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# International Remedies

Lea Brilmayer†

It could easily be argued that the most important topic in international law is the law of remedies. The subject includes both the sanctions that are imposed following a breach of international substantive norms, and the system of institutions designed to investigate violations and then impose those sanctions. The fact that norms governing international conduct lack a secure centralized enforcement mechanism leaves the international system vulnerable to the accusation that international law is not really "law" at all. For this reason, scholars of the subject have addressed with great seriousness the question of whether an adequate system of sanctions, formal or informal, exists.<sup>1</sup>

The new *Restatement's* contributions to the subject are therefore particularly welcome. The prior *Restatement* did not have a chapter dedicated specifically to remedies, although (as in the present *Restatement*) there were references to remedial issues scattered throughout the substantive discussion.<sup>2</sup> In adding a chapter devoted specifically to remedies, the new *Restatement* focuses upon this important subject the attention that it needs and deserves. The *Restatement's* treatment of remedies, however, by its very nature cannot be inclusive enough. While apparently broad-minded and all-encompassing, on closer examination, it appears to be heavily slanted towards a narrow legalistic view that would undercut the claim that substantive norms of international conduct are adequately supported by legal enforcement mechanisms. The more narrowly the *Restatement's* remedies provisions are drawn, the less convincing are the claims that an adequate system of remedies exists, and that the substantive norms are "legal." Because a system of substantive norms requires adequate remedies to be effective, the very motivation behind the inclusion of a section on remedies requires a more expansive discussion.

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1. See L. HENKIN, *HOW NATIONS BEHAVE* (2d ed. 1979), especially pages 1-27 dealing with the distinctive nature of a decentralized system (and whether the system is really a legal one), and pages 49-68 entitled "Why Do Nations Observe Law?". See also O. SCHACTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 26-32 (1982).

2. See, e.g., *RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* §§ 806(3), 807(1) (1965) (remedies for violations of GATT obligations).

## I. Remedies in Domestic and International Law Contrasted

The motivation for discussing remedies is rather different in international law than in domestic law. Of course, the topic of remedies is important in both contexts. "Sanctions and enforcement, at all levels of organization, are appropriate legal questions because they represent the crucible of law, the test of its reality."<sup>3</sup> Under one commonly held view, proof of the existence of adequate remedies is virtually a condition precedent to a convincing claim that substantive norms of international conduct should be taken seriously. In the international context the existence of adequate remedies is more in doubt, and this feeds suspicion that international law is not really a developed legal system. In this respect, a theory of international remedies is as important to international law as a theory of judicial review is to domestic constitutional law. Certainly it is possible to study constitutional doctrine without reference to *Marbury v. Madison*<sup>4</sup> or the literature that it has engendered. It is equally possible to study international substantive norms separately from a discussion of the distinctive jurisprudential issues that arise in a world of decentralized authority. In both instances, however, doing so cuts one off from central foundational issues that both motivate and permeate doctrinal development at key points. The international law of remedies is more analogous to such central jurisprudential issues as judicial review than to the domestic law of remedies, which in comparison to both is far less controversial.

Once one has recognized that the motivation for studying remedies in the international context is somewhat different than the motivation for studying domestic remedies, one should not be surprised to see that the *Restatement's* treatment is strikingly different from what domestic lawyers would expect to find in a chapter entitled "Remedies." It is necessary only to contrast the table of contents of the Remedies chapter in the *Restatement* to the table of contents of the remedies portions of the *Uniform Commercial Code*, for example, to see how great the differences are.<sup>5</sup> The usual general domestic discussions of remedies address the

3. Reisman, *Sanctions and Enforcement*, in *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER: CONFLICT MANAGEMENT* 276 (1971).

4. 5 U.S. (1 Cranch) 137 (1803).

5. The *Uniform Commercial Code* sections on remedies differentiate sellers' and buyers' remedies. See, e.g., UNIF. COMMERCIAL CODE § 2-508 (cure by seller of improper tender or delivery; replacement), § 2-601 (buyers' rights on improper delivery), § 2-703 (sellers' remedies in general), § 2-706 (sellers' resale including contract for resale), § 2-711 (buyers' remedies in general; buyers' security interest in rejected goods), § 2-709 (action for the price), § 2-712 ("cover," buyers' procurement of substitute goods), § 2-715 (buyers' incidental and consequential damages).

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types of remedies available: specific performance, money damages, injunctions, and the like. This is not to say that such topics are never mentioned in the *Restatement*. They are, if only briefly.<sup>6</sup> However, the bulk of the discussion in the *Restatement* concerns something else: namely, the proper institutional structures to which remedial arguments should be addressed. Is jurisdiction available in the International Court of Justice? Can a nation exercise self-help? Is arbitration appropriate?

In domestic law, we relegate such questions of institutional competence to a different group of scholars than the ones who specialize in remedies. By and large, institutional questions are studied and taught by specialists in civil procedure, federal courts, or alternative dispute resolution. Thus, the question of what remedy should be applied is differentiated from the question of which remedial institution ought to apply it. There is no such division of labor in international law: institutional issues are at the core of the remedy problem. This difference should not be surprising, because in the international context adequate solutions to these institutional questions cannot be taken for granted to the same degree as in the domestic context. Similarly, international lawyers cannot afford to separate the question of the existence of institutions to remedy violations from the question of what remedies those institutions are actually able to apply. The very existence of adequate authoritative mechanisms is in doubt. International legal theorists must, therefore, consistently address and rebut the skeptics' suspicions that international norms rest on foundations no more secure than the international legal scholars' *ipse dixit*. The *Restatement's* remedies sections cannot avoid addressing the availability of institutional mechanisms to a much greater degree than is necessary in a domestic discussion of the subject.

While the need to demonstrate adequate remedial institutions in the international context is therefore clear, what is less obvious is the tension that this causes within the *Restatement's* general enterprise. Some international remedies result from formal legal processes, such as adjudication and arbitration, that would be reasonably familiar to domestic lawyers. Others have a larger political component, such as the application of diplomatic pressure: these types of remedies are not legalistic in the narrow sense. It seems undeniable as a practical matter that such legal/political mechanisms are crucial to maximizing respect for international norms and are therefore central to the claim that international norms should be taken seriously. If the *Restatement* dealt only with for-

6. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 901 comments d and e (1987) (discussions of reparations) [hereinafter RESTATEMENT (THIRD)].

mal legal mechanisms for remedying international violations, then it would seriously understate the importance of international substantive norms both to scholars and to the party seeking a remedy. An overly legalistic view of remedies for this reason undermines the substantive norms that are set out with such care in other parts of the *Restatement*.

If, on the other hand, the *Restatement* attempts to be complete in its treatment of international remedies and seeks to go beyond legalistic mechanisms, it has a different problem. This problem centers on the core issue of using the *Restatement* as a vehicle to address broader issues on the margin between international law and politics. It is not clear how well suited a restatement is for delineating a broader range of legal/political remedies.

As we will see below, the *Restatement* currently discusses the sorts of remedies that are well captured by its black letter legal rules; it does not attempt to describe remedies that might be thought more political. By maintaining a clear separation of law and politics—by taking a narrow view of the former and disregarding the latter—the *Restatement* eliminates political/legal remedies from its consideration. The effect is to undercut the efficacy of its norms and thus the argument that international law is law like any other. It is arguably neither possible nor appropriate to reduce the subject of international remedies to a set of narrow legal rules, as the *Restatement* apparently attempts to do. Such a reduction to legalistic rules is impossible because a broader range of sanctions for international violations is essential to pressure outlaw states to terminate violations; it is undesirable because there is no reason to suppose that all responses should be reducible to narrow legalistic ones.

My claim is as follows. To have convincing substantive legal norms, one would like to be able to demonstrate the existence of effective remedies. A narrow definition of what constitutes a remedy leaves substantive wrongs without a remedy. By choosing not to address the variety of remedies that have political as well as legal overtones, the *Restatement* takes a narrow view of what remedies are available. However, an insistence that remedies take a legalistic form underestimates the efficacy of international enforcement. Restricting remedies to those that are purely legal undercuts the claim that the *Restatement's* substantive norms are indeed legal, because if the narrow view of what counts as a remedy is correct, then there are no sanctions for many substantive violations. One is then left with supposed legal rights without effective remedies, a result that is jurisprudentially troubling. To demonstrate this claim requires taking a closer look at the variety of remedies that are recognized in the

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*Restatement* and those that exist in the world of international law and relations.

### II. The Variety of International Remedies

A wide variety of institutional responses to a perceived violation of international law might be swept under the general heading of remedies. At least five different types of situations come to mind as involving remedial issues. I list them here in increasing order of coerciveness and legal formality: voluntary remedial responses, political pressure, negotiation, self-help, and international adjudication.

The least coercive and formal of these remedies are the actions that one state takes voluntarily to correct its own breaches of its international obligations. In section 901, the *Restatement* provides that a state must terminate any continuing violation, and (ordinarily) make reparations.<sup>7</sup> It need not admit guilt, although it may do so, or it may make a formal apology.<sup>8</sup> The institution to which remedial arguments are addressed in this situation is the violating state itself, which may respond either out of respect for the principle or from domestic political pressure. It is hard to deny that domestic political measures are one means of encouraging at least rough compliance with norms of international law.<sup>9</sup> To the extent that states live up to international law at all, it is in some degree because of such domestic political constraints.

Hand in hand with spontaneous remedial actions by the violator is remedial action taken as a result of political pressure by the victim state or by third parties. This second category does not refer to efforts by third party decisionmakers, but rather to informal political pressure by other concerned states aiming to force the offending nation to cease the objectionable conduct and/or make reparations. While political protests by the victim and by third parties may be channelled through institutional structures such as the United Nations, they need not be. Protests can also be conveyed through traditional diplomacy or informal communication. They can be public or secret, from allies of the violator or allies of the victim. This second category, as does the first, includes the actions of the violating state's political institutions as an element of the enforcement process, but here the actions are taken in response to pressures resulting from the political activities of other nations.

7. RESTATEMENT (THIRD) § 901.

8. *Id.* § 902 comment h (ex gratia relief), § 901 comment d (apology).

9. See L. HENKIN, *supra* note 1, at 60-68.

Of course voluntary compliance and political pressure are not always enough. A third possibility, therefore, is negotiation. Negotiation may enable the victim state and the violator state to successfully settle a problem that has persisted in the face of diplomatic pressures. The possible results include a promise to discontinue violations, an apology, or perhaps monetary compensation. Negotiations may be facilitated by third parties who offer to mediate. This institutional response is similar to our second alternative of political pressure, but is somewhat more formalized.

Fourth, the victim may choose self-help. Self-help may include breaking off diplomatic relations or suspension of reciprocal treaty rights, and is generally defensible as long as the response is not out of proportion to the injury suffered and the response does not violate rules against the use or threat of force.<sup>10</sup> This institutional mechanism is basically a physical response directed against the state violating the international norm.

The final institutional remedy, which most resembles what we in the domestic arena would characterize as truly remedial, is authoritative third party adjudication. A variety of third party mechanisms are potentially available. The first possibility that comes to mind is the International Court of Justice—the apparent analog to domestic adjudication—but there are other possibilities, such as arbitration or instituting litigation in the domestic courts of one of the involved states.

### III. The Structure of the Remedies Sections

The structure of the Remedies chapter of the *Restatement* seems at first glance to reflect this variety of formal and informal remedies, although, as we see below, this appearance of broad-mindedness is somewhat misleading. Section 901 states generally that a violating state has an obligation to terminate the violation and make reparations. Section 902 provides that states may make claims against one another either through diplomatic channels or through any other procedure on which the parties have agreed. Section 903 deals with the International Court of Justice, outlining the circumstances in which it may exercise jurisdiction. Section 904 discusses arbitration, while section 905 discusses unilateral (self-help) remedies. Sections 906 and 907 address private remedies generally, and in U. S. domestic courts specifically. The organization of the Remedies chapter thus reflects the different institutional structures that participate in the international sanctioning process.

10. See O. SCHACTER, *supra* note 1, at 167-87.

What difference does it make that there is such a wide range of possible remedial institutions in the international setting? One answer is that what the victim gets, as a remedy, may depend upon which institutional avenue is pursued. The question of what remedy to grant is differently phrased in different contexts. In the context of voluntary compliance the remedial question would be: What should the violating state do when and if it recognizes that it has committed a violation of international law? In the context of political protests lodged against the violator, one might instead ask: What corrections are other states entitled to demand when rights have been violated? Regarding negotiation, one asks: What would be a reasonable negotiated settlement as between the parties for this violation of international law? When the issue is self-help, one would ask: What unilateral measures is a state entitled to impose in response to a violation of its rights under international law? Finally, in the context of third party resolution, one has the classic remedial question of domestic law: What should the third party decisionmaker impose as a remedy once a violation has been found?

Separating these questions in this way, it is clear that pursuing remedies through different institutional avenues has very different consequences. In less formal remedial contexts, the question of the appropriate remedy is much less sharply posed than when a remedial action is considered by a third party adjudicator. For instance, the remedy named by a domestic court addressing international law issues, or by the International Court of Justice adjudicating an international dispute, might very well be influenced by the sense that moderation is required in matters of important state interests. This is not to say, of course, that the violator would be limited to a moderate remedy if it felt moved to offer voluntary reparations, or that the victim state should not demand a great deal more in the course of lodging political protests against the violator. Nor is this to say that the remedy that the parties would ideally reach through negotiation or diplomacy would be the same as the remedy suggested by a third-party decisionmaker. Certainly there is no reason to believe that a third-party remedy would necessarily resemble a self-help remedy that was permitted under international law. There are constraints on formal decisionmaking processes that do not apply to informal dispute resolution or to political give and take.

The question of "who imposes the remedy?" is of great significance to the question of which remedial outcome ought to or will be imposed. The remedial outcome may depend substantially upon the remedial process that is utilized. In particular, it is not at all clear whether the more political mechanisms for dispute resolution, such as the lodging of diplo-

matic protests with the violator state directly, ought to be regulated by rules about what is "appropriate" to request or what procedures should be employed to make or communicate demands. This raises the question of whether the rules which are set out by the *Restatement* for pursuing formal remedial procedures, such as World Court adjudication, are intended to apply also to informal mechanisms, such as diplomatic demands.

Presumably not, although at times this is not completely clear. The *Restatement's* ambivalence towards informal remedial procedures can be illustrated by its discussion of standing. In the text of section 902, we find that "[a] state may bring a claim against another state"<sup>11</sup> for a violation of international obligation. Comment a, entitled "Standing to make claims," reiterates the general principle that "[o]rdinarily, claims . . . may be made only by *the state* to whom the obligation was owed."<sup>12</sup> There are limited exceptions, since some international obligations are owed to all states; the comment cites examples of harm to the environment<sup>13</sup> and to international human rights.<sup>14</sup> Other violations are enforceable by private persons under sections 906 and 907. But by and large remedies seem limited by standing requirements. Reporters' note 1 of section 902, for instance, cites authority concerning which states have the right to take legal action.<sup>15</sup> Section 905 speaks of the right of the *victim* to take unilateral measures.<sup>16</sup> The general introduction to the remedies chapter states that only the victim state has standing to make a formal claim or to resort to third party settlement procedures, aside from obligations *erga omnes*.<sup>17</sup>

Yet one wonders whether such standing limitations are really designed to apply to all sorts of remedies. One could adduce evidence that they are not; the references to "legal action," "formal claims" and "third party settlement procedures" in the provisions just cited suggest that the standing requirement is limited to such relatively formal remedial responses. It therefore seems likely that under the *Restatement*, the usual standing rule applies only to some remedial mechanisms and not to others. The ripeness and exhaustion requirements seem similarly lim-

11. RESTATEMENT (THIRD) § 902 (emphasis supplied).

12. *Id.* § 902 comment a (emphasis supplied).

13. *Id.* §§ 602, 703(2).

14. *Id.* § 703(2).

15. *Id.* § 902 reporters' note 1, citing *Ethiopia and Liberia v. South Africa* [1966] I.C.J. 6, 47.

16. *Id.* § 905.

17. *Id.* pt. IX, introductory note.

ited.<sup>18</sup> But what precisely *are* “legal” claims, “formal” claims, claims before “third party settlement procedures”? The provisions cited above do not seem entirely consistent in this regard. Common sense provides a rough answer. Technical requirements such as standing do not apply to informal remedies in the same way that they apply to formalized, legalistic remedies. Although the *Restatement’s* language is unclear on this point, it does not make sense to apply standing requirements equally to all remedial efforts.

Consider as examples the Soviet intervention in Afghanistan or the Iranian threats against Salman Rushdie. The right of other nations to lodge diplomatic protests against such actions does not depend upon whether the claimed violation is technically an obligation *erga omnes*. Effective enforcement of international law depends upon the involvement of a greater range of states than just the state which is formally the victim. Expanding the category of obligations *erga omnes* is no solution, because that would enlarge the rights of third parties to initiate formal dispute resolution procedures, such as initiating cases before the International Court of Justice. Instead, the appropriate response is to recognize that there is a broad range of remedies for legal violations, and that technical legal rules for formal legal remedies do not automatically apply to all of these remedies. This is particularly clear in the least formal and coercive remedial context, namely, domestic political pressure or informal diplomatic pressures by allies.

By using terms such as “claim” in the text of section 902, the *Restatement* sidesteps the issue of which measures are subject to its standing rule. If “claim” were read broadly to encompass all protests, then comment a on “standing to make claims” is patently false as a descriptive matter, and even more patently undesirable as a normative matter. Of course, the better reading would be that section 902 was not designed to apply a standing requirement to all remedial action, informal as well as formal.

One suspects that portions of the analysis of remedies found in the *Restatement* were implicitly designed to deal with the types of formal decisionmaking institutions with which lawyers feel most comfortable, such as arbitration and adjudication. Self-help is also reasonably susceptible to characterization in fairly narrow legal terms, and is a topic on which the *Restatement* also supplies rules. Remedies that fall more towards the political end of the legal/political spectrum, however, do not

18. *Id.* § 902 comment b (ripeness) (referring to “formal claims” in contrast to “informal protests”), comment k (exhaustion) (referring to “formal claims”).

lend themselves well to legal rules about the appropriate steps to take. It is difficult, if not impossible, to lay down rules on who can lodge diplomatic protests and what the contents of such protests might include. On such questions, it is not clear that any specific "law" of remedies exists, except, perhaps, for rather vague exhortations that a state ought to voluntarily observe its obligations, cure any breaches, and respond to reasonable political pressure to observe international obligations.

It is therefore understandable that the *Restatement* does not accommodate such remedial possibilities. Although its remedial provisions at first appear all-encompassing, it is not clear where such legal/political remedies might fit within the *Restatement's* scheme. For reasons already mentioned, they do not fit well within the provision in section 902 that states make "claims" against one another. Section 902 by its own terms deals only with obligations "owed to the claimant state or to states generally." The introductory note to Part IX recognizes that "in many instances, states prefer to settle disputes in a political forum," but its cross-references demonstrate clearly that this allusion includes only political responses by the victim.<sup>19</sup> The more closely one reads the discussion of remedies, the more clearly it appears that political pressure by the world community, or by domestic constituencies, is simply not intended to be included. Indeed, the general introductory remarks to the *Restatement* suggest that for analytical purposes the posture that is adopted is that of a hypothetical world tribunal.<sup>20</sup> If this focus is carried over into its remedies provisions it becomes clear why the remedial provisions are so narrowly drawn.

This observation returns us to our starting point—the reason that the subject of remedies is so central to international law. Remedies is an important topic to the *Restatement* in the same way that all of the other sections are important—as part of the ordinary fabric of international law. Remedies are important, however, for foundational reasons as well. The case for the importance of international substantive norms is strengthened considerably by demonstrating the existence of an adequate mechanism for correcting substantive violations. To disregard an important source of international remedies—informal diplomatic and political pressure, both domestic and from the world community—is to undercut the relevance of the remainder of the *Restatement*. It forces upon us a difficult and controversial jurisprudential issue: whether the existence of

19. The cross-references are to § 902, comment d and reporters' note 5 which deal with "direct negotiations between the parties" and "[d]ispute settlement in or by international organizations," respectively.

20. RESTATEMENT (THIRD) introduction.

substantive legal norms depends upon a showing of adequate legal enforcement mechanisms. More importantly, it denies what may be, practically speaking, the most significant remedy of all. Nations are constrained by domestic and world politics more than by their fear of an arbitration or a World Court judgment.

In the longstanding debate over whether international norms are “really law,” even the most ardent supporters of the legal characterization would surely balk at asserting that international remedies can be reduced to narrowly legalistic terms as well. As Louis Henkin notes,

[n]ations today promote their interests principally by *ad hoc* negotiation, influence, compromise, and political accommodation. Relations between nations are primarily the responsibility neither of generals nor of judges; they remain the domain of diplomacy between representatives of nations promoting national policies.<sup>21</sup>

The normative force of international law rests on more than formal dispute resolution processes, yet by and large, the *Restatement* chooses not to address the larger remedial possibilities. If the reason is that these remedial possibilities are deemed political and therefore not within the scope of a Restatement of Law, then the most important foundations of the subject are thereby excluded. In terms of its own substantive aspirations, the *Restatement of Foreign Relations Law* must recognize that any narrow legalistic analysis of international remedies is necessarily incomplete.

21. L. HENKIN, *supra* note 1, at 2.