "discover" international customary law given substantial controversy about its existence. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). See also R. FALK, *The Role of Domestic Courts in the International Legal Order* (1964). If there is no consensus as to the existence of a custom as evidenced by resolutions, the treaty analysis has a better chance of domestic judicial acceptance.

"Agreements are binding."

It is not possible to draw a domestic analogy from the experience of the European Common Market. The E.E.C. is a sui generis legal order created by the *transfer of legislative power* through the treaty process. Because the power to legislate in certain areas has been transferred, the acts and regulations of the Community—the secondary law—supersede municipal law by their own force and not through the conduit of a treaty. Preliminary Ruling No. 6/64 (Flaminio Costa v. E.N.E.L.) [1964] Comm. Mkt. L.R. 425, 443, 456 (1964); see Dagstoglou, *European Communities and Constitutional Law, 32 Cambridge L.J.* 256, 257 (1973). See generally Behr, *Law of the European Communities and Municipal Law, 34 Modern L. Rev.* 481, 482-84 (1971).

An executive agreement, like a treaty, is an international agreement. No attempt will be made here to distinguish the two. Attempts to delimit their scope elsewhere have been singularly unsuccessful. For such an attempt, see note 129 infra.

As Henkin puts it:

It could hardly make a constitutional difference that U.S. representatives reach international agreements within some organ of an international organization, rather than negotiating a formal agreement in a plenipotentiary conference.

HENKIN, supra note 16, at 194.

There is no reason why executive agreement analysis cannot apply to resolutions in the General Assembly to which the United States assents, though no treaty analysis would be possible here because the Charter for the most part does not authorize binding consequences for action by the Assembly. Henkin's argument in fact refers specifically to resolutions of "international organizations," which as a rule do not have mandatory powers, rather than to those of the Security Council. *Id.*
U.S. concurrence. International lawyers object that this definition of "agreement" hardly describes the precise and arduous process involved in the promulgation of international agreements. In its international aspect such a use of the "agreement" analysis might be suspect. However, the international law of treaties and the U.S. constitutional position on treaties and agreements are not identical. The former is primarily a set of general principles and specific rules whereby treaties may be promulgated, interpreted, and enforced in the international arena. In domestic law, characterization of executive action as an international agreement also describes an allocation of competences within the federal government. It is to this aspect of the domestic law of international agreements that the executive agreement analysis relates. Such a definition legitimizes certain executive actions in the international arena.

It has also been suggested that resolutions of international organizations may be seen domestically as "implementations of the original treaty which established the organization and gave it regulatory powers." Apparently, "implementation" means an executive agreement made pursuant to a treaty. This analysis parallels the international process from which Security Council resolutions derive their legal force. Third, any resolution involving Chapter VII powers (sanctioned for U.S. on April 24, 1970, but not yet ratified, Sen. Exec. L., 92d Cong., 1st Sess., Nov. 22, 1971, 63 AM. J. INT'L L. 875 (1969), 8 INT'L LEG. MAT. 679 at 681 (1969). This Convention excludes agreements not in writing. Id. at art. III. Oral statements, nevertheless, may be equally binding. See The Hyde Park Agreement, Joint Statement of President Roosevelt and Prime Minister MacKenzie King. 4 DEPT STATE BULL. 494 (1941), and the oral declaration of the Norwegian Foreign Minister in the Legal Status of Eastern Greenland Case, [1933] P.C.I.J., ser. A/B, No. 53.

We are accustomed to think of international agreements in written form partially because the term is inaccurately regarded as a synonym for treaties and because recent efforts in this field have focused on the Vienna Convention on the Law of Treaties, signed for U.S. on April 24, 1970, but not yet ratified, Sen. Exec. L., 92d Cong., 1st Sess., Nov. 22, 1971, 63 AM. J. INT'L L. 875 (1969), 8 INT'L LEG. MAT. 679 at 681 (1969). This Convention excludes agreements not in writing. Id. at art. III. Oral statements, nevertheless, may be equally binding. See The Hyde Park Agreement, Joint Statement of President Roosevelt and Prime Minister MacKenzie King. 4 DEPT STATE BULL. 494 (1941), and the oral declaration of the Norwegian Foreign Minister in the Legal Status of Eastern Greenland Case, [1933] P.C.I.J., ser. A/B, No. 53.


Chapter VII. Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air,
tions) could be seen as an executive agreement authorized by Act of Congress, since the United Nations Participation Act of 1945 specifically delegates power to the President to impose sanctions voted under Chapter VII.

The last two approaches emphasizing either executive agreements pursuant to a treaty or an Act of Congress are preferable in a time when the power of the President to conclude executive agreements is being challenged since both recognize some role for the legislature in the treaty-resolution process. If the resolution is an executive agreement authorized by treaty, the Senate at least can be said to assent to resolutions arising out of the Security Council by having consented to the Charter. An additional advantage of this approach is that a resolution would have the same effect as a treaty—it would supersede previous statutes on the subject. The same is true if the resolution is seen as an executive agreement authorized by Act of Congress since an act of Congress supersedes a previous act. In contrast, an executive agreement pursuant to the President’s constitutional authority would not supersede previous acts; therefore, the pure executive agreement approach would limit the potential scope of a resolution in U.S. law, since the resolution would not be superior to existing statutes. On the other hand the presidential prerogative definition should not be rejected out of hand. In a situation where Congress has failed to act (as opposed to acting by withdrawing implementation as was the case in Diggs), independent presidential power could justify the binding effect of a Security Council resolution. In any event the purpose of assigning a Security Council resolution the status of an executive agreement is to traverse what would otherwise be a constitutional problem raised by the fact that treaties need the consent of the Senate, and some international agreements need the consent of Congress, whereas a resolution is presented to neither for a vote.

Before a resolution of the Security Council can have a binding

postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.


24 Such delegation was previously upheld in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).


26 RESTATEMENT §§ 119, 142.

27 Id. § 144.
effect on individuals by way of U.S. treaty obligations in a U.S. court, it must spring from a Charter provision which compels the adherence of member states. Article 24 of the United Nations Charter confers primary responsibility on the Security Council for the maintenance of international peace and security and lists the specific powers to be found in Chapters VI (Peaceful Settlement of Disputes), VII (Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression), VIII (Regional Arrangements), and XII (International Trusteeship System). Article 25 binds members to carry out the decisions of the Security Council. Thus, in order to know when members are obligated, it is necessary to know when a Security Council action is a decision and whether the Charter empowered the Security Council to make that decision.

There are three alternative interpretations of the Charter regarding the kinds of Security Council resolutions which mandate compliance by member states. The first position holds that action under any of the powers specifically enumerated in Article 24 may be the basis for a decision. This will be called the specific Article 24 approach. Until recently, however, the most common definition of what action is mandatory under the Charter has been more narrowly defined. This narrower position holds that a resolution which derives its authority from Chapter VII is mandatory because the wording of only that Chapter specifically authorizes the Security Council to make a decision capable of triggering the application of Article 25. Since Chapter VI contains no explicit authorization for decisions, only recommendations which have no legal consequences for member states could be taken under it. However, as Rosalyn Higgins has demonstrated, the idea that Article

---

28 See note 117 infra.
29 Additionally, resolutions which are recommendatory in nature may become binding if repeated and recited enough to become, through the expectations built up around them, norms of customary law. Cf. authorities cited note 9 supra. But see note 13 supra.
30 1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
   2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.
31 "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with present Charter."
32 Higgins, The Advisory Opinion on Namibia: Which UN Resolutions Are Binding Under Article 25 of the Charter?, 21 INT'L & COMP. L.Q. 270, 279 (1972). As will be evident, many of the comments in this section on mandatory resolutions come from this seminal article.
33 Id.
could apply only to Chapter VII actions is clearly not warranted by the wording of the Charter, the *traveux préparatoires* or the early practice of the Council. The separation of Chapter VI from VII on the basis of a distinction between "powers to recommend" and "powers to decide" lacks textual support since recommendations are authorized under Chapter VII, Article 39, and because decisions can arguably be made under Chapter VI. Indeed, Article 27 refers to decisions under Chapter VI. Early debates indicate that action taken under Chapter VI was considered binding. In addition, the *traveux préparatoires* record the rejection of an amendment which would have limited the obligatory nature of Security Council decisions to Chapters VI, VII, VIII and XII, much less to Chapter VII alone.

The third approach, a contextual one, was first proposed by the Secretary-General who, in 1947, provided a legal opinion that the powers of the Security Council were not limited to those specifically enumerated in Article 24, but included general powers in the field of international peace and security as well. Members were obligated, he added, to submit to actions taken under either general or specific powers upon application of Article 25. This argument was accepted during the 1971 South West Africa litigation by the I.C.J. The Court pointed out the obvious inaccuracy in reading Article 25, which is placed in Chapter V, as applying only to Chapter VII. Also, if Chapter VII were to be the sole beneficiary of Article 25 application, Articles 48 and 49 in Chapter VII would have been superfluous. Instead of relying upon specific invocations of Chapter VII, the I.C.J. argued that each resolution should be examined in light of its terms, the discussions leading to it, the Charter provisions invoked, and in general, all circumstances which might assist in determining the legal consequences of the resolutions of the Security Council.

---

34 The "legislative history" of treaties.
35 The Corfu Channel Incident (1947), the Greek Frontier Dispute (1947), the Trieste Question (1947) and the Kashmir Dispute (1957) all involved assertions that "recommendations" had to be accepted by Members in conformity with Article 25. Higginson, supra note 32, at 279-82. In the Greek Frontier case the United States specifically argued that Article 34 in Chapter VI was a binding obligation. 2 U.N. SCOR 1124, 1522-26 (1947).
37 2 U.N. SCOR 44, 45 (1947).
38 1971 S.W.A. Case, supra note 2, at 53, ¶ 113.
39 Id. These Articles require members of the United Nations to carry out the decisions of the Security Council regarding mandatory enforcement actions.
40 The present U.S. position is unclear. At the U.N.'s inception the United States favored the Article 24 general approach. Secretary of State, CHARTER OF THE UNITED NATIONS: REPORT TO THE PRESIDENT ON THE RESULT OF THE SAN FRANCISCO CONFERENCE, June 26, 1945, Dep't State Pub. No. 2349, Conf. Ser. 71 at 79 (1945). In practice
Whether resolutions are based upon Article 24 general powers, which the I.C.J. prescribes, or the specific Article 24 approach, the I.C.J.'s formula for determining whether or not an action is mandatory will still have to be applied. In both cases, it will be necessary to determine whether the delegates considered the resolution to be mandatory. The only way to do this would be to analyze the debates and the text of the resolution for evidence of intent. Therefore, there is little methodological difference between the general Article 24 approach of the I.C.J. and the specific Article 24 position. While there may be a practical argument that limiting obligatory measures to those voted under Chapter VII enhances understanding of what is at stake in a heated debate, it generally is not difficult to determine from the records of the debate and the terms of the resolutions whether or not the resolution was intended to be mandatory.

A potential disadvantage in using either the specific or general Article 24 theories of mandatory obligations to enforce Security Council decisions involves Article 2(7), which provides that the United Nations may not interfere with the domestic jurisdiction of member countries. Article 2(7), by specific reference, forbids the use of this de-

it has supported a theory of binding obligations arising, inter alia, out of Chapters VI, VII, and XI. See respectively 2 U.N. SCOR 1124, 1522-26 (1947), 56 DEPT STATE BULL. 140-43 (1967) (address by Ambassador Goldberg before the American Ass'n of Law Schools at Washington, D.C., Dec. 29, 1966), and id. at 143. However, while the Chapter VII approach is increasingly discredited, the United States may be moving toward its acceptance. Judge Fitzmaurice's dissenting opinion in the 1971 South West Africa Case, at 297, 298 noted that the U.S. representative had argued that sanctions which member states would be bound to apply to an offending state could only be taken under Article 39. It is possible that he was referring to sanctions as a term of art, not as a synonym for enforcement. On the other hand, the counsel may have been developing a distinction between the obligations of members, parties to the dispute, and the obligations of the other nations to honor or implement the Security Council decision regarding the dispute. This distinction is supported by U.S. practice since on the occasions in which the United States has argued that an obligation arose out of non-article VII sources, the debate centered upon whether the parties to the dispute were obligated to submit to the Security Council directive. The distinction, if it is intended, is fatuous. If the Security Council is entitled to make decisions in an area then all nations are bound to that decision by way of Article 25 whether or not they are parties to the dispute. While the decision itself may contain no specific action for noninvolved members, Article 25 contains an implied obligation of states not to interfere with the Security Council's handling of the situation and, presumably, to facilitate it diplomatically, or otherwise, if possible.

41 The distinction between these positions may be illuminated by analogy to the "general welfare-delegated powers" dispute surrounding federal powers in the United States.

42 Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.
fense to avoid obligations incurred by application of Chapter VII sanctions. No such exception to Article 2(7) exists for action under Article 24 or another Chapter. The rationality of the domestic jurisdiction clause in this area is questionable, however, in actual practice. Where actions constitute a threat to peace and security, they have already exceeded the bounds of domestic jurisdiction so the final clause of Article 2(7) is superfluous for any mandatory Security Council resolution. Particularly with regard to problems of human rights and racial discrimination, Article 2(7), in practice has been overtaken by a realization that human rights problems can never be within the sole jurisdiction of one country. On the other hand, despite the clear prohibition of the use of the doctrine when enforcement measures are contemplated, domestic jurisdiction has been put forth as a defense even when Chapter VII powers have been invoked. Since the efficacy of the Chapter VII exception is doubtful anyway, its failure to include reference to Article 24 should not limit the extension of Article 24 resolutions in domestic situations.

An example of the Chapter VII approach is the Rhodesian sanctions upon which the Diggs litigation was based. Security Council Resolution 232, adopted December 16, 1966, was the first employment of mandatory sanctions voted specifically under Chapter VII power. It imposed mandatory selective sanctions against importation by United Nations members and nonmembers of a wide range of mineral and agricultural products, and imposed an arms and vehicle embargo. Superseding Resolution 232 on May 29, 1968, Security Council Resolution 253 imposed comprehensive mandatory sanctions against all commodities from Rhodesia, and instructed member states to avoid diplomatic relations, to restrain their citizens and corporations from any business dealings with Rhodesia, and to prevent investment in Rhodesia. The official U.S. position regarding these two resolutions was that they were authorized by Chapters VII and XI (Declaration Regarding Non-Self Governing Territories).

The court of appeals in Diggs did not question the statement of the

---

45 McDougal & Reisman, supra note 43, at 13-16.
district court that the Rhodesian embargo was mandatory,\textsuperscript{49} nor the argument in the appellant's brief that it was mandatory under Chapter VII and Article 25 of the Charter.\textsuperscript{50} The court focused on whether the resolution created individual rights rather than upon the necessarily anterior question of whether states were bound by the resolution. Prior to \textit{Diggs} a congressional act\textsuperscript{51} had had the effect of directing the President to issue import licenses for metallurgical chromite in violation of the Security Council embargo of Rhodesian minerals. The suit challenged the power of the President to violate that embargo resolution (the power of Congress to do so having been admitted). While standing to sue was upheld for those plaintiffs who had either been physically barred from Rhodesia or who had suffered economic damage as a result of the Rhodesian Government's racist policies, the D.C. Court of Appeals ultimately dismissed the case for lack of justiciability in light of the clear intent of the congressional act to direct the President to violate the Charter.\textsuperscript{52} However both courts accepted, at least by implication, that the sanctions are binding on U.S. courts unless Congress passes conflicting legislation. It could be argued that resolutions are binding only because they have been implemented by the United Nations Participation Act of 1945 or by Executive orders. Neither court, however, followed this line of reasoning. It is arguable that the courts considered the resolution directly binding.

Perhaps one reason the \textit{Diggs} court perceived no difficulty in terming the embargo resolution a treaty obligation binding upon individuals was the fact that it was based on Chapter VII. There is very little international dispute over the mandatory force of Chapter VII. But resolutions based on the general Article 24 power, because its mandatory force is internationally contested, would raise a more difficult problem for a U.S. court. If the court should refuse to accept Article 24 as giving rise to mandatory obligations, then neither the United States as a state, nor its citizens as individuals,\textsuperscript{53} would be bound by a resolution voted under that provision. The resolution would be seen as recommendatory.


\textsuperscript{52} 470 F.2d at 466.

\textsuperscript{53} Since individuals are not recognized in international law their claims are necessarily derivative of the claim of the states of which they are citizens.
only. The Namibia resolutions illustrate the problem. The Security Council rarely makes explicit during debate the authority under which it acts. Several resolutions of the Security Council, both prior and subsequent to the I.C.J.'s 1971 South West Africa Advisory Opinion on the legal consequences of the termination of the mandate, included both mandatory and permissive language regarding the legal status of South Africa in Namibia and the legal consequences of South Africa's presence for other states. By the International Court of Justice formula for distinguishing mandatory from permissive resolutions, the termination itself was clearly mandatory. The debates leading up to the resolutions, and the resolutions themselves definitively demonstrate that the Security Council considered the Mandate terminated and the continued presence of South Africa in Namibia illegal.

While there is little doubt that the paragraphs dealing with termination of the Mandate itself and the consequent illegal occupation of South Africa were decisions made by the Security Council, the accompanying pronouncements calling upon states to refrain from any dealings with South Africa which would imply recognition were expressed in recom-mendatory terms. The United States agreed that South Africa's presence in Namibia is illegal but conditioned its support of Resolution 264 on the Council's not applying mandatory sanctions under Chapter VII, arguing that the situation could not sensibly or humanely be remedied this way. Again in Resolution 269, the United States argued that only steps undertaken voluntarily by individual nations could realize the objective of Namibian independence.

In the debate preceding Resolution 301 the United States delegate

54 Compare the operative verbs in the following excerpts. Security Council Resolution 264, Mar. 20, 1969 (U.S. in favor): Recognizes the General Assembly's termination of the Mandate, and Considers South Africa's continued presence illegal; Resolution 269, Aug. 12, 1969 (U.S. abstained): Decides the continued occupation is an aggressive encroachment on the authority of the United Nations, Calls Upon States to refrain from dealing with South Africa on behalf of Namibia; Resolution 276, Jan. 30, 1970 (U.S. in favor): Reaffirms G.A. 2145, S.C. Resolution 264 and Reaffirms that extension of South Africa's laws is illegal, Calls Upon States to refrain from dealing with South Africa implying the legality of South Africa in Namibia; Resolution 283, July 29, 1970 (U.S. in favor): Reaffirms Resolutions 264 and 276, Requests all States to refrain from diplomatic or consular relations concerning Namibia, Calls Upon States to ensure that companies cease dealings in Namibia; Resolution 301, Oct. 20, 1971 (U.S. in favor): Reaffirms territory of Namibia is under direct responsibility of the United Nations, Declares South Africa's presence to be illegal and a breach of international obligations, Agrees with the I.C.J. that Members of the United Nations are under an obligation to recognize the illegality of South Africa's presence and the invalidity of acts on behalf of or concerning Namibia, Declares all franchises and contracts granted by South Africa after G.A. resolution 2145 to be void.
56 Id. at 684.
specifically approved the I.C.J.’s conclusion that South Africa is legally obligated to withdraw and that states are legally obligated to refrain from dealings with South Africa which could imply recognition or lend support to the administration.\(^67\) However, he went on to say that, as to the specific obligations suggested by the court\(^68\) (which prohibited *inter alia* bilateral treaties with South Africa involving Namibia, and diplomatic missions in or for Namibia), the United States “considers states free to take appropriate action to protect their own citizens and to assist the people of Namibia.”\(^69\) The United States representative seemed to be attempting to reserve the right to individual states to define the legal consequences of the termination for states not parties to the dispute\(^60\) despite the fact that precisely this question had been put before the I.C.J. for resolution with the affirmative vote of the United States.

In an oral statement before the I.C.J. during the 1971 South West Africa litigation, the Legal Advisor to the State Department reminded the Court that the request for an advisory opinion on the termination of the Mandate asked only what the legal consequences were for states, not for individuals.

In many cases it will be for the courts of the member States to determine, in accordance with recognized principles of private and public international law, the effect on private relationships and transactions of acts taken by the Government of South Africa on behalf of or concerning Namibia after the adoption of Resolution 2145.\(^61\)

Despite the caveat that the United States considers itself free to take any action necessary, as a result of its affirmative votes on the series of resolutions leading up to the termination of the Mandate,\(^62\) and the explanation of its position during the proceedings before the I.C.J. and


\(^{68}\) 1971 S.W.A. Case, * supra* note 2, ¶¶ 133, 118, 122, 123, 125 at 58, 54-56.


\(^{60}\) *See* note 40 *supra*.


\(^{62}\) On May 19, 1970, the U.S. Ambassador to the United Nations announced before the General Assembly that the United States would henceforth officially discourage investment by U.S. nationals in Namibia, would refuse to grant Export-Import Bank guarantees for trade with Namibia, and would not extend protection of the United States to U.S. nationals who acquire rights in Namibia after the adoption of G.A. Resolution 2145 (Oct. 22, 1966) against the claims of a future government of Namibia. \(62\) *Dept. State Bull.* 709 (1970). The policy was also announced by the Assistant Secretary of State for African Affairs before the Subcommittee on African Affairs of the House Committee on Foreign Affairs on May 20, 1970. *Id.* at 718. The U.S. Ambassador to the United Nations again affirmed this policy during the Security Council debates on Resolution 301. “Investors were informed of this new policy and investment has in fact been inhibited.” U.N. Doc. S/PV 1598 at 11 (1971).
the debates on Resolution 301, the United States is bound under international law to do nothing which would imply recognition of South Africa’s presence in Namibia.  

Plaintiffs in *American Metal Climax* could have put forth an argument along the lines developed above to prove that the termination of the Mandate by the General Assembly and the Security Council is binding not only upon South Africa but also upon the United States. As previously indicated, the United States Executive has taken the position that the consequences enumerated by the I.C.J. and listed as recommendations in the resolutions are not binding. However, no domestic court should lightly disregard the ruling of the I.C.J., even in an advisory opinion, since such an opinion carries great weight in interpreting the obligations of states arising out of treaty commitments. In addition, the federal and state judiciaries are not, in the area of treaty interpretation, bound to the construction given by the Executive, although his opinion is entitled to great weight. Until now no conflict has appeared in an internationally sensitive case. As the U.S. representative argued before the I.C.J., the courts are free to determine whether a treaty obligation arose as a result of the United States’ vote in the Security Council on the termination of the Mandate. Or, rather than accept the I.C.J.’s interpretation, a domestic court could determine for itself the consequences in international law, as opposed to treaty law, flowing from the termination of the Mandate. Thus, the actual domestic impact within members states could be determined not by reference to treaty obligations, but by reference to international law which may look even to a recommendatory resolution as a source of law-creating expectations. Because the subsequent resolutions were recommendatory as to the consequences for states, they are not treaty obligations pursuant to the Charter. They may, however, be the consequences of the mandatory termination which international law imposes, as the I.C.J. held. It will be up to domestic courts to determine whether the termination resolution obligates the United States under existing principles of

---

63 In addition to the treaty argument, this assertion can be based upon principles of estoppel recognized in international law by Legal Status of Eastern Greenland, [1933] P.C.I.J., ser. A/B, No. 53.


65 An advisory opinion by the I.C.J. is considered an authoritative guide on the points of law involved in the case. I. Brownlie, *Principles of Public International Law* 706 (1973).


67 See Falk, *supra* note 9, at 782.
international law, whether the recommendatory resolutions have given rise to a norm of customary law, or whether notwithstanding the recommendatory language, the resolutions were decisions of the Security Council and therefore binding as treaty obligations. Thus, mandatory Security Council resolutions may have either a direct effect on national law through treaty law, as in the Rhodesian case, or they may have an indirect effect by compelling the application of international law in U.S. courts.

Non-Self-Executing Treaties and the Political Question Doctrine

Non-Self-Executing Treaties

Once it is determined that a resolution is a treaty obligation, questions of interpretation will arise. A binding decision by the Security Council has been before a U.S. court only in Diggs v. Shultz. However, other Charter provisions having impact on the rights of individual citizens have been before the Supreme Court and the analysis applied in these cases will help determine the perspective from which mandatory resolutions are viewed. The Supreme Court has never ruled directly on litigation involving the Charter even when the issue was before it, though in concurring opinions Justices Black and Douglas, and Murphy and Rutledge, have implied that the Charter holds a prestigious position in U.S. law. The bulk of interpretation has been done by lower federal and state courts. From these courts two lines of cases have emerged—those attempting to use the “human rights” provision of the Charter to invalidate state laws, federal and state administrative regulations, or private contracts; and those asserting the legal personality of the United Nations within the United States to secure contract damages.

The human rights litigation is based on the Charter’s preamble, Article 1 (Purposes and Principles), Article 2 (Duty of Members to Act in Accordance with Principles), Article 55 (Objectives of Economic and Social Cooperation), Article 56 (Pledge of Members to Act to Achieve the Article 55 Purposes) and Article 62 (Powers of the Economic and Social Council). Proponents argue that these provisions

---

68 470 F.2d 461 (D.C. Cir. 1972).
71 United Nations Charter provisions involved in domestic litigation have been the preamble, articles 1, para. 3; 2, para. 2; 41; 55; 56; 62; 100; 104; 105 and Chapter XII.
have legal force equal to that of a federal statute because Article VI, Section 2 of the United States Constitution places treaties and statutes on an equal basis in U.S. law. Alternatively, they rely on the Charter as an authoritative expression of United States public policy. Armed with these arguments, plaintiffs have challenged alien land laws, racially restrictive covenants, immigration regulations, voting requirements of literacy in English, and statutes prohibiting interracial marriages. A frivolous (or desperate) attempt to avoid a Mississippi statute prohibiting possession of liquor even asserted that Article 62 had given the Economic and Social Council complete jurisdiction over regulation of alcoholic beverages.

Ultimately all of these claims were rejected. The earlier opinions suffer from a lack of analytical rigor in that they employ none of the theories of treaty interpretation which might have justified their denials of the legal efficacy of the Charter in U.S. courts. Admittedly these assorted claims were normally only collateral issues, but occasionally their validity was denied with the bare assertion that the Charter has no impact on private rights. The Supreme Court of Michigan, for example, maintained:

We do not understand it to be a principle of law that a treaty between sovereign nations is applicable to the contractual rights between citizens of the United States when a determination of those rights is sought in the State Courts. . . . [T]hese pronouncements are merely indicative of a desirable social trend and an objective devoutly to be desired by all well-thinking peoples.

This position is clearly erroneous. A treaty is determinative of indi-

---

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


75 Hitai v. Immigration and Naturalization Service, 343 F.2d 466 (2d Cir. 1965); Vlissidis v. Anadell, 262 F.2d 398 (7th Cir. 1959).


77 Perez v. Sharp, 32 Cal. 2d 211, 198 P.2d 17 (1948).

78 Dossett v. State, 211 Miss. 650, 52 So. 2d 490 (1951).

vidual rights if it indicates clearly enough that it is intended to have that effect, and the Charter was submitted to the Senate as a treaty. The Supreme Court itself has stated:

A treaty, . . . by the express words of the Constitution, is the supreme law of the land, binding alike National and state Courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights.\(^{80}\)

Other courts argued that Article 2(7) (which prevents the United Nations from intervening in the domestic jurisdiction of members) of the Charter itself precluded application of the specific provisions by domestic courts.\(^{81}\) Several scholars of international law, and the I.C.J., however, have maintained that Article 2(7) does not limit the competence of the United Nations with respect to human rights because members have assumed international obligations with respect to those human rights. Given these undertakings the interpretation, application and enforcement of these obligations have ceased to be a matter exclusively within the domestic jurisdiction of nations.\(^{82}\)

The early opinions tended to dismiss the entire Charter as irrelevant. Later cases at least recognized that the Charter provisions should be examined individually. Some provisions, such as Article 104 (functional legal capacity of the United Nations) and Article 105 (privileges and immunities of United Nations Mission and Staff), are self-executing\(^{83}\) on their face. The Charter has been invoked successfully to establish the legal rights of the United Nations as an institution vis-à-vis the government, U.S. citizens, and corporations. Articles 104 and 105 have been held to authorize United Nations organizations to sue U.S. companies for contract violations;\(^{84}\) permit immunity from prosecution for members of the United Nations Mission\(^{85}\) or Staff;\(^{86}\)

---


\(^{82}\) For citations see Wright, supra note 44, at 74 n.35.

\(^{83}\) The self-executing doctrine refers to a principle of foreign relations law which holds that certain international agreements can have no domestic effect until implemented by Congress. For fuller discussion see text at notes 92–110 and notes 97, 104 infra.


\(^{86}\) United States v. Melekh, 190 F. Supp. 67 (S.D.N.Y. 1950) (dictum); United
and permit the City of New York to provide special facilities for the United Nations Headquarters. Judge Edgerton of the Court of Appeals for the District of Columbia also held that Articles 100 (Prohibition of Member States Influence on United Nations Staff) and 105, together with United Nations regulations passed in conformity with those articles, prevented application of limited U.S. definitions of privileged testimony in United States courts when staff members were involved, and conferred greater privilege on U.S. citizens questioned about knowledge obtained as a United Nations employee.

Edgerton's rationale was that the United Nations could not function effectively nor fulfill its stated purpose were such privilege not granted its employees. The same theory was the basis of the suit noted above brought to determine the capacity of a U.N. organization to sue on a contract. This functional approach, echoed in the Reparations Case, has never been extended beyond cases involving the organization's legal personality. However, the enforcement of the decisions of the organization with regard to peace and security, the protection of which was the primary objective of the Charter, is at least important to the survival of the United Nations, as an institution, as is its legal capacity in the world community.

The first courts to analyze in any depth the binding effect of the Charter in U.S. law were the Second District Court of Appeals of California and that state's Supreme Court in Sei Fujii v. State. Sei Fujii was a challenge to the California Alien Land Laws which prohibited an alien who could not qualify for permanent resident status from owning land within the state. The case presented a two-pronged attack asserting violations of the equal protection clause of the United States Constitution and the human rights provisions of the United Nations Charter. The California Court of Appeals reasoned that it could not decide the case on constitutional grounds, because the United States Supreme Court had upheld alien land laws several times and had only recently decided a case on technical grounds which had pre-


88 United States v. Keeney, 218 F.2d 843 (D.C. Cir. 1954) (Judge Edgerton wrote the opinion but pointed out that the other justices did not concur with him on this point).

89 Id. at 845; Balfour, Guthrie & Co. v. United States, 90 F. Supp. 831 (N.D. Cal. 1950).


presented fully the constitutional issues. Instead, it struck down the California statute on the theory that it conflicted with the preamble, Articles 1, 2, 55 and 56 of the Charter which were held paramount to state law because of the Supremacy Clause.

On appeal, the California Supreme Court, handing down what has become the leading case on domestic application of the Charter, affirmed the holding on equal protection grounds, but rejected the lower court's application of the Charter. The Charter provisions were held not to be self-executing because they did not sufficiently indicate, on their face, an intention to prescribe a rule that, standing alone, would be enforceable by the courts. Neither the language used nor the preparatory history of the Charter, the court argued, showed the requisite intention of its framers to confer legal rights and obligations upon individual citizens. Most courts subsequent to Sei Fujii have relied on or referred to its non-self-executing arguments to reject human rights cases.

There are two answers to the California Supreme Court's argument in Sei Fujii. First, it misapplied the doctrine of non-self-executing treaties as that doctrine is applied in domestic law. While the doctrine is common to both national and international law, it is not identical in both contexts. In international law, the doctrine does indeed refer to whether the treaty provision is intended to have immediate effect on individuals, or whether it is a direction to a political officer. In U.S. law the doctrine has assumed a separation of powers gloss and in a sense has become part of the political question doctrine.

Historically, treaties were monarchical instruments governing matters of state and international concern. Whether they had impact on individuals could hardly have been of consequence given the supremacy of authority residing in the monarch over all citizens in both their public and private capacities. As constitutional forms of government developed which separated legislative functions, such as representation of private rights, from executive ones such as treaties, the treaties continued to be restricted in application to states, not individuals. But then the distinction had become meaningful. Something more than a normal treaty was needed to confer rights on individuals which would be binding on a domestic court. That requirement became the self-executing doctrine.

---

92 Id. at 485 (referring to Oyama v. California, 332 U.S. 633 (1948)).
93 U.S. Const. art. VI, § 2. For text see note 72 supra.
96 See note 104 infra.
97 Historically, treaties were monarchical instruments governing matters of state and international concern. Whether they had impact on individuals could hardly have been of consequence given the supremacy of authority residing in the monarch over all citizens in both their public and private capacities. As constitutional forms of government developed which separated legislative functions, such as representation of private rights, from executive ones such as treaties, the treaties continued to be restricted in application to states, not individuals. But then the distinction had become meaningful. Something more than a normal treaty was needed to confer rights on individuals which would be binding on a domestic court. That requirement became the self-executing doctrine.
executing treaties involve the issue of competence of the maker. Quincy Wright contends:

In practice, the doctrine of non-self-executing treaties has been applied only to preserve the constitutional rights of the political organs of the Federal Government—the President, the Congress, and especially the House of Representatives which does not normally participate in treaty making—in matters which for historical or practical reasons have been considered particularly within the competence of these organs.98

Sei Fujii relies heavily upon the absence of intent. But “intent” is an inadequate criterion to distinguish executed from executory treaties. This is demonstrated by the fact that no treaty, regardless how clear the intent or specific the language, which tried to declare an act a criminal offense could be self-executing.69 Neither could a treaty which required appropriation.100 Both of these powers are specifically reserved to the Congress. Thus, it would appear that the non-self-executing doctrine may have arisen as a check on the broad executive power to conclude treaties.

Non-self-executing treaty analysis should not be used to decide questions involving the compatibility of treaty provisions and state law because the policies which the self-executing doctrine serves are those of separation of powers between the federal branches—not policies concerning federal-state comity. Whether or not the treaty provision is self-executing, it is a statement of federal policy101 which should prevail over conflicting state law according to Zschernig v.

arose as individuals began to play a more extensive role in public affairs. The presumption against treaties having individual impact was rebuttable if the treaty clearly expressed an intention that individuals would be affected. Such an intention on the part of the Executive would not conflict with the legislative competence over private rights where the legislature had to approve the treaty before it had any domestic effect anyway. In Europe the legislatures normally must consent in advance to a treaty (as the Senate must in the United States before a treaty can have international effect). But in the United States, where consent of the legislature is not required to give domestic effect if the treaty is self-executing, the self-executing doctrine protected the prerogatives of the legislature. See Wright, The Legal Nature of Treaties, 10 Am. J. Int’l L. 706, 711–18 (1916).

98 Wright, supra note 44, at 68.
100 But see 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 490 (1943).
A domestic court's search for the intention of the signatories leads to other conceptual difficulties. The question to be asked of a treaty provision is whether it was intended to have "immediate" effect. Under the "intent" theory surely the intention of the other parties to the treaty would be relevant. Yet in most countries the treaty must be specifically incorporated by legislative act after ratification since those countries have no equivalent of the Supremacy Clause which accomplishes that incorporation for the United States. While incorporation and implementation are not necessarily identical doctrines, a treaty promulgated under a system requiring incorporation could not "intend" to have "immediate" domestic effect. "Intent" analysis is inapplicable to the question of self-executing treaties where multilateral treaties, like the Charter, bring together countries with differing constitutional provisions on the domestic effect of treaties, and where those provisions preclude a treaty from having immediate domestic force.

Second, if, as the Sei Fujii decision implied, precision is evidence of justiciability, rather than intent, and if precision is provided after the treaty becomes effective, the formerly executory provision is executed by those subsequent agreements. It may be argued that what-

102 SOHN & BUERGENTHAL, supra note 94, at 947.

It is Quincy Wright's contention that in no case other than Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829), later repudiated on other grounds in United States v. Perche- man, 32 U.S. (7 Pet.) 51 (1833), has a treaty protecting private rights been rejected in favor of state law on the grounds that the treaty was not self-executing. Wright, supra note 44, at 66.


105 Incorporation is not the same as implementation. In Germany, the courts have held provisions of GATT to be non-self-executing even though GATT has been incorporated into German law. Risenfeld, The Doctrine of Self-Executing Treaties and GATT, 65 AM. J. INT'L L. 548 (1971); see Schlüter, The Domestic Status of the Human Rights Clauses of the United Nations Charter, 61 CALIF. L. REV. 110, 131 (1973). By way of explanation, analogies are sometimes drawn to administrative law where a statute providing for a minimum price of wheat is to be carried out by regulations of the Secretary of Agriculture. The statute is not enforceable until the rules are promulgated, but it is still the law of the land. Part of the "law" is that right3 accrue only when the Secretary acts. Note, When Are Treaties Self-Executing?, 31 NEw. L. REV. 463, 467 (1952). Where a statute is involved, however, a party has the opportunity of bringing mandamus against the agency to compel it to implement the statute according to the congressional directive. If this interpretation of the self-executing doctrine is correct, then consistency would require a mandatory injunction to lie against the appropriate executive department for failure to implement an executive agreement which the Executive has negotiated in an international organization. Cf. the impoundment cases: State Highway Comm'n v. Volpe, 479 F.2d 1099 (8th Cir. 1973); Community Action Programs Executive Directors Ass'n v. Ash, 365 F. Supp. 1355 (D.N.J. 1973); National Council of Community Mental Health Centers v. Weinberger, 361 F. Supp. 897 (D.D.C. 1973).

ever absence of specificity existed upon passage of the Charter, that specificity has since been provided. The Universal Declaration of Human Rights\textsuperscript{106} has been called an authoritative interpretation of the human rights provisions of the Charter.\textsuperscript{107} Additional interpretations are the International Covenant on Civil and Political Rights\textsuperscript{108} and the International Covenant on Economic, Social and Cultural Rights.\textsuperscript{109} Thus, the \textit{Sei Fujii} court should have considered the specificity of Article 17 of the Universal Declaration of Human Rights, which prescribes that everyone has the right to own property and that no one should be arbitrarily deprived of it. These and many United Nations resolutions on human rights, while not treaty obligations in themselves, have become over the years the international customary norm regarding human rights. They easily provide the requisite precision of language to make the rights guaranteed in the Charter justiciable.\textsuperscript{110} In so far as justiciability turns on precision, international action, not domestic implementation, should suffice.

This extended analysis of the potentially executory nature of certain Charter provisions underlines a problem for mandatory resolutions. Chapter VII, the most commonly cited Charter provision capable of giving rise to Security Council \textit{decisions}, was specifically implemented by the United Nations Participation Act. The fact of passage and the debates revealed a general belief in Congress that Chapter VII was not self-executing. By analogy it could be argued that all mandatory charter provisions are not self-executing and must be specifically implemented by Congress before they can take domestic effect.

The United Nations Participation Act of 1945\textsuperscript{111} delegates congressional power to the President to impose a complete or partial economic and communication blockade and to impose penalties on U.S. citizens who violate the embargo. But the Act authorizes such action only if sanctions are voted by the Security Council in pursuance of Article 41 (economic sanctions in Chapter VII). In this respect invocation of some Security Council actions under Article 24 or Chapters VI, VIII or XII could be disadvantages for litigants seeking to uphold Security Council resolutions in U.S. courts because they would not be implemented.

\textsuperscript{107}Bleichr, supra note 9, at 458-65.
\textsuperscript{109}\textit{Id.} at 49.
\textsuperscript{110}For extensive analysis of the self-executing doctrine in relation to \textit{Sei Fujii}, see Schlüter, supra note 104.
\textsuperscript{111}22 U.S.C. § 287(c) (1970).
The existence of congressional implementation is not a clear indication, however, of the necessity for implementation. If the self-executing doctrine is based on competence to pass laws, it can be argued that charter provisions may be self-executing despite the United Nations Participation Act because the President has power in foreign commerce derived from his foreign relations power. In many fields congressional and executive responsibilities overlap; thus the mere existence of the United Nations Participation Act is not clear evidence that congressional implementation would be necessary if enforcement measures were to be taken under Article 24. The Restatement (Second) of Foreign Relations Law observes:

The mere fact, however, that a Congressional power exists does not mean that the power is exclusive so as to preclude the making of a self-executing treaty within the area of that power. Thus, the fact that Congress has the power to regulate commerce with foreign nations does not mean that the making of a self-executing treaty dealing with foreign commerce is precluded; in fact, many provisions in treaties dealing with foreign trade and commerce are self-executing.

Even if otherwise self-executing, however, an Article 24 resolution would still be executory if it contemplated criminal penalties for its violation. The United Nations Participation Act delegated to the President the authority to impose criminal penalties for violation of Article 41 sanctions. Without such congressional implementation, such penalties would be precluded since, under Article I, Section 8, Clause 10 of the United States Constitution, Congress has exclusive power to define crimes and impose penalties. Thus, treaties which impose criminal penalties cannot be self-executing because the President has no independent authority to enact criminal penalties for "international crimes." Unless the 1945 Act were amended to read decisions of the Security Council, instead of enforcement measures under Article 41, the Executive would have to return to Congress after

---

122 The fact that article 41 was implemented by this Act does not necessarily provide conclusive evidence that the treaty is executory with respect to sanctions voted under a different article, or even that execution was needed in that case. In Balfour, Guthrie & Co. v. United States, 90 F. Supp. 831 (N.D. Cal. 1950), and Curren v. City of New York, 191 Misc. 229, 77 N.Y.S.2d 206, 212 (Sup. Ct. 1947), Articles 104 and 105 were held to be self-executing despite the fact that Congress had passed further implementing legislation in the International Organizations Immunities Act, 22 U.S.C. §§ 288–288f (1970).

123 RESTATEMENT § 141.

124 "To define and punish Piracies and Felonies committed on high Seas, and Offences against the Law of Nations."

115 See authorities cited note 99 supra.
each Security Council vote for authority to impose such penalties.

With the exception of the criminal sanctions, the distinction in the Charter between Article 24 resolutions and Chapter VII resolutions need have little effect in domestic law. A range of action is open to the President, even under Article 41, which is not and need not be specifically implemented by Congress. Diplomatic measures, for example, are uniquely within the President's foreign policy capacity, and measures under Article 41 are not specifically limited to the three enumerated ones of economic, communication and diplomatic blockade. Only economic and communication sanctions require prior congressional delegation of authority to the President, and it is likely that, should such measures be contemplated, they would be invoked under the Chapter VII powers anyway. Even under the Chapter VII approach implementation is not guaranteed because Congress can always withdraw the authority granted to the President as was done with regard to strategic materials during the Rhodesian sanctions.

Action under Chapter VII will normally be taken in different situations so the question of what would happen if Article 24 general powers were used to further a Chapter VII purpose would probably not arise. The real problem for domestic invocation of Security Council resolutions raised by Article 24 is also likely to arise under those Chapter VII powers which are exercisable by the Executive alone. That problem is whether the Executive intended to create rights in U.S. citizens by his actions in the Security Council and whether the courts will be willing to "discover" these rights if they are ambiguous.

Theoretically a resolution calling for executive action should be subject to the requirements of the self-executing doctrine. Yet case law is confused over whether the implementation required by an executory provision must be enacted by Congress or whether it could also be supplied by the Executive. Dicta indicate that any of the three branches

---


117 Byrd Amendment, supra note 45.

Since treaties supersede prior legislation and since mandatory resolutions have been interpreted as treaty obligations, it has been argued that the resolutions reaffirming the sanctions which were passed subsequent to the Byrd Amendment should have the effect of repealing the amendment. 14 VA. J. INT'L L. 185, 192 (1973). This analysis overlooks the fact that the effect of the Byrd Amendment was to withdraw the congressional delegation of power to the President to enforce Chapter VII with regard to strategic materials. Therefore the resolutions, not having been congressionally implemented, could have no domestic effect. If, however, the President has the constitutional power to impose economic sanctions on his own, then implementation would not be needed and this thesis would be correct. See text at notes 27–28 infra.
could be called upon to implement a treaty. However, in no actual case has a treaty provision been found to be executory where action other than congressional has been lacking, a situation which provides support for the thesis that the self-executing doctrine is primarily based on a separation of powers rationale. Even if the dicta are correct, the problem would probably never be analyzed in those terms. Rather, it would likely be viewed as within the traditional province of the political question doctrine.

**Political Question Doctrine**

The remaining obstacle to domestic invocation of United Nations mandatory resolutions is the political question doctrine. Two situations are likely to arise in this area. First, in situations like that in *Diggs*, where Congress passed legislation which in effect ordered the President to break a treaty, the courts must decide whether they can intervene in a dispute between the executive and legislative branches. This separation of powers issue raises the strict political question doctrine. The second type of political question involves the willingness of the judiciary to "interfere" with executive action in foreign policy. Where a resolution purporting to be mandatory is accompanied or followed by ambiguous executive pronouncements which arguably limit the resolution's legal effect, the temptation of the judiciary to defer to the interpretation of the Executive is strong, but should be resisted. The function of the judiciary is to adjudicate rights of litigants, not to determine the relative powers of the three branches. But where executive action under the treaty power has given rise to rights and legal expectations, courts can and should intervene to enforce those rights. Indeed, the principal advantage of characterizing mandatory resolutions as treaties is that such an approach avoids the traditional judicial deference to the Executive in foreign affairs.

It is well settled in U.S. treaty law that Congress can violate a treaty (or a resolution passed pursuant to a treaty) by passing a later, inconsistent statute. While this does not excuse the violation in international law, it does prevent domestic courts from applying the treaty

---

118 *See, e.g.*, Head Money Cases [*Edye v. Robertson*], 112 U.S. 580, 598 (1884); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 272 (1796).

119 For a comparison of the strict political question and the discretionary political question, see Scharpf, *supra* note 66.

120 See note 12 *supra*.

provision. Given the equal positions of treaty and statute in U.S. law, such an interpretation is compelling. To preclude Congress from passing inconsistent legislation would be to confer upon treaty law a preferred position over statutes, which the Constitution does not prescribe. Otherwise, a treaty which could not be terminated would have constitutional force in U.S. law.

If a U.S. court cannot prevent Congress violating mandatory Charter resolutions, can it prevent the President from doing so? The power of the President to violate a treaty, either by failure to implement or by outright breach, is not clear. Congress can violate a treaty because the creation of new laws is its peculiar function, but the Executive's responsibility is faithfully to execute the laws, of which treaties are a part. The plaintiffs in Diggs, by arguing that the amendment of the statute did not clearly direct the President to violate the Charter, attempted to mold that case into one which would present the question of whether the President could, on his own authority, violate a treaty. The court avoided ruling on this argument by concluding that the clear intention of Congress in passing the Chrome Statute (Byrd Amendment) was to violate the treaty.

122 There is a distinction between the violation of a treaty and its termination which commentators are not always careful to make as seen by the fact that some argue that a President can violate a treaty because he can terminate it. Henkin suggests that the President has the power to denounce or terminate treaties even in violation of their terms. HENKIN, supra note 16, at 460-61 n.61. Hackworth suggests the same. 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 319, 332 (1940). Neither cites supporting cases. Petitioner's Brief for Certiorari at 23, Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972) states:

Any confusion resulting from those statements is nothing but a matter of semantics flowing from imprecise use of terminology. The "termination" or "renunciation" referred to has to do with the President (consistent with recognized principles of international practice) noting the termination of a treaty upon its terms or as directed by Congress, or because of a breach by the other state. . . . We know of no precedent for a Presidential power to violate a treaty.

(Emphasis in original.) Termination occurs upon events specified in the treaty itself or upon breach by the other party which causes the political departments to consider the treaty terminated. Both Congress and the President have the power to terminate a treaty according to these terms.

The Restatement §§ 163(a) and (b) limits the presidential power to suspend or terminate an international agreement upon its terms or because of violation by the other side.

123 For a similar attempt with the same conclusion see Van Der Weyde v. Ocean Transport Co., 297 U.S. 114, 117 (1836).

124 From the records of the Senate debates it cannot be doubted that abrogation of the Charter was indeed the objective of the sponsors and the majority of the Senate knew it. U.S. Sanctions Against Rhodesia—Chrome, Hearings on S. 1404 Before the Senate Comm. on Foreign Relations, 92d Cong., 1st Sess. (1971); ARMED SERVICES COMM., REPORT AUTHORIZING MILITARY APPROPRIATIONS FOR FISCAL YEAR 1972, S. Rep. No. 359, 92d Cong., 1st Sess. (1971); Senate and House Debates on the Byrd Amend-
Dicta in two cases would indicate that either Congress or the Executive can breach a treaty without judicial interference if the subject matter is uniquely within the power of that branch. In the Chinese Exclusion Case the courts implied that the power to violate a treaty stems from the power of the violator to create laws in the same area.

If the treaty operates by its own force, and relates to a subject matter within the power of Congress, it can be deemed in that particular only the equivalent of a legislative Act to be repealed or modified at the pleasure of Congress.

Even more broadly, Tag v. Rogers states:

Once a policy has been declared in a treaty or statute, it is the duty of the federal courts to accept as law the latest expression of policy made by constitutionally authorized policy-making authority. If Congress adopts a policy that conflicts with the Constitution of the United States, Congress is thus acting beyond its authority and the courts must declare the resulting statutes to be null and void. When, however, a constitutional agency adopts a policy contrary to a trend in international law or to a treaty or statute, the courts must accept the latest act of that agency.

In both cases, however, the breaching agency was the Congress. Drawing inferences from dicta is hazardous, but at least two interpretations of this view are possible. First, a President may constitutionally break a treaty because he has a constitutional part in its creation coequal with the Senate (though, of course, the Senate alone cannot override a prior statute). Or, if the President has the power to conclude a treaty alone, i.e., by executive agreement under his constitutional authority, he would have the power to breach it. Nevertheless, nothing is
gained by distinguishing executive agreements from treaties and concluding that the President is uniquely authorized to abrogate the former unilaterally because he alone enacted them. The distinctions between executive agreements and treaties are too vague and too little honored in practice for such agreements to be determinative of whether the President has the independent power to breach.  

With respect to United Nations Security Council resolutions, the Executive has an effective way to avoid their legal effect. He can simply veto them. To analogize from congressional power to violate a similar ability on the part of the Executive is inappropriate. Congress does not have the veto capability, so its ability to violate the treaty-resolution is more understandable. There can be no justification for the President to violate, or fail to implement a mandatory resolution. Once legal rights have been created, the executive is estopped to deny them. Were conditions to change, dictating the need for termination of the treaty, such action could be achieved under present principles of international law by renegotiating the agreement or resolution, rather than by breaching it.

The Namibia resolutions have already given rise to litigation involving the rights of a U.S. company operating in Namibia and the rights of U.S. citizens vis-à-vis that company. In the *American Metal Climax* case a federal district court was faced with deciding whether these resolutions have legal force cognizable by U.S. courts in determining the rights of individuals and corporations. Perhaps it rejected the claim because, by detailing the consequences of those resolutions or even attempting to invoke them, the judiciary could open itself to charges that it is interfering with executive discretion in foreign affairs. This, however, should not be dispositive of the issue. Courts have traditionally pointed to executive discretion in foreign affairs as the principal example of the political question doctrine. Such de-

---


Most cases abound with dicta that would pose no limits whatsoever on the President's foreign relations power. E.g., the conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the Property of what may be done in the exercise of this political power is not subject to judicial inquiry or decision. Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918).
ference could be based on two possible theories. The first of these is that foreign affairs cannot be reviewed by the judiciary because the Constitution commits foreign affairs to the Executive thus precluding, on a separation of powers rationale, the judiciary from intervening. The second and alternative theory is not that the judiciary is constitutionally compelled to defer to the Executive, but that in many cases the subject matter makes foreign affairs unsuitable for judicial review.

The first of these views has been subjected to criticism. If it is correct, why is the foreign affairs power so totally within the discretion of the Executive whereas other executive powers specifically granted by the Constitution are subject to frequent review? And, why is there no clear evidence that the court's practice has actually conformed to this rule? In opposition to the strict political question doctrine it has been argued:

[If the "entire active conduct of foreign affairs" were entrusted exclusively to the political departments, it would be equally difficult to explain the numerous circumstances in which the courts have interpreted international agreements without reference to, and sometimes in direct conflict with the interpretation adopted by the executive department.]

Unsuitability of the subject matter may be the reason for the political question doctrine, but treaties, for the most part, have not been regarded as unsuitable subjects. In other words treaties have not been swallowed by the foreign affairs power which is shielded from judicial review either by constitutional command or judicial discretion. But the courts have traditionally had authority over interpretation of treaties in spite of their relationship to foreign affairs. While the President's interpretation is usually accorded great weight, on occasion courts have construed treaties in a manner directly conflicting with his prescription. In the treaty field the judiciary has specifically invoked the political question doctrine only where it would otherwise be called upon the determine whether the treaty was valid in light of allegations of the incompetence of the other party to ratify, or in the face of

---

133 Scharpf, supra note 66, at 540–51.
134 Id. at 546.
135 Jones v. Meehan, 175 U.S. 1 (1899).
136 Scharpf, supra note 66, at 546 n.102.
silence from the Executive after a breach by the other party.\textsuperscript{138} Decisions as to who has competence to enter into an agreement with the United States and how the United States should react to breaches by other parties are indeed political decisions. Treaties concerning international boundaries have similarly been viewed as political questions and thus not subject to review by the courts.\textsuperscript{139} In terms of precedent, then, there is no reason to hold that courts should abstain from deciding the legal relevance of United Nations resolutions imposing mandatory obligations upon member states. These resolutions are in effect executive agreements established pursuant to the Charter and sometimes with specific congressional authorization, (\textit{e.g.}, United Nations Participation Act). The concerns which restrain courts from ruling on foreign affairs are not present with respect to such an agreement since, by his affirmative vote or the withholding of his veto, the Executive has acknowledged it to be binding upon the United States.

In the Namibia situation neither the resolutions nor the remarks of the United States representatives reveal a clear picture of the Executive's conception of the legal consequences of the termination of the Mandate. The State Department did issue an announcement that the United States would not support U.S. companies investing in Namibia after the termination in 1966 of the Mandate by the General Assembly.\textsuperscript{140} This announcement was never put in the form of an executive order, and never published in the Federal Register. Indeed, it apparently was only casually circulated among interested parties by the State Department. But this announcement was prior to the U.S. statements before the International Court of Justice concerning South West Africa and prior to debates on Resolution 301 in which the United States definitively declared its position on the termination of the Mandate. Given the special judicial competence to determine the meaning of treaties, and these subsequent executive statements, the initial announcement should not be viewed as the exclusive source from which to ascertain the legal ramifications of the withdrawal of recognition of South Africa's authority.

\textsuperscript{138} Charlton v. Kelly, 229 U.S. 447 (1913); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 260–61 (1796). \textit{But see} Schapff, \textit{supra} note 66, at 545 n.100 for opinion that this is not an example of a political question but a correct determination on the merits under international law.


\textsuperscript{140} See note 62 supra.
CONCLUSION

Security Council decisions promulgated in the form of mandatory resolutions are treaty obligations justiciable in U.S. courts. If passed under the authority of Chapter VII, the necessary congressional implementation will have been provided by the United Nations Participation Act. If passed under Article 24, a resolution is self-executing unless it is clearly addressed to the political departments or unless the subject matter of the resolution is one which the United States Constitution delegates exclusively to Congress, in which case congressional implementation is necessary. The judicial deference shown Congress, however, need not be extended to the Executive in light of his ability to avoid, through the veto, the binding effect of such resolutions. Since the policies dictating judicial deference to the Executive are not present where treaty obligations under the Charter are involved, domestic courts should assume an active role in enforcing such agreements.

Janis P. Bianchi