

Conceptual Foundations

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I. Introduction

The *Restatement* format is so formidable and authoritative that it virtually overwhelms a prospective reviewer. Within its four corners it offers an instance of perfected workmanship that warrants the praise that it habitually elicits, but it tends for this very reason to make criticism seem captious at best, and more likely, arbitrary or insufficiently informed.

In considering the opening sections of this *Restatement of Foreign Relations Law* it might be helpful to comment first on the process itself. Unless we become somewhat reflective about format and auspices, we can neither appreciate the achievement, nor grasp its goals and inevitable constraints. One feature of the *Restatement* is its evident obsession with drafting precision and accuracy of detail. I doubt whether there is a single comma misplaced or citation mistaken in the entire two volumes. As such, we are treated to a spectacle of the legal practitioners' craft, a function of which is to convey authority and inspire confidence by its mastery of technical language. Such attention to detail is as vocationally valued as is ingenuity and clarity of argument or the breadth and depth of scholarly research. Perhaps this enormous effort to be precise is, in part, a legacy of pre-modern law, which stressed the precision of forms as a principal basis of ascertaining rights and duties.

More interesting and consequential is the institutional assurance claimed on behalf of the *Restatement* by its sponsors. The authoritative-ness of the venture rests on the backing of the American Law Institute (ALI) and a work process that is at once exhaustive and exhausting. The Institute consists of 1500 judges, academics, and practitioners (augmented by 300 ex officio members— law school deans, state chief judges, presidents of state bar associations), who are generally regarded as “the cream” of the legal profession at any given time.

The Reporters of each *Restatement* are eminent academic figures appointed by the Institute, and it is they, as assisted by an array of advisers, who do the initial drafting. Yet the process is distinctive partly because it submits the work of these renowned specialists to assessment by the

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membership of the Institute as a whole. The process is described in a prefatory note:

Each topic goes through a drafting cycle. The cycle begins with a Preliminary Draft that is reviewed and criticized by the Advisers and revised by the Reporter accordingly. The revision is embodied in a Council Draft, which is reviewed and criticized by the Council of the Institute. The text is then reworked in light of the Council's deliberations into a Tentative Draft and as such is submitted to the membership at its Annual Meeting. The discussions at the Annual Meeting usually yield further revisions. Successive topics are addressed through additional cycles of the same procedure. When all the topics have been addressed, the Tentative Drafts are integrated into an Official Draft.¹

In essence, the first phase of the process in which Reporters and Advisers interact gets the specialists to agree upon a text for each topic, then the process is shifted to the executive body of the ALI ("The Council"), and finally to the membership as a whole. In the end, the introductory notes, rules of law presented in black-letter type in numbered sections, and the comments "express the views of the Institute."² There are also "reporters' notes" which are attributed only to the Reporters and give some indication of the sources upon which they relied; these do not bind the Institute. In fact, there is no discernible substantive or doctrinal divergence, but the reporters' notes, coming at the end of each section, elaborate upon the Institute's official version by discussing various legal subtleties and providing selective, yet generally helpful, documentation.

So what we have in the eventual published text is a polished jewel of standard doctrine, with each word having been scrutinized by hundreds, if not thousands, of well-trained, adept juridical eyes. Such dedication to a purified finished product is both an expression of vocational identity and a statement of professional pride. One can hardly imagine dentists or corporate executives embarking upon a comparable enterprise, nor government officials. Perhaps the closest analogous process is the shaping of religious doctrine by ecclesiastical gatherings of prelates, although such undertakings are often fixed in the end by a single voice of authority.

Given the character of this process, then, it is virtually guaranteed that the results will embody orthodoxy of the most scrupulous type. As such, the black-letter formulations of what the law currently prescribes are bound to be helpful and influential. Indeed, their weight is often quite

1. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES xi (1987) [hereinafter RESTATEMENT (THIRD)].

2. *Id.*

overwhelming. Such an observation is likely to be especially true in an area such as “Foreign Relations Law,” which is a generally unfamiliar subject for most lawyers, judges, and government officials. To pull this material together in such an authoritative format is of exceptional practical value, and we all owe the ALI, and especially its corps of reporters, a large vote of gratitude, as well as of appreciation for a job well done.

It is also appropriate to single out the Chief Reporter, Louis Henkin (who took over from Richard Baxter after his election to the International Court of Justice in 1979), for particular praise. Professor Henkin is the natural choice for such a role, having distinguished himself in at least two ways—writing influential books on the way international law is incorporated into the framework of domestic law, and exhibiting a scholarly style and jurisprudential approach that hits closer to the bullseye of orthodoxy than anyone else of stature among international law specialists. Further, Henkin combines experience in government with a distinguished academic career, and in each setting, he has performed with consummate skill and consistent moderation.³

Given this profile of the *Restatement*, it is evident that there are certain things one would not expect to find, and doesn't: wit, controversy, originality, passion. These elements of scholarly approach are ruthlessly suppressed by the prevailing imperatives of orthodoxy. As such, at a time of tension and turmoil in international life, the *Restatement's* view of foreign relations law conveys a misleadingly ultra-stable image of the subject matter. To some slight extent this is implicitly acknowledged by the *Restatement* authors in the form of their recognition that any particular version of the *Restatement* has a useful life of one generation, that is, of about twenty years. Since it takes more than a decade to produce a new version, and longer to gather the reporters and advisers, the work of “restating” is both continuous and never really finished. The doubling of the length since the original *Restatement*,⁴ published back in 1965, suggests that much has happened in the intervening years, especially with respect to international economic law, the international law of the sea, the environment, and human rights. It is beyond doubt that no matter how well the landscape of the present is surveyed by this new *Restatement*, there will be a manifest need to update and expand in the years ahead, with the prospect that the next *Restatement* again will be a very

3. It should be noted that Professor Baxter possessed many of these same qualities. He was better known for his work of scholarly specialization on such international law topics as the law of war and international waterways, being less interested than Henkin in the constitutional dynamics governing the application of international law.

4. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965).

different look at U.S. foreign relations law than its predecessor, although it seems unlikely that the length of subsequent *Restatements* can keep pace with the expansion in actual substantive developments. This dynamic aspect is not a matter of paradox. The framework remains rather fixed over time—based on the dominance of territorial states, the acknowledgment of a role for international institutions, and a firm commitment to a rule-framed conception of law—even if the material treated becomes more complex and diverse as the multiple interdependencies in the world register their effects on legal doctrine and practice.

This arrangement by which the doctrine is fixed at a given time, but in frequent need of revision, is a practical compromise between the desirability of stability surrounding expectations about law and the realization that change is continuously subverting doctrinal foundations, necessitating frequent “restatements.” There is a sort of Faustian bargain here: clarity of doctrine is achieved by taking a snapshot at a given point in time, and then freezing perceptions until the next photo opportunity, that is, the next restatement. Such a bargain allows fairly clear legal guidelines, but misrepresents the character of law by refusing to address its processive essence.⁵ One wonders about Myres McDougal’s presence among the Advisers, whether he was an active accomplice in the process or a stoically disposed spectator who kept swallowing hard as he lent his prestige to an undertaking that embodies the type of legal positivist conceptions of law that elsewhere he treats with dismissive scorn.⁶

II. The Framework

It is against this background that we turn now to consider the opening parts of *Restatement* which set forth a framework within which the substance evolves.

The introduction to the *Restatement* includes a strong declaration of commitment:

[The] Restatement of the Foreign Relations Law of the United States is also a reaffirmation: relations between nations are not anarchic; they are governed by law.⁷

5. Compare with M. McDougal & F. Feliciano, *LAW AND MINIMUM PUBLIC WORLD ORDER* ch. I (1961) (defining international law). See generally *INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* (M. McDougal & W. Reisman eds. 1981).

6. *Editors’ Note*: Professor McDougal states that he has passed the torch of enlightenment to younger and stronger hands.

7. *RESTATEMENT (THIRD)* introduction, at 5.

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In the future, the drafters might avail themselves of an international relations expert. The use here of “anarchic” is quite odd, at least for non-lawyers drawing on its popular connotation as chaotic rather than upon its more technical connotation within political science that associates “anarchy” with a structure of authority that lacks a government. In this regard a world of sovereign states is necessarily a species of anarchy.⁸ The operation of rules, reciprocal tolerances, and regimes takes place, more or less effectively, within a setting of anarchy. The formulation in the *Restatement* is especially unfortunate. It seems to claim that relations between the political units must be either anarchic or law-governed, whereas the more instructive inquiry is to show how law (and cooperation) works under conditions of international anarchy. This is not a trivializing or precious observation. Perhaps the most influential recent work in international relations has been done under the heading “international cooperation under conditions of anarchy.”⁹

To extend the criticism in a different direction, it is peculiar that the word “nation” is used to designate the territorial units that constitute international society rather than “state.” There are 800 or more “nations” (that is, ethnically distinct peoples that conceive of themselves as nations), but somewhat fewer than 200 states.¹⁰ Again, the point is more significant than a matter of semantic style. Throughout their existence, states have been ruthlessly suppressing subordinate nations, relying on the fiction of the “nation-state” to validate claims of exclusive control over “nations” trapped within the state. One important, evolving dimension of the international law of human rights is to place legal limits on what a state can do to its own minority nations. By collapsing “nation” into “state,” the importance of this tension is overlooked at the very time when ethnic conflict has grown intense and is encountered in various configurations in every region of the world. The present turmoil in the Soviet Union is partly a result of the challenges being mounted by subject “nations” against the exploitative ascendancy of the Soviet state.

Yet, the main intention of the drafters here is laudable—namely, to insist on the relevance of law to the foreign relations behavior of all branches of government, and to their constitutional interplay as it touches upon the conduct of foreign relations. The *Restatement* asserts, perhaps too confidently, that “the relevance of law” (in these contexts)

8. See, e.g., H. BULL, *THE ANARCHICAL SOCIETY* (1977).

9. For a helpful overview of this research tendency, see *COOPERATION UNDER ANARCHY* (K. Oye ed. 1986); see also R. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984).

10. See E. GELLNER, *NATIONS AND NATIONALISM* (1983).

“is beyond question.”¹¹ But what can this possibly mean? Elsewhere in the *Restatement*, it is evident that the President and the Congress cannot be legally challenged for their foreign relations conduct, at least not internally by recourse to courts and judicial remedies.¹² When President Reagan bombed Libya in April, 1986, no procedure existed by which to test the application of law to this contested use of force. True, the Reagan Administration at the time justified the attack by an appeal to legal principles, but such an idea about the relevance of law reduces its content to matters of linguistic trope, that is, relying on self-justifying and self-serving arguments that assert the relevance of law without appraising the assertion by reliance on some kind of third-party review. The larger question, perhaps appropriately ducked by *Restatement*, is precisely what is the test of the relevance of law to the participation by governments (and other international actors) in a world that continues to lack central institutions for assessment and to refuse independent forms of accountability by domestic institutions. There is a strong subjective tendency in foreign relations, especially as governments so often insist in critical settings on limiting the relevance of law to self-appraisal by their own heads of state; the persistence of this tendency is what leads international law to be scorned or ignored both by much of public opinion and in comprehensive discussions of foreign relations. Again if we consult the international relations literature, we will find quite a different stance toward the relation of law to foreign policy—a growing disposition toward “the irrelevance of law.”¹³ Of course, it depends on the issue area, but these discussions are characteristically built around the impact of law upon sovereign discretion to use force. Even some prominent jurists seem inclined to argue against the relevance of law in these settings.¹⁴ Such an attitude represents, in part, an acknowledgment that earlier normative conceptions about limits on force have not been respected in the course of state practice.¹⁵ The *Restatement* assertion, then, would be more persuasive if it were qualified as to subject matter and the ambiguities of recent U.S. diplomatic practice. If read on its own, this formula-

11. RESTATEMENT (THIRD) introduction, at 5.

12. See especially *id.* § 1 and associated comments and reporters' notes.

13. Textbooks on international relations now rarely devote much attention to international law. For an example of this inattention, see P. KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHALLENGE AND MILITARY CONFLICT FROM 1500 TO 2000* (1988). But see Professor Abbott's attempt to make international relations scholarship more accessible and meaningful for international lawyers. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT'L L.* 335 (1989).

14. Compare Falk, *Reviving The World Court*, 19 *N.Y.U. L. REV.* 261 (1986).

15. See Franck, *Who Killed Article 2(4)?: Changing Norms Concerning Use of Force by States*, 64 *AM. J. INT'L L.* 805 (1970); G. VON GLAHN, *LAW AMONG NATIONS* 581-82 (4th ed. 1981); L. HENKIN, *HOW NATIONS BEHAVE* 140-45 (1979).

tion would strike most policymakers as evidence that “legalism” is not dead, at least among lawyers. Again, one can’t help wondering how to interpret McDougal’s acquiescence.¹⁶

My reading of these introductory sections of the *Restatement* leaves me with one strong recommendation to the ALI when it forms its plans for the next *Restatement*—to sophisticate foreign relations law by including among the corps of advisers at least one international relations specialist, preferably someone of strong will! Such a competence would ensure a more professional treatment of several issues: the nature of the sovereign state; the character of international society as a whole; the interplay of law and politics in the interpenetrated settings of governmental decisions and of international society in general.

III. The Conception of Foreign Relations Law

The conceptual identity of the *Restatement*, carrying forward the innovation of antecedent volumes, centers its analysis around the notion of “foreign relations law.” In section 1 the two arms of foreign relations law are set forth: “international law as it applies to the United States,” and “domestic law that has substantial significance for the foreign relations of the United States or has other substantial international consequences.”

Such an emphasis encourages attention to the forms and content of international law implementation within the U.S. legal system. Although the conception is extended to the governing process as a whole (including the sub-units of the federal system), the overwhelming stress is on how international law is processed through the federal judicial system of the United States, with decisions of the U.S. Supreme Court given great prominence.

The discussion in the comments clearly and precisely expresses the core understanding of how international law becomes internally applicable within the United States. The reporters’ notes for section 1 are particularly useful in delineating the main dimensions of concern to lawyers and scholars, and providing a compendium of principal judicial authorities. Somewhat less satisfactory are the references to secondary sources. More extensive references would have been useful, as well as reliance on more diverse scholarly materials. For instance, it is a serious oversight not to have referred readers to the excellent, slightly revisionist thinking

16. *Editors’ Note: See supra* note 6.

of Michael Glennon on these matters,¹⁷ or even to the more firmly revisionist work of Jules Lobel (and others).¹⁸ Too high a proportion of secondary references are to Henkin's own writings, which, although excellent and relevant, need to be balanced and enriched by other points of view. The reporters' notes are an excellent place to disclose lines of controversy among experts, thereby allowing lawyers and scholars to realize that challenges to prior judicial pronouncements may rest on strong analytic, doctrinal, and policy grounds. Such a willingness to acknowledge diversity and controversy in the sub-contexts would make the *Restatement* more interesting from both pedagogic and reformist points of view, as well as more reflective of the currents and crosscurrents that underlie the deceptively calm surface of the black-letter formulations and their explication in the comments. Along a similar line, it would be stimulating intellectually if some comparative treatment were considered in the reporters' notes, even if briefly and by reliance on influential secondary references. There is some expertise on comparative law among those listed as advisers and reporters, but there is no indication of their input in relation to the basic issues of how international law is implemented by sovereign states other than the United States. For instance, it would be useful to know whether the "political question" doctrine is a special feature of U.S. foreign relations law, or is more or less characteristic of most modern legal systems. If there are alternative approaches in like-minded foreign countries it would be important to know this, and to have some idea as to whether they produce their own difficulties. Similarly, it would be helpful to have some idea whether the American approach to foreign relations law anchored in a conception of executive supremacy is standard for other constitutional democracies. Such added information could be easily obtained by adding an Associate Reporter with the specific mission of enriching the reporters' notes with appropriate references to comparative practice and citations to some illuminating secondary sources.

I feel somewhat disappointed by the treatment accorded some key substantive issues in the reporters' notes. It is here that one should expect to obtain some feeling for nuance, including the interplay between the evolution of international law and its reception by the domestic legal order. On no single issue is this potential for exploration more evident than in relation to the crucial notion of executive supremacy, and its correla-

17. See Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Bareme or Curtiss-Wright?*, 13 YALE J. INT'L L. 5 (1988).

18. See, e.g., A LESS THAN PERFECT UNION: ALTERNATIVE PERSPECTIVES ON THE U.S. CONSTITUTION (J. Lobel ed. 1988).

tive implications for judicial deference, which is most frequently and generally discussed under the rubric of the “political question” doctrine. There are several closely linked questions that could have been usefully flagged, but are not.

For example, does the *Curtiss-Wright*¹⁹ precedent upon which this tradition of deference rests remain authoritative, given subsequent treaty elaboration of standards of conduct intended to operate as constraints on governmental discretion even in the area of war and peace? These treaty rules have generated criteria for court decisions that were not available when *Curtiss-Wright* was decided. The broader inferences drawn from *Curtiss-Wright* have always been controversial given the narrow technical dispute, and surely it would be helpful to have raised doubts in the reporters’ notes along these lines.

In another area, can executive supremacy, as processed through the courts in the form of “political questions” (thus being unfit for adjudication), be reconciled with the *Restatement’s* basic affirmation of the relevance of law to foreign relations? There is a tension here that might have been acknowledged, even if not explored in any depth. If the President is left to determine conclusively the relevance of international law, without any further procedure of accountability, then the relevance of international law (at least internally) is effectively reduced to rhetorical acquiescence. Such a rule for decision on a domestic level could also have been distinguished from the more objective character of collective and individual responsibility on an international level. An American president can arguably determine the internal application of international law in most instances, but this does not relieve the United States of its responsibilities to uphold international law as it is interpreted to apply by third party procedures, nor does it relieve the individual leader from his or her overriding responsibility in the war/peace area to uphold international law. It is rather scandalous to have not a single reference to the Nuremberg Judgment²⁰ or the Nuremberg Principles in this *Restatement*. Surely, the Nuremberg perspectives offer an alternative reading of the relevance of international law to that of *Curtiss-Wright*, and it is a reading that has been fashioned at the highest levels of the U.S. government in the period after World War II. The refusal to respect the 1986 World Court outcome in the dispute involving the Nicaraguan challenge directed at the

19. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

20. *Judgment, THE TRIAL OF GERMAN MAJOR WAR CRIMINALS, PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL* (1948). See generally R. CONOT, *JUDGMENT AT NUREMBURG* (1983).

legality of U.S. government policies of aiding the contras²¹ is a recent reminder that the President seems free internally to treat international law as irrelevant. In my judgment, the reporters' notes should have raised these issues of resolving internal and external assessments of U.S. obligations under international law.

Finally, how does one connect the assertion in Article VI of the U.S. Constitution that duly ratified treaties are "the supreme law of the land" with this tendency to avoid allowing either legislative or judicial challenges to executive policy that allegedly violates treaty rules? This is not a matter of considering the implications for foreign relations law of the domestic hierarchy of rules based on time, with the later enactment taking precedence, but rather a further questioning of whether a state can validly follow the U.S. practice of occasionally disregarding international law. We are faced with whether the unconditional obligation by a state to give precedence over any inconsistent legal claim (whether deriving from Congress, the presidency, or the acts of one of the federal sub-units) doesn't deserve consideration as a problematic aspect of U.S. foreign relations law. Such an issue relates to whether *Curtiss-Wright*, and its legacy, is a proper internal reading of the constitutional framework bearing on foreign relations law, regardless of its external status. Certainly, it is not the only responsible reading as the work of Michael Glennon and Thomas Franck have abundantly demonstrated.²² Here, too, consideration of comparative treatment would be helpful. Some exploration of the policy implications would seem appropriate as well.

IV. Sources and Status

There is a basic shift from 1965 in the approach taken by the drafters of the new *Restatement* to the underlying orientation. The earlier version initiated inquiry, and anchored understanding, in the form of an elaborate consideration of jurisdiction. The implicit assumption of such an approach, more then than now, was that the capacity to prescribe and apply international law in domestic settings could not be taken for granted. It is both more confident and logical to anchor the *Restatement* text, as does this latest version, in a direct discussion of the nature and content of international law, and then proceed to its application within the United States, especially by courts.

21. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 14 (Merits, Judgment of June 27).

22. See T. FRANCK & M. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW* (1987).

In defining international law, the *Restatement* is notable for its move beyond a strict positivism of states.²³ The definition is still rule-oriented, and premised on an acceptance of sovereign rights, but it operates within an enlarged sense of the international legal order. States are not the only participants, but they are now treated as co-equal with international organizations as subjects of international law. Beyond this, rules and principles form part of international law, and are acknowledged as covering states and international organizations in “some of their relations with persons, whether natural or juridical.” In effect, the rights and duties of individuals, corporations, and various types of formal associations are brought conditionally within the definition. “Some of their relations” is obviously vague and selective, and no careful criteria are provided to indicate how these boundaries are to be drawn.

The section on sources²⁴ is clear and straightforward, largely modeled on the classic formulation in Article 38 of the Statute of the International Court of Justice. The small, yet symbolic, variations suggest how well connected the drafters of the *Restatement* are with subtle currents of expert opinion. Article 38(1)(c) refers to “general principles common to the major legal systems of the world.” The main issue here is avoiding the colonialist connotations of the word “civilized” in the ICJ statute, and substituting the equally vague, but less evaluative, conception of “major legal systems,” although in practice, it must be assumed that “major” is a euphemism for western. These general principles are regarded in subsection 102(4) (and the accompanying comment) as “supplementary” rules, that is subordinate to rules derived from international agreements or international custom.

The comment to section 102 sets forth some of the dimensions of the legal activity that have emerged as vocationally significant in the last few decades, *e.g.*, issues that have affected the legal undertakings of lawyers, judges and government officials. These have included the legal effect of various categories of U.N. resolutions, especially those with a specific law-declaring intention; the character and relevance of “peremptory norms”; the complex interplay between international legal rules based on treaty and those arising from custom; and the applicability of “equity” as a general principle in the context of legal disputes among states or in the setting of domestic litigation. The reporters’ notes are particularly useful in setting out sources, delving deeper than the comment, and providing more of a sense of the jurisprudential aspects of the topic and some ex-

23. See RESTATEMENT (THIRD) § 101.

24. *Id.* § 102.

ceedingly useful guides to documentation and research. Perhaps most valuable in these regards is the detailed awareness of how the *Restatement* approach conforms to the codification effort of the Vienna Convention on the Law of Treaties,²⁵ and an informed sense of the relevance of particular judgments of the World Court that contain the most up-to-date authoritative reconsideration of the legal doctrines pertaining to sources.

The *Restatement* draws a sharp distinction between sources²⁶ and evidence of international law²⁷ that is quite dissimilar from their merger in Article 38 of the ICJ Statute. Thus, domestic and international tribunal judgments and opinions, as well as scholarly writing, can be relied upon to determine whether "a rule has become international law."²⁸ Article 38(d)(1) treats such material "as subsidiary means for the determination of rules of law." In effect, the *Restatement* distinguishes the process of becoming international law²⁹ from the product of the process,³⁰ whereas the ICJ statute integrates the two aspects of identifying authoritative rules. One other feature of the *Restatement* approach to evidence is relevant. Under subsection 103(2)(d), "pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states," are to be treated as evidence of the existence of an international law rule. This provision can be understood as a concession to the process jurisprudence of the New Haven School of World Public Order Studies. In effect, it suggests that the unilateral assertion of international law claims—for example, sovereign rights over the continental shelf—can serve as evidence of international law, even absent any "source" validation, if the community of states acquiesces in the claim. In effect, a unilateral claiming process is given a legislative capacity by way of the *Restatement* guidelines in section 103 as to evidence.

The two ideas about sources and evidence are reconciled in section 103(1) and the attached comment. A rule is easier to qualify as international law by way of section 102, which is described as primary evidence of international law, than section 103, which is designated as "secondary evidence." The matter is somewhat confusing because the comment also is concerned with giving guidance as to which forms of evidence are most

25. May 23, 1969, 1155 U.N.T.S. 331.

26. RESTATEMENT (THIRD) § 102.

27. *Id.* § 103.

28. *Id.*

29. *Id.*

30. *Id.* § 102.

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convincing (what in domestic law is referred to as “the best evidence rule”).

The *Restatement* admirably restates the general understanding of the complex interplay between international law and the internal legal system of the United States in sections 111-115. There is nothing surprising, nothing disturbing upon which to focus. Perhaps most notable is a useful clarification of the confusing notion of “non-self-executing” international agreements in section 111(4), as well as the detailed discussion of federal supremacy in matters of international law and issues arising from allegations that international legal obligations violate provisions of the U.S. Constitution. Throughout these sections the comments and reporters’ notes give a practitioner or academician a useful summation of standard views, done with the elegance of expert craftsmanship.

My only complaint, and possibly it is misplaced, is a certain lack of conceptual and normative initiative, especially in the supposedly more free-wheeling reporters’ notes. The positivist bent of the drafters is almost always evident as an inhibitor. For instance, in the intriguing area of customary international law as a basis of individual rights, the reporters’ notes are content with the generalization that “[c]ustomary law does not ordinarily confer legal rights on individuals or companies, even rights that might be enforced by a defensive suit such as one to enjoin or to terminate a violation by the United States (or a State) of customary law.”³¹ Such an assertion is accurate enough, but why not identify the exceptions that have been drawn, and why not put forward the possible conceptual case, in an era of expanding concern about human rights, for a more extensive application of customary law. The *Filartiga*³² case is duly noted, but blandly, and without seizing upon the opportunity to offer encouragement to support and extend, which could be influential in lower court cases. In this regard, no mention, except a dismissive generalization, is made of efforts to invoke international law (both customary and treaty) as a block to foreign policy actions perceived to be in violation of international law.³³

V. Persons

The *Restatement* sustains its approach in this important series of provisions: acknowledge new trends, but don’t disturb the understanding of the international legal order as run by, for, and within sovereign states.

31. *Id.* § 111 reporters’ note 4.

32. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

33. See Falk, *The Extension of Law to Foreign Policy: The Next Constitutional Challenge*, in *CONSTITUTIONALISM* (A. Rosenbaum ed. 1988) (citizen rights to a lawful foreign policy).

In this regard, the growing importance of international organizations is noted, as is the expanding scope of areas within which international law is applied directly to individuals. The drafters seek to convey their positivist bias by contending that these extensions of Brierly's image of international law as the rules binding upon states in their relations with one another,³⁴ can be accommodated by insisting that whatever rights and duties international organizations and individuals possess they do so as a consequence of the consent of states. Expressions of consent can take the form of either an international agreement that vests rights and duties, or customary practice that manifests acquiescence in the formation of a legal status. Such explanations are not in error, but they are strained, and are not necessary either as a matter of doctrine or description. The degree of statist emphasis is an expression of jurisprudential choice that can be evaluated from various perspectives such as usefulness, convenience, standard expectations, and world order values.

A convincing argument can be put forward that the positive orientation helps reassure readers of the *Restatement* that the drafters have not gone out on a limb. It is an effective manner of building confidence in international law among traditionally conservative lawyers and judges. The cost of such a disposition is to avoid some policy-relevant concerns of great normative importance. For instance, nowhere in the entire *Restatement*, or specifically in relation to individuals, is the word Nuremberg to be found. And yet a variety of attempts have been made in scholarly writing and in the judicial practice of the United States (and elsewhere) to argue that the Nuremberg Principles form an authoritative part of contemporary international law.³⁵

The issues at stake are crucial: do those in responsible positions have a legal responsibility to uphold international law in the face of contrary policies of U.S. government in the area of war and peace? Do citizens have a right of resistance to ensure respect for these obligations of international law? Particularly at stake are various aspects of nuclear weapons in the Third World.³⁶ What one might have expected from the drafters is a summary of the arguments for and against the applicability of the Nuremberg Principles, but to neglect the whole topic is to pretend that such questions are not even a responsible part of the subject matter of U.S. foreign relations law.

34. See J. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* (1964).

35. See R. FALK, *A GLOBAL APPROACH TO NATIONAL POLICY* (1975); F. BOYLE, *DEFENDING CIVIL RESISTANCE UNDER INTERNATIONAL LAW* (1987).

36. Compare *TOWARD NUCLEAR DISARMAMENT AND GLOBAL SECURITY* (B. Weston ed. 1984).

Restatement: Conceptual Foundations

The *Restatement* treats issues of “recognition” as an element of the state as “person.”³⁷ It is impossible to systematize practice in the form of obligatory standards. The underlying reality is that “recognition” is a diplomatic instrument that is manipulated to the advantage or disadvantage of foreign political communities struggling with issues of legitimacy. The drafters acknowledge in passing the subjective character of recognition practice when they observe in comment a to section 201 that matters of statehood are “resolved by the practice of states reflecting political expediency as much logical consistency.”

The introduction to Part II on “Persons” is technical, and gives the reader no feeling for the political context of this subject matter. In a sense, the technical tone overwhelms here even the jurisprudential identity of the *Restatement*. It is precisely because states are co-equal and without subservience to a higher order that the creation and disintegration of statehood and governmental legitimacy are both of extreme political importance and almost entirely dependent on discretionary governmental actions.

The recent struggle over the status of Palestinian claims to statehood and the right of the Palestinian Liberation Organization to act on behalf of Palestinian claims to self-determination is illustrative of both aspects of the topic. It is obviously of the highest political importance to all sides to control the symbolic status of Palestine. International law does little more than supply the symbolic language that confers or withholds legitimacy; it does not offer clear guidelines or attach serious consequence to their manipulation. Rather, controversial practices are handled diplomatically as being indicative of either a constructive attitude toward resolving the underlying conflict or as unhelpful, even hostile, maneuvers.

My contention is that the *Restatement* gives us almost no help in grasping this political texture, but rather presents the subject as a crazy quilt of doctrinal practice—virtually a collection of exceptions. To the extent it offers guidelines at all, they are formalistic and unhelpful. For instance, in subsection 203(2) the duty of a state not to accord “recognition” of a government created as a consequence of “the threat or use of armed force in violation of the United Nations Charter” is set forth. Such a standard seems impractical and unworkable—providing at most an explanation for deferring recognition. If it were to be regarded as a serious rule then it would need some procedure to give it content. One possibility is substituting the language “as determined by the United Na-

37. RESTATEMENT (THIRD) § 202.

tions Security Council.” Alternatively, such a rule could be treated as a rule of diplomatic practice based on foreign policy pronouncements of the Executive Branch. Indeed, this is the main way in which such a conception would operate, as it did to some extent during the period of Soviet aggression against Afghanistan. Whether the Kabul regime would still be denied “recognition” on such grounds in light of the completion of the Soviet withdrawal is more problematic.

As elsewhere, there is much that is useful and instructive about the doctrinal presentation in Part II. However, here more than elsewhere, the failure to discuss more coherently the interplay of law and politics is unfortunate. It makes it more difficult to understand what is actually happening when states use legal language in inconsistent and self-serving ways. Part of the difficulty is that recognition practice has more to do with international law as authoritative communications than it does with international law as a behavioral constraint or a rule system.

VI. Conclusion

These comments on Parts I and II have been selective, and have emphasized those characteristics of the *Restatement* that this reviewer found deficient or disappointing. Let us hope that the next *Restatement* will sustain the impressive excellence of technical achievement found in this *Restatement*, while increasing the sophisticated integration of the global political and economic setting into the discussion of international law, and being more receptive to the frontier issues in international law, especially those developed and considered in domestic courts.