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COMMENTARIES

DANIEL T. MURPHY*

The Restatement (Third)'s Human Rights Provisions: Nothing New, But Very Welcome

The Restatement (Third) of the Foreign Relations Law of the United States contains three sections specifically dealing with the international law of human rights.

Section 701 sets forth the source of a nation state's obligation to respect human rights:

§ 701. Obligation to Respect Human Rights

A state is obligated to respect the human rights of persons subject to its jurisdiction

- (a) that it has undertaken to respect by international agreement;
- (b) that states generally are bound to respect as a matter of customary international law (§ 702); and
- (c) that it is required to respect under general principles of law common to the major legal systems of the world.¹

Section 701(b)'s obligation to respect certain human rights as a matter of customary international law is amplified by section 702, which lists the customary international law human rights and sets out the circumstances in which they are violated.

§ 702. Customary International Law of Human Rights

A state violates international law if, as a matter of state policy, it practices, encourages, or condones

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1. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (1986) [hereinafter RESTATEMENT (THIRD)].

- (a) genocide,
- (b) slavery or slave trade,
- (c) the murder or causing the disappearance of individuals,
- (d) torture or other cruel, inhuman, or degrading treatment or punishment,
- (e) prolonged arbitrary detention,
- (f) systematic racial discrimination, or
- (g) a consistent pattern of gross violations of internationally recognized human rights.²

Lastly, in section 703 the remedies available to nation states and individuals in the event of a state's breach of its human rights obligations as stated in sections 701 and 702, are set forth.

§ 703. Remedies of Violation of Human Rights Obligations

(1) A state party to an international human rights agreement has, as against any other state party violating the agreement, the remedies generally available for violation of an international agreement, as well as any special remedies provided by the agreement.

(2) Any state may pursue international remedies against any other state for a violation of the customary international law of human rights (§ 702).

(3) An individual victim of a violation of a human rights agreement may pursue any remedy provided by that agreement or by another applicable international agreement.³

These three sections are contained in Chapter One of Part VII of the Restatement (Third), which is titled "Protection of Persons (Natural and Juridical)." Chapter Two, the other chapter in this Part, treats "Injury to Nationals of Other States." That chapter is dominated by section 712, dealing with state responsibility for economic injury to nationals of other states, which is perhaps one of the more controversial provisions of the Restatement (Third). It certainly was one of the most contentious during the debates on the Restatement (Third).⁴ Chapter Two contains, however, in addition, a fourth human rights provision that reinforces the obligations in Chapter One. Section 711 provides in part:

§ 711. State Responsibility for Injury to Nationals of Other States

A state is responsible under international law for injury to a national of another state caused by an official act or omission that violates

- (a) a human right that, under § 701, a state is obligated to respect for all persons subject to its authority⁵

2. *Id.* § 702.

3. *Id.* § 703.

4. See generally Clagett, *Protection of Foreign Investment Under the Revised Restatement*, 25 VA. J. INT'L L. 73 (1984); Clagett, *The Treatment of Economic Injury to Aliens in the Revised Restatement of Foreign Relations Law*, 22 INT'L LAW. 35 (1988); Houck, *Restatement of the Foreign Relations Law of the United States (Revised): Issues and Resolutions*, 20 INT'L LAW. 1361 (1986); Note *Expropriation in the Restatement (Revised)*, 78 AM. J. INT'L L. 176 (1984).

5. RESTATEMENT (THIRD) § 711.

By the terms of the human rights provisions in section 701 a state is "obligated to respect the human rights of persons *subject to its jurisdiction*"⁶ Section 711(a) reiterates the notion that a state has an obligation to respect certain human rights. That section's obligation runs to all persons "*subject to [the state's] authority*"⁷ The introductory portion of section 711, of course, only sets forth a separate violation of international law if the state fails in its human rights obligations with respect to nonnationals.

Several preliminary observations are warranted regarding these provisions. The first is simply a celebration of the fact that human rights provisions are contained in the Restatement (Third). Their inclusion is a testament, if indeed further testament is necessary, to the heightened consciousness regarding fundamental human rights and the necessity for their protection that has occurred during the twenty-five or so years since the prior restatement.⁸ Inclusion of this important topic is a significant step for the protection of human rights. Its treatment is also significant for the Restatement (Third); because of these provisions, the Restatement (Third) is a more authoritative and credible work than it might otherwise have been.

Second, it is important to appreciate that the human rights provisions of the Restatement (Third) are statements of principles of international law as they would be applied by the United States and other nation states and international organizations. They are not restatements of the domestic laws of the United States in the narrower sense.⁹ This fact must be borne in mind when considering,

6. *Id.* § 701 (emphasis added).

7. *Id.* § 711. The use of the term "jurisdiction" in § 701 and "authority" in § 711 probably is not intended to be of significance. In fact, the term "authority" is perhaps a better one. The term "jurisdiction" is used in Part IV of the Restatement (Third) in the sense of jurisdiction to prescribe and enforce its laws and to adjudicate (§§ 402-416). Nothing in Part IV or elsewhere states that this use of the term "jurisdiction" is limited to Part IV. In the human rights context a state's international law obligation is not only to avoid adoption and enforcement of laws that violate human rights norms, but under some circumstances to bear responsibility for conduct of its officers or agents. Given the special use of the word "jurisdiction" in the Restatement (Third), the word "authority" may capture this broader responsibility in the human rights context better than the word "jurisdiction."

8. The Restatement of Foreign Relations Law contained no human rights provisions. It acknowledged in a Comment that the theory had been advanced that international law obligated a state to protect basic human rights of all persons and that the doctrine of state protection of aliens is one aspect of that general responsibility. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 165 comment b (1965). But the Restatement itself looked the other way and articulated rules of state responsibility to aliens independent of any obligation regarding human rights. It took the position that the question of "whether international law imposes any obligations with respect to the treatment by a state of its own nationals is beyond the scope of [this] Restatement . . ." *Id.*

9. RESTATEMENT (THIRD) *Introduction* at 3, 3-5; *id.* § 101. Admittedly this statement glosses over the important question of international law as part of the law of the United States. *See infra* notes 37-46 and accompanying text. However, in contrast, there are a number of provisions in the Restatement (Third) that are intended as restatements of the domestic law of the United States having a substantial significance for the foreign relations of the United States or having other substantial international consequences. *See, e.g.* RESTATEMENT (THIRD) §§ 112-115 (interpretation and application of international law), §§ 204-205 (recognition of states), § 212 (citizenship and nationality),

in particular, the specific subsections of section 702; it explains some of the frustration with the scope of that section.¹⁰

Finally, as is apparent from a reading of these provisions, they are not extreme statements. If anything they are a conservative articulation—not in the sense of political ideology—but a narrow, noncontroversial statement of human rights norms, probably supported in what they say by an overwhelming majority of authorities.¹¹

In the Introductory Note to Part VII, the Reporters explain the different international law underpinnings of the two portions of this Part—the traditional law of state responsibility for injury to aliens and the contemporary human rights law. Under the former, injury to alien persons (either to their person or property) may constitute an offense to the state of nationality for which it may seek redress under international law. Absent international agreement, however, no international law right would accrue to the individual, and no international redress would be available to him or her.

Human rights law is said to have developed in the aftermath of the Second World War. It embodies the notions that individuals have some rights in their societies, which the state should respect, and that a state's treatment of its own nationals is not only a matter of its own concern, but is a proper subject of international concern.¹² The United Nations Charter is a reflection and source of

§ 302 (authority to make international agreements), § 314 (reservations of international agreements), § 326 (authority to interpret international agreements), §§ 415–416, 422 (application of certain principles of jurisdiction), § 433 (external measures in aid of enforcement of criminal law), § 442 (requests for disclosure), § 443 (act of state), §§ 457–460 (immunity from jurisdiction to adjudicate), § 472 (service of process), § 474 (obtaining evidence), § 478 (international extradition procedure), §§ 481–486 (foreign judgments), §§ 721–722 (individual rights), § 823 (judgments on obligations in foreign currency), § 907 (private remedies for violation of international law).

10. See *infra* notes 19–28 and accompanying text.

11. Professor Louis Henkin, the Chief Reporter for Restatement (Third) indicated during discussion of §§ 702 and 703 that § 702 was intended to be a consensus statement with which everyone could agree. 62 ALI PROCEEDINGS 543 (1985).

Indeed these human rights provisions were not the subject of vigorous disagreement during the floor discussions of Restatement (Third). They were among the sections presented at the annual meetings of the ALI in 1982 and 1985. Probably not more than an hour was spent in floor discussion and debate of them. See, 59 ALI PROCEEDINGS 204–28 (1982); 62 ALI PROCEEDINGS 543–44 (1985).

12. See generally L. HENKIN, *THE RIGHTS OF MAN TODAY* (1978); H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1968); M. MCDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* (1980); A. H. ROBERTSON, *HUMAN RIGHTS IN THE WORLD: AN INTRODUCTION TO THE STUDY OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* (2d ed. 1982); L. SOHN & T. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* (1973); *INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* (R. Lillich ed. 1983); *HUMAN RIGHTS IN INTERNATIONAL LAW* (T. Meron ed. 1984); Henkin, *International Human Rights as "Rights,"* 1 *CARDOZO L. REV.* 425 (1979); Higgins, *Conceptual Thinking about the Individual in International Law*, 24 *N.Y.L. SCH. L. REV.* 11 (1978); Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 22 *AM. U.L. REV.* 1 (1982).

Although not so stated in the Introduction, contemporary human rights law has as another of its underpinnings the doctrine of humanitarian intervention. See I. BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 338–42 (1st ed. 1963); I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNA-*

this concern. It contains, as a goal, the promotion of respect for and observance of human rights.¹³

This brief backdrop in the Introductory Note explains the international law grounding of the obligation to respect human rights contained in section 701. The sources of this obligation, as set forth in the three subsections of section 701, international agreements, customary law, and general principles of law common to the major legal systems of the world,¹⁴ are straightforward and noncontroversial.

Section 702 lists six human rights norms that exist as matters of customary international law and sets out the parameters on section 701(b)'s obligation to observe human rights as a matter of customary international law. Nation states may be obliged on the international level to observe human rights as a matter of international agreement or customary law. Hence nonsignatory states do have an international obligation to observe certain human rights, an obligation based on customary international law.

The introductory portion of section 702 contemplates an intense level of activity on the part of the state, however, before any of the practices can be said to be violations of the customary international law of human rights. The state, as *a matter of state policy*, must practice, encourage, or condone the abuse. Thus the practice must exist as a matter of the state's official policy, affecting its own citizens or aliens, before there can be a violation under section 702.¹⁵ In contrast, a state may be responsible for injury to aliens under the doctrine of state responsibility embodied in sections 711–713 for the conduct of an officer within the scope of his or her authority that is in fact contrary to the states's official policy.¹⁶

TIONAL LAW 565 (3d ed. 1979); HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (R. Lillich ed. 1973); Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275 (1973).

13. U.N. CHARTER, arts. 1, para. 3; 55–56; see also *Universal Declaration of Human Rights*, G.A. Res. 217, 3 U.N. GAOR, U.N. Doc. A/810 (1948); *International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200, U.N. GAOR Supp. (No. 16) at 49, 52, U.N. Doc. A/6316 (1967).

14. General principles of law common to a variety of legal systems are a source of international law generally. Hence they are certainly a possible source of international human rights law. Much should not be made of this as a separate source of human rights norms. Comment *b* to § 701 acknowledges that as of 1986 all human rights norms seem to be contained in agreements or customary law, and that it cannot be said that any norms exist separately as general principles of law common to various legal systems. RESTATEMENT (THIRD) § 701 comment *b*.

15. *Id.* § 702 comment *b*.

16. *Id.* §§ 711–713. The example was cited during the floor discussion of § 702 of torture practiced by a sheriff in one of the states of the United States. The United States might be liable to the victim's state of nationality for violation of § 711 or under the terms of an international agreement. But such an act of torture would not be a violation of § 702's prohibition of torture because it was not performed as a matter of state policy. 59 ALI PROCEEDINGS 205 (1982). Of course the obligation of a signatory state to observe specified human rights will be governed, as to the other signatories, by the terms of the agreement. The agreement need not require "state policy" before a violation can occur. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, and the Convention on the Abolition of Slavery, the Slave

As stated in section 702, the abuses that constitute customary international law human rights violations, regardless of whether the object of the abuse is a national or an alien, are only six: genocide; slavery or slave trade; the murder or causing disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; and systematic racial discrimination. This certainly is a safe list. It contains, as noted in Comment *a*, only those human rights "whose status as customary law is generally accepted . . . and whose scope and content are generally agreed."¹⁷ In Comments *d* through *i* to section 702 each of these abuses is separately treated, the elements of each are articulated, and the broad acceptance of each as a human right protected by international agreement and state practice is demonstrated.¹⁸

Such discussion and controversy regarding section 702 as there was during debates of it centered not around the abuses listed, but, quite expectedly, on the abuses not listed. Specifically, discrimination on the basis of gender or religion and the right to hold property are not included on the list.

In the drafting of section 702 the Reporters faced a difficult task. It was most important that the Restatement (Third) treat human rights matters and that such treatment go beyond a recitation of the protection of human rights through international agreement. It was important that a statement be included to the effect that human rights are a matter of customary international law and thus are binding on states that are not signatories to various bilateral and multilateral agreements. Yet it was equally important for the credibility of the Restatement (Third) that the section not boldly hold out certain rights, which in some parts of the world community are not protected, as having attained the status of customary law rights.

It is on this point that the status of section 702 as a statement of international law is important. Frustration was expressed that prohibition on gender or religious discrimination was not included among the list of customary international law human rights norms.¹⁹ From a U.S. perspective, and indeed from that of most of the West, these are fundamental protected human rights. They are all covered in the Universal Declaration, and they are the subject of treaty protection and supported by extensive state practice. Yet at the same time there is contrary state practice in important portions of the world community.

The Restatement (Third)'s balance between the need to treat some rights as matters of customary international law and the need to narrowly draw these rights

Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, T.I.A.S. No. 6418, 266 U.N.T.S. 3, neither of which requires that the prohibited conduct be the consequence of a state policy in order for a violation to occur.

See also RESTATEMENT (THIRD) § 207(c) and comments c & d, regarding attribution to a state of conduct resulting from action or inaction by an organ, agency, official, employee, or other agent of a government acting within the scope of authority or under color of authority.

17. RESTATEMENT (THIRD) § 702 comment a.

18. *Id.* comments d-i. For further expansion on these points, see also, *id.* reporters' notes 3-7.

19. See 59 ALI PROCEEDINGS 208-27 (1982); 62 ALI PROCEEDINGS 541-44 (1985).

is contained in section 702(g) and the last portion of Comment *a* to section 702. Section 702(g) lists as a separate violation of customary international law a state policy that practices, encourages, or condones “a consistent pattern of gross violation of internationally recognized human rights.”²⁰ Comment *a* amplifies this clause by noting that the list of customary international law human rights contained in section 702(a) through (f) is not a closed list, nor is it necessarily a complete list. The Comment thus asserts that other human rights norms may achieve the status of customary international law in the future, and it implies that indeed there may be some others that have already achieved that status.

While section 702(g) and Comment *a* provide the possibility of expansion of the list of customary international law human rights norms, they have injected some confusion and uncertainty into the question of what human rights can become protected as customary international law. They also create differences in status among customary international law human rights.

First, a substantially more intense level of activity is necessary before abuses of these unlisted human rights can be considered to be breaches of customary international law. Section 702(g) requires that there be “consistent pattern” of “gross” violation of these unlisted human rights before a violation of customary international law occurs. Neither of these showings is required for the six enumerated abuses.

For the six human rights listed, section 702 requires only that the state as a matter of state policy practice, encourage, or condone the abuse. Apparently, no actual implementation of a concerted policy of violation is necessary. An announced policy of genocide or of degrading treatment, even if not carried out, is probably sufficient to constitute a violation of customary international law.²¹ Such a state policy certainly would encourage and condone the abuse. Yet for the unlisted abuses there must be not only a state policy, but a state policy that results in a “consistent pattern” of “gross” violation. A state policy that results in isolated or “non-gross” incidents of abuse of these unlisted human rights is not sufficient to constitute a violation of section 702.

While the need for a separate showing of a “consistent pattern” of abuse is clear, the requirement of a separate showing of “gross” violation has been extremely muddled, if not largely voided, by a subsequent Comment. Comment *m* to section 702 first explains that the abuses listed in clauses (a) through (f) are violations of customary international law even if the practice is not consistent or part of a pattern provided that such abuses are inherently “gross.” It then repeats the elements of section 702(g), noting that abuses of unlisted human rights can become violations of customary international law only if there is a “consistent

20. RESTATEMENT (THIRD) § 702 (g).

21. Comment *b* takes this point further. It notes that international law requires affirmative action to outlaw genocide and slavery. A state is said to be responsible under § 702 if it fails to prohibit these activities or to enforce the prohibition. *Id.* comment *b*.

pattern of gross violations.’’ A definition of ‘‘gross’’ is given. A violation is said to be ‘‘gross’’ if it is ‘‘particularly shocking because of the importance of the right or the gravity of the violation.’’²²

Comment *m* then substantially undercuts the need for any separate showing of ‘‘grossness,’’ with one possible glaring exception. The Comment states that while all of the rights set forth in the Universal Declaration and protected by the covenants are internationally protected, some are ‘‘fundamental and intrinsic to human dignity.’’²³ Abuses of those rights, if engaged in as part of a state policy and consistent pattern, may be deemed ‘‘gross’’ ipso facto. The Comment then lists a variety of such practices.²⁴ Curiously, gender discrimination is not among those listed. Consequently, it appears that a showing of gross violation is not required in order to make out a violation of customary international law with respect to, for example, freedom of movement or invasion of privacy. But practices of gender discrimination can rise to the level of customary international law violation only on a showing of gross violation.²⁵

Another difference between the rights listed in section 702(a) through (f) and the other human rights norms, even those that may, by virtue of section 702(g), rise to the level of customary international law, is that only the listed rights are said to be such basic rights as to constitute preemptory norms of international law. Hence, any agreement abridging them is void.²⁶

Section 702(g) and Comment *a* leave the status of gender and religious discrimination and the right to property as customary international law rights in a very ambiguous position. Comment *a* opines that some human rights not listed in (a) through (f) may have already achieved that status and that some others may in the future. It then refers to Comments *j*, *k*, and *l*, which deal with religious discrimination, the right to property, and gender discrimination, respectively. This causes one to wonder if perhaps these rights are included as customary international law rights after all.

Comment *j* concludes by stating that a strong case can be made that systematic religious discrimination, as a matter of state policy, is a violation of customary

22. *Id.* comment m.

23. *Id.*

24. These abuses include: systematic harassment; invasions of privacy of the home; arbitrary arrest and detention (even if not prolonged); denial of fair trial in criminal cases; grossly disproportionate punishment; denial of freedom to leave a country; denial of the right to return to one's country; mass uprooting of a country's population; denial of freedom of conscience and religion; denial of personality before the law; denial of basic privacy such as the right to marry and raise a family; and invidious racial or religious discrimination. *Id.*

25. In fairness, Comment *m* notes that the rights for which an abuse may be deemed gross include the rights listed in *supra* note 24. The Comment does not limit this more favorable treatment only to the rights listed, nor does it state that in all instances abuse of those rights automatically will be deemed gross. However, given the prominent prohibition on gender discrimination in the Universal Declaration and the covenants, as well as the concern expressed about its inclusion in the list of customary international law human rights, its omission is surprising.

26. *Id.* comment n.

international law.²⁷ In contrast Comment *k* notes that although the Universal Declaration includes the right to own and not be deprived of property, there is wide disagreement among states as to the scope and content of such a right. This disagreement weighs against inclusion of any right to property as a customary international law right.

The Restatement (Third)'s position on gender discrimination is somewhat between that on religious discrimination, which Comment *j* strongly suggests, but does not commit, exists as a customary law human right, and that on property, for which Comment *k* suggests no customary right presently exists. Comment *l* acknowledges that prohibitions on sex discrimination are provided for in the Universal Declaration and the covenants. The principal multilateral convention on sex discrimination²⁸ has been ratified by more than ninety states, and the freedom is supported in domestic law of many states. The Comment notes that there is conflicting state practice and that gender discrimination is practiced in a number of states. It concludes, nevertheless, that freedom from such discrimination in many matters may be a principle of customary law. No indication is given as to what such matters are. The status of gender discrimination, as a matter of customary law, is thus left in a state of tantalizing indefiniteness.

The articulation in section 703 of remedies available for violation of sections 701 and 702's human rights obligations is very conservative. Essentially, three types of remedies are stated. Under section 703(1) a state party to an international agreement has, as against another state party violating the agreement, any remedies provided for in the agreement, as well as those remedies generally existing for violations of international agreements. The customary international law human rights are rights *erga omnes*.²⁹ Consequently, any state, not only the state of the victim's nationality, may pursue, by reason of section 703(2), international remedies available for violations of customary international law human rights.³⁰ By reason of section 703(3), an individual victim of a violation of human rights protected by sections 701 or 702 alas has available only such remedy as is provided by the agreement protecting that right or by another international agreement.

The Achilles' heel of individual enforcement of human rights is readily apparent from this remedies section. While states, including the state of nationality, may seek redress under section 703(1) or (2), the avenues whereby an individual can seek redress are very limited.³¹ Section 703(3) states that an individual's

27. The Comment notes that religious discrimination is treated the same as racial discrimination in the U.N. Charter and the covenants as well as in the constitutions and law of many states. *Id.* comment *j*.

28. Convention on the Elimination of all Forms of Discrimination against Women, G.A. Res. 34/180, U.N. Doc. A/34/46 (1978).

29. RESTATEMENT (THIRD) § 702 comment *o*.

30. For a list of remedies, see *id.* § 703 comment *a*.

31. Certain multilateral conventions contain sophisticated procedures for review of individual petitions and determination of violations. See the right of petition in the European and

international law recourse in the event of violation of a protected human right is only that offered by some international agreement.

Section 703(3) limits individual recourse in two ways. First, it provides an individual remedy only for violations of human rights that are protected by an agreement. No individual recourse is stated for violations of customary international law human rights. Second, the only available remedy is that provided in the agreement protecting the right or in another agreement.

Perhaps the best that can be said about section 703(3)'s statement of individual remedies is that it very starkly sets out the exasperating situation confronting an individual attempting to redress a violation of internationally protected human rights. Surely the question of individual remedies for human rights abuses is one of the most frustrating aspects of human rights law.³² In its human right chapter the Restatement (Third) has effectively taken a very modest position on individual redress. Section 703(3) may be an unduly gloomy statement of available remedies,³³ and it is certainly a position not borne out in other parts of the Restatement.

In contrast, Chapter Two of the Restatement (Third) states an individual's remedies more generously. Section 711 provides that a state is responsible under international law for injury to a national of another state that is caused by an official act violating a human right that the state is obliged to respect by reason of section 701. This section incorporates much of sections 701 and 702; but breaches of section 711 constitute a separate international law violation, if the individual victim is an alien. Thus there are two layers of protection for aliens, one under Chapter One's human rights provisions and the other under Chapter Two's state responsibility provisions.³⁴

American human rights conventions. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 25; American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, art. 44.

32. See *infra* notes 37-46 and accompanying text.

33. But see *infra* notes 40-43 and accompanying text.

34. The RESTATEMENT (THIRD) § 711 requires much less intense state involvement in order for a violation to take place. Isolated acts of abuse by a state officer can constitute a violation of this human rights provision if the victim is an alien even though such conduct or neglect is not a part of, or is contrary to, state policy. See *supra* note 16 and accompanying text.

Whether or not the ambit of protection differs between §§ 703 and 711 is not clear. Assume a state officer discriminates against an alien on the basis of race or subjects an alien to cruel and inhuman treatment while incarcerated. Such conduct is not a violation of § 701 unless it is a matter of state policy, even if known by higher authorities. By § 711 that state is responsible for injury to an alien caused by an official act violating a human right that a state is obliged to respect under § 701. At first reading it appears that the state officer's conduct would violate § 711. However, there is some uncertainty as to what is the human right that the state is obliged to respect under § 711(a). Is it freedom from racial discrimination or cruel and inhuman treatment or only freedom from *state policies* of racial discrimination and cruel and inhuman conduct?

Comment *b* to § 702 states that human rights violations are only a violation of customary international law if they are practiced as state policy. It notes that a different rule exists with respect to state responsibility for injury to aliens under § 711. RESTATEMENT (THIRD) § 702 comment *b*. The

Section 713 sets out the remedies for violations of section 711. The remedies section 713 affords the state of nationality are much the same as those afforded by section 703—such remedies as are generally available between states for violations of international law. For individuals, however, the avenues of recourse under section 713 are more broadly stated than those provided in section 703. By reason of section 713(2) an alien injured by a violation of section 711 may pursue any remedy provided by (i) international agreement between the injuring state and the state of nationality (this is similar to section 703(3)), (ii) the law of the injuring state, or (iii) the law of any other state.³⁵

Chapter Two is based on the doctrine of state responsibility. That body of international law includes the notion that violations of its precepts give rise to a claim by the state of nationality against the injuring state. An international law remedy generally is not afforded the individual, other than as may be provided by international agreement. Section 713(2), however, lists several potential avenues of redress that are open to injured individuals. The discussion of these avenues of individual redress in the Comments and Reporters' Notes to section 713(2) is focused on remedies for breach of contract rights or for other economic injuries such as expropriation. The section does not discuss recourse to these avenues for violation of human rights. Nevertheless section 713(2), by its terms, clearly applies in the human rights context.

It is interesting and somewhat ironic that Chapter Two, which is based on the doctrine of state responsibility and which focuses on economic injury to alien natural and legal persons, is more generous in its statement of possible individual remedies than is the human rights chapter. Section 703, the basic human rights remedies section, is devoid of any provisions comparable to section 713(2)(b) and (c).

Subsections (b) and (c) of section 713(2) are, of course, somewhat illusory. They do not require a state to provide any redress for individuals; they merely

difficulty is that § 711(a) imposes responsibility for violation of human rights, which under § 701 a state is obliged to respect. *Id.* § 711. Section 701's inclusion of violations of customary international law of human rights in § 702 would not include the conduct mentioned because it is not engaged in as a matter of state policy.

It is probably the intent to afford broader treatment under § 711, but to do so the human rights abuses must be read apart from the requirements of a violation of customary international law.

35. Section 713 reads in its entirety as follows:

§ 713. Remedies for Injury to Nationals of Other States

(1) A state whose national has suffered injury under § 711 or § 712 has, as against the state responsible for the injury, the remedies generally available between states for violation of customary law, § 902, as well as any special remedies provided by any international agreement applicable between the two states.

(2) A person of foreign nationality injured by a violation of § 711 or § 712 may pursue any remedy provided by

- (a) international agreement between the person's state of nationality and the state responsible for the injury;
- (b) the law of the state responsible for the injury;
- (c) the law of another state; or
- (d) agreement between the person injured and the state responsible for the injury.

state that an individual may pursue any remedy provided by the law of the injuring state or the law of any other state, including, presumably, the state of nationality. The existence of any such remedy is not required.³⁶ Given the innocuousness of section 713(2)(b) and (c), it is striking that section 703 provides no parallel set of provisions.

Several U.S. cases have dealt with the issue of providing an individual remedy in instances of abuse of internationally protected human rights. These cases have reached very different conclusions. In the now famous *Filartiga v. Pena-Irala*³⁷ case the Second Circuit upheld the entertainment of jurisdiction by a federal district court over a tort claim brought by Paraguayan nationals against the Paraguayan government official alleged to have tortured to death their brother and son. The case was brought under the Alien Tort Statute,³⁸ which confers jurisdiction over civil actions brought by aliens for tortious conduct committed "in violation of the law of nations."³⁹

*Tel-Oren v. Libyan Arab Republic*⁴⁰ involved a suit by victims of a terrorist attack on an Israeli bus against the state alleged to have sponsored the attack. The Circuit Court for the District of Columbia upheld the district court's dismissal of the complaint on the grounds, among others, that the Alien Tort Statute does not cover conduct unless the customary international law principle or treaty provision on which the cause of action is based contemplates an individual remedy.⁴¹

The recent Supreme Court case of *Argentine Republic v. Amerada Hess Shipping Corp.* severely undercuts effective use of the Alien Tort Statute as a basis of subject matter jurisdiction cases brought against foreign states.⁴² In *Amerada*

36. Failure to provide a remedy called for by an international agreement referred to in § 713(2)(a) or the inadequacy of such a remedy may constitute a separate denial of justice. See RESTATEMENT (THIRD) § 713 comment i.

37. 630 F.2d 876 (2d. Cir. 1980).

38. 28 U.S.C. § 1350 (1988).

39. *Id.* On remand the district court awarded the plaintiff actual and punitive damages. *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984). Other cases upholding jurisdiction under the Alien Tort Statute in the human rights context include *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), *aff'd on reh'g*, 694 F. Supp. 707 (N.D. Cal. 1988); *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985); *Sinderman deBlake v. Republic of Argentina*, No. CV-82-1772 (C.D. Cal. Sept. 28, 1984) (LEXIS, Genfed library); *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980).

40. 517 F. Supp. 542 (D.D.C. 1981), *aff'd*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

41. Three different rationales were used to affirm the district court's ruling in *Tel-Oren*. Judge Edwards refused to extend the *Filartiga* principle to nonstate actors such as the PLO. Judge Robb disposed of the case as nonjusticiable under the political question doctrine. Judge Bork determined that the Alien Tort Statute did not create subject matter jurisdiction; but it allowed a court to take jurisdiction of the case only when the customary international law principle contemplates an individual remedy. See also *Handel v. Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985).

42. 109 S. Ct. 683 (1989).

Hess the Supreme Court held that the Foreign Sovereign Immunities Act⁴³ is the sole basis for obtaining jurisdiction over foreign states.⁴⁴

The Restatement (Third) strongly supports the proposition that customary international law is part of the law of the United States and is to be applied by our courts, state and federal, as part of federal common law.⁴⁵ Yet on this critical issue of individual recourse for violations of customary international law of human rights,⁴⁶ the Restatement (Third) has failed to take a position. The

43. 28 U.S.C. §§ 1330, 1332(a), 1391 (f), 1441(d), 1602-11 (1988).

44. The Court held that 28 U.S.C. § 1604 bars state and federal courts from exercising jurisdiction when a state is entitled to immunity under the Foreign Sovereign Immunities Act (FSIA), and § 1330 (a) confers jurisdiction when the foreign state is not entitled to immunity. 109 S. Ct. at 688.

In this case two Liberian corporations sued the Argentine Republic in federal district court to recover in tort for damages to their vessels allegedly caused by Argentine armed forces in violation of international law during the Falklands crisis. The district court dismissed the complaint for lack of subject matter jurisdiction, ruling that the suits were barred by the FSIA. *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F. Supp. 73 (S.D.N.Y. 1986). A divided panel of the Second Circuit reversed, holding that FSIA was not meant to "eliminate remedies in United States courts for violations of international law." *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 426 (2d Cir. 1987). See Note, *Amerada Hess Shipping Corp. v. Argentine Republic: Denying Sovereign Immunity to Violators of International Law*, 39 HASTINGS L.J. 1109 (1989).

The Supreme Court opinion does not involve human rights. However, it effectively precludes suits against foreign states based on the Alien Tort Statute unless the conduct fits within one of the exceptions to immunity set forth in the FSIA. Conduct constituting an abuse of human rights, with the possible exception of deprivation of property, does not readily fit within the exceptions to immunity contained in the FSIA. 28 U.S.C. § 1605 (1988).

For an argument that the FSIA does not preclude suits against foreign states in human rights cases, see Paust, *Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights: Non-immunity for Violations of International Law under the FSIA*, 8 HOUS. J. INT'L L. 49 (1985) and the numerous authorities cited therein. See also Belsky, Merva & Roht-Arriaza, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CALIF. L. REV. 365 (1989).

Filartiga was a suit brought by the sister and father of a man tortured to death in Paraguay against a Paraguayan citizen, the former Inspector General of Police in Asuncion, Paraguay. The state of Paraguay was not a defendant in the case, and the state of Paraguay was found not to have ratified the defendant's conduct. *Filartiga*, 577 F. Supp. at 862; see also *Filartiga*, 630 F.2d at 889. Whether the Supreme Court opinion in *Amerada Hess* means that a court could not entertain jurisdiction in a case like *Filartiga* is less clear. The issue is whether individuals are entitled to protection under the FSIA. Individuals are not within the definition of a "foreign state" or its "agencies or instrumentalities" for purposes of the FSIA. 28 U.S.C. § 1603 (1988). There appears to be little case law on the issue of derivative immunity for individuals. When the suit against the person is really a suit against the state, immunity has been told to exist. *Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986). See generally J. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* (1988) and in particular § 1.8 thereof. If the suit is really against the individual, especially when the individual is acting beyond his or her authority, immunity may not attach. *Id.* If immunity under the FSIA does not attach, the opinion in *Amerada Hess* is not controlling, and it might be possible for the suit to proceed under the Alien Tort Statute.

45. RESTATEMENT (THIRD) introductory note to pt. I, ch. 2; *id.* § 111. At "federal common law" such principles are supreme over state law and are superseded only by a federal statute or treaty provision. See, Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

46. See generally R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* (1964); Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J.

Reporters' Notes to section 703 discuss the *Filartiga* and *Tel-Oren* cases, but express no opinion on the issue.⁴⁷

The omission from section 703 of provisions similar to section 713(2)(b) and (c) is all the more surprising because the Restatement (Third) does not take the position that such recourse in human rights cases is not available or is inappropriate. Quite the contrary. At the end of the Restatement (Third) is a chapter dealing with remedies generally. There, in section 906,⁴⁸ is a provision very similar to section 713. Section 906 permits a person injured by a state's violation of an international obligation to bring a claim against the injuring state in the courts or tribunals of that state or in the courts or tribunals of either the state of nationality or a third state. Like section 713(2)(b) and (c) this section does not require an effective domestic law remedy. It also circumscribes any such remedy by the limitations of international law, such as sovereign immunity⁴⁹ or appropriate jurisdictional basis.

The Restatement (Third) thus acknowledges the possibility of individual enforcement of human rights claims in both sections 713 and 906. A reference to section 906 is even made in Comment *c* to section 703. The omission from section 703 of provisions like those in section 713(2)(b) and (c) means that section 703 understates the avenues of possible individual recourse in the human rights context.

Despite these concerns regarding unstated customary international law human rights in section 702 and the status of individual remedies in section 703, the Restatement (Third)'s set of human rights provisions is a most welcome addition to human rights law. The chapter does not break new ground and is probably very traditional. Yet its inclusion as a separate chapter on a par with the treatment given the classic doctrine of state responsibility is a significant statement about the importance of this subject in the latter part of the twentieth century.

INT'L L. 461 (1989); Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9 (1970); Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332 (1988); Paust, *On Human Rights: The Use of Human Rights Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543 (1989); Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231 (1975); Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349 (1988); Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988); Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986); Note, *Enforcing Customary International Law of Human Rights in Federal Court*, 74 CALIF. L. REV. 127 (1986); Note, *Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and the Separation of Powers*, 74 GEO. L.J. 163 (1985).

47. See RESTATEMENT (THIRD) § 703 reporters' note 7.

48. § 906. **Private Remedies for Violation of International Law**

- A private person, whether natural or juridical, injured by a violation of international obligation by a state, may bring a claim against that state or assert that violation as a defense
- (a) in a competent international forum when the state has consented to the jurisdiction of the forum with respect to such private claims;
 - (b) in a court or other tribunal of that state pursuant to its law; or
 - (c) in a court or other tribunal of the injured person's state of nationality or of a third state, pursuant to the law of such state, subject to limitations under international law.

49. See *supra* notes 42–44 and accompanying text.