COMMENTARIES

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The Restatement's Treatment of Sources and Evidence of International Law

The Restatement (Third) of the Foreign Relations Law of the United States is a "comprehensive revision"[1] of its predecessor, the original Restatement,[2] which the American Law Institute (ALI) published in 1965.[3] The new version is

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1. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 3 (1987) [hereinafter RESTATEMENT (THIRD)]. The Chief Reporter for the Restatement (Third) is Professor Louis Henkin. The Associate Reporters are Professors Andreas F. Lowenfeld, Louis B. Sohn, and Detlev F. Vagts. *Id.* at V. The procedure by which Restatements are prepared and adopted by the American Law Institute is described in *id.* at XI.

2. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) [hereinafter RESTATEMENT (SECOND)].

3. Lawyers trained outside the United States and not familiar with Restatements should be aware that, despite what their titles might imply, neither Restatement of Foreign Relations Law represents the official position of the United States Government. The ALI emphasizes that the Restatement (Third) is " 'in no sense an official document of the United States.' The American Law Institute is a private organization, not affiliated with the United States Government or any of its agencies." RESTATEMENT (THIRD), *supra* note 1, at IX (quoting from RESTATEMENT (SECOND), *supra* note 2). Indeed, the ALI notes in the foreword that "[i]n a number of particulars the formulations in this Restatement are at variance with positions that have been taken by the United States Government." *Id.* These variations were presumably deliberate, since the ALI extended the Restatement (Third) project one year beyond its original schedule in part to take into consideration "communications received . . . from the Department of State and from the Justice Department . . . ." AMERICAN LAW INSTITUTE, PROCEEDINGS, 63RD ANNUAL MEETING, 1986, at 90 (1987) [hereinafter ALI

an ambitious undertaking, covering "many more subjects, and reflect[ing] important developments in the intervening decades . . . ."[4] Like the previous Restatement, its impact may be even greater than that of the Restatements of other subjects, due to the relative lack of familiarity of the American bench and bar with international law. The likelihood that lawyers in the United States will rely heavily upon the Restatement (Third), coupled with the increasing frequency with which practice in this country assumes a transnational dimension, makes this a particularly important Restatement.

Despite appearances created by the arcane system of the ALI, the Restatement (Third) is actually a revision of the first Restatement to deal with the foreign relations law of the United States.[5] The previous Restatement did not address the sources of international law in black letter; in that volume the ALI relegated coverage of this fundamental topic to the comments to section 1,[6] which defines "international law."[7] This review article examines the manner in which the new Restatement deals with the sources of international law and related subjects. It does so more from a practical than a theoretical perspective,[8] and due to space constraints, does not attempt a detailed study of the Restatement (Third)'s treatment of these matters.

One of the considerations motivating the ALI to prepare a revised and expanded Restatement was that "[f]urther experience has suggested . . . the desirability of guidance in matters not likely to be familiar to the average lawyer, for example, the sources of international law . . . ."[9] This rationale for covering the sources of international law in the Restatement (Third) raises the question whether the ALI has achieved the goal it implicitly set for itself: providing "guidance" to the "average lawyer" on the subject of sources, since it is a matter "not likely to be familiar" to the nonspecialist. The material examined is assessed in part from this perspective. Before turning to the relevant sections of the Restatement (Third) however, several general points merit brief comment.

PROCEEDINGS]. The Foreign Relations Restatements could, in fact, be used as authority against the U.S. Government or American nationals as, for instance, in proceedings before the Iran-U.S. Claims Tribunal.

4. RESTATEMENT (THIRD), *supra* note 1, at 3.

5. In an asterisked footnote to the foreword, the ALI explains that while the working title of the project was "Restatement of the Foreign Relations Law of the United States (Revised)," the designation "Restatement Third" was ultimately adopted to signify that the work "is in the generation of Restatements forthcoming since the Restatements Second." *Id.* at IX. The original Foreign Relations Restatement was actually designated the "Restatement (Second) of the Foreign Relations Law of the United States." It "was called the *Restatement (Second)* not to distinguish it from a *Restatement (First)*, (there is no *Restatement (First)*), but to indicate that it was part of the second series of restating efforts by the ALI." Maier, *Remarks,* The Restatement of Foreign Relations Law of the United States, Revised: How Were the Controversies Resolved?, AM. SOC'Y INT'L L., PROCEEDINGS OF THE 81ST ANNUAL MEETING 180 (1990).

6. RESTATEMENT (SECOND), *supra* note 2, § 1 comment c.

7. *Id.* § 1; this section is set forth *infra* in text at note 16.

8. For a more theoretical view of Restatement (Third), see Falk, *Conceptual Foundations,* 14 YALE J. INT'L L. 439 (1989).

9. RESTATEMENT (THIRD), *supra* note 1, at 4.

I. General Considerations

Any effort to evaluate the Restatement (Third) must begin with a determination of what it is that the ALI has set out to restate. The answer to this question may appear obvious from the title of the work, but a closer look raises questions about the extent to which the title accurately describes the contents. Section 1 of Restatement (Third) defines the "foreign relations law of the United States" as consisting of:

(a) international law as it applies to the United States; and
(b) domestic law that has substantial significance for the foreign relations of the United States or has other substantial international consequences.[10]

One might first inquire whether "international law" is properly contrasted with the "domestic law" of the United States, in view of Justice Gray's ringing declaration in *The Paquete Habana* that "[i]nternational law is part of our [U.S.] law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[11]

If international law is in fact part of U.S. domestic law, then it is certainly an element of the foreign relations law of the United States. But by "international law" does the ALI mean the customary and treaty law that has been ascertained and administered by U.S. courts?[12] Or, assuming for purposes of analysis that there may be some differences, does it contemplate the law that would be applied by an international tribunal or that would be generally agreed upon by the international community as a whole? The Introduction to the Restatement (Third) provides the following answer to that question:

> In restating international law, this Restatement maintains the conception and follows the method of the previous Restatement. As the Reporters of the previous Restatement said . . . : [t]he positions or outlooks of particular states, including the United States, should not be confused with what a consensus of states would accept or support. Like the previous Restatement, this Restatement represents the opinion of The American Law Institute as to the rules that an impartial tribunal would apply if charged with deciding a controversy in accordance with international law.[13]

For the purposes of the Restatement (Third), therefore, "international law" is not necessarily what an American court would ascertain and administer, but rather "what a consensus of states would accept or support," or phrased another way, "the rules that an impartial tribunal would apply."

It is thus possible that in referring to the "foreign relations law *of the United States*," the title of the Restatement (Third), like that of its predecessor, could be somewhat misleading. "International law" as ascertained and administered by

10. *Id.* § 1.
11. The Paquete Habana, 175 U.S. 677, 700 (1900).
12. That term is defined in § 101, but the definition does not answer our question. *See infra* note 17 and accompanying text.
13. RESTATEMENT (THIRD), *supra* note 1, at 3.

U.S. courts may in fact differ in material respects from that which would be ascertained and applied by an international tribunal, whether it be the International Court of Justice or an ad hoc arbitral tribunal. While the Reporters' Notes to the Restatement (Third) make frequent reference to U.S. case law, implying that it is in significant part the basis of the rules stated in black letter, the lawyer should bear in mind, when referring to the Restatement (Third), that it does not generally set forth U.S. law per se,[14] but purports to reflect rules that "a consensus of states would accept or support."[15]

The reference to "international law" in the definition of "foreign relations law" quoted above leads to a second general point: What is encompassed within the term "international law" as used in the Restatement (Third)? The previous Restatement defined "international law" as follows: " 'International law,' as used in the Restatement of this Subject, means those rules of law applicable to a state or international organization that cannot be modified unilaterally by it."[16] To its credit, the Restatement (Third) adopts a broader definition, which recognizes that the subjects of international law are not only states and international organizations, but also individuals and juridical persons. That definition is found in section 101, which provides as follows: "International law, as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se,* as well as with some of their relations with persons, whether natural or juridical."[17]

The Comments to section 101 of the Restatement (Third) make clear that the term "international law" refers to *public* international law, although they recognize that "[t]he concepts, doctrines, and considerations that inform private international law also guide the development of some areas of public international law . . . ."[18] The Restatement (Third) adds the term "principles" to its

14. The ALI does attempt, however, to identify significant differences between international law and U.S. law where they exist and designates as "Law of the United States" those "[r]ules or principles that are not international law applicable to states generally, but . . . are part of the domestic law of the United States . . . ." RESTATEMENT (THIRD), *supra* note 1, Introduction at 5.

15. *Id.* at 3 (quoting from RESTATEMENT (SECOND) *supra* note 2, at xii). In light of this standard, one might inquire what is added by the words "as it applies to the United States" in § 1 (a). Those words presumably refer to the way in which general rules apply to the United States, rather than indicating that the Restatement only deals with international law insofar as it applies specifically and directly to the United States.

16. RESTATEMENT (SECOND), *supra* note 2, § 1.

17. RESTATEMENT (THIRD), *supra* note 1, § 101.

18. *Id.* comment c. Somewhat curiously, the Comments to § 101 seem to assume that the designations "public international law" and "private international law" are unknown, or at least little used in the United States: "International law, which in most other countries is referred to as 'public international law,' is often distinguished from private international law (called conflict of laws in the United States)." *Id.* While it is true that the appellations "international law" and "conflict of laws" are generally used in American law school curricula, the terms public and private international law have gained some currency. For example, the Department of State has Advisory Committees on Public and Private International Law.

definition, but offers no explanation, in section 101 itself or in the Comments, of what is meant by that term or whether the ALI intends to draw a distinction between "rules" and "principles." Possibly the ALI has in mind the kinds of general principles of law that the International Court of Justice has described as "well established" or "well known," such as the principle that "no one may be judge in his own cause"[19] or that a judgment "is *res judicata* and has binding force between the parties to the dispute."[20] Other such general principles may include "good faith, abuse of rights, retroactivity, the obligation to repair a wrong, the territoriality of criminal law, acquiescence, and estoppel."[21] The term "principles" as used in section 101 could also refer to fundamental principles of international law, such as the peaceful settlement of disputes, *pacta sunt servanda,* and the sovereign equality of states.

A third general point concerns the manner in which rules are stated. One of the great virtues of the Restatements is that they set forth rules in a clear and concise manner. However, clarity is a virtue only insofar as it is not misleading. The student of international law is struck by the confidence and simplicity with which a number of the rules in the Restatement (Third) are stated,[22] which sometimes conveys the impression that the rules are rigid and undisputed. One wonders whether this approach well serves the average American lawyer or judge, who will probably be far better equipped to evaluate and intelligently utilize a Restatement of the law of, for example, contracts, than of international law.

A fourth general observation concerns another sense in which the Restatement may present an oversimplified view of international law, namely, that the black letter and commentary often leave the impression that the body of norms making up the field is relatively static rather than dynamic. As Professor Falk has commented, "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."[23] Indeed, the ceding of aspects of sovereignty and independence by states in Western Europe and the assertions of sovereignty and independence by states, nations, and republics in Eastern Europe portend fundamental changes in contemporary ideas about international law. Regardless of whether one views the present era as being more or less stable than others, the conceptualization of

19. Chorzow Factory Case, 1928 P.C.I.J. (ser. A) No. 17, at 32.

20. Effects of Awards of Compensation made by the United Nations Administrative Tribunal, 1954 I.C.J. 47, 53 (emphasis in original).

21. Virally, *The Sources of International Law,* in MANUAL OF PUBLIC INTERNATIONAL LAW 116, 148 (M. Sørensen ed. 1968).

22. To cite only a few examples, see §§ 203(2), 207, 223, 451, 601(2), and 602(2). This does not apply to all sections of the Restatement (Third), of course. Section 403, on "Limitations on Jurisdiction to Prescribe," is an example of a provision that, because of its complexity and flexibility, may go too far in the other direction.

23. Falk, *supra* note 8, at 441. To the same effect with particular reference to Part VI of Restatement (Third), The Law of the Environment, see Caron, *The Law of the Environment: A Symbolic Step of Modest Value,* 14 YALE J. INT'L L. 528 (1989).

general international law as an ongoing and constantly unfolding *process* is not accorded the prominence it deserves.[24] Professor McDougal, the principal exponent of this view, has suggested that "international law be regarded not as mere rules, but as a whole *process* of authoritative decision in the world arena . . . ."[25] In an article discussing the law of the sea, Professor McDougal offered a description of customary law relating to that field, which applies more generally and has since been frequently quoted. According to this characterization, customary international law is

> not a mere static body of rules but . . . rather a whole decision-making process . . . . It is, in other words, a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character . . . and in which other decision-makers, external to the demanding state . . . weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them. As such a process, it is a living, growing law, grounded in the practices and sanctioning expectations of nation-state officials, and changing as their demands and expectations are changed by the exigencies of new interests and technology and by other continually evolving conditions in the world arena.[26]

This view of the way in which international law functions will probably not make the practitioner's life much easier, since it does not correspond to orthodox conceptions of law or the process of law formation. It could, however, enrich the practitioner's understanding of the field and the manner in which it evolves and thus result in more effective advocacy.

A fifth and final matter of general significance concerns the roles played by Comments and Reporters' Notes in the Restatement (Third). In general, Comments to sections of other Restatements (including the original Foreign Relations Restatement) contain explanations of the black letter rules, together with illustrations of the way in which the rules would apply in concrete fact situations, while Reporters' Notes in those Restatements briefly set forth citations of authority relied upon by the reporters in formulating the black letter rules and Comments.

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24. The following appears in the Introductory Note to Part I, Chapter One, "International Law: Character and Sources:"

> Customary international law has developed slowly and unevenly, out of action and reaction in practice, rather than systematically or by major leaps. National courts required to determine questions of international law must . . . look at a process that is world-wide and includes the actions and determinations of foreign actors (including foreign courts). Determinations by United States courts are also part of the process.

RESTATEMENT (THIRD), *supra* note 1, at 19. Professor McDougal's description of the process of international law formation, set forth in part in text, *infra* at note 26, is quoted in reporters' note 2 to § 102. There is no reference to international law as a process either in the black letter of §§ 101–103 or in the comments to those sections.

25. McDougal, *The Impact of International Law Upon National Law: A Policy-Oriented Perspective,* 4 S. DAK. L. REV. 25, 36 (1959), *reprinted in* M. MCDOUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 157, 170 (1960) (emphasis in original).

26. McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea,* 49 AM. J. INT'L L. 356, 356–57 (1955). This passage is partially quoted in RESTATEMENT (THIRD), *supra* note 1, § 102 reporters' note 2, at 32. *See also* Falk, *supra* note 8, at 442.

A perusal of the Restatement (Third) indicates that in many cases this pattern was not followed. The emphasis—in terms of length and detail of discussion—seems to have shifted from the Comments to the Reporters' Notes, and the Comments are devoid of illustrations. The ALI offers no explanation for this apparent departure. Whether it is due to preferences of the reporters for this particular Restatement or to a decision by the ALI concerning the form of Restatements generally, the rather sharp contrast with the previous Restatement leaves the reader wondering about the considerations that motivated these changes. Any difference that exists in this respect may seem innocuous. But illustrations of the ways in which often abstract rules would apply to concrete fact situations would doubtless have been of assistance to nonspecialist members of the American bench and bar. Furthermore, the ALI takes no responsibility for what appears in the Reporters' Notes.[27] The controversy surrounding a number of the provisions of the Restatement (Third)[28] suggests the possibility that material that once appeared either in black letter or Comments may have been moved to Reporters' Notes. Such a transfer is not improper, but the reader should bear in mind that the ALI has approved only the material in the Introductory Notes, the black letter, and the Comments, and not the Reporters' Notes.[29]

With these general considerations in mind, let us now turn to sections 102 and 103.

II. Sources of International Law: Section 102 of the Restatement (Third)

The Restatement (Third) devotes two sections to the subject of "sources" of international law, *lato sensu:* section 102 deals with "Sources of International Law" proper, while section 103 treats "Evidence of International Law." This distinction between sources and evidence is analytically sound and well accepted:

> It is common for writers to distinguish the formal sources and the material sources of law. The former are those legal procedures and methods for the creation of rules of general application which are legally binding on the addressees. The material sources provide evidence of the existence of rules which, when proved, have the status of legally binding rules of general application. In systems of municipal law the concept of formal source refers to the constitutional machinery of law-making and the status of the rule is established by constitutional law . . . ."[30]

27. "The Introductory Notes, the rules of law in blackletter type, and the Comments express the views of the Institute. . . . The Reporters' Notes, on the other hand, reflect the views of the Reporters and describe the legal sources that they have considered relevant." RESTATEMENT (THIRD), *supra* note 1, at XI.

28. *See* ALI PROCEEDINGS, *supra* note 3, at 90–91, 93.

29. This caveat is not meant in any way to depreciate the value of the Reporters' Notes. They contain a wealth of useful information and references and are backed by the standing of the Reporters themselves, which is considerable.

30. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 1 (3d ed. 1979).

Or, as the Restatement (Third) explains, "[s]ection 102 sets forth the 'sources' of international law, *i.e.*, the ways in which a rule or principle becomes international law. [Section 103] indicates the means of proving, for example, in a court or other tribunal, that a rule has become international law by way of one or more of the sources indicated in § 102."[31]

Section 102 consists of four paragraphs.[32] Paragraph (1) identifies in summary fashion the three principal sources of international law, while paragraphs (2) through (4) elaborate on each of those sources. The treatment of sources is traditional, closely following the classical listing in article 38(1) of the Statute of the International Court of Justice.[33] The formulations are generally clear and, in

31. RESTATEMENT (THIRD), *supra* note 1, § 103 comment a.

32. (1) A rule of international law is one that has been accepted as such by the international community of states
    (a) in the form of customary law;
    (b) by international agreement; or
    (c) by derivation from general principles common to the major legal systems of the world.
    (2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.
    (3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.
    (4) General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.
    Id. § 102.

33. 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
    a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
    b. international custom, as evidence of a general practice accepted as law;
    c. the general principles of law recognized by civilized nations;
    d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
    Statute of the International Court of Justice annexed to the Charter of the United Nations, art. 38, para. 1, 59 Stat. 1055, T.S. 993, 3 Bevans 1153 [hereinafter ICJ Statute]. Subparagraph d concerns evidence of international law, which is dealt with in § 103 of the Restatement (Third).

    Other possible sources that might have been mentioned, at least in Comments or Reporters' Notes, but are not, include unilateral acts or declarations and decisions of certain international tribunals. Concerning the former, see, e.g., the Nuclear Tests Cases (Austl. & N.Z. v. Fr.), 1974 I.C.J. 253 & 457; Fiedler, *Unilateral Acts in International Law,* in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 517 (1984); Rubin, *The International Legal Effects of Unilateral Declarations,* 71 AM. J. INT'L L. 1 (1977); and Virally, *supra* note 21, at 154 ("Article 38 . . . does not list unilateral acts of states among the sources of law it enumerates. But this does not mean that such acts cannot give rise to international rules of law."). With regard to the latter, certain decisions of the European Court of Human Rights are binding on the parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov.

some cases, even improve upon those of article 38.[34] The explanations if paragraphs (2) through (4) further assist the reader in understanding the nature of the individual sources.

One aspect of paragraph (1) of § 102 of the Restatement (Third) is somewhat puzzling, however. The introductory clause, or "chapeau," of that paragraph provides that "[a] rule of international law is one that has been accepted as such by the *international community of states* . . . ."[35] The paragraph goes on to list customary law, international agreement, and general principles of law as means by which the international community accepts a rule. The question this language raises is whether all rules of international law must be "accepted as such" by the entire international community.[36] For example, is a provision of a bilateral or plurilateral treaty less binding because it is not "accepted" by the international community? A negative answer to this question is reinforced by the statement in paragraph (3) of section 102 that "[i]nternational agreements create law for the states parties thereto . . . ." The formulation of the chapeau also raises questions about how section 102 takes into account regional custom.[37] The Comments to that section leave no doubt that the ALI intended to include regional or special custom within section 102,[38] but do not explain how it fits within the opening clause of paragraph (1).

Paragraph (3) of section 102 deals with international agreements. Its first clause is straightforward and unproblematic, but one wonders whether it was advisable to include the balance of the paragraph—stating that agreements "may lead to the creation of customary law"—in black letter. While there is no doubt

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1950, 213 U.N.T.S. 221; and the same is true of certain decisions of the Court of Justice of the European Communities (EC) as to EC Member States.

34. In particular, the formulation of paragraph (1)(b) of article 38, which refers to "international custom, as evidence of a general practice accepted as law," has been criticized as being backwards, "since it is the practice which is evidence of the emergence of a custom." L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 37 (2d ed. 1987) [hereinafter L. HENKIN]. The references to customary international law in paragraphs (1)(a) and (2) of § 102 are more straightforward. *See supra* note 32. Section 102's treatment of "general principles of law recognized by civilized nations" (ICJ Statute, *supra* note 33, art. 38 (1)(c)) is also preferable to the Statute's formulation since, by referring to "legal systems," it more nearly conveys the idea that the principles in question are those of municipal or domestic law, rather than general principles of international law recognized by civilized nations. *See also* RESTATEMENT (THIRD), *supra* note 1, § 102 comment 1.

35. RESTATEMENT (THIRD), *supra* note 1, § 102(1) (emphasis added).

36. The language in question could be interpreted to mean "not rejected by the international community," in the sense that the "rule" would not contravene a norm of *jus cogens*, but this seems farfetched.

37. The possibility that regional customary law may exist was implicitly recognized by the International Court of Justice in the Asylum Case (Colom. v. Peru), 1950 I.C.J. 266. With regard to "special custom," see Case Concerning Right of Passage Over Indian Territory (Merits), (Port. v. India), 1960 I.C.J. 6. " '[R]egional,' 'special,' or 'particular' customary law" is addressed in RESTATEMENT (THIRD), *supra* note 1, § 102 comment e.

38. RESTATEMENT (THIRD), *supra* note 1, § 102 comment e.

about the proposition per se,[39] lumping it together with the paragraph on international agreements may cause some confusion in the mind of the uninitiated reader.[40] There is often an understandable temptation, which should not be encouraged, to oversimplify the search for rules of customary law by giving undue weight to treaties as evidence of custom without regard to other forms of evidence. As the late Judge Baxter has written,

> Rules found in treaties can never be conclusive evidence of customary international law. . . . The law-creating multilateral treaty is received as evidence of the law only when States not parties adopt it in their own practice. . . . Each one of these treaties or series of treaties must be weighed in the balance with other evidence of customary international law before the true rule of international law may be ascertained. Treaties will have varying weight vis-à-vis the rest of the evidence of the law in each instance in which resort is made to them.[41]

The relationship and interaction between treaties and custom is thus a complex subject[42] that would seem more suitable for careful explanation in the commentary than concise treatment in black letter. The Restatement (Third) touches upon the subject in at least four places: the Introduction to Part I;[43] paragraph (3) of section 102; comment *i* to section 102; and reporters' note 5 to section 102. The relevant portion of the Introduction emphasizes the continued importance of custom; comment *i* devotes three sentences to the subject, one of which may be misleading;[44] and reporters' note 5 quotes from the *North Sea Continental Shelf Cases* and the Vienna Convention on the Law of Treaties. It is debatable whether a subject that is introduced so prominently in black letter, and is inherently so complex, has been dealt with adequately in the supporting material for the purposes of the nonspecialist.

The treatment of another aspect of the influence of treaties on the development of custom merits brief mention. Comment *i* to section 102 includes the following

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39. *See* North Sea Continental Shelf Cases (W. Ger. v. Den. & Neth.), 1969 I.C.J. 3, para. 71.

40. It would seem to have been more logical to deal with the influence of treaties on the formation of custom in paragraph (2), which concerns custom, or better still, in the comments to that paragraph.

41. Baxter, *Treaties and Custom,* 129 RECUEIL DES COURS 25, 99 (1970-I). Professor Anthony D'Amato would give greater weight to treaties as components of the state practice that contributes to customary international law. *See, e.g.,* A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 152–60 (1971).

42. *See generally id. See also, e.g.,* Weisburd, *Customary International Law: The Problem of Treaties,* 21 VAND. J. TRANSNAT'L L. 1 (1988); and the colloquy between Professors D'Amato and Weisburd in 21 VAND. J. TRANSNAT'L L., No. 3 (1988).

43. RESTATEMENT (THIRD), *supra* note 1, at 18.

44. The sentence in question reads: "Some multilateral agreements may come to be law for non-parties that do not actively dissent." *Id.* § 102 comment i. It would not be the agreement itself that would "come to be law for non-parties," of course, but the rule reflected therein. *See also* Article 38 of the Vienna Convention on the Law of Treaties, quoted in reporters' note 5: "Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State *as a customary rule of international law,* recognized as such." Vienna Convention on the Law of Treaties, art. 38, U.N. Doc. A/CONF. 39/27 (1969), 63 A.J.I.L. 875 (1969), 8 I.L.M. 679 (1969) (emphasis added).

sentence: "A wide network of similar bilateral arrangements on a subject may constitute practice and also result in customary law." While this statement is supported by respectable authority,[45] it is not uncontroversial.[46] Some indications of the circumstances in which such a group of treaties would be likely to contribute to the formation of customary law would have been helpful.

Peremptory norms of international law (*jus cogens*) are dealt with in comment *k* to section 102 and reporters' note 6. Comment *k* explains that "[t]hese rules prevail over and invalidate international agreements and other rules of international law in conflict with them."[47] While it has been enshrined in no less an authority than the Vienna Convention on the Law of Treaties,[48] the concept of *jus cogens* remains controversial.[49] Further, "more authority exists for the category of *jus cogens* than exists for its particular content . . . ,"[50] and the Reporters admit as much.[51] Uncritical acceptance of so powerful, yet vague, a doctrine, without examining its basis in state practice, may prove somewhat deceptive to the American legal community.

Other than "principles of the United Nations Charter prohibiting the use of force,"[52] the only examples of such possible norms that are offered are found in the Reporters' Notes,[53] for which the ALI is not responsible.[54] Even the example

45. *See, e.g.,* I G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 17 (1940); L. HENKIN, *supra* note 34, at 87; C. HYDE, INTERNATIONAL LAW 10–11 (2d ed. 1945); Hayton, *The Formation of the Customary Rules of International Drainage Basin Law,* in THE LAW OF INTERNATIONAL DRAINAGE BASINS 834, 868–71 (A. Garretson, R. Hayton & C. Olmstead eds. 1967).

46. For example, a similar statement in a report of the special rapporteur of the International Law Commission on International Watercourses elicited a mixed response in the Commission. *See* 1989 I.L.C. REP. 346. For cases rejecting the rise of bilateral agreements as evidence of custom, see the North Sea Continental Shelf Cases, [1969] I.C.J. Rep. 3; and the Barcelona Traction Case, [1970] I.C.J. Rep. 3.

47. RESTATEMENT (THIRD), *supra* note 1, § 102 comment k.

48. Vienna Convention on the Law of Treaties, *supra* note 44, art. 53.

49. *See, e.g.,* G. SCHWARZENBERGER, INTERNATIONAL LAW 425–27 (3d ed. 1957); Schwarzenberger, *International* Jus Cogens?, 43 TEX. L. REV. 455 (1965). Brownlie notes that the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, adopted by the U.N. General Assembly on 24 Oct. 1970, G.A. Res. 2625 (XXXV 1970), "makes no reference to peremptory norms." I. BROWNLIE, *supra* note 30, at 515 n.1.

50. I. BROWNLIE, *supra* note 30, at 515. One commentator has observed that "the beauty of a general . . . formula of international *jus cogens* is that it leaves everybody absolutely free to argue for or against the *jus cogens* character of any particular rule of international law." Schwarzenberger, *supra* note 49, at 477 (footnote omitted).

51. *See* RESTATEMENT (THIRD), *supra* note 1, § 102 reporters' note 6.

52. *Id.* § 102 comment k. The mention of even this one example in the commentary is an improvement over the original draft, which contained no examples either in the Comments or in the Reporters' Notes. *See* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 102 comment k & reporters' note 6 (Tent. Draft No. 1, 1980) [hereinafter Tent. Draft No. 1].

53. Other than the principles of the Charter prohibiting the use of force, the only examples given in reporters' note 6 are contained in the following: "*It has been suggested* that norms that create 'international crimes' and obligate all states to proceed against violations are also peremptory. . . . Such norms *might include* rules prohibiting genocide, slave trade and slavery, apartheid and other gross violations of human rights, and perhaps attacks on diplomats." RESTATEMENT (THIRD), *supra*

just mentioned could be challenged, in view of the failure of the international community to reject, unequivocally, interpretations of certain instruments that would place them in direct contravention of Charter principles prohibiting the use of force. The Treaty of Guarantee concerning Cyprus[55] is such an instrument. Article IV(2) of the Treaty of Guarantee could be interpreted to confer upon each of the guaranteeing powers a unilateral right of intervention. According to that provision, "each of the three guaranteeing Powers [Greece, Turkey, and the United Kingdom] reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty."[56] During the Cyprus crisis of 1963–64, the United Kingdom interpreted article IV(2) as conferring "[a] right of intervention [for the purpose of re-establishing the state of affairs], and for this purpose alone . . . ."[57] The Greek representative gave an unambiguous response to the precise question whether "this article gives [Greece] the right to intervene militarily and unilaterally without the authorization of the Security Council. The answer is 'no.' "[58] The Foreign Minister of Cyprus stated that "Turkey . . . appears to interpret [the Treaty] as giving to it the right of unilateral military intervention [and declared that] [i]t is quite clear that Article IV of the Treaty of Guarantee as interpreted by Turkey[59] is contrary

note 1, § 102 reporters' note 6 (emphasis added). This statement is properly cautious, but its very tentativeness hardly lends strong support to the unqualified acceptance of this category of norms in the commentary. Furthermore, the concept of international crimes of states is itself a highly controversial one, and it is here used as a basis for identifying norms of *jus cogens* without explaining its meaning or derivation. The Reporters merely invite the curious reader to "compare" a report of the International Law Commission that deals with the subject. *Id.*

54. *See supra* note 27 and accompanying text.

55. Treaty of Guarantee, 16 Aug. 1960, 382 U.N.T.S. 3. *See also* Treaty Concerning the Establishment of the Republic of Cyprus, 16 Aug. 1960, 382 U.N.T.S. 8 in which the same four parties (Cyprus, Greece, Turkey, and the United Kingdom) agreed to the independence of Cyprus. I am indebted to my colleague, Prof. Dr. Henn-Jüri Uibopuu of the University of Salzburg Law Faculty, for pointing out to me the apparent inconsistency of the Cyprus treaties (and, in particular, article IV, para. 2, of the Treaty of Guarantee) with the idea that an agreement authorizing the use of force against a third state would violate a norm of *jus cogens*. Arguably, Cyprus, a party to the Treaty of Guarantee, consented to a prospective intervention, thus eliminating the problem. But the circumstances surrounding the independence of Cyprus blunt such an argument. On those circumstances, *see generally* 2 A. CHAYES, T. EHRLICH & A. LOWENFELD, INTERNATIONAL LEGAL PROCESS 1234–42 (1969) [hereinafter A. CHAYES]; T. EHRLICH, CYPRUS 1958–1967 (1974). *See also* the interpretations of the relevant provision of the Treaty of Guarantee by the United Kingdom and Cyprus, set forth *infra,* which would avoid a conflict with the relevant provisions of the Charter. On "Guarantee Treaties," see Ress, 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 117 (1984).

56. Treaty of Guarantee, *supra* note 55, art. IV, para. 2.

57. 19 U.N. SCOR (1098th mtg.) at 11, U.N. Doc. S/PV.1098 (1964).

58. 19 U.N. SCOR (1097th mtg.) at 32, U.N. Doc. S/PV.1097 (1964).

59. "In Ankara, officials began to talk about unilateral intervention by Turkey on the basis of the Treaty of Guarantee." A. CHAYES, *supra* note 55, at 1244. The United Kingdom, on the other hand, took the view that "the guarantor powers would be acting as a 'regional arrangement' established under the Treaty of Guarantee and authorized by Chapter VIII of the United Nations Charter." *Id.* (citing 688 Parl. Deb., H.C. (5th Ser.) 530–31 (1964). (Author's footnote.)

to peremptory norms of international law, *jus cogens* . . . .''[60] The United Nations Security Council, however, took no position on the question.[61]

Resolutions of international organizations, and in particular of the United Nations General Assembly, are not listed in section 102 of the Restatement (Third) as separate sources of international law, nor should they be. However, ''[b]inding resolutions of international organizations''—i.e., those that are binding by virtue of the treaty forming the organization—are properly characterized in comment *g* as ''secondary sources'' of international law for the members of the organization in question.[62] Curiously, other kinds of resolutions are the subject of rather extensive discussion in the Reporters' Notes to section 102, even though section 103 (Evidence of International Law) also deals with them. The latter section would seem to be the proper place to consider United Nations resolutions, since they are not ''sources'' of international law strictly speaking, but at most are ''evidence of what the states voting for [a declaratory resolution] regard the law to be.''[63] To be sure, the practice of states in international organizations, as manifested through their statements and in some cases their votes, is relevant to the formation of custom. It is questionable, however, whether this form of state practice should be singled out for special treatment in the Reporters' Notes to section 102, particularly when it is so easy to confuse the assessment of state *behavior,* which may contribute to the *formation* of a new rule of customary law, with the value of a *resolution* as *evidence* of an existing rule.[64]

Reporters' Note 2 to section 102, which contains the discussion of nonbinding resolutions, bears the heading ''Customary law.'' In Tentative Draft No. 1 of what is now the Restatement (Third), there was a separate Reporters' Note to section 102, headed ''Resolutions of international organizations,'' which contained substantially the same material concerning resolutions as now appears in

60. 19 U.N. SCOR (1098th mtg.) at 16, U.N. Doc. S/PV.1098 (1964). He went on, however, to argue that the treaty should be interpreted so as to be consistent with the U.N. Charter, referring, in particular, to articles 103 and 2(4) of the latter instrument.

61. *See* Resolution Concerning the Situation in Cyprus, 19 U.N. SCOR, Supp. (Jan.–Mar. 1964) at 102–03, U.N. Doc. S/5575 (1964). The Council merely ''considered'' the positions taken by the parties to the Treaty of Guarantee and called upon all Member States ''to refrain from any action or threat of action likely to worsen the situation in the sovereign Republic of Cyprus, or to endanger international peace. . . . '' *Id.* at 103, para. 1. The resolution went on to recommend the establishment of a United Nations peace-keeping force in Cyprus—the first such recommendation adopted by all five permanent members of the Security Council. *Id.* at 103, para. 4.

62. RESTATEMENT (THIRD), *supra* note 1, § 102 comment g. To qualify as such a ''binding resolution,'' the instrument must be adopted pursuant to a provision of the constituent agreement of the organization conferring power upon it to impose binding obligations on its members. In becoming parties to such an agreement, states agree to be bound by these resolutions. The ''source'' of the obligation is thus the international agreement, not the resolution, per se. Certain provisions of the U.N. Charter, such as article 17 and chapter VII, have this character.

63. *Id.* § 103 comment c.

64. The passage from reporters' note 2 to § 102, quoted in note 68 *infra,* contributes to this confusion.

Note 2.[65] The editorial changes to the text and the removal of the heading may have been an attempt to placate those who had criticized the prominence accorded resolutions in the section of Tentative Draft No. 1 concerning sources of international law. Whatever motivated the changes, the final version's treatment of resolutions is potentially misleading,[66] and is now buried in a Reporters' Note that is nearly three pages long. This is unfortunate in view of the heated controversy that surrounds the subject of the legal effect of U.N. resolutions.[67] If the subject were to be covered at all in connection with section 102, it would have been more helpful to the reader if the discussion had been placed under a descriptive heading, such as "State practice in or through international organizations." It is the behavior of states, through their statements and votes, not the resolutions per se, that is relevant and that is actually addressed in the Reporters' Note. Finally, the discussion of General Assembly resolutions in Reporters' Note 2 would have been more useful if it had contained a more detailed treatment of the various factors bearing upon the effect of the forms of state behavior involved.[68]

III. Evidence of International Law: Section 103 of the Restatement (Third)

The Restatement (Third)'s coverage of evidence of international law[69] has undergone a considerable transformation since its first iteration in Tentative Draft

65. Tent. Draft No. 1, *supra* note 52, § 102, reporters' note 3.

66. The discussion of resolutions in reporters' note 2 to § 102 is potentially misleading because, as previously stated, it is placed in the context of the *sources,* rather than of the *evidence* of international law. Even declaratory resolutions "on which the generality of the States has expressed agreement [are not sources of international law; they] proclaim rules recognized by the community of nations [and] do not create a custom but confirm one. . . . " Texaco Overseas Petroleum v. Libyan Arab Republic, Award of Jan. 19, 1977, 17 I.L.M. 1, para. 87 (1978) [hereinafter TOPCO Arbitration]. Stated another way, they "do not create the law; they have a declaratory nature of noting what does exist." Casteñeda, *Valeur Juridique des Résolutions des Nations Unies,* 129 RECUEIL DES COURS 204, 315 (1970) (translation from 17 I.L.M., *supra*).

67. See generally the helpful bibliography on the subject of the effect of General Assembly Resolutions, providing "a broad sampling of opinion," in Sloan, *General Assembly Resolutions Revisited (Forty Years Later)*, 1987 BRIT. Y.B. INT'L L. 39, 142 (1988).

68. Six different factors are listed in reporters' note 2, but they are not explained or discussed. The list is preceded by the statement that "[t]he contributions of such resolutions and of the statements and votes supporting them to the lawmaking process will differ widely, depending on factors such as [those listed]." RESTATEMENT (THIRD), *supra* note 1, § 102 reporters' note 2, at 31. It would have been helpful if the reporters had provided some illustrations of how the factors bear upon the extent to which the resolutions, statements, and votes contribute to the lawmaking process. The reporters could have utilized for this purpose the well-known award of Professor René-Jean Dupuy in the TOPCO Arbitration, *supra* note 66. See generally the discussion of "Factors in Determining the Effect of General Assembly Resolutions," in Sloan, *supra* note 67, at 125.

69. Section 103 of the Restatement (Third) is entitled "Evidence of International Law," and provides as follows:

> (1) Whether a rule has become international law is determined by evidence appropriate to the particular source from which that rule is alleged to derive (§ 102).

No. 1.[70] One paragraph with three subparagraphs has become two paragraphs, the second, containing four subparagraphs. From the standpoints of precision of drafting and usefulness to the practitioner, the final version constitutes a substantial improvement over the original formulation. Section 103 is of great importance to any lawyer dealing with public international law, since it specifies "the means of proving, for example, in a court or other tribunal, that a rule has become international law by way of one or more of the sources indicated in § 102."[71]

Subsection (1) of section 103 is new.[72] While its full significance may not be apparent to the nonspecialist without the aid of the commentary, it does state a fundamental principle that belongs in black letter. The principle is simply that the best evidence that a rule of law exists is *primary* evidence that is "appropriate to the particular source from which that rule is alleged to derive . . . ."[73] In the case of customary law, for example, "the 'best evidence' is proof of state practice . . . . Law made by international agreement is proved by reference to the text of the agreement . . . ,"[74] and so on. Subsection (2) deals with *secondary* evidence of international law, which is covered in article 38(1)(d) of the Statute of the ICJ.[75]

Article 38 mentions only two kinds of secondary evidence: "judicial decisions" and writings of "publicists." Section 103 elaborates on the first of these forms, modernizes the terminology of the second, and adds a third: "pronouncements of states." Section 103's treatment of "judicial decisions" provides welcome precision and constitutes an improvement over article 38. The bare refer-

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(2) In determining whether a rule has become international law, substantial weight is accorded to

(a) judgments and opinions of international judicial and arbitral tribunals;
(b) judgments and opinions of national judicial tribunals;
(c) the writings of scholars;
(d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.

RESTATEMENT (THIRD), *supra* note 1, § 103.

70. The original version of § 103, contained in Tent. Draft No. 1, is also entitled "Evidence of International Law," and provides as follows:

In determining whether a rule has been accepted as international law in one of the ways indicated in § 102, substantial weight is accorded to

(a) judgments and opinions of international judicial or arbitral tribunals, and of national judicial or arbitral tribunals;
(b) resolutions of international organizations;
(c) writings of experts on international law.

Tent. Draft No. 1, *supra* note 52, § 103.

71. RESTATEMENT (THIRD), *supra* note 1, § 103 comment a.

72. Paragraph (1) is in fact a slightly reformulated version of the first sentence of the original comment a. Tent. Draft No. 1, *supra* note 52, comment a.

73. RESTATEMENT (THIRD), *supra* note 1, § 103(1).

74. *Id.* comment a.

75. "The Court . . . shall apply . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." ICJ Statute, *supra* note 33, art. 38(1)(d).

ence in article 38 to ''judicial decisions'' is rather opaque, as it does not specify whether decisions of international courts or national tribunals or both are intended, and it implies that arbitral awards are excluded. Section 103, however, makes clear that decisions of both international[76] and national[77] courts are relevant forms of evidence and refers expressly to international ''arbitral'' awards.[78]

Unfortunately, neither the Comments nor the Reporters' Notes explain the reason for deleting the reference to ''national . . . arbitral tribunals'' that had appeared in Tentative Draft No. 1.[79] One consideration may have been that, unlike courts, such tribunals are usually not governmental organs. While this factor would preclude the use of such national arbitral awards as instances of state practice, there is no obvious reason for excluding published awards by respected arbitrators or tribunals from the list of forms of evidence.[80] The fact that an arbitral tribunal is a ''national'' one does not mean that it will not have to pronounce itself on questions of international law that may be involved in the arbitration. Although awards of such tribunals may not be entitled to as much weight as those of international courts and tribunals, this should not, by itself, exclude national tribunals from the list; section 102 does not state that the items listed in subsection (2) are weighted equally.[81]

Perhaps the most controversial aspect of section 103 as originally drafted was its treatment of resolutions of international organizations. Tentative Draft No. 1 provided in section 103(b) that ''substantial weight'' be accorded, inter alia, to ''resolutions of international organizations.'' This type of evidence was listed along with decisions of international courts and tribunals (section 103(a)) and writings of experts (section 103(c)). Since the term ''resolutions'' was not qualified, section 103(b) could have been interpreted to apply to all kinds of resolutions. The same could be said of the expression ''international organizations.'' The commentary was of some assistance, explaining that ''§ 103 addresses the weight to be given to a resolution purporting to declare what the law is.''[82] But

76. RESTATEMENT (THIRD), *supra* note 1, § 103(2)(a).

77. *Id.* § 103(2)(b).

78. *Id.* § 103(2)(a).

79. Tent. Draft No. 1, *supra* note 52, § 103(a).

80. ''Subsection (2) refers to secondary evidence indicating what the law has been found to be by *authoritative* reporters and *interpreters* . . . . '' RESTATEMENT (THIRD), *supra* note 1, § 103 comment a (emphasis added). Among other factors taken into consideration in selecting an arbitrator would certainly be his or her impartiality and expertise. ''The views of national courts . . . generally have the weight due to bodies of presumed independence, competence, impartiality, and authority.'' *Id.* comment b. There is no apparent reason why a national arbitral tribunal could not qualify as such a body.

81. ''[T]he order of the clauses is not meant to indicate their relative importance.'' RESTATEMENT (THIRD), *supra* note 1, § 103 comment a (referring to subsection (2)). Still, it would be difficult to prove empirically that judgments of the ICJ, for example, are accorded less weight than other forms of evidence listed.

82. Tent. Draft No. 1, *supra* note 52, § 103 comment c.

would a declaratory resolution of the International Tin Council, the OECD, or even UNESCO be entitled to the same weight as one adopted by the U.N. General Assembly? The commentary offered no assistance on this point. Finally, some critics charged that Tentative Draft No. 1 gave too much prominence to resolutions of international organizations.[83] After all, such resolutions are not even mentioned in article 38 of the World Court's Statute, and as already noted, their legal effect has been the subject of intense controversy. To what extent does the Restatement (Third) respond to these concerns?

The redrafting of section 103 has resulted in a number of improvements in the Restatement (Third)'s treatment of resolutions. First, the term ''resolutions'' no longer appears in black letter. In its place is the term ''pronouncements of states.'' This is more than a cosmetic change, since it places emphasis on what motivated the state behavior (for example, a statement or vote in the General Assembly) in question. Second, the kinds of ''pronouncements of states'' that may be accorded ''substantial weight'' are carefully qualified: they must ''undertake to state a rule of international law'' and they must not be ''seriously challenged by other states.'' Finally, the subject is now dealt with last, according pride of place (if not priority in a hierarchical sense[84]) to decisions and scholarly writings.

The final version of section 103 of the Restatement (Third) still raises a number of questions, however: Why was the expression ''pronouncements of states'' chosen? Does it refer to both individual and joint ''pronouncements''? If the expression is restricted to or includes individual pronouncements, can such statements be both a ''source'' of international law under section 102 and ''evidence'' thereof under section 103?[85] Would the expression include individual pronouncements made outside the context of resolutions, for example, in diplomatic notes? Would not individual pronouncements constitute evidence of the practice of the State in question, even if ''seriously challenged''? If the expression includes joint pronouncements, as comment *c* to section 103 indicates, may these take some form other than ''[d]eclaratory resolutions of international organizations''?[86] What is the import of the clause, ''when such pronouncements are not seriously challenged by other states''? Would a ''pronouncement'' be due ''substantial weight'' when the states it would principally affect *abstain* from

83. *Cf., e.g.*, Comments of Overseas Private Investment Corporation (OPIC) 2, para. 2 (May 12, 1982) (on file with the author) stating ''[t]he draft does not, in our view, adequately weigh the sources of international law. In particular, it accords too much authority to resolutions of the General Assembly of the United Nations.''

84. The clauses are not necessarily listed in order of importance. *See supra* note 81.

85. For example, the ''Truman Proclamation'' of Sept. 28, 1945, declaring sovereign rights in the continental shelf, was not ''seriously challenged by other states'' and indeed gained general acceptance within a short time. It is not clear whether the Proclamation should be regarded as a ''source'' or as ''evidence'' of international law under the Restatement's approach.

86. RESTATEMENT (THIRD), *supra* note 1, § 103 comment c. (The quoted phrase is the heading of comment c.)

supporting (voting for) it? Does it make any difference *which* ''other states'' seriously challenge the pronouncement?[87]

The Comments to section 103 do not directly answer any of these questions; the Reporters' Notes, while containing much fuller explanations than the Comments, address only the last three. However, the evolution of the black letter, as well as the manner in which the Comments and Reporters' Notes are structured,[88] suggest rather strongly that the ALI had declaratory resolutions of international organizations, and particularly those of the U.N. General Assembly, foremost in mind when it adopted subsection (2)(d). Assuming this to be the case, the next question is whether the Restatement (Third) is correct in stating that ''substantial weight is accorded to'' such resolutions, when they ''are not seriously challenged by other states''?[89]

As previously noted, the subject of the legal effect of General Assembly resolutions, even declaratory ones, is highly controversial.[90] This suggests that if such resolutions are to be mentioned at all in black letter, even by implication, they should be treated with extreme care. The Restatement (Third) comes close to this standard, but more precision would have been helpful. The Comment pertaining to subsection (2)(d) states as follows: ''International organizations generally have no authority to make law, and their determinations of law ordinarily have no special weight, but their declaratory pronouncements provide some evidence of what the states voting for it [*sic*] regard the law to be.''[91] This passage embodies an approach to the question of the effect of declarations that appears opposite to that taken in black letter: it suggests that the general rule is that the ''determinations of law'' by international organizations ''ordinarily have no special weight,'' and that ''declaratory pronouncements'' may constitute an

87. For example, it is conceivable that, for political or other reasons, a landlocked state could challenge a declaratory resolution concerning maritime zones; or that an island state could challenge a resolution concerning the law of international watercourses. Such challenges would presumably not significantly affect the authoritative value of the resolutions, since the challenging states would not be among those ''principally affected.'' *Cf.* RESTATEMENT (THIRD), *supra* note 1, § 102 reporters' note 2, noting that factors to be considered in evaluating the contribution of a particular resolution to the lawmaking process include ''how numerous and important are the dissenting states, [and] whether it is widely supported (including in particular the states principally affected) . . . . ''

88. Of a total of three separate Comments to § 103, the only one bearing at all upon subsection (2)(d) is comment c, entitled ''Declaratory resolutions of international organizations.'' That Comment begins with the following sentence: ''States often pronounce their views on points of international law, sometimes jointly through resolutions of international organizations that undertake to declare what the law is on a particular question. . . . '' RESTATEMENT (THIRD), *supra* note 1, § 103 comment c. Similarly, there are two Reporters' Notes to § 103. The first is headed ''Writings of international law scholars,'' and the second, ''Declaratory resolutions of international organizations.'' There is no Comment or Reporters' Note dealing with any other kind of ''pronouncement.''

89. RESTATEMENT (THIRD), *supra* note 1, § 103 comment c. This is the second of the two criteria contained in subsection (2)(d). The first, that the pronouncement ''undertake to state a rule of international law,'' refers to the ''declaratory'' nature of the resolution. *Id.* § 103(2)(d).

90. *See supra* note 67 and accompanying text.

91. RESTATEMENT (THIRD), *supra* note 1, § 103 comment c.

exception to this general rule, at least insofar as they indicate what the states voting for the resolution regard the law to be. Even those pronouncements, however, only "provide *some* evidence" of the law and "[t]he evidentiary value of such resolutions is variable."[92] The black letter rule, on the other hand, leaves the impression that the general rule is that declaratory resolutions are ordinarily entitled to substantial weight, provided only that they are not seriously challenged by certain states.

The Reporters' Notes are even clearer than the Comments on the effect of declarations. They further qualify the above passage by explaining that a declaratory resolution "is some evidence of what the states voting for the resolution regard the law to be, although what states do is more weighty evidence than their declarations or the resolutions they vote for."[93] The Reporters' Notes recognize that, while U.N. resolutions adopted unanimously or by consensus have a high evidentiary value, "[e]ven a unanimous resolution may be questioned when the record shows that those voting for it considered it merely a recommendation or a political expression . . . ."[94] Apparently, resolutions adopted by a less than unanimous vote should be scrutinized especially closely. The Reporters' Notes confirm this conclusion: "majorities may be tempted to declare as existing law what they would like the law to be, and less weight must be given to such a resolution when it declares law in the interest of the majority and against the interest of a strongly dissenting minority."[95]

These explanations are all most helpful because they emphasize the importance of carefully assessing the authoritative value of each individual resolution, taking into account the kinds of factors mentioned.[96] This detailed treatment contrasts with the relatively broad brushstrokes of the black letter, and even of

92. *Id.*

93. *Id.* reporters' note 2. That Reporters' Note contains the following further qualifications: "A resolution is entitled to little weight if it is contradicted by state practice . . . or is rejected by international courts or tribunals." *Id.* A memorandum of the Office of Legal Affairs of the United Nations Secretariat, quoted (apparently with approval) in the Reporters' Notes to § 102, takes the opposite approach. It states that a declaration "may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it. Consequently, *insofar as the expectation is gradually justified by State practice,* a declaration may *by custom* become recognized as laying down rules binding upon States." RESTATEMENT (THIRD), *supra* note 1, § 102 reporters' note 2 (quoting U.N. Doc. E/CN.4/L.610) (emphasis added). In other words, while reporters' note 2 to § 103 suggests that certain declaratory resolutions would be accorded substantial weight *unless they are contradicted* by state practice, the memorandum appears to state that a declaration is entitled to weight *only if it is supported* by state practice.

94. RESTATEMENT (THIRD), *supra* note 1, § 103 reporters' note 2.

95. *Id.*

96. *See also* the similar list of factors set forth in reporters' note 2 to § 102, and especially the analysis of the legal effect of the U.N. General Assembly Resolution on Permanent Sovereignty over Natural Resources, G.A. Res. 1803, U.N. Doc. A/5344/Add. 1, (XVII 1962), 2 I.L.M. 223 (1963) and the Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. Doc. A/9946, (XXIX 1974), 14 I.L.M. 251 (1975), respectively, by Prof. René-Jean Dupuy, the sole arbitrator in the TOPCO Arbitration, *supra* note 66.

the commentary. It is somewhat troublesome that of the three components of section 103 (black letter, Comments, and Reporters' Notes), the most accurate "restatement" of the effect of declaratory resolutions of international organizations is thus contained in the one component for which the ALI bears no responsibility. One can only hope that those referring to the Restatement (Third) will read as far as the Reporters' Notes (those used to Restatements of other subjects might justifiably assume that any important explanations would be contained in the Comments[97]) and will interpret the black letter in light of the explanations the notes contain.

IV. Conclusion

Has the ALI accomplished its purpose of providing guidance to the average lawyer on the subject of sources of international law?[98] The answer, on balance, is in the affirmative. The Restatement (Third) renders assistance to the American bench and bar by elucidating, in two sections with supporting commentary, the rather esoteric doctrines of the sources and evidence of international law. In this respect the ALI has improved considerably upon the previous Restatement, which did not devote a single section to sources. The various questions raised in this article, however, suggest that the Restatement (Third)'s treatment of sources and evidence, while generally sound, should be utilized with care.

Difficult and complex subjects, such as the relationship between treaties and custom, peremptory norms of international law (*jus cogens*), and the legal effect of U.N. resolutions, are perhaps not well-suited to the kind of concise coverage that is required in a Restatement. This is especially true in view of the American legal community's relative lack of familiarity with public international law, as compared with subjects treated in other Restatements. The ALI courageously tackles these difficult topics, and on the whole, presents them usefully. But the practitioner or judge having recourse to the Restatement (Third)—and, in particular, to the material on sources and evidence of international law—should be aware of the debates raging about many of the subjects with which it deals and should read the relevant sections with corresponding circumspection. Reporters' Notes, whole not adopted by the ALI, contain excellent discussions and explanations of the rules in black letter, which, curiously, are usually more helpful than those in the Comments. They therefore merit the close attention of the reader.

It has been said that Restatements have "a useful life of one generation."[99] Given the cataclysmic changes sweeping many parts of the world today, this may prove to be an optimistic assessment in the case of the new Foreign Relations Restatement. But for the time being at least, the Restatement (Third) will, when used advisedly, serve as a convenient reference work for the American lawyer.

97. *See supra* notes 27–29 and accompanying text.
98. *See supra* note 9 and accompanying text.
99. Falk, *supra* note 8, at 441.