judges' opinions, arranged analytically under headings and comprehensively indexed," may not be worth the labor that went into it, in spite of its apparent high quality.[2] The usefulness of the series, now at seven volumes, is doubtful, argues Thirlway, in view of the general availability of the official *ICJ Reports*. If one needs the *Fontes* at all, it is exclusively for its thorough index, he says, adding that "were there as good an index published separately, he would unhesitatingly urge that it, rather than this volume, be purchased."[3]

Dr. Thirlway's point is well-taken, but it calls for an additional comment. Since 1987, the ICJ documents, as they appear in the *ICJ Reports*, have been available through the WESTLAW service. The coverage begins with the 1947 *Report*. The data base includes documents as they are released by the Court even prior to their official publication. The researcher can use the terms-and-connectors search method, relying on the actual wording of the documents. But she can also use plain English, as WIN, the natural-language search method, is available in this data base.

Anyone who has access to the WESTLAW INT-ICJ data base will find the *Fontes*, even with its index, obsolete. The World Court's jurisprudence is now open to any kind of analysis, limited only by the researcher's skills and imagination.

MARIA FRANKOWSKA

TO THE EDITORS IN CHIEF:

In correspondence printed in the April 1993 issue of this *Journal* (87 AJIL 252 (1993)), Professor Jordan Paust once again argues that "international law" limits the constitutional authority of the President of the United States. Lest his argument be left unchallenged, I should like to point out to your readers that its two principal pillars rest on quicksand: (1) the phrase "law of nations" as used in the period leading to the formation of our magnificent Constitution and for about half a century thereafter is not a synonym for "international law" as that phrase is used by Professor Paust; and (2) the cases appearing to hold "international law" to be inherently part of the law of the United States, like *The Paquete Habana*, are either taken out of the special context of admiralty and prize, or overstate the effects of a normal choice-of-law referral to the rules of international law.

As to the first, ancient theories under which the general principles of municipal law were construed to be general principles of all legal orders, including the international legal order, had come under serious fire as early as the seventeenth century,[1] and by 1789 the theory had become the subject of serious and influential comment.[2] But our founding generation had been educated in the conven-

[2] *See* 87 AJIL 341 (1993).

[3] *Id.* at 342.

[1] FRANCISCO SÚAREZ, *De legibus, ac deo legislatore*, bk. II, ch. XIX, secs. 2, 6, 8, *in* 2 SELECTIONS FROM THREE WORKS (Carnegie ed., Gwladys L. Williams trans., 1944) (1612). The sharp distinction between the *jus gentium* (rules of law common to all legal orders, thus evidenced normally by private law examples) and the *jus inter gentes* (law between nations) was set out by an English admiralty scholar unmistakably in the next generation. 2 RICHARD ZOUCHE, IURIS ET IUDICII FECIALIS, pt. I, sec. I, no. 1 (Carnegie ed., J. L. Brierly trans., 1911) (1650). Actually, doubts about whether universal-uniform "justice"-based natural law existed at all were expressed even by Aristotle. ARISTOTLE, NICHOMACHEAN ETHICS, bk. V, ch. VII, at 294/295 (H. Rackham trans., Loeb Classical Library 1939) (ca. 350 B.C.).

[2] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, ch. XVII, §2, para. 25, esp. n.1, *in* A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION BY JEREMY BENTHAM 426 (Wilfred Harrison ed., 1823 ed., Basil Blackwell 1948) (1789).

tional wisdom of the time[3] under which the shift in concept and language had not yet occurred. The great shift in language began in the Marshall Court, and the "new" theory of "conflict of laws" ended the discussion by 1834, when Justice Joseph Story published his great work on the subject.[4] From that time on, the notion of the old "law of nations" was incorporated into public international law as a rarely used theoretical remnant, nowadays codified as a source of law in Article 38(1)(c) of the Statute of the International Court of Justice as "general principles of law recognized by civilized nations." It is a source of law the Court has rarely used.[5]

As to the second, it is still common in admiralty and prize cases to refer to a hypothesized uniform and universal private international law and to argue (or, more likely, merely assume) that states are bound by the structure of the international legal order to harmonize their municipal laws in order to enforce that uniform and universal overarching law. Not only has choice-of-law theory done away with that approach in other contexts, but even in the admiralty context, such municipal legislation as our own Harter Act and Jones Act[6] is law for American courts regardless of possible inconsistencies with hypothesized universal law.

It is certainly possible to construct a complex model in which the notion of a universal and uniform law survives, but models built on that notion seem to be unnecessarily complex, thus violating Occam's razor.[7] Even if adopted, the carv-

[3] The leading legal text of the time, and the one familiar to those of our constitutional generation who were lawyers, was, of course, William Blackstone, *Commentaries on the Laws of England* (1765–1769). Volume 4 (1769) is the only one pertinent to this discussion. See vol. 4, ch. V: "Of Offences Against the Laws of Nations." Blackstone defined the "law of nations" to include all rules deducible by "natural reason" and adopted "by universal consent among all the civilized inhabitants of the world." The major area for its play was in transnational trade,

> mercantile questions, such as bills of exchange and the like; in all marine causes relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; the law-merchant . . . to prizes, to shipwrecks, to hostages and ransom-bills, there is no other rule of decision. . . . But though in civil transactions and questions of property between the subjects of different states the law of nations has much scope . . . offences against the law of nations . . . are principally incident to whole states or nations: in which case recourse can only be had to war . . . .

See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: OF PUBLIC WRONGS 1474–75 (William Draper Lewis ed., Rees Welsh & Co. 1897). Is this what Professor Paust has in mind as the guiding spirit of our Founding Fathers? If so, what happened to the notion of "consent"? But there is much in Blackstone that seems self-contradictory to a modern analyst, and strains in the system that resulted from too easy an adoption of his legal model probably contributed to the massive shift in legal theory in the next generation.

[4] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES (1834). For a summary analysis of Story's role in this shift, see Alfred P. Rubin, *Private and Public History; Private and Public Law*, 82 ASIL PROC. 30 (1988).

[5] For a criticism of the Court's approach to this source of law, see Richard B. Lillich, *The Rigidity of Barcelona*, 65 AJIL 522, esp. 529–31 (1971). Lillich seems to have confused the ICJ's choice-of-law referral to municipal corporation law with what he argues should have been a referral to municipal corporation law as a source of international law dealing with stockholders' claims. Some arbitral tribunals have found general principles of law a fertile source of law in some cases. *See* Wolfgang Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 AJIL 279 (1963). The indispensable work, pointing out the limits of the approach, is still HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (1927).

[6] Harter (Carriage of Goods by Sea) Act of 1893, 27 Stat. 445 (46 U.S.C. app. §§190–195 (1988)); the Jones (Merchant Marine) Act of 1920, ch. 250, 41 Stat. 988, often supplemented and amended, now dispersed throughout 46 U.S.C.

[7] Occam's razor, otherwise called the Law of Parsimony, "Essentia non sunt multiplicanda praeter necessitatem" (Essences [assumptions] are not to be multiplied unless necessary). William of Occam

ing out of a special exception to the easier choice-of-law theories, then expanding that exception to cover constitutional law while leaving choice of law the operative theory to apply to all other cases, raises complexities of a magnitude that almost requires rejection of the basic notion of there being an international law at all. It is very hard to see a country's constitution as a document governed by international law unless it takes the form of a treaty among separate subjects of the international legal order joining together.[8] Thus, constitutions' references to international law are to be interpreted not as incorporating international law into municipal law in derogation of other provisions of the constitution, but as statements of a municipal law authority referring to a foreign legal order for whatever purposes the municipal constitutional authorities find to be the operative interpretation of their own constitutional powers.

For an example on a much simpler, practical level, consider whether an American tribunal applying French law becomes a French tribunal. Are its decisions likely to be persuasive to a proper French tribunal? Are its pronouncements on points of French constitutional law, to which its choice of law might have referred it, to be considered in any way persuasive in France? Similarly, does an American tribunal applying international law become an international tribunal? Are the decisions of American-trained jurists, selected for their expertise in American municipal law through an American political process, likely to be persuasive to a proper international tribunal beyond the sphere that international law allows to the precedents of municipal systems? Or do Professor Paust and those who agree with his analysis really propose to replace our Constitution's lawmaking and enforcing processes with the judgment of lawyers and judges who represent no popular constituencies and who disagree among themselves on most important questions of law (as Professor Paust and I seem to on this one)?

ALFRED P. RUBIN

Professor Paust replies:

Professor Rubin speaks of sand but grasps at straws. Many of the pillars that he has only a glimpse of are actually of venerable marble, are on firm American ground, and stand at the front of and within the Supreme Court of the United States. His world of multiplied assumptions is simply out of line with actual trends in U.S. judicial expectation concerning the "law of nations," "international law" and the duty of the President faithfully to execute such law.

He cites no view of a Founder, argues no specific provision of constitutional text, and cites no federal case, but by now the readers probably know why. There have been literally thousands of federal opinions using the phrases "law of nations" or "international law," and over 550 have generally used them interchangeably, whether the proceedings were civil, criminal, jurisdictional, prize or admiralty, administrative, or constitutional in focus. Need one stress, with thousands of federal cases using such law throughout our history, that it is unnecessary, if not misleading, to rest incorporation on any single or particular type of case?[1] Certainly, our courts have not generally done so, and their patterns of expectation, if

(Ockham) was an English monk and philosopher who died in 1349. *See* 19 ENCYCLOPÆDIA BRITANNICA 965–66 (11th ed. 1911).

[8] Even then, there can be problems and different interpretations. For example, was the United States Constitution, adopted as if a treaty in 1788, not to be subject to denunciation as if a treaty, by the "sovereign" states composing the legal union in 1861?

[1] Certainly, they were not merely those involving admiralty or prize, and none seem to have involved merely "choice of law" or "conflict of laws," as Professor Rubin would prefer. *See also* Alfred P. Rubin, *Professor D'Amato's Concept of American Jurisdiction Is Seriously Mistaken,* 79 AJIL 105, 106