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The Restatements and the Rule of Law

Kristina Daugirdas

In drafting and publishing Restatements of the Law of Foreign Relations, both the American Law Institute and the reporters have understood the projects as contributing to the rule of law at the international level, at the domestic level, or both. Herbert Wechsler described 1965—the year that the first such Restatement was published—as a time “when the maintenance and development of law in the governance of international relationships increasingly engages the attention and the hopes of all mankind.”¹ This publication was formally captioned the Second Restatement, as others have explained.² Some twenty years later, when a comprehensive revision—the Third Restatement—was published, the introduction returned to and elaborated on this theme. The Restatement should be understood as a “reaffirmation” of the role of law along two dimensions: “Relations between nations are not anarchic; they are governed by law”; so too are “Presidents, members of Congress, and public officials when they conduct the foreign relations of the United States.”³ Finally, the recently published Fourth Restatement reiterated the point that “this project is a reaffirmation of the rule of law.”⁴

It is easy to cheer promotion of the rule of law. Indeed, reaffirmations of the rule of law seem especially welcome, even urgent, at this historical moment, when the president of the United States has repeatedly manifested disdain for legal rules and legal institutions, national and international alike. But, as is often the case when it comes to slogans that garner widespread endorsement, things are more complicated than they initially appear. This chapter surfaces some of

¹ RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES intro. at vii (Am. Law Inst. 1965).

² Sarah H. Cleveland & Paul B. Stephan, *Introduction: The Roles of the Restatements in U.S. Foreign Relations Law*, in this volume.

³ THIRD RESTATEMENT intro. at 5.

⁴ FOURTH RESTATEMENT intro. at 2. The Introduction continues: “Responsible officials—domestic, foreign, and international alike—face legal constraints on their choices in the conduct of foreign relations. Particular rules may demand revision in the face of changes in international relations and the world economy, but the fundamental importance of the rule of law remains beyond question. This Restatement, as much as the work of our distinguished predecessors, seeks to direct attention to law as a means of expressing, supporting, and reinforcing the decisions that make up international relations.” *Id.*

the tensions that are built into the project of reaffirming or promoting the rule of law.

To start, there are at least three distinct ways that Restatements of foreign relations law might promote the rule of law. First, they might do so by clarifying the content of the law. With respect to international law, which is largely unfamiliar to a significant fraction of the Restatement's audience, clarifying content involves both explaining the sources of international law and identifying specific rules. As Thomas Franck has observed, rules that are clear are generally perceived to be more legitimate, in part because, when rules are clear, they are easier to follow—and violations are easier to identify.⁵

Second, the Restatements might contribute to the development of new legal rules—specifically to the evolution and consolidation of customary international law.⁶ Of course, as a formal matter, the American Law Institute lacks the authority to promulgate new rules of international law. But the Restatement nevertheless has significant capacity to influence their development. When U.S. courts rely on the Restatement for an articulation of a rule of customary international law and apply it, the resulting opinions supply data points that are relevant to assessing the existence and content of such rules. As the audience for the Restatement extends beyond the borders of the United States, the Restatement can also influence the practice and *opinio juris* of other states as well.

Clarification of the law always involves some degree of development of the law. As a result, contributing to the development of new rules of international law is, at least to some degree, inevitable. Of course, the greater the degree of development, the more controversial the exercise. Efforts to nudge the development of the law can backfire, leaving the authors vulnerable to charges that they are engaged in advocacy and that they are undermining the credibility of the Restatement as a restatement—and of customary international law as a source of law.⁷

⁵ THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 55–83 (1990); cf. Frederick Schauer, *Official Obedience and the Politics of Defining Law*, 86 S. CAL. L. REV. 1165, 1190, 1992 (2013) (arguing that clear rules are especially important when courts or other formal institutions for adjudicating disputes are unavailable).

⁶ Karl M. Meessen, *Conflicts of Jurisdiction and the New Restatement*, 50 L. & CONTEMP. PROBS. 47, 53 (1987) (“[T]oday’s *lex ferenda* might be tomorrow’s *lex lata* if only due to the impact of the Restatement itself.”).

⁷ See, e.g., David B. Massey, *How the ALI Influences CIL*, 22 YALE J. INT’L L. 419 (1997) (“The usefulness of the entire Restatement diminishes when the accuracy of one of its key sections is called into question. Judges and practitioners who rely on the Restatement because of its user-friendliness will do so only as long as they perceive that it is authoritative.”); W.T. Burke, *Customary Law of the Sea: Advocacy or Disinterested Scholarship?*, 14 YALE J. INT’L L. 508, 527 (1989) (“Expanding the rule of law in international affairs is unquestionably worthy and important, but it is not a service to that goal for allegedly objective observers to endorse official views about customary law irrespective of the amount or probity of the evidence supporting those views.”).

Finally, the Restatements might promote the rule of law by promoting compliance with the law. In a variety of ways, U.S. courts have the potential to play an important role in promoting compliance with international law, by the United States and by other actors if they are subject to suit in U.S. courts.⁸ Separately, the Restatements of Foreign Relations Law might provoke or support action by foreign governments or other actors abroad that promotes compliance with international law.⁹

The Third and Fourth Restatements have taken quite different approaches to promoting the rule of law. To some extent these different approaches are a consequence of changes in the legal landscape over the past three decades. They also reflect different choices that the reporters and the American Law Institute have made about how to carry out the project of restating foreign relations law.

Part I identifies some developments in U.S. case law since the publication of the Third Restatement that have rendered the promotion of the rule of law a more complicated task. While the United States remains a “semi-monist” system,¹⁰ during that interlude, the United States moved closer to the dualist end of the spectrum. These steps were not inevitable—in fact, some of them were quite controversial. Regardless, these developments have begun to drive a wedge between promoting the rule of domestic law and promoting compliance with international law.

Part II turns to the diverging approaches of the Third and Fourth Restatements with respect to articulating rules of customary international law. The Third Restatement is notably quick—according to some critics, too quick—to articulate rules of customary international law. In doing so, the reporters of the Third Restatement were quite willing to disagree with the views of the U.S. government. By contrast, the Fourth Restatement is more reticent on both fronts. The approach taken by the Fourth Restatement avoids some of the downsides of that taken by its predecessor, but also forfeits some of the advantages.

Part III argues that future installments of the Fourth Restatement ought to promote the rule of international law by updating and expanding the sections of the Third Restatement that address the architecture of international law on two key issues: international responsibility and the evolution of customary international law over time. The Fourth Restatement need not directly exhort litigants and judges to comply with international law. But by providing this basic

⁸ This capacity is by no means limited to U.S. courts; it is shared by all national courts. See ANDRÉ NOLLKAEMPER, *NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW* (2011).

⁹ See, e.g., Karl M. Meessen, *Foreword to Special Review Essays: The Restatement (Third) of Foreign Relations of the United States*, 14 YALE J. INT'L L. 433, 435 (1989) (“[I]n disputes with the U.S. government, foreign governments can be expected to rely on the Restatement whenever it supports their case.”).

¹⁰ Cleveland & Stephan, *supra* note 2.

information about the international legal system, the Restatement would wave a caution flag and encourage courts to take the procedural steps that would avoid unwitting (and potentially deleterious) engagement with international law.

I. Promoting International vs. Domestic Rule of Law

When it comes to implementing the United States' treaty obligations, the reporters for the Fourth Restatement confronted a legal landscape that looked quite different from that faced by the reporters for the Third Restatement. This section describes two Supreme Court decisions that have created tension between the promotion of international and domestic rule of law. They don't make it impossible to do both simultaneously, but—especially in combination—they do make it make it harder, and therefore less likely.

First, there was the Supreme Court's 2008 decision in *Medellín v. Texas*.¹¹ The case concerned a decision by the International Court of Justice (ICJ) about the required remedy for the United States' breach of the Vienna Convention on Consular Relations (VCCR). Pursuant to Article 36 of the VCCR, the United States has an obligation to inform foreign nationals arrested in the United States that they have a right of access to their consular officials.¹² Implementation of this obligation was spotty at best, and no one so informed José Ernesto Medellín when he was arrested for murder in Texas. Medellín was subsequently convicted and sentenced to death. On behalf of Medellín and a number of other individuals, Mexico pursued action against the United States before the ICJ, which ruled that, as a consequence of this breach, the United States was obliged to permit "review and reconsideration" of these individuals' cases to ascertain whether the breach of Article 36 "caused actual prejudice to the defendant in the process of administration of criminal justice."¹³

There was no doubt that the United States had an international obligation to comply with this decision.¹⁴ The problem was that Texas law precluded such review and reconsideration. If the ICJ's decision were self-executing, Texas law would have to give way.

The black-letter provisions of the Third Restatement suggest that, as a default matter, international agreements are self-executing. Section 111 provides that such agreements are non-self-executing only if "the agreement manifests an

¹¹ 552 U.S. 491 (2008).

¹² Vienna Convention on Consular Relations, art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

¹³ Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), Merits, 2004 I.C.J. Rep. 1 (Mar. 31), para. 121.

¹⁴ *Medellín*, 552 U.S. at 504.

intention that it shall *not* become effective as domestic law without the enactment of the implementing legislation,” “if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation,” or “if implementing legislation is constitutionally required.”¹⁵ A reporters’ note explains that “compliance is facilitated and expedited” where treaties are self-executing.¹⁶ Thus, “if the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts.”¹⁷

The approach taken by the Supreme Court in *Medellín* diverged from that prescribed by the Third Restatement. Instead of looking for evidence that ICJ judgments were not meant to be self-executing, the Supreme Court engaged in a search for affirmative indications that ICJ judgments were intended to be self-executing, and did not find them.¹⁸ Moreover, the Court appeared untroubled by the risk of noncompliance with international law. Instead, the Court was anxious to preserve the option of violating international law: The Court did not want to “undermin[e] the ability of the political branches to determine whether and how to comply with an ICJ judgment.”¹⁹

Ultimately, the Court concluded that the ICJ’s decision was not self-executing. In doing so, the Court raised the costs of compliance with treaty obligations. The federal government could try to cajole states into compliance, but in the wake of *Medellín*, those efforts repeatedly failed to deliver results.²⁰ In theory, Congress could still enact federal legislation to require review and reconsideration. In practice, Congress did not.²¹ This omission is no great surprise: inaction in Congress is overdetermined. Had the Supreme Court’s opinion gone the other way, noncompliance with an ICJ decision would remain possible. But the default would be set to compliance, and a president who wanted to disregard an ICJ opinion would have to secure legislation requiring or permitting this course of action.

While *Medellín* insisted that implementing legislation was the solution for implementing non-self-executing treaties, a decision that followed several years later, *Bond v. United States*, made this solution harder to obtain. In particular,

¹⁵ THIRD RESTATEMENT § 111(4) (emphasis added).

¹⁶ *Id.* reporters’ note 5.

¹⁷ *Id.*

¹⁸ *Medellín*, 552 U.S. at 517 (“Given that ICJ judgments may interfere with state procedural rules, one would expect the ratifying parties to the relevant treaties to have clearly stated their intent to give those judgments domestic effect, if they had so intended. Here there is no [such] statement. . .”).

¹⁹ *Id.* at 510–11.

²⁰ Kristina Daugirdas & Julian Davis Mortenson, *Another Mexican National Executed in Texas in Defiance of Avena Decision*, 108 AM. J. INT’L L. 322 (2014).

²¹ *Id.*

Bond made it harder to enact implementing legislation that would comprehensively implement certain treaty obligations—specifically those that address matters that have been traditionally regulated by state governments. In this way, *Bond* further increased the obstacles to complying with treaty obligations.

Bond concerns a challenge to the constitutionality of the Chemical Weapons Convention Implementation Act. As the statute's title suggests, it was enacted to implement the United States' obligations as a party to the Chemical Weapons Convention. That treaty prohibits States Parties from using chemical weapons "under any circumstances,"²² and separately imposes an obligation on states parties to enact legislation that would prohibit individuals from "undertaking any activity prohibited to a State Party under this Convention."²³ Accordingly, Section 229 of the implementing legislation includes a provision that forbids, among other things, the possession or use by any person of "any chemical weapon."²⁴ Both the treaty and the legislation define "chemical weapons" as toxic chemicals and their precursors, except where the chemicals are intended for industrial, agricultural, and certain other narrowly defined uses.²⁵ And both the treaty and the legislation define "toxic chemical" as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals."²⁶

Federal prosecutors had charged Carol Anne Bond with two counts of possessing and using a chemical weapon pursuant to this statute.²⁷ Bond, a microbiologist, had sought to poison her former friend, Myrlinda Hanes, upon learning that Hanes was pregnant—and that Bond's husband was the father.²⁸ Apparently hoping that Haynes would "develop an uncomfortable rash," Bond spread the chemicals on Haynes's car door, mailbox, and doorknob.²⁹ Haynes was largely able to avoid the chemicals, and suffered only a "minor chemical burn on her thumb."³⁰

This unlikely set of facts laid the groundwork for the Supreme Court to reconsider the scope of Congress's authority to implement treaties under the necessary and proper clause. Bond argued that Section 229 exceeded Congress's enumerated authorities under the Constitution. The U.S. government had disavowed the interstate commerce clause as a source of authority.³¹ As a result, Bond's

²² Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, art. I, § 1(b), S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 317 [hereinafter CWC].

²³ *Id.* art. VII, § 1(a).

²⁴ 18 U.S.C. § 229(a)(1).

²⁵ CWC art. II(1)(a); art. II(9)(a); 18 U.S.C. § 229F(1)(A); 229F(7).

²⁶ CWC art. II(2); 18 U.S.C. 229F(8)(A).

²⁷ *Bond v. United States*, 572 U.S. 844, 852 (2014).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Bond*, 572 U.S. at 854–55.

challenge set the stage for the Supreme Court to revisit *Missouri v. Holland*, the 1920 case in which the Supreme Court held that “[i]f the treaty is valid there can be no dispute about the validity” of the implementing legislation “as a necessary and proper means to execute the powers of the Government.”³²

Two Justices were ready and willing to overturn *Missouri v. Holland*.³³ The majority, however, was not. Instead, the majority interpreted the statute as not reaching Bond’s conduct. Reading the Implementation Act to reach a “purely local crime[]” like Bond’s would intrude on the police power of the States, according to the majority. The Court declined to do so in the absence of a clear statement from Congress that the legislation was meant to reach such conduct. In this way, the majority avoided reaching the constitutional challenge.

The majority opinion suggested that—unlike in *Medellín*—the United States’ international obligations were not in play. Chief Justice Roberts wrote: “[T]here are no apparent interests of the United States Congress or the community of nations in seeing Bond end up in federal prison, rather than dealt with (like virtually all other criminals in Pennsylvania) by the State.”³⁴ In making this observation, Roberts relied on the Solicitor General’s statement during oral argument that it was unlikely that the failure to prosecute Ms. Bond would “give rise to an international incident.”³⁵ Perhaps this characterization was a strategic choice on the part of the executive branch to downplay the risk of a breach (more on this later).³⁶ But “not giv[ing] rise to an international incident” is not the same thing as saying the United States’ compliance with the Chemical Weapons Convention was not at risk. And, indeed, an amicus brief filed by several former diplomats who negotiated the Chemical Weapons Convention argued forcefully that the treaty’s prohibitions did reach Bond’s conduct.³⁷ Moreover, they explained, the United States could not fulfill its obligations under the Chemical Weapons Convention by relying on State criminal laws:

The CWC requires states parties to enact criminal prohibitions that apply not only to use of chemical weapons but also development, manufacture, possession, and transfer—acts that State law generally leaves unregulated. Even if all 50 States could be persuaded to enact compliant implementing legislation,

³² *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

³³ See *Bond*, 572 U.S. at 873–82 (Scalia, J., dissenting). Justice Thomas joined this dissent.

³⁴ *Bond*, 572 U.S. at 865.

³⁵ *Id.*

³⁶ See *infra* text accompanying note 109.

³⁷ Brief of Amici Curiae Chemical Weapons Convention Negotiators and Experts in Support of Respondent, *Bond v. United States*, 2013 WL 4518601 (2013), at *16 (“In this case, the plain text, structure and context of the CWC make clear, and the *travaux* confirm, that the CWC’s prohibitions reach Bond’s conduct.”).

the laws must apply not only within the country but to U.S. nationals located abroad.³⁸

Importantly, the effects of the Supreme Court's decision in *Bond* were not confined to implementing the Chemical Weapons Convention. The United States is party to a number of other treaties that require the United States to enact particular domestic penal regimes, including treaties related to biological and nuclear weapons and to hostage-taking.³⁹ A number of other treaties likewise require action on "local" matters in order to comply, including the Hague Convention on Civil Aspects of Child Abduction and the Convention on Road Traffic.⁴⁰ After *Bond*, the legislation that implements these treaties is vulnerable to challenge.

The Fourth Restatement takes a cautious approach to characterizing both *Medellín* and *Bond*, and is careful not to overstate their holdings. In fact, the Fourth Restatement may understate the extent to which *Medellín* reflected a change from past practice. The black-letter text on evaluating whether a treaty provision is self-executing retains the Third Restatement's references to the Senate's views and to constitutionally required implementing legislation; it also provides that "Courts will evaluate whether the text and context of the provision, along with other treaty materials, are consistent with an understanding by the U.S. treaty makers that the provision would be directly enforceable in courts in the United States."⁴¹ In a comment that follows, the Fourth Restatement elaborates that while "[m]odern practice has made inquiry into self-execution more routine," the case law "has not established a general presumption for or against self-execution, in the sense of a clear statement or default rule that dictates a result in the absence of contrary evidence."⁴² It is true that *Medellín* didn't expressly establish a presumption against self-execution, but—as a reporters' note acknowledges⁴³—some lower courts have characterized it as doing so. Such a characterization is, at a minimum, entirely plausible in light of the Court's demanding search for affirmative indications of self-execution. The establishment of a *de facto* presumption against self-execution is all the more plausible in light of Justice Breyer's observation that such affirmative evidence is unlikely to be found, at least in the context of multilateral treaties, in light of the range of national practices with respect to incorporating treaty provisions into domestic law.⁴⁴

³⁸ *Id.* at *4.

³⁹ *Id.* at *34; Brief of Former State Department Legal Advisers as Amici Curiae in Support of Respondent, *Bond v. United States*, 2013 WL 4518602 (2013), at *23–*24.

⁴⁰ Brief of Former State Department Legal Advisers as Amici Curiae in Support of Respondent, *Bond v. United States*, 2013 WL 4518602 (2013).

⁴¹ FOURTH RESTATEMENT § 310.

⁴² *Id.* § 310 cmt. d.

⁴³ *Id.* § 310 reporters' note 3.

⁴⁴ *Medellín*, 552 U.S. at 552.

Likewise, the Fourth Restatement avoids anticipating how the Supreme Court might build on these cases in the future. Thus, for example, the Fourth Restatement follows the lead of the majority in *Bond* and does not address the vulnerability of *Missouri v. Holland* to future challenges.⁴⁵ Instead, the Fourth Restatement reiterates *Missouri*'s holding in black letter.⁴⁶

All that said, it may well be the case that the Supreme Court will drive a bigger wedge between national and international law in years to come. Since *Medellín* and *Bond* were decided, the Court's composition has changed. On the D.C. Circuit, now-Justice Kavanaugh went out of his way to reject international law as relevant to either statutory or constitutional interpretation. In *Al-Bihani v. Obama*, he wrote a concurrence that rejected the *Charming Betsy* canon of interpretation⁴⁷ with respect to non-self-executing treaties and customary international law.⁴⁸ In *Bahlul v. United States*, he wrote another concurrence that dismissed as "extraordinary"—in other words, implausible, if not ridiculous—an argument that Congress has the constitutional authority to establish military commissions only for offenses recognized by the international law of war.⁴⁹ Justice Gorsuch's views regarding international law remain unknown. As a Tenth Circuit judge, he wrote almost nothing about international law or foreign affairs.⁵⁰

II. Clarifying the Content of Customary International Law

When it comes to customary international law, the Restatements agree on the appropriate methodology for ascertaining such rules, at least as a formal matter. In this sense, the legal landscape has not shifted over the past thirty years. The Third Restatement supplies a definition of customary international law that closely tracks—and arguably even improves on—that found in Article 38 of the Statute of the International Court of Justice. Section 102 explains that "[c]ustomary

⁴⁵ FOURTH RESTATEMENT § 312 cmt. *e* & reporters' note 5.

⁴⁶ *Id.* § 312(2) ("Congress has constitutional authority to enact legislation that is necessary and proper to implement treaties, even if such legislation would otherwise fall outside of Congress's legislative authority.").

⁴⁷ Section 406 of the Fourth Restatement articulates the *Charming Betsy* canon of construction in the context of jurisdiction to prescribe: "Where fairly possible, courts in the United States construe federal statutes to avoid conflict with international law governing jurisdiction to prescribe." For further discussion of the Restatement's treatment of the canon, see Anthony J. Bellia Jr. & Bradford R. Clark, *Restating The Charming Betsy as a Canon of Avoidance*, in this volume.

⁴⁸ 619 F.3d 1, 9–11 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

⁴⁹ 840 F.3d 757, 759–63 (D.C. Cir. 2016) (Kavanaugh, J., concurring).

⁵⁰ Congressional Research Service, Judge Neil M. Gorsuch: His Jurisprudence and Potential Impact on the Supreme Court 85 & n.685 (2017), available at <https://fas.org/sgp/crs/misc/R44778.pdf>.

international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”⁵¹ The next section elaborates on evidence of international law. For customary international law, the “‘best evidence’ is proof of state practice, ordinarily by reference to official documents and other indications of government action” while for international agreements, the key evidence is the “text of the agreement, but appropriate supplementary means to its interpretation are not excluded.”⁵² Thus, the Third Restatement’s black-letter description of the secondary rules regarding customary international law hews to a traditional, positivist approach.⁵³

The Fourth Restatement does not (yet) include a comparable introduction to the international legal system. Nevertheless, scattered in comments and reporters’ notes is an affirmation of the same methodology for identifying rules of customary international law. Thus, for example, a comment following Section 401, which introduces categories of jurisdiction, explains that customary international law “results from a general and consistent practice of states followed out of a sense of international legal right or obligation.”⁵⁴ A later comment explains that the Foreign Sovereign Immunities Act (FSIA) “and cases applying it may also contribute to the content, interpretation, and development of international law. Judicial decisions and domestic legislation, if enacted or decided out of a sense of international legal obligation, constitute state practice and evidence of *opinio juris*, the two elements of customary international law.”⁵⁵

Notwithstanding their parallel descriptions of the elements of customary international law, the Restatements take quite different approaches to identifying such rules. The Third Restatement does not shy away from articulating rules of customary international law on a wide range of topics. Its reporters seemed to embrace the status of that Restatement as a subsidiary means for identifying rules of customary international law.⁵⁶ In identifying such rules, the reporters for the Third Restatement disagreed, sometimes quite vehemently, with the positions taken by the U.S. government with respect to such rules.⁵⁷ Indeed, a number of

⁵¹ THIRD RESTATEMENT § 102(2).

⁵² *Id.* § 103.

⁵³ Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757 (2001).

⁵⁴ FOURTH RESTATEMENT § 401 cmt. a.

⁵⁵ *Id.*; see also *id.* § 402 cmt. c (explaining why actions and decisions based on international comity are not evidence of what customary international law requires).

⁵⁶ THIRD RESTATEMENT § 103 reporters’ note 1.

⁵⁷ See *id.* Foreword at ix (“In a number of particulars the formulations in this Restatement are at variance with positions that have been taken by the United States Government.”); *The Restatement of Foreign Relations Law of the United States, Revised: How Were the Controversies Resolved?*, 81 PROC. AM. SOC’Y INT’L L. 180, 184 (1987) (remarks of Detlev Vagts) (“While in our last round we adjusted quite a few things to meet government objections, particularly of The Legal Adviser of the State Department, we didn’t change our view of the law. There are some things in there that The Legal Adviser does not like.”).

participants described the process of drafting the Third Restatement as rife with tension between the reporters, the American Law Institute, and the U.S. executive branch.⁵⁸

Reviews of the Third Restatement's analysis of customary international law were mixed.⁵⁹ Among the criticisms that emerged, one common theme was that the reporters were too quick to claim the status of customary international for the rules that they articulated: They did so with what was, at best, a cursory review of evidence of practice and *opinio juris*.⁶⁰

A comment following Section 103's discussion of evidence of customary international law suggests the reporters deliberately established a lower evidentiary threshold for certain rules: "A determination as to whether a customary rule has developed is likely to be influenced by assessment as to whether the rule will contribute to international order."⁶¹ As drafted, this sentence could be taken as descriptive—as meaning something like: Notwithstanding the black-letter rules, one can observe that tribunals and others take this consideration into account. The sentence could also be read as taking a normative position endorsing the appropriateness of this consideration. Employing a laxer approach to evaluating evidence for desirable rules (in the eyes of the reporters and the American Law Institute) is one way that the Third Restatement might seek to promote the rule of international law.

Indeed, by influencing judges and other actors at home and abroad, the Third Restatement's contestable assertions that certain rules had already attained the status of customary international law could become self-fulfilling prophecies. Precisely because collecting and analyzing evidence of customary international

⁵⁸ See *The Restatement of Foreign Relations Law of the United States, Revised: How Were the Controversies Resolved?*, 81 PROC. AM. SOC'Y INT'L L. 180, 181 (1987) (remarks of Harold Maier) (noting the "unusually vituperative controversy that accompanied the development, promulgation, and eventual adoption" of the Third Restatement).

⁵⁹ Massey, *supra* note 7, at 423–24 (collecting and summarizing reviews).

⁶⁰ See, e.g., Burke, *supra* note 7, at 509 (arguing that the Restatement "mistreats" customary international law by "declaring that some principles have that quality when there is no evidence that customary international law has anything effective to say on the matter; second, by declaring unqualified customary law principles when the evidence of state practice is unclear at best; and finally, by identifying principles as customary law which are supported only by distorted and misleading characterizations of sources."); David Caron, *The Law of the Environment: A Symbolic Step of Modest Value*, 14 YALE J. INT'L L. 528, 534 (1989) ("The legal propositions in these sections [on transfrontier pollution] are sometimes conservative, sometimes progressive, and almost always stated with too much conviction. The recurring certainty with which propositions are stated in Part VI gives an impression of overall stability to this area of law that is unwarranted, if not inappropriate."); *The Restatement of Foreign Relations Law of the United States, Revised: How Were the Controversies Resolved?*, 81 AM. SOC'Y INT'L L. PROC. 180, 192 (1987) (remarks of Monroe Leigh) ("This brings me to my first general criticism of the new Restatement—that the Reporters have been a bit too prone, perhaps we can say too willful, to finding new customary international law?").

⁶¹ THIRD RESTATEMENT § 103, cmt. a.

law is difficult and resource-intensive, judges and other actors rely on sources like the Restatement without undertaking an independent analysis.⁶²

At the same time, allowing such normative considerations to infuse analyses of customary international law is risky. It could invite unflattering assessments of the reporters' motivations.⁶³ More consequentially, such a normatively infused approach could disserve the goal of promoting the rule of law by fueling skepticism about customary international law as a source of law.⁶⁴ On what basis should, or could, the world possibly be bound by the subjective assessment of the American Law Institute about which rules conduce to the global good?

By contrast to the Third Restatement, the Fourth approaches customary international law with greater humility, reflecting the view that a rigorous analysis of practice and *opinio juris* is genuinely difficult. In the area of immunity, one reporter explained that uncovering the practice of foreign states was challenging: "Many states have not codified their rules of state immunity, and in many of these states, the courts have not been required to address the full range of issues that are addressed by the FSIA."⁶⁵ Identifying *opinio juris* was likewise difficult: "Even when there is a controlling statutory provision or judicial decision, it can be challenging to determine whether the particular rule is followed out of a sense of international legal obligation or whether the foreign country has extended or curtailed immunity beyond what may legitimately be viewed as the requirements of customary international law."⁶⁶

At the same time, unlike the Third Restatement, the Fourth reflects a more collaborative approach with the U.S. government. In fact, one reporter described the reporters as "trying assiduously to avoid finding ourselves in a box where we are declaring, based on our understanding of international law, that U.S. practice might be inconsistent with international law."⁶⁷ An example cited in this volume by the chief reporters is the Fourth Restatement's handling of "tag" jurisdiction.⁶⁸ Faced with a conflict between U.S. practice and the customary international law

⁶² Cf. David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority*, 96 AM. J. INT'L L. 857, 866–68 (2002) (expressing the concern that arbitrators would "defer too easily and uncritically" to apparently neutral external sources describing rules of customary international law like the draft articles on state responsibility).

⁶³ Monroe Leigh, *supra* note 60, at 192 (suggesting that international lawyers in general are susceptible to "the addiction of declaring that a favorite proposition of law has now become customary international law and is therefore binding on everybody. Especially if the favorite proposition is close to the goal line of acceptance, international lawyers, in their writings, in their decisions, and even in restatements such as this, find it difficult to resist the temptation to nudge that favorite proposition across the goal line and into the end zone of customary international law.>").

⁶⁴ Burke, *supra* note 7, at 527.

⁶⁵ *Perspectives on the Restatement (Fourth) Project*, 109 AM. SOC'Y INT'L L. PROC. 209, 212 (2015) (remarks by William S. Dodge).

⁶⁶ *Id.*

⁶⁷ *Id.* (remarks by Paul B. Stephan).

⁶⁸ Cleveland & Stephan, *supra* note 2.

rule articulated by the Third Restatement, the Fourth Restatement refrains from addressing the latter.⁶⁹

A. Prescriptive Jurisdiction

The Third and Fourth Restatements' respective handling of prescriptive jurisdiction illustrates their diverging approaches to customary international law—as well as the risks and advantages of those diverging approaches.

The Third Restatement garnered significant attention—at the time of publication and subsequently—for declaring that customary international law imposes a requirement of reasonableness on exercises of prescriptive jurisdiction. In particular, after setting out the accepted bases of prescriptive jurisdiction,⁷⁰ Section 403 explains that an exercise of jurisdiction is “nonetheless unlawful if it is unreasonable.”⁷¹ To structure the analysis of this question, the Third Restatement sets out a list of eight factors to consider when evaluating reasonableness.⁷² Among these factors were “the extent to which another states may have an interest in regulating the activity” and the “likelihood of conflict with regulation by another state.”⁷³

Louis Henkin, the Chief Reporter for the Third Restatement, explained that, in drafting this section, the reporters

tried to combine what American courts have done in developing this balancing and these standards, and foreign objections to what they call extravagant and exorbitant exercises of jurisdiction—combining those two approaches into a principle of international law which we think our courts would accept, and has a good chance of being accepted by the people abroad as a restatement of what they are doing.⁷⁴

The executive branch objected to Henkin's approach as a matter of both law and policy. In the view of the State Department Legal Adviser, Section 403 neither accurately reflected international law nor did it “constitute a desirable change in the law.”⁷⁵

⁶⁹ *Id.*

⁷⁰ THIRD RESTATEMENT § 402.

⁷¹ *Id.* § 403 & cmt. a.

⁷² *Id.* § 403(2).

⁷³ *Id.*

⁷⁴ *Thursday Morning Session, May 21, 1981*, 58 AM. L. INST. PROC. 255, 262 (1981).

⁷⁵ Davis R. Robinson, *Conflicts of Jurisdiction and the Draft Restatement*, 15 LAW & POL'Y INT'L BUS. 1149, 1152 (1983) (describing the opinion of the Office of the Legal Adviser).

Of course, even if the Third Restatement was wrong about the status of the reasonableness requirement at the moment that it was published, it could become right over time. Within the United States, the reasonableness rule did get some traction. Justice Scalia, writing a dissent on behalf of four Justices in *Hartford Fire Insurance v. California*, relied on Section 403's characterization of customary international law to interpret the extraterritorial reach of the Sherman Act.⁷⁶ In 2004, the Supreme Court decided another antitrust case in line with the reasonableness requirement. The Court wrote that it "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations," and observed that this "rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow."⁷⁷ A handful of lower courts likewise relied on Section 403.⁷⁸

In at least one instance, the State Department itself adopted the Third Restatement's characterization of the reasonableness requirement as part of customary international law. Communicating with Congress, the Legal Adviser's Office objected to certain proposed sanctions on the grounds that "international law . . . requires a state to apply its laws to extraterritorial conduct only when doing so would be reasonable in view of certain customary factors."⁷⁹

Ultimately, however, neither the U.S. executive branch nor foreign governments endorsed the reasonableness requirement, and most scholars of international law remained unpersuaded that the reasonableness requirement was part of customary international law.⁸⁰

Reflecting these developments, the Fourth Restatement departs from the Third in delineating permissible exercises of prescriptive jurisdiction:

Customary international law permits exercises of prescriptive jurisdiction if there is a genuine connection between the subject of the regulation and the state seeking to regulate. The genuine connection usually rests on a specific connection between the state and the subject being regulated, such as territory, effects, active personality, passive personality, or protection. In the case of universal jurisdiction, the genuine connection rests on the universal concern of states in suppressing certain offenses.⁸¹

⁷⁶ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818–19 (1993).

⁷⁷ *F. Hoffmann-La Roche v. Empagran*, 542 U.S. 155, 164 (2004).

⁷⁸ Massey, *supra* note 7, at 437–39.

⁷⁹ *Id.* at 439.

⁸⁰ See, e.g., Phillip R. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT'L L. 53, 55 (1995); CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 178–79 (2008). But see Hannah Buxbaum & Ralf Michaels, *Reasonableness as a Limitation on the Extraterritorial Application of U.S. Law: From 403 to 405 (via 404)*, in this volume.

⁸¹ FOURTH RESTATEMENT § 407.

Reasonableness isn't entirely irrelevant to this inquiry, the Fourth Restatement explains: "Reasonableness, in the sense of showing a genuine connection, is an important touchstone for determining whether an exercise of jurisdiction is permissible under international law."⁸² But, the Fourth Restatement continues,

state practice does not support a requirement of case-by-case balancing to establish reasonableness as a matter of international law. . . . Nor does international law require a state with a legitimate basis for asserting prescriptive jurisdiction to refrain from exercising such jurisdiction because another state has a stronger interest in exercising jurisdiction.⁸³

One might view the demise of the reasonableness requirement as confirmation of the problematic nature of the Third Restatement's approach to customary international law. In my view, however, this assessment misses the value added by the Third Restatement, which was wrong in a constructive way. Even if the reasonableness rule articulated by the Third Restatement was not supported by widespread practice and evidence of *opinio juris*, the reasonableness rule did reflect a good-faith effort to assimilate the practice of U.S. courts and the protests of foreign governments. The rule that the Third Restatement articulated supplied a focal point to which courts, scholars, and governments could react. Article 38(1)(d) of the ICJ Statute affirms that "the teachings of the most highly qualified publicists of the various nations" constitute a "subsidiary means for the determination of rules of law." Such "teachings" are worth consulting not because they are infallible, but because they can reflect good-faith efforts to collect and analyze the data points that supply evidence of customary international law.

B. The Terrorism Exceptions to the FSIA

The terrorism exceptions to the FSIA resulted from a series of amendments to that statute permitting lawsuits and facilitating enforcement of judgments against states that the U.S. executive branch had designated sponsors of terrorism. The consistency with international law of the terrorism exceptions is questionable: The exceptions have elicited protests from foreign governments. For example, in 2016, the Coordinating Bureau of the Non-Aligned Movement issued a communiqué protesting the United States' unilateral waiver of sovereign immunity:

⁸² *Id.* § 407 reporters' note 3.

⁸³ *Id.*

This practice runs counter to the most fundamental principles of international law, in particular the principle of sovereign immunity as one of the cornerstones of the international legal order and a rule of customary international law. . . .⁸⁴

Some scholars have likewise concluded that some or all of the exceptions violate customary international law⁸⁵—and many within the U.S. executive branch share this assessment.⁸⁶

Because the terrorism amendments are a relatively new feature of the legal landscape, the reporters for Third Restatement did not have to wrestle with them.⁸⁷ The Fourth Restatement generally downplays the controversy associated with these amendments, either declining to address their consistency with international law or omitting references to protests by other governments and negative assessments by scholars.⁸⁸ At a minimum, the Restatement ought to have acknowledged more directly the contested status of the terrorism amendments.⁸⁹

⁸⁴ Communiqué of the Coordinating Bureau of the Non-Aligned Movement in rejection of unilateral actions by the United States in contravention of international law, in particular the principle of State immunity, reproduced in U.N. Doc. A/70/861-S/2016/420 (May 6, 2016). For other examples, e.g., Kristina Daugirdas & Julian Davis Mortenson, *Congress Overrides Obama's Veto to Pass Justice Against Sponsors of Terrorism Act*, 111 AM. J. INT'L L. 156 (2017) (cataloging responses of foreign governments to JASTA's enactment); Beth Stephens, *The Fourth Restatement, International Law, and the "Terrorism" Exception to the Foreign Sovereign Immunities Act*, in this volume.

⁸⁵ ROSANNE VAN ALEBEEK, *THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW* 355 (2008) ("This study asserts that the terrorist exception to the FSIA causes the United States to violate its obligations under international law. . . . The entertainment of claims against 'rogue' states for payment of damages suffered as a result of human rights violations and terrorist acts is illegal under international law."); Paul B. Stephan, *Sovereign Immunity and the International Court of Justice: The State System Triumphant*, in *FOREIGN AFFAIRS LITIGATION IN UNITED STATES COURTS* 67, 78–82 (John Norton Moore ed., 2013) (explaining reasons to doubt the consistency with international law of the terrorism exception as codified in 2008).

⁸⁶ Ashley Deeks, *Statutory International Law*, 57 VA. J. INT'L L. 263, 280 (2018) ("Many, including the executive branch, believe that the [terrorism] exception violates the rule of international law that immunizes states from being sued in each other's courts for their sovereign acts.").

⁸⁷ For the drafters of the Third Restatement, foreign sovereign immunity was quite straightforward. As Louis Henkin put it during the deliberations of the American Law Institute, "[i]t is my impression that there are no serious substantive issues about sovereign immunity. There is a statute." 58 ALI PROC. 255, 256 (1981).

⁸⁸ Austen Parrish makes this same critique with respect to the Fourth Restatement's treatment of adjudicatory jurisdiction. Austen Parrish, *Adjudicatory Jurisdiction and Public International Law: The Fourth Restatement's New Approach*, in this volume.

⁸⁹ Unlike the final published version of the Fourth Restatement, the reporters' first draft of the chapter on the immunity of states from jurisdiction did acknowledge the contested status of 28 U.S.C. § 1605A. See Restatement of the Law Fourth, *The Foreign Relations Law of the United States: Sovereign Immunity* § 460 reporters' note 1 (Preliminary Draft No. 1, Sept. 13, 2013) (including the following text: "Some suggest that by denying immunity to state sponsors of terrorism, the United States may have gone beyond what the international law of sovereign immunity permits."). This acknowledgment disappeared in the first Council Draft, which was circulated one year later. See Restatement of the Law Fourth, *The Foreign Relations Law of the United States: Sovereign Immunity* 37–39 § 460 reporters' notes 1–10 (Council Draft No. 1, Sept. 29, 2014).

More broadly, the Fourth Restatement missed an opportunity to contribute to the rule of law by addressing more comprehensively the terrorism exceptions' consistency with international law. Such a contribution could provide useful guidance to judges, who must interpret the terrorism amendments, and to members of Congress, who face persistent efforts to enact additional amendments. Such guidance would be especially useful because—perhaps surprisingly—the U.S. executive branch has remained steadfastly silent about this issue, at least in public.

By way of background, the initial version of the terrorism exception was enacted as part of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in 1996.⁹⁰ It permitted lawsuits against states that had been designated sponsors of terrorism:

in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency. . . .

Since 1996, Congress has repeatedly legislated to expand on that initial terrorism exception. Some of these provisions made it easier for plaintiffs to win such suits on the merits or expanded the damages they could seek; other provisions were designed to facilitate enforcement of judgments.⁹¹ Many of these enactments were narrowly targeted to aid particular plaintiffs. To cite just one example, in 1997, the requirement that both the claimant *and* the victim be U.S. nationals was modified so that only one *or* the other had to be a U.S. national.⁹² The House Report indicates this change was made to allow lawsuits brought by families of individuals who were killed when Pan Am 103 exploded over Lockerbie, Scotland.⁹³ Some of the victims were aliens whose close family members were U.S. nationals, so they couldn't satisfy the nationality requirement in the terrorism exception as originally enacted.

Remarkably, in many cases these amendments were adopted over the strenuous objections of the executive branch. In 1994, when Congress was considering

⁹⁰ Pub. L. No. 104-132 (1996). The terrorism exception was initially codified as 28 U.S.C. § 1605(a) (7).

⁹¹ See, e.g., Sean Murphy, *Satisfaction of U.S. Judgments Against State Sponsors of Terrorism*, 94 AM. J. INT'L L. 117 (2000); Sean Murphy, *2002 Victims of Terrorism Law*, 97 AM. J. INT'L L. 187 (2003); Stephens, *supra* note 84.

⁹² An Act to make a technical correction to title 28, United States Code, relating to jurisdiction for lawsuits against terrorist states, Pub. L. No. 105-11, 111 Stat. 22 (1997).

⁹³ H.R. Rep. No. 105-48; Stephens, *supra* note 84.

creating a terrorism exception to the FSIA, officials from the State and Justice Departments made a range of arguments against such an amendment.⁹⁴ They pointed out that Congress's expansion of courts' jurisdiction reflected a departure from the practice of other states regarding foreign sovereign immunity,⁹⁵ and warned that this divergence from state practice could erode the credibility of the FSIA as a whole and undermine foreign states' willingness to defend other lawsuits that the FSIA permits.⁹⁶ Furthermore, the State Department maintained that the terrorism exception could interfere with the United States' calibration of sanctions against state sponsors of terrorism and its ability to develop joint positions with other nations regarding acts of terrorism.⁹⁷ Finally, the State Department observed there was a risk that other states would expand the jurisdiction of their own courts to reach acts of alleged wrongdoing by foreign states—and would do so in a way that would potentially harm the United States.⁹⁸ These objections did not sway many members of Congress. In the end, AEDPA included many provisions that President Bill Clinton had specifically requested Congress to enact.⁹⁹ And so, notwithstanding the administration's objections to the terrorism exception, Clinton not only signed AEDPA but hailed its enactment as “an important step forward in the Federal Government's continuing efforts to combat terrorism.”¹⁰⁰

On two subsequent occasions, legislation expanding the terrorism exception generated presidential vetoes. In 2007, Congress included language in that year's National Defense Authorization Act to expand the original terrorism exception along multiple dimensions, including by expressly creating a cause of action and allowing the recovery of punitive damages. President George W. Bush vetoed that legislation and secured an exception for Iraq in a subsequent version of the bill, which he signed in 2008.¹⁰¹ The other expansions of the terrorism exception the 2007 legislation had contained were enacted and codified in 28 U.S.C. Section 1605A. In 2016, Congress overrode President Barack Obama's veto to enact the Justice Against Sponsors of Terrorism Act (JASTA).¹⁰² JASTA allows

⁹⁴ The Foreign Sovereign Immunities Act: Hearing on S. 825 Before the Subcomm. on Courts and Administrative Practice of the Judiciary Comm., 103d Cong. (1994).

⁹⁵ *Id.* at 13–14 (prepared statement of Jamison S. Borek) (“We are not aware of any instance in which a state permits jurisdiction over such tortious conduct of a foreign state without territorial limitations.”).

⁹⁶ *Id.* at 14.

⁹⁷ *Id.*

⁹⁸ *Id.* at 15.

⁹⁹ Pub. L. No. 104-32 (1996).

¹⁰⁰ Statement of President William J. Clinton on Signing S. 1965, 32 Weekly Comp. Pres. Doc. 719 (Apr. 29, 1996).

¹⁰¹ National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-81, Jan. 28, 2008, 122 Stat. 338.

¹⁰² Kristina Daugirdas & Julian Davis Mortenson, *Congress Overrides Obama's Veto to Pass Justice Against Sponsors of Terrorism Act*, 111 AM. J. INT'L L. 156 (2017).

Americans to sue foreign states for playing a role in terrorist attacks on U.S. soil. While the statute is written in general terms, it was drafted specifically to allow families of the victims of the 9/11 attacks to sue Saudi Arabia for its suspected role in those attacks. In his veto message, President Obama expressed concern that JASTA would “reduce the effectiveness of our response to indications that a foreign government has taken steps outside our borders to provide support for terrorism, by taking such matters out of the hands of national security and foreign policy professionals and placing them in the hands of private litigants and courts”; would “upset longstanding international principles regarding sovereign immunity”; and “threatens to create complications in our relationship with even our closest partners.”¹⁰³ Notably, these objections were not framed in terms of international legal obligations governing foreign sovereign immunity.¹⁰⁴

To analyze the consistency of the terrorism exceptions with international law, it is necessary to draw some distinctions among them. The basic objection is that any kind of “terrorism exception” is inconsistent with the restrictive theory of sovereign immunity, pursuant to which foreign sovereigns maintain immunity from adjudicative jurisdiction for their sovereign acts (but not their commercial acts).¹⁰⁵ The ICJ recently affirmed that this immunity subsists even for serious human rights violations.¹⁰⁶ Exceptions like JASTA that address events on the territory of the United States may be easier to justify: numerous states and the U.N. Convention on Jurisdictional Immunities of States and Their Properties recognize exceptions to sovereign immunity with respect to some territorial torts.¹⁰⁷ By contrast, terrorism exceptions that permit enforcement against foreign states are generally harder to justify because customary international law requires more robust protections with respect to exercises of enforcement jurisdiction.¹⁰⁸

A key motivation for the U.S. executive branch’s silence is to avoid supplying ammunition to challenge or critique the United States to foreign states adversely affected by the provisions in the event they are enacted into law.¹⁰⁹ An unequivocal public statement that proposed legislation expanding the terrorism

¹⁰³ *Id.* at 159.

¹⁰⁴ When asked directly whether JASTA violates international law, the White House press secretary sidestepped the question. *Id.* at 161.

¹⁰⁵ The analysis for different terrorism exceptions will vary in the particulars. For example, foreign sovereign immunity from enforcement is generally considered broader than foreign sovereign immunity from adjudication. In addition, there is support in state practice for an exception to foreign sovereign immunity for territorial torts.

¹⁰⁶ Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶ 88 (Feb. 3).

¹⁰⁷ *Id.* ¶¶ 64–79; United Nations Convention on Jurisdictional Immunities of States and Their Properties art. 12, Dec. 2, 2004, 44 I.L.M. 803 (not yet in force).

¹⁰⁸ Jurisdictional Immunities of the State, *supra* note 106, ¶ 113.

¹⁰⁹ HAZEL FOX & PHILIPPA WEBB, *THE LAW OF STATE IMMUNITY* 285 (3d rev. ed. 2015) (noting the “consequences of disregarding the rules of state immunity” include “potential liabilities of the US before international tribunals”).

exceptions violates international law could become a liability once that legislation is actually enacted. Other states could cite it as a definitive concession that the United States has violated its international obligations.

This concern is not merely hypothetical. In 2016, the U.S. Supreme Court rejected Iran's challenges to a legislative provision that was designed to help certain plaintiffs who had obtained default judgments against Iran to enforce them against assets held in New York on behalf of the Central Bank of Iran.¹¹⁰ Iran subsequently initiated proceedings against the United States before the International Court of Justice based on the dispute resolution provision of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States. Iran argued that this bilateral treaty incorporates customary international law rules regarding foreign sovereign immunity, and therefore confers jurisdiction to decide whether the United States had violated those customary international law obligations. Ultimately, the ICJ concluded that the treaty did not supply such jurisdiction.¹¹¹

The Fourth Restatement's discussion of foreign sovereign immunity offers little indication that the terrorism exceptions are widely—albeit not universally—viewed as contrary to international law. The Fourth Restatement begins with a statement that addresses both international law and U.S. law regarding adjudicative jurisdiction: Under both sources of law, “a state is immune from the jurisdiction of the courts of another state, subject to certain exceptions.”¹¹² This formulation leaves open the question of whether those exceptions align. Section 460 describes Section 1605A. A reporters' note observes that the United States was the first country to enact a terrorism exception, that Canada followed some years later, and that the U.N. Convention on Jurisdictional Immunity of States and Their Property “neither endorses nor precludes the removal of immunity for acts of state-sponsored terrorism.”¹¹³ Strikingly, the Fourth Restatement omits any mention of scholarship or protests by foreign governments charging that these exceptions violate international law. Instead, the Fourth Restatement adduces reasons to doubt a violation: “Given its focus on injuries to U.S. nationals resulting from acts that have been condemned as illegal by the international community, and the frequently repeated exhortation that states should provide relief and means of compensating victims of terrorism, it is not clear that Section 1605A contravenes any presumptive jurisdictional constraint under

¹¹⁰ *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016); see also Kristina Daugirdas & Julian Davis Mortenson, *U.S. Supreme Court Upholds Law Facilitating Compensation for Victims of Iranian Terrorism*, 110 AM. J. INT'L L. 555 (2016); Pamela K. Bookman & David Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 816–23 (2017) (describing the background of the contested provision).

¹¹¹ *Certain Iranian Assets (Islamic Republic of Iran v. U.S.)*, Preliminary Objections, Feb. 13, 2019, ¶ 80.

¹¹² FOURTH RESTATEMENT § 451.

¹¹³ *Id.* § 460 reporters' note 11.

international law.”¹¹⁴ The Fourth Restatement describes JASTA in a reporters’ note, but says nothing at all about how it aligns with international law.¹¹⁵ When it comes to enforcement jurisdiction, the Fourth Restatement acknowledges that customary international law imposes some limits but does not describe them, and does not address whether the terrorism exceptions regarding enforcement align with customary international law.¹¹⁶

The Fourth Restatement could have made a valuable contribution by saying more about whether and how the various terrorism exceptions align with customary international law. Judges sometimes turn to customary international law to interpret the FSIA,¹¹⁷ but they need help ascertaining the content of those rules. Legislators too are often swayed by arguments that proposed legislation would contravene international law¹¹⁸—but they can only be swayed by such arguments if they know what international law requires.

Separately, keeping in mind the educational role of the Restatements of Foreign Relations Law and the importance of “showing” as well as “telling” how to work with customary international law, the Fourth Restatement could have illustrated how to assess evidence for (or against) a given rule of customary international law. There is little doubt that American litigators and judges would benefit from such demonstrations. Ryan Scoville has demonstrated in an empirical study of U.S. judicial opinions that American judges rarely undertake rigorous and comprehensive analyses before pronouncing rules of customary international law.¹¹⁹ Moreover, it is quite likely that Congress will continue to legislate additional terrorism exceptions, and that foreign governments will continue to protest those expansions. American judges and legislators would benefit from an illustration of how to interpret those protests and what significance to assign to them.

Finally, to the extent that the Fourth’s Restatement assessment of Section 1605A rests in part on the absence of clear statements by foreign governments that they believe customary international law requires foreign sovereign

¹¹⁴ *Id.*

¹¹⁵ *Id.* reporters’ note 9.

¹¹⁶ *Id.* § 464 & reporters’ notes 10 & 16.

¹¹⁷ *Id.* § 451 reporters’ note 2 (citing examples of courts’ use of international law to help interpret the FSIA).

¹¹⁸ See generally Deeks, *supra* note 86; Kevin Cope, *Congress’s International Legal Discourse*, 113 MICH. L. REV. 115 (2015).

¹¹⁹ Ryan M. Scoville, *Finding Customary International Law*, 101 IOWA L. REV. 1893 (2016). As it turns out, American judges are hardly alone along this dimension: international courts and tribunals rarely undertake such analyses either. Stephen J. Choi & Mitu Gulati, *Customary International Law: How Do Courts Do It?*, in *CUSTOM’S FUTURE* 117 (Curtis A. Bradley ed., 2016); Stefan Talmon, *Determining Customary Int’l Law: The ICJ’s Methodology Between Induction, Deduction, and Assertion*, 26 EUR. J. INT’L L. 417 (2015) (finding that, “in a majority of cases, the ICJ has not examined the practice and *opinio juris* of states but, instead, has simply asserted the rules that it applies.”).

immunity for terrorist acts, a statement to that effect may have spurred precisely such statements. In turn, such statements would contribute to the clarification of customary international law on this topic.

III. Architecture of the International Legal System

While the Third Restatement aimed for comprehensive coverage of foreign relations law, the Fourth Restatement has, so far, tackled only a limited set of topics. Two topics ought to be a priority for future installments of the Fourth: International responsibility and the evolution of customary international law over time. Addressing these topics would educate American lawyers and judges about the basic architecture of the international legal system. Even today, many, and perhaps most, practitioners have had very limited exposure to international law. No State bar exam tests international law, and international law is not part of the Federal Judicial Center's curriculum for new federal judges.¹²⁰

Because it addresses only selected topics, the Fourth Restatement periodically touches on international responsibility but does not address it systematically. For example, the reporters' note following Section 401, which sets out the three categories of jurisdiction, explains that "if a state exercises jurisdiction beyond the limits of international law, the state in question will violate international law, and such a violation will entail international responsibility."¹²¹ This note cites the International Law Commission's Draft Articles on State Responsibility, but does not go on to elaborate what international responsibility entails. As another example, a comment in a subsequent section explains: "If Congress were to violate international law governing jurisdiction to prescribe, the United States would not be relieved of its obligations under international law or of the consequences of a violation of those obligations."¹²²

Systematically addressing the law of international responsibility is important—and even urgent—in light of the developments described in Part I. In recent years the United States' legal system has become more dualist, and there are some indications that in future years it may move further in this direction. The more insulated U.S. law becomes from international law, the greater the risk of international responsibility. Judges and lawyers ought to understand these risks so that they can make deliberate decision about how to handle them. Judges have various tools at their disposal that they can deploy to better understand the

¹²⁰ John Coyle, *The Case for Writing International Law into the US Code*, 56 B.C. L. REV. 433, 468 (2015).

¹²¹ FOURTH RESTATEMENT § 401 reporters' note 1.

¹²² *Id.* § 406 cmt. b.

international legal consequences of their decisions. They might seek the views of the executive branch. Alternatively, or in addition, judges might take additional steps to discern the content of rules of international law to more precisely ascertain the risk of breach, or what is needed to avoid one.¹²³

Moreover, the law of international responsibility is “ripe” for inclusion in future installments of the Fourth Restatement because its contents are largely settled since the International Law Commission completed its work on state responsibility in 2001. The draft articles the Commission produced are increasingly accepted and cited as reflecting customary international law.¹²⁴ At the time that the Third Restatement was being developed and published, the Commission had not yet figured out how it would handle a number of controversial issues.¹²⁵

The Third Restatement addresses responsibility mainly in Part IX, which is captioned Remedies in International Law. This part briefly addresses “defenses,” or what the Commission referred to as “circumstances precluding wrongfulness”;¹²⁶ obligations to cease wrongful conduct and make reparation;¹²⁷ and the possibility that a state that is a victim of a breach may take countermeasures.¹²⁸

One issue that merits attention in a future installment of the Fourth Restatement is attribution. Section 207 of the Third Restatement addresses attribution of conduct to States, providing: “A state is responsible for any violation of its obligations under international law resulting from action or inaction by . . . any organ, agency, official, employee or other agent of a government or of any political subdivision, acting within the scope of authority or under color of such authority.”¹²⁹ This remains an accurate statement of the law of international responsibility, but judges who are unfamiliar with international law could easily miss two points that merit emphasis, especially in the wake of the *Medellín* and *Bond* decisions. First, the acts and omissions of the individual U.S. States are attributable to the United States as a matter of international law. A reporters’ note states: “The United States has consistently accepted international responsibility for actions or omissions of its constituent States and has insisted upon similar

¹²³ See, e.g., Scoville, *supra* note 119, at 1947 (noting that courts can deploy Federal Rule of Civil Procedure 44.1 to gather additional evidence of practice and *opinio juris*).

¹²⁴ See, e.g., Report of the Secretary-General, Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals, and Other Bodies, U.N. Doc. A/71/80 (2016).

¹²⁵ See generally Alain Pellet, *The ILC’s Articles on State Responsibility for Internationally Wrongful Acts and Related Texts*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 75, 84 (James Crawford, Alain Pellet, & Simon Olleson eds., 2010) (noting that, even by 1996, nearly a decade after the Third Restatement was published, the Commission had not yet resolved a number of controversial issues, including the notion of State international crime, countermeasures, and settlement of disputes).

¹²⁶ THIRD RESTATEMENT § 901 cmt. a & reporters’ note 1.

¹²⁷ *Id.* § 901.

¹²⁸ *Id.* § 905.

¹²⁹ *Id.* § 207.

responsibility on the part of the national governments of other federal states.” The problem is the implication that this is a discretionary, and perhaps idiosyncratic, position on the part of the United States. A second point that warrants emphasis is that decisions of individual U.S. courts are likewise attributable to the United States.

Separately, future installments of the Fourth Restatement ought to explain in general terms how rules of customary international law may change over time. On this topic, the Third Restatement offers no information at all. The Fourth Restatement, once again, includes some scattered notes about the evolution of customary international law. Thus, a reporters’ note observes: “National legislation, executive action, and the decisions of national courts on jurisdiction represent forms of state practice and may contribute to the *development* and interpretation of customary international law on jurisdiction if done out of a sense of legal right or obligation.”¹³⁰ Systematic discussion of how customary international law evolves over time would, among other things, help judges and legislators understand how to cope with new developments relating to the terrorism exceptions of the FSIA. Supplementing the Fourth Restatement in this way would have another positive effect: It would extend its shelf life, preserving the Fourth Restatement’s utility over the decades to come as both international law and U.S. law will continue to shift.

IV. Conclusion

Promoting the rule of law is not exactly a straightforward task. All three of the Restatements of Foreign Relations Law have advanced this goal in various ways. There remains room for future installments of the Fourth Restatement to further advance this goal.

¹³⁰ FOURTH RESTATEMENT § 401 reporters’ note 1.