Security Council Resolutions: When Do They Give Rise to Enforceable Legal Rights—The United Nations Charter, the Byrd Amendment and a Self-Executing Treaty Analysis

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NOTES

SECURITY COUNCIL RESOLUTIONS: WHEN DO THEY GIVE RISE TO ENFORCEABLE LEGAL RIGHTS? THE UNITED NATIONS CHARTER, THE BYRD AMENDMENT AND A SELF-EXECUTING TREATY ANALYSIS*

As the United Nations enters its fourth decade, it is significant to note the absence of attempts to relate Security Council resolutions to rights enforceable in United States Courts. The only case to date which has raised the issue of domestic rights created by Security Council resolutions is the 1972 case of Diggs v. Shultz, which was brought to compel the Secretary of the Treasury to comply with an embargo on the importation of chrome products from Southern Rhodesia which was imposed by Security Council resolutions supported by executive orders. The District of Columbia Court of Appeals accepted the premise that enforceable legal rights had been created but then held that the subsequent enactment by Congress of the Byrd Amendment had, by the later-in-time rule, abrogated any obligations and rights created by the

* This Note was selected by the Cornell Law School faculty International Legal Studies Committee as a co-recipient of the 1976 Henry White Edgerton Prize in international law.

1. It is widely agreed that, unlike the General Assembly, the Security Council has the power to create obligations binding upon member states of the United Nations. See, e.g., Higgins, The Advisory Opinion on Namibia: Which U.N. Resolutions are Binding Under Article 25 of the Charter?, 21 INT'L & COMP. L.Q. 270, 275 (1972). This interpretation was underscored most recently by the former chief United States delegate to the United Nations, Henry Cabot Lodge, when he referred to the anti-Zionism resolution passed by the General Assembly on November 10, 1975: "Everything the General Assembly does is hortatory, recommendatory, and doesn't have the force of law, unlike the Security Council which has the right to issue a legally binding action order." N.Y. Times, Nov. 12, 1975, at 17, col. 4.


5. The Diggs opinion does not make clear whether the court considered these rights to exist before, or only after, the Executive Orders were issued. In introducing the issue, however, it speaks of the Executive Orders as "establishing criminal sanctions for violations of the embargo," thereby implying that all other implications of the embargo existed before the executive orders were issued. 470 F.2d at 463.


7. By the rule lex posterior derogat priori, it is recognized that if a treaty and a federal
resolutions and executive orders involved. Since that time, United Na-
tions concern with the Rhodesian situation has persisted, resulting in six
resolutions reaffirming the sanctions created by the resolutions consid-
ered in Diggs. Most significantly, four of these resolutions have been
enacted subsequent to the Byrd Amendment. The question has arisen,
therefore, of the effect of these resolutions in United States Courts in
light of the continued existence of the Byrd Amendment. If these or
other United Nations Security Council resolutions can create rights and
obligations enforceable in domestic courts the result would have impor-
tant significance for domestic litigants.

After a brief discussion of the doctrine of self-execution and the judi-
cial application of its principles to the United Nations Charter, this
Note will examine the current legal status of the Byrd Amendment in

I

BACKGROUND OF THE SELF-EXECUTION DOCTRINE

Article VI, clause 2 of the United States Constitution declares that
"all Treaties made, or which shall be made, under the Authority of the
United States, shall be the Supreme Law of the Land." Chief Justice
Marshall rendered the initial interpretation of this clause early in our
history when he stated that while most nations require sovereign imple-
mation to give an international agreement intraterritorial effect,

[In the United States a different principle is established. Our Constitu-
tion 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.]

statute are in direct contradiction, the more recent supersedes the earlier of the two, since
both are the law of the land. See Moser v. United States, 341 U.S. 41, 45 (1951); Clark v.
Allen, 331 U.S. 503, 508-509 (1947). The appellants in Diggs argued that this rule need
not be applied, citing the canon of construction that a statute and treaty, if possible,
should be construed as being consistent. The court rejected this argument in finding that
the Byrd Amendment's major purpose was to abrogate obligations created by the Rhode-
sian embargo. 470 F.2d at 466.


9. These are resolutions 314, 318, 320 and 333, supra note 8.
In 1884, in the *Head Money Cases*, the Supreme Court applied the self-execution doctrine and found that individuals, and not just nations, could derive rights from treaties: "[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." A court is required to resort to a treaty just as it would resort to a statute for a rule of decision in the case before it.

Even though a treaty may provide a rule by which rights may be determined and at the same time contain no executory language, there are further doctrines which may prevent it from having self-executing status. Treaties calling for the expenditure of funds, inasmuch as they are ineffective without an accompanying appropriation, are uniformly considered to be non-self-executing. Similarly, a self-executing treaty cannot deal with other matters which have been expressly and exclusively delegated to Congress.

The principles involved in determining self-execution are generally stated in terms of restrictions on the areas with which the language of a treaty may deal, but several considerations must be kept in mind in order to prevent the doctrine from being carried so far as to virtually negate the intent of the Article VI language making treaties the supreme law of the land. Even though commerce is an element over which control is expressly delegated to Congress, such control is not exclusive, and treaties dealing with commerce have commonly been held self-executing. Arguments that other nations require implementing legislation to give effect to a certain treaty have not resulted in decisions that

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11. 112 U.S. 580 (1884).
12. *Id.* at 598-99.
15. Robertson v. General Electric Co., 32 F.2d 495, 500 (4th Cir.), *cert. denied*, 280 U.S. 571 (1929). The subject of this case was a treaty dealing with patents, over which Congress has power. *U.S. CONST.* art. I, § 8, cl. 7. Although patent treaties, due to the detail required in implementation, are usually drafted intending further legislation, more recent cases have held some patent treaties to be self-executing. *See, e.g.*, Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d Cir. 1956). There remains, however, a presumption against self-execution in such areas. Comment, *Criteria for Self-Executing Treaties*, 1968 U. Ill. L.F. 238, 242-43.
the United States must follow suit.17 Neither has the fact that a treaty contains language of limitation been enough, in itself, to result in the treaty being held to be non-self-executing.18 The result of these considerations is that the doctrine of self-execution, even though negatively defined, makes treaties the law of the land without further congressional implementation.

II

THE UNITED NATIONS CHARTER AND THE DOCTRINE OF SELF-EXECUTION IN UNITED STATES COURTS

A. Charter Articles Which Have Been Held to Be Non-Self-Executing

1. Articles 55 and 56

Ironically, the only time Supreme Court Justices have indicated self-executing status for articles of the United Nations Charter, the result was a concurrence by four Justices in a position which has subsequently been rejected by every lower court which has considered the issue.19 In Oyama v. California,20 the Supreme Court declared the California alien land law unconstitutional as a violation of the Fourteenth Amendment.

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19. Judicial discussion of the United Nations Charter has been limited, for the most part, to the lower courts. Only six Supreme Court opinions have even mentioned the Charter or related matter. Even then, with the possible exception of Oyama v. California, 332 U.S. 633 (1968), see notes 20-22 infra and accompanying text, any reference to the Charter has been insignificant. Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 71 (1955), only mentioned that the Supreme Court of Iowa “ruled that the provisions of the United Nations Charter have no bearing on the case” before dismissing certiorari on Fourteenth Amendment grounds; in Zemel v. Rusk, 381 U.S. 1 (1965), the Court did not deal with the appellant’s contention that the denial by the Secretary of State of his application for a visa to Cuba violated rights guaranteed to him by the United Nations Declaration of Human Rights; in Katzenbach v. Morgan, 384 U.S. 641, 646 n.5 (1966), the court said in a footnote that contentions based on articles 55 and 56 of the Charter need not be dealt with; in Mora v. McNamara, 389 U.S. 934, 938 (1967), Justice Douglas dissented to a denial of certiorari, raising, inter alia, the question of whether article 39 of the Charter would “embrace hostilities in Vietnam or give rights to individuals affected to complain, or in other respects give rise to justiciable controversies;” and in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 673 n.9 (1974), the court merely footnoted the fact that the United States had ceased transmission of information concerning Puerto Rico to the Secretary General of the United Nations under article 73(e) of the Charter.
ment. Concurring opinions maintained that the California law was in conflict with the law of the land as established by articles 55 and 56 of the United Nations Charter. Article 55 states that the United Nations "shall promote" conditions such as "higher standards of living," "full employment," "solutions of international economic, social, health, and related problems," and "universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion." Article 56 further recognizes that United Nations members "pledge" to take action "in co-operation with the Organization for the achievement of the purposes set forth in Article 55."

The leading case declaring articles 55 and 56 to be non-self-executing is the California case of Sei Fujii v. State. An alien Japanese, ineligible for citizenship, contested a lower court decision that land purchased by him in 1948 had escheated to the state under the California alien land law enacted subsequent to the Oyama decision. Although the California court held the law in violation of the Fourteenth Amendment, it did so only after first considering the contention that the land law had been invalidated and superseded by certain provisions of the United Nations Charter. After declaring the preamble and article 1 to "state general purposes and objectives" which "do not purport to impose legal obligations," the court addressed articles 55 and 56, stating:

Although the member nations have obligated themselves to cooperate with the international organization in promoting respect for, and observance of, human rights, it is plain that it was contemplated that future legislative action by the several nations would be required to accomplish

21. Id. at 647.
22. The language of these two opinions indicates an interpretation of the articles as self-executing. For instance, Justice Black stated:

There are additional reasons now why that law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to cooperate with the United Nations to "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?

332 U.S. at 649-50 (footnote omitted). Black's opinion was followed by one in which Justice Murphy wrote:

[The California law's] inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned.

332 U.S. at 673.
the declared objectives, and there is nothing to indicate that these provisions were intended to become rules of law for the courts of this country upon ratification of the charter. 24

Subsequent decisions have cited the Sei Fujii analysis in holding articles 55 and 56 to be non-self-executing, and therefore ineffective without further legislation. These cases have involved attacks upon private contract provisions, 25 visa requirements 26 and quota systems 27 established by the Immigration and Nationality Act, and a New York literacy test used in determining eligibility to vote. 28 None of these cases has given the articles any effect against the challenged legislation.

2. Articles 73(a), 76, and 79; Non-Self-Governing and Trusteeship Territories

In the 1974 case of United States v. Vargas 29 a defendant claimed that conscription of Puerto Ricans under the Selective Service Act violated article 73(a) of the United Nations Charter, which provides that members assuming the administration of non-self-governing territories are "to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses." The District Court for Puerto Rico declared this article to be non-self-executing, since it was "not a specific mandate, but rather a general standard or goal to be followed." 30

Articles 76 and 79 deal with the establishment of trusteeship territories. Their language is to the effect that the terms of a trusteeship agreement "shall be agreed upon by the states directly concerned." 31 In Pauling v. McElroy, 32 the District Court for the District of Columbia stated that these provisions are non-self-executing and "do not vest any of the plaintiffs with individual legal rights which they may assert in this Court." Any claims under these articles were said to be assertable "only by diplomatic negotiations between the sovereignties concerned." 33

24. Id. at 722, 242 P.2d 617 at 621.
27. Vlissidis v. Anadell, 262 F.2d 388 (7th Cir. 1959).
30. Id. at 915.
31. U.N. CHARTER art. 79. Article 76 sets out the "basic objectives" of the trusteeship system.
33. Id. at 393.
B. SELF-EXECUTING CHARTER ARTICLES

1. Articles 104 and 105

The California court in the Sei Fujii case, after declaring articles 55 and 56 to be non-self-executing, went on to admit that certain Charter articles were indeed intended to be self-executing. More specifically, reference was made to article 104, which gives the United Nations necessary legal status within the territory of member nations, and article 105, which grants certain "privileges and immunities" to the organization within such territory. In support of the self-executing status given these two articles, the Sei Fujii court referred to Curran v. City of New York, a 1947 New York State case which involved an action to set aside grants of land and easements made by the City of New York to the United Nations for its headquarters site. In holding articles 104 and 105 to be applicable and self-executing, the Curran court stated:

Even without further action by Congress or by the State, the effect of Article 104 would be to give the United Nations the legal status and capacity to own land in the United States. Also, that without further action by Congress or the State, the immunities "necessary for the fulfillment of its purposes," conferred upon the United Nations by Article 105, includes immunity from taxation.

Article 104 has also been found to give the United Nations the right to bring damage actions in United States courts.

2. Article 2 (4)

In the 1974 case of United States v. Toscanino, the Second Circuit Court of Appeals made it clear that a Charter article, without any other legislation, may be self-executing, and thereby create enforceable legal rights. Article 2 (4) states that "all Members shall refrain in their international relations from the threat or use of force against the terri-

34. The Sei Fujii court stated that "when the framers of the charter intended to make certain provisions effective without the aid of implementing legislation they employed language which is clear and definite and manifests that intention," citing articles 104 and 105 as examples. Sei Fujii v. State, 38 Cal.2d 718, 722, 242 P.2d 617, 621.
36. Id. at 234, 77 N.Y.S.2d at 212.
38. 500 F.2d 267 (2d Cir. 1974).
39. Toscanino actually considered articles 104 and 105 along with the International Organizations Immunities Act, 22 U.S.C. §§ 288-288f (1970), but the presence of this Act was not found necessary in order to give the articles domestic effect. See also quotation accompanying note 36 supra.
torial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” The Toscanino court ruled that the kidnapping of an individual in Uruguay, in order to bring him back to the United States to face narcotics charges, violated this provision. Since this article has received no implementing legislation, such a finding is clear recognition of self-executing status.

C. SELF-EXECUTING ACTS TAKEN UNDER ARTICLES OF THE UNITED NATIONS CHARTER

On at least two occasions, courts have interpreted acts in conjunction with articles of the United Nations Charter. In Keeney v. United States, the District of Columbia Court of Appeals reversed a conviction for contempt of Congress in which a Senate subcommittee witness had refused to disclose whether or not anyone in the State Department had aided her in obtaining employment with the United Nations. The reversal was based, in part, on a privilege created by the Staff Rules of the United Nations in conjunction with articles 100 and 105. Staff Rule 7 includes a provision that staff members “shall not communicate to any other person any unpublished information known to them by reason of their official position.” Explaining his opinion that this rule is supported by articles 100 and 105, Judge Edgerton said:

Compulsory disclosure of the persons who influence appointments to the staff of the United Nations would not be consistent with the independence of the Organization on “the exclusively international character of the responsibilities of the Secretary-General and the staff * * *.” (Art. 100, Par. 2.) And the prospect of such disclosure might influence staff members, in one degree or another, to regulate their official conduct with a view to avoid embarrassment of sponsors. The privilege of nondisclosure is, therefore, “necessary for the independent exercise of their functions in connection with the Organization.” (Art. 105, Par. 2.)

40. 500 F.2d at 277. The Toscanino court went on to imply that the Security Council resolution (U.N. Doc. 112 (1960)), passed in response to the kidnapping in 1960 of Adolf Eichmann from Argentina by Israel, had force as a statement of law in regard to such an international kidnapping. This implication was weakened by a subsequent statement by the court that “the resolution merely recognized a long-standing principle of international law.” Id. at 278.

41. 218 F.2d 843 (D.C. Cir. 1954).

42. Although the Keeney court reversed “because of errors in the admission of evidence,” Judge Edgerton’s opinion was careful to state, in reference to the lower court’s admission of evidence, that “[i]n so far as the answer depends upon data in the files of the United Nations or upon information derived from those files, it was privileged by the Charter and the Staff Rules and could not legally be revealed.” 218 F.2d at 845.

43. Id.
The *Keeney* court, therefore, recognized the binding force of the law created by the Staff Rules in conjunction with Charter articles 100 and 105.

In *Saipan v. United States Department of the Interior,* citizens of the Trust Territory of the Pacific Islands challenged the execution by the High Commissioner of a lease permitting construction and operation of a hotel on public land. After the court had “assume[d] without deciding” that certain other articles of the Charter were not self-executing, it entered into a discussion of the Trusteeship Agreement which had been created pursuant to the authority granted for such purposes by article 79. Referring specifically to the language of article 6 of the Trusteeship Agreement requiring the United States to “protect the inhabitants against the loss of their lands and resources,” the court concluded that “the Trusteeship Agreement can be a source of rights enforceable by an individual litigant in a domestic court of law.” The source of such rights was not the Charter article itself, but rather the agreement concluded under the authority of the article.

III
APPLICATION OF THE SELF-EXECUTION DOCTRINE TO ARTICLE 25 AND SECURITY COUNCIL RESOLUTIONS

A. ANALOGIES AND DISTINCTIONS: PUTTING THE CASE LAW IN PERSPECTIVE

There are several comparisons which can be drawn between Security Council resolutions and the acts found to be self-executing in the *Keeney* and *Saipan* cases. As with the Staff Rules in *Keeney,* a Security Council resolution is promulgated, not by all parties to the Charter, but rather by an organ established by the Charter. Like the Trusteeship Agreement in *Saipan,* a Security Council resolution supported by the United States is a written document to which the United States has specifically agreed. Just as the Staff Rules were considered in conjunc-

44. 502 F.2d 90 (9th Cir. 1974).
45. Article 79 provides that the terms of trusteeship for territories in the trusteeship system “shall be agreed upon by the states directly concerned . . . .” U.N. CHARTER art. 79.
46. 502 F.2d at 97. The *Saipan* court went on to run the Trusteeship Agreement through the self-execution wringer and found it to come out intact. The agreement’s concern with the local economy and environment was “explicit,” the enforcement of its terms required “little legal or administrative innovation in the domestic fora,” and to send the plaintiffs to the alternative forum—the Security Council—would have “present[ed] to the plaintiffs obstacles so great as to make their rights virtually unenforceable.” Accordingly, the court concluded, the features of the Agreement suggested “the intention to establish direct, affirmative, and judicially enforceable rights.” 502 F.2d at 97-98.
tion with articles 100 and 105, and the Trusteeship Agreement was considered under the authority of article 79, Security Council resolutions must be considered alongside article 25, which states: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

As is the case in any comparison of new issues with decided opinion, while there are analogies there are also distinctions which must be drawn. In Keeney, at least one of the articles considered in conjunction with the Staff Rules had been held to be self-executing in its own right and could quite possibly have been interpreted as creating the privilege even without Staff Rule 7. Article 25 has not been held to be self-executing and, without being considered in conjunction with a Security Council resolution, it clearly could not create enforceable rights and obligations. This distinction, however, leads to an analogy with article 79, considered in Saipan, which was held non-self-executing. That did not prevent the Ninth Circuit from giving full effect to the agreement entered into under that article.

B. SECURITY COUNCIL RESOLUTIONS AS "TREATY OBLIGATIONS"

In Diggs v. Shultz, the District of Columbia Court of Appeals viewed the Security Council resolutions involved as creating treaty obligations, and accordingly, the Byrd Amendment was considered by that court to have the clear purpose "to detach this country from the U.N.

47. Article 105, mentioned in Keeney, was held self-executing in Curran v. City of New York, 191 Misc. 229, 77 N.Y.S.2d 206 (Sup. Ct. 1947). See notes 35-36 supra and accompanying text.

48. Until a resolution is passed by the Security Council there is no "decision" to "agree to accept to carry out." U.N. CHARTER art. 25. One interpretation would find that Chapter VII of the Charter (Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression) was implemented by Congress through the United Nations Participation Act of 1945, 22 U.S.C. § 287(c) (1970). Note, Security Council Resolutions in United States Courts, 50 Ind. L.J. 83, 104 (1974). This interpretation implies that Congress viewed the entire Charter as non-self-executing but then voted to delegate legislative powers to the Security Council in instances of mandatory article 25 resolutions. The reluctance of Congress to delegate any degree of sovereign power to an international organization, however, clearly indicates that the United Nations Participation Act was not meant as an implementation of portions of the Charter or even as a determination of the self-executing status of the Charter, but rather as a delegation of powers and responsibilities to the President in his response to actions proposed by the United Nations under its Charter.

49. In Saipan it was the Trusteeship Agreement, not article 79, that was held to be self-executing. Saipan v. United States Dep't of Interior, 502 F.2d 90, 97-98 (9th Cir. 1974).

50. 470 F.2d 461 (D.C. Cir. 1972).

51. Id. at 466.

Boycott of Southern Rhodesia in blatant disregard of our treaty undertakings." Although the court recognized that treaty obligations existed, the fact that the President had implemented the resolutions through executive orders relieved it from considering whether such resolutions would have constituted binding obligations without the executive orders. If a Security Council resolution is framed in the language of self-execution, Diggs raises the next question of when such a resolution itself actually becomes a binding "treaty obligation."

Here, two basic requirements originating at the international level come into play: first, whether the Security Council has made a "decision," and second, whether the action has been taken "in accordance with the present Charter. Dispute has arisen over what constitutes a "decision" of the Security Council. The pre-Byrd Amendment resolutions concerning Rhodesia are the only "breach of peace" resolutions to date to include the verb "to decide," so they are as yet the only resolutions to meet the most narrow and literal reading of article 25. The

53. 470 F.2d at 466.
55. It is important to note at this point that treaty obligations can be incurred not only through negotiation by the President and ratification by the Senate, the usual procedure, but also through the President's use of Executive Agreements. United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); L. Henkin, Foreign Affairs and the Constitution 177-87 (1972); Mathews, The Constitutional Power of the President to Conclude International Agreements, 64 Yale L.J. 345 (1955). These can be concluded not only where Congress has sanctioned Presidential action, but are available, according to some authorities, even where Presidential action has no congressional sanction. Henkin, supra at 432 n. 40; Comment, Self-Executing Executive Agreements: A Separation of Powers Problem, 24 Buffalo L. Rev. 137 (1974). Contra, United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953). The major limitations on executive agreements have been a prohibition against dealing unilaterally with the enumerated powers of Congress, and an expressed doubt that an agreement could supersede a prior inconsistent federal statute. When the agreement is entered into with prior congressional approval, however, the former limitation falls by definition and the latter is reduced to a de minimus effect. Mathews, supra, at 381.
56. These requirements are imposed by U.N. Charter art. 25. The International Court of Justice has concluded that a broad range of Security Council resolutions, including those pursuant to articles 24 and 25, can be binding upon U.N. member states. Legal Consequences for States of the Continued Presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970), [1971] I.C.J. 16. This position is far from receiving unanimous approval from U.N. members. See Higgins, The Advisory Opinion on Namibia: Which UN Resolutions are Binding Under Article 25 of the Charter?, 21 Int'l & Comp. L.Q. 270 (1972).
57. Higgins, supra note 56, at 275.
59. See note 62 infra and accompanying text.
best rule, however, seems to be that an indication of decisive intent need not necessarily carry the verb "to decide" in order that it fit within article 25. Therefore, other resolutions may create binding obligations through the use of comparable language.\(^{60}\)

The bulk of debate in the international arena has centered on what decisions of the Security Council are "in accordance with the present Charter."\(^{61}\) The most restrictive view, which has generally been the one followed by the United States, is that a decision under article 25 is binding only if made following a determination of the existence of a breach of the peace under article 39.\(^{62}\) Under this view, such a determination must have been made in either the instant resolution or in a prior one before the resolution can create a binding international obligation on the United States as a nation.\(^{63}\)

\(^{60}\) See generally Higgins, supra note 56.

\(^{61}\) Id. at 275-86.

\(^{62}\) Article 39 requires the Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to make recommendations or take other action to "restore international peace and security." The restrictive position was the one taken by the United States before the I.C.J. in the advisory opinion on Namibia. Legal Consequences for States of the Continued Presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970), [1971] I.C.J. 16, 227-98 (dissenting opinion). This view is also reflected in the report of Secretary of State Stettinius after the San Francisco Conference which adopted the Charter. Stated the report:

"Decisions of the Security Council take on a binding quality only as they relate to the prevention or suppression of breaches of the peace. With respect to the pacific settlement of disputes, the Council has only the power of recommendation . . . ." United States Dep't of State, Report to the President on the Results of the San Francisco Conference, Pub. No. 2349, Conf. Series 71, at 78 (1945).

\(^{63}\) At least one authority interprets the International Court ruling in the Namibia case, supra notes 56 & 62, as holding that Security Council resolutions may be made binding under either article 24 or article 25 and pursuant to the specific powers of Chapters VI (Pacific 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). Higgins, supra note 56 at 286. This view is based on the language of article 24 of the Charter, which places upon the Security Council the "primary responsibility for the maintenance of international peace and security" and lists the four Chapters above as outlining the "specific powers granted to the Security Council . . . ." A recent commentator has extended Higgins' article 24 analysis and has contended that individual legal rights enforceable in United States courts may arise pursuant to article 24 as well as article 25. Note, Security Council Resolutions in United States Courts, 50 Ind. L.J. 83, 89-91 (1974). Although the Higgins analysis is probably correct in ascertaining the existence of obligations binding upon United Nations members in their exercise of international relations, authority for extending the analysis to individual rights is at best tenuous if one analyzes the domestic history of Charter interpretation. See, e.g., note 56, supra and The United Nations Participation Act of 1945, 22 U.S.C. § 287(c) (1970).
This does not, however, determine when such an international obligation might create rights enforceable by individuals in United States courts. To answer this question, it is necessary to look to the actions of the executive and legislative branches relating to a resolution passed by the Security Council. There are five possible procedural stages at which arguments can be made that enforceable rights and obligations arise. These stages are: (1) upon passage of the resolution by the Security Council, (2) upon passage of the resolution by the Security Council only if the United States casts an affirmative vote, (3) upon passage of the resolution by the Security Council plus confirmation of its provisions through a presidential order as provided for in the United Nations Participation Act, 64 (4) upon passage of the resolution by the Security Council plus its formal ratification as a treaty by the President upon the advice and consent of the Senate, 65 (5) upon passage of the resolution by the Security Council plus some type of legislative implementation by Congress.

At the fifth stage, there is no question that enforceable rights and obligations exist. The legislative act in itself creates enforceable law which does not depend for its validity upon whether the Security Council resolution it follows was binding or non-binding, self-executing or non-self-executing.

Stage four is perhaps no more than an alternative to stage five, involving relatively the same participants as did the latter stage. The difference here would be that the President would act first in submitting the resolution to the Senate as a treaty to be consented to by two-thirds of that body. Unlike stage five, this process would bypass the House of Representatives. Under Article VI of the United States Constitution, if the resolution were framed in language of self-execution, this process would nonetheless result in enforceable domestic law. 66

As evidenced by Diggs v. Shultz, 67 any submission of a resolution to Congress is unnecessary when the President, such as in stage three, has pursued the directives of the resolution through an executive order giving definite and binding force to the resolution. In order to provide guidelines for United States representation and participation in the United Nations following our ratification of the U.N. Charter, Congress passed the United Nations Participation Act 68 which gave the President the power, "[n]otwithstanding the provisions of any other law," to give

64. 22 U.S.C. § 287c(a) (1970). See also notes 68-69 infra and accompanying text.
66. See notes 9-17 supra and accompanying text.
effect to decisions of the Security Council made pursuant to Article 41 of the Charter by applying the measures called for in the resolution. As a result, the President has the authority to create binding rights and obligations at stage three of the above procedural outline, stemming from the Participation Act's sanction of such an executive order.

Whether enforceable rights exist at stage two is a more difficult question. The United Nations Participation Act gives the President the authority "to give effect to decisions under the Charter through any agency which he may designate," and the United States representative in the Security Council is an agent of the Executive who has not only been designated by the President but has taken office with the consent of the Senate. Furthermore, the representative must, "at all times, act in accordance with the instructions of the President transmitted by the Secretary of State," thus, the President also has the power to determine just how the representative will vote on any resolution before the Security Council. The President thereby has as much control over the United State's vote in the Security Council as he has over regulations promulgated through executive orders made pursuant to congressional sanction. It would be entirely reasonable, therefore, for a Security Council resolution to create enforceable rights and obligations upon passage with the United States' representative casting an affirmative vote. This proposition is also supported by a further argument, applying the rule which recognizes that a self-executing executive agreement made pursuant to a treaty can have the full effect of the self-executing treaty. By directing his representative to vote for a given resolution, the Presi-

69. Id.
72. This analysis is parallel to Professor Henkin's treatment of "Sole Executive Agreements" made pursuant to article 5 and 11 of the North Atlantic Treaty, April 4, 1949, 63 Stat. 2241, T.I.A.S. No. 1964 (effective Aug. 24, 1949). Henkin, supra note 55, at 176, n.14. For a discussion of the President's power to conclude such agreements despite curtailment attempts such as the Bricker Amendment, see id. at 176-87.
73. One author has suggested that in such a case the political question doctrine would be an "obstacle to domestic invocation of United Nations mandatory resolutions." Note, Security Council Resolutions in United States Courts, 50 IND. L.J. 83, 107-112 (1974). This opinion seems to stem from the statement in Baker v. Carr, 369 U.S. 186, 217 (1962) that "[p]rominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department . . . ." Such an interpretation ignores the fact that the Supreme Court has not hesitated to adjudicate issues of whether the executive or the legislature has the power to take certain actions. See, e.g., Kent v. Dulles, 357 U.S. 116 (1958); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Henkin, supra note 55, at 97-99.
74. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 142 (1955).
dent enters into an agreement made pursuant to article 25 of the United Nations Charter. In doing so the President does not skirt congressional authority since his action is taken pursuant to the authority granted him by Congress through both the United Nations Participation Act and the ratification of the United Nations Charter.

To summarize, at this point there are at least four procedures by which a Security Council resolution may become the law of the land. Congress may implement a resolution by separate legislation, the President may ratify the resolution as a full treaty upon the advice and consent of two-thirds of the Senate, the President may give effect to a resolution through executive order, or the President may give effect to a resolution by instructing the United States representative to vote for its passage in the Security Council. As seen above, this last method must involve a resolution pursuant to articles 39 and 41 of the United Nations Charter, and its language must be couched in terms which are self-executing. Although scholars of international law would find binding obligations to arise from a Security Council resolution whether or not the United States had voted for its passage, such as in the first stage of Security Council resolution procedure, there is little authority extending these obligations to individuals on the domestic level without the acquiescence of some branch of the United States government.

IV
APPLYING THE ANALYSIS TO THE RHODESIAN RESOLUTIONS AND DETERMINING THEIR EFFECT UPON THE BYRD AMENDMENT

A. THE PRE-BYRD RESOLUTIONS

The two important pre-Byrd resolutions are resolutions 232 and 253, which were considered in Diggs v. Shultz. Each of these resolutions makes direct reference to a determination of a breach of the peace in Southern Rhodesia under Articles 39 and 41, and is, therefore, "in accordance with the present Charter." Each of the resolutions also contains the word "decides" as its activating verb, thereby leaving no doubt

75. Henkin, supra note 55, at 194.
76. See notes 61-66 supra and accompanying text.
77. See generally Higgins, supra note 56.
78. These two resolutions were both directed against Southern Rhodesia and directed that members prevent the importation into their territories of commodities and products originating from that country. S.C. Res. 232, U.N. Doc. S/INF/21 (1966); S.C. Res. 253, U.N. Doc. S/INF/23 (1968).
as to whether a "decision" of the Security Council is involved. The language of these resolutions also demonstrates a clear intent that they be self-executing; nothing about them is executory in nature and would require further implementation, nor do they touch upon an area restricted by either constitutional limitations or delegations of power.

Since both of the resolutions were passed with an affirmative vote by the United States representative, the Diggs court had solid ground to find that a binding treaty obligation existed even without the executive orders which followed the resolutions.

B. THE BYRD AMENDMENT AND THE POST-BYRD RESOLUTIONS

On November 17, 1971, the President signed into law the Military Procurement Act of 1971, section 503 of which constituted the Byrd Amendment to the Strategic and Critical Materials Stock Piling Act. This amendment barred the President from prohibiting or regulating the importation of "any material determined to be strategic and critical pursuant to the provisions of this Act" so long as the material did not come from a country listed as Communist-dominated under the Tariff Schedules of the United States. In January of 1972, the Office of Foreign Assets Control, pursuant to the Byrd Amendment, issued a general license authorizing the importation of a number of materials from Rhodesia. This action led to the litigation involved in Diggs and the finding that treaty obligations originating in the pre-Byrd resolutions had been abrogated to the extent that the Byrd Amendment applied.

81. U.N. CHARTER art. 25. See text accompanying notes 57-60 supra.
82. See, e.g., the following excerpt from Resolution 253:

The Security Council,

Reaffirming its determination that the present situation in Southern Rhodesia constitutes a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

3. Decides that, in furtherance of the objective of ending the rebellion, all States Members of the United Nations shall prevent:

(a) The import into their territories of all commodities and products originating in Southern Rhodesia and exported therefrom after the date of this resolution

83. See quotation accompanying note 10 supra.
84. See note 15 supra and accompanying text.
The adoption of the Byrd Amendment also aroused response from the United Nations, including four Security Council resolutions reaffirming the embargo created by resolutions 232 and 253. Through incorporation by reference to earlier resolutions, these resolutions have reaffirmed the fact that they are pursuant to a finding of a breach of peace, and it is arguable that they are "decisions" of the Security Council. They have failed, however, to meet two requirements that would have enabled them to create enforceable domestic rights and obligations. Each of the four resolutions contains executory language that invalidates any claim that they were intended to be self-executing. Moreover, the United States has abstained from voting in the passage of each of these resolutions, thus withholding the authority which would have made them law by analysis either as an executive order under the United Nations Participation Act or as an Executive Agreement under the authority of this country's ratification of the United Nations Charter.

C. A PROPOSAL FOR PRESIDENTIAL INITIATIVE

The United Nations response to the Byrd Amendment has been echoed in the halls of Congress, but with little substantive result. In


89. The new resolutions "recalled" the previous resolutions, which contained breach of peace determinations. Once the Security Council has determined that a breach of peace exists it does not seem necessary that such fact need be restated in every subsequent resolution dealing with the same issue.

90. Executory language in these resolutions includes:
Resolution 314:
Urges all States to implement fully all Security Council resolutions establishing sanctions against Southern Rhodesia . . . .

Resolution 318:
Demands that all Member States should scrupulously carry out their obligations to implement fully Security Council resolutions 253 (1968), 277 (1970) and 314 (1972).
. . . . . urges them to review the adequacy of the legislation and the practices followed so far . . .

Resolution 320:
Calls upon all States to implement fully all Security Council resolutions establishing sanctions against Southern Rhodesia . . . .

Resolution 333:
Requests States with legislation permitting importation of minerals and other products from Southern Rhodesia to repeal it immediately . . . .

91. The use of executive orders to implement Security Council resolutions is discussed in notes 54 & 67-68 supra and accompanying text. Executive Agreements are treated in note 55 supra.
December 1973, the Senate passed a bill introduced by Senator Humphrey which would have restored the United States to full compliance with the sanctions against Rhodesia imposed by Security Council resolutions 232 and 253. This Senate action was reinforced by the announcement that the Ford Administration favored repeal of the Byrd Amendment when Secretary of State Henry Kissinger told a congressional committee that the amendment was not essential to our national security, brought no real economic advantage, and was detrimental to the conduct of foreign relations. In the House of Representatives the State Department again expressed its support of the repeal movement. The House, however, postponed indefinitely a vote on its bill in December 1974. When an identical bill was again introduced in the House, it reached a final vote and was defeated on September 25, 1975.

Despite the fact that Congress has been unwilling to change the law established by the Byrd Amendment, the door to such legal transfiguration is not closed to the Executive branch. A properly worded United Nations Security Council resolution passed with an affirmative vote by the United States would supersede the Byrd Amendment by the same later-in-time rule which caused the amendment to prevail over the earlier resolutions. If President Ford truly desires to see the Byrd Amendment repealed, there can be little doubt that other members of the United Nations would welcome United States initiative in enacting an effective post-Byrd Security Council resolution. Although such a method of abrogative legislation may be without precedent, the result would bring domestic law in line with national obligation and put the United States no longer "in blatant disregard of our treaty undertakings."

CONCLUSION

Certain acts taken pursuant to articles of the United Nations Charter can possess the status of a treaty creating binding rights and obligations in United States courts. A Security Council resolution should be accorded this status in the United States when it is binding by interna-

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93. N.Y. Times, Aug. 21, 1974, at 8, col. 3.
97. See note 7 supra.
tional standards, self-executing by domestic standards, and supported by an affirmative vote of the United States in its passage. Although post-Byrd Amendment resolutions have not met all of these requirements, the possibility of introducing such a resolution affords the executive branch a method of bringing domestic law into compliance with international obligation without the necessity of submission to the cumbersome congressional process.

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