

# Special Review Essays: The *Restatement (Third) of the Foreign Relations Law of the United States*\*

## Foreword

Karl M. Meessen†

### I. The *Restatement* in the Process of International Lawmaking

Whose *Restatement* is it? Scholars regard it as theirs. After all, the *Restatement* was mainly drafted by four professors of law who had assumed the burdensome role of reporters. Other professors of law now look for its shortcomings, for signs of unevenness, for inaccuracies, and for a possible lack of perspective. However, the *Restatement* was prepared for U.S. law practitioners. Indeed it will be used in practice. A restatement of foreign relations law has an even greater impact on legal practice than a restatement of domestic law. Practitioners are familiar with domestic law and feel at ease drawing upon a variety of sources to confirm, or to contradict, the rule found in a restatement. In the field of foreign relations law, however, especially in customary international law, users are much less inclined to embark on similar exercises of critical scrutiny. For its peculiar effectiveness, therefore, this *Restatement* should be treated not merely as yet another piece of legal doctrine, albeit a collective one, but as the practitioners' *Restatement*, to wit itself a source of expectations regarding future conduct.

\* The Editors wish to thank Professor Myres McDougal for his invaluable assistance in gathering these special reviews.

† Dr. iur. (Bonn), Professor of Public Law, International Law, European Law and International Economic Law at the University of Augsburg, Augsburg, Federal Republic of Germany; Professor of International Trade Law at the Institut Universitaire de Hautes Etudes Internationales, Geneva, Switzerland; Special Consultant on International Economic Law within the International Advisory Panel, as established by the American Law Institute in 1982 during the preparation of the *Restatement (Third) of the Foreign Relations Law of the United States*.

A paraphrase such as "Right or wrong, the *Restatement* says so," would overstate matters. Yet is it entirely off the mark? With respect to its impact on legal practice, the *Restatement* is not a homogeneous product at all. To identify its effects on practice, therefore, one has to differentiate among the issue areas of international law. For example, a number of the *Restatement's* rules constitute political law and give guidance primarily to the political branches of governments, notably the Department of State and its foreign counterparts. There is, however, also a growing body of international law rules that lend themselves to application in court practice. Again, their impact will differ according to whether they are invoked before U.S. courts, foreign courts, or international tribunals.

Customary international law is, potentially at least, created by, and binding upon, all the 160 or so states of the international community. Yet in formulating the rules, the authors of the *Restatement* emphasize the U.S. perspective as contrasted with "what a consensus of states would support or accept."<sup>1</sup> As a result, the *Restatement* will be of greatest significance in the United States itself. In fact, it will be hard to persuade U.S. Federal and State courts of international law rules differing from those set out in the *Restatement*. Those who resent such overwhelming influence should consider the alternative: confronted with a variety of learned affidavits relying on bits of state practice collected from all over the world, could a court of the United States, or of any other state, be blamed for trying to find some domestic law device to avoid the international law question altogether? The access domestic courts are given to international law has its price: rules of the *Restatement* might be applied even in cases where, from a scholar's perspective, doubts as to their support persist.

Foreign courts, however, will be guided by the case law of their own jurisdictions and of international tribunals. Only in the absence of such case law will they look beyond their national frontiers to the practice of other states, including the United States. What about international tribunals? The "restators," in the language of Stefan Riesenfeld all of those involved in the preparation and adoption of the *Restatement*,<sup>2</sup> purported to state the law as they expected it to be applied by an "impartial tribunal,"<sup>3</sup> which should be taken to refer to an international tribunal. Such a tribunal, even if it eventually applies a rule exactly as stated in the

1. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 3 (1987) [hereinafter RESTATEMENT (THIRD)].

2. See Riesenfeld, *International Agreements*, 14 YALE J. INT'L L. 455, 455 n.1 (1989).

3. *Id.*

*Restatement*, will not base its decision on the *Restatement* alone. The *Restatement* will, from that perspective, have the character of an authoritative doctrinal expression of the law along with other authoritative statements of individual writers or collective bodies, such as the Institut de droit international, the International Law Association, and learned societies in other states.

Despite those differences, even outside the United States, the *Restatement* is not confined to its declared function of giving evidence of the law. It actually contributes to the formation of international law in at least three ways. First, in disputes with the U.S. government, foreign governments can be expected to rely on the *Restatement* whenever it supports their case. This will make it difficult for the U.S. government to put forth any proposition not supported by the *Restatement*. Second, the *Restatement* will be taken as indicating U.S. practice and its future trends. As a result, that practice will be presumed to exist already, or to develop in the future, for the purpose of establishing state practice as an element of customary international law. Finally, the comprehensive discussion of the law in the *Restatement* itself, in related research, and in U.S. practice referring to the *Restatement*, will influence and structure debate throughout the world. This again will have an effect on how the law is eventually defined for application.

Inside and outside the United States, the *Restatement* has a role—a more varied one than could be explained here—in the making of international law. The approach in preparing the *Restatement* may have been positive-law-oriented and may even be criticized for understating the fluidness and ambiguity of international law. But the *Restatement* is not only a scholar-produced mirror of the law; it itself introduces an element of stabilization into international disputes. To evaluate the *Restatement*, therefore, means more than just checking its accuracy and other scholarly virtues. One must address additional questions, among them those discussed below: what was the role of government policies in formulating the international law part of the *Restatement*<sup>4</sup> (section II), and to what extent did the *Restatement* contribute to the cause of fairness and justice in international law<sup>5</sup>?

## II. Government Policies in Restating International Law

Contributing to lawmaking always involves an element of political choice. The non-governmental character of the American Law Institute,

4. See *infra* section II.

5. See *infra* section III.

its open procedures, and the sense of objectivity and independence guiding its officers and members are valuable assets in trying to keep political choice apart from government policies. But could an entanglement in governmental positions be avoided altogether? Should U.S. restators ignore their influence on the claims of U.S. parties before international tribunals? Should they, for instance, state the standard of compensation to be paid for a taking of foreign-owned property so as to undermine U.S. claims presented to the Iran-United States Claims Tribunal?

There is no way, as was said before, to prevent foreign governments from invoking those positions of the *Restatement* that support their case. Not surprisingly, therefore, the U.S. government, following the deliberations in the Institute with increasing concern, allowed itself to become involved in the drafting process. In 1985, the Departments of State and Justice even requested, and obtained, a postponement of the adoption of the *Restatement* by one year.<sup>6</sup> As a result, of course, neither the U.S. government nor U.S. plaintiffs are likely to find their chances enhanced if ever they wish to persuade international tribunals of the purely private and noncommittal character of the undertaking.

Whenever U.S. restators did not by themselves share the view of their government, they were confronted with a difficult choice. Should they follow their conscience as impartial and unbiased lawyers, or should they act as loyal citizens who would, if they stated their objective view, run the risk of having it mistaken by the outside world as an U.S. negotiating position? Evidence of that dilemma may be found throughout the process of drafting the *Restatement*, an important part of which is recorded in the proceedings of the annual meetings of the Institute. It may also be found in the process of reviewing it. For example, in the following reviews the rules on the taking of foreign-owned property receive praise whereas those on the law of the sea do not.<sup>7</sup> Quite clearly, governmental attitudes have left their imprint in both cases.

Yet it may be wondered whether efforts to support existent or presumed government policies have not at times been exaggerated. Interests within the United States on a number of international law rules are quite varied. Government agencies, for example, may favor retaining a free hand with respect to jurisdiction. But should U.S. industry do so as well? Are not they the first to suffer from extraterritoriality when they

6. See AMERICAN LAW INSTITUTE, PROCEEDINGS, 62ND ANNUAL MEETING 374-85 (1985).

7. Compare Chen, *Protection of Persons (Natural and Juridical)*, 14 YALE J. INT'L L. 542 (1989) with Burke, *Customary Law of the Sea: Advocacy or Disinterested Scholarship*, 14 YALE J. INT'L L. 508 (1989).

are squeezed between U.S. enforcement and foreign blocking legislation? One could argue the U.S. government will take care of such problems and eventually formulate an official position on the interests of the United States in each case. But does such an approach allow for long-term planning of business operations? And what about private litigation as it may develop independently of any second thoughts the U.S. government might have?

Even though international law limits on national jurisdiction may today impose restraints mainly on the U.S. government, which normally finds itself at the assertive end of conflicts of jurisdiction, is that situation likely to last forever? The European Community has already stepped into some of the traditional fields of extraterritorial jurisdiction and prompted U.S. companies to turn to their government for assistance and defense. Those companies could benefit from a more balanced view of jurisdiction, one which considered the consequences of a role reversal, with the United States among the target states. At any rate, a broader view of the present and future interests of the United States might have allowed the restators to feel less uneasy with the vagaries of governmental policies, and to make fairness and justice their exclusive objective in restating international law.

### III. Striving for More Fairness and Justice

Reporters and other restators, Stefan Riesenfeld will agree, are human beings. All their frustrations are best rewarded if they can be acknowledged as having moved the law a little ahead toward more fairness and justice. Such efforts have been undertaken throughout the *Restatement*, although with varying intensity. The reviewers applauded the *Restatement's* progress on human rights for instance,<sup>8</sup> and deplored its stopping at the transboundary aspect of international environmental law.<sup>9</sup>

The emphasis, for praise and criticism, seems well chosen. International law is still suffering from its state-centered structure. It is largely through the medium of states that international law is created, and it is through states that international law is implemented and enforced. In protecting human rights and the environment, states must make and enforce the law against themselves. Recent events in Beijing, on the one hand, and the futility, so far, of all attempts to preserve the tropical rain

8. See Chen, *supra* note 7, at 564.

9. See Caron, *The Law of the Environment: A Symbolic Step of Modest Value*, 14 YALE J. INT'L L. 528 (1989).

forests, on the other, amply demonstrate how difficult it is to overcome that structural impasse.

Fairness and justice demand that international lawyers stride ahead to further reinforce the substantive law of human rights and environmental protection, and to develop ingenious devices for indirect enforcement. With respect to human rights, the *Restatement* has indeed moved on, encouraged by general trends in international practice and by the imagination of a particular court in the *Filartiga* case.<sup>10</sup> Unfortunately, environmental law will have to wait for the "next photo opportunity," as Richard Falk labels the occasion of drafting the *Restatement (Fourth) of Foreign Relations Law*.<sup>11</sup> Two years have already gone by since the adoption of this *Restatement*, and intermediate steps, as the "1986 Revisions" of the *Restatement of Conflict of Laws* show, are not unprecedented in the practice of the Institute. In a most timely manner, therefore, the following book reviews, in addition to analyzing, explaining and criticizing the law as stated in the present *Restatement*, proceed to start setting the agenda for the next effort of this kind.

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

11. See Falk, *Conceptual Foundations*, 14 YALE J. INT'L L. 439 (1989).