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The Convergence of the Law of State Responsibility for Injury to Aliens and International Human Rights Norms in the Revised Restatement

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The now celebrated (infamous to some) section 711 of the Restatement of Foreign Relations Law of the United States (Revised)¹ ("Revised Restatement") is meant to replace the allegedly dated and obtuse black-letter content² of sections 178 through 183 of the Restatement (Second) of Foreign Relations Law of the

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1. Restatement of Foreign Relations Law of the United States (Revised) (Tent. Draft No. 5, 1984). The section addressed in this Article is found in Tentative Draft No. 3 of the Revised Restatement. Restatement of Foreign Relations Law of the United States (Revised) § 711 (Tent. Draft No. 3, 1983) [hereinafter cited as Restatement (Revised)].

2. 59 A.L.I. Proc. 243 (1982) (comment by Professor Henkin) [hereinafter cited as A.L.I. Proceedings]. "[W]e have here . . . minimized the use of black letter. We find that black letter is the Institute shouting. It does not say very subtle things. On Comment we can converse, and the Reporters whisper down in the Notes. The experience with the black letter in the first Restatement was really not encouraging. . . ." Id. See also *infra* notes 83-86 and accompanying text.

United States³ ("Second Restatement") with more contemporary, subtle, and economical provisions.⁴ The proponents of section 711, namely, Professor Henkin, the Chief Reporter for the new Restatement, and Professor Wechsler, formerly the Director of the American Law Institute, assert that the considerably reduced substance of the proposed section evidences nothing more than a stylistic change which is in keeping with the new drafting format for the entire Restatement.⁵ In fact, they contend that the mere passage of time and the concomitant academic need to update the Restatement with current developments were the principal motives for the "cosmetic" surgery.⁶ According to the Reporters' notes, "[t]his section [§ 711] and §§ 712-13 condense §§ 178-96 of the previous Restatement, but do not differ from them in substance in any major respect."⁷ Also, Professor Wechsler states in the foreword to Tentative Draft No. 3 of the Revised Restatement that "[t]he formulations addressed to injury to nationals of other states . . . greatly compress the treatment in Part IV of the original [Restatement] but propose no major change of substance. The apprehensions some have expressed upon that score are quite unfounded, in my view."⁸

3. Restatement (Second) of Foreign Relations Law of the United States (1965) [hereinafter cited as Restatement (Second)].

4. See A.L.I. Proceedings, *supra* note 2, at 227.

5. See *id.*

6. See *id.* Professor Henkin states that:

This part looks quite different from the treatment of the subject in the previous Restatement for a number of reasons. One is that we have condensed many parts, including this one, in recognition of the fact that we have expanded very widely in other respects. Secondly, the coming of human rights has had impact also on the law of treatment of aliens, and we reflect that in Section 711. Thirdly, we have tried to follow in this the same pattern we followed . . . [in drafts 1, 2, and the rest of 3] . . . of fairly stark and lean black letter and fuller Comments and still fuller Reporters' Notes. So I think I can state for the Reporters—and I was glad to see that the Director in his Introduction agreed with us and made the point—that the changes in this law, while they make it look different, have not been of substance. (I am quoting from viii, Professor Wechsler's Foreword [in Tentative Draft No. 3]). We are satisfied that we propose no major change of substance. The distribution between black letter and Comment and Reporters' Notes is partly a matter of taste and style. It may be partly also a recognition that some things are not as readily put in black letter when the situation in international law is so different from what it was twenty-five years ago.

Id. at 227.

7. Restatement (Revised), *supra* note 1, § 711 Reporters' note 9.

8. Restatement (Revised), *supra* note 1, at viii.

This Article briefly assesses the significance of these disclaimers against the unmistakable "new look" of section 711. Even upon initial perusal, the divergence in content and presentation between the existing provisions and the recommended formulation of the law of state responsibility for injury to aliens ("S.R.I.A.") is so striking that it is difficult to find any common ground in which to anchor an attempt at meaningful comparison. For example, in regard to the elaboration of formal rules, the content of proposed section 711 represents only about a quarter of the express provisions contained in the Second Restatement.⁹ Moreover, it eliminates virtually all of the accepted concepts, definitions, and consecrated formulae which applied in state responsibility practice, replacing them with more abstract and less specific human rights language, thereby robbing the law of S.R.I.A. of its established framework and predictability. In real as well as proverbial terms, apples and oranges do differ, and—no matter how adept the arguments to the contrary—can rarely be successfully compared or assimilated to one another. In effect, the Reporters' disclaimers notwithstanding, the allegedly innocent drafting modifications introduced in section 711 appear to have resulted in a dramatic change in the format, presentation, and most importantly, in the

9. On the Second Restatement, see generally Fisher, *Foreign Relations Law of the United States: A Preface*, 41 N.Y.U. L. Rev. 2 (1966); Garretson, *The Immunities of Representatives of Foreign States*, 41 N.Y.U. L. Rev. 67 (1966); Lissitzyn, *The Law of International Agreements in the Restatement*, 41 N.Y.U. L. Rev. 96 (1966); Meeker, *Recognition and the Restatement*, 41 N.Y.U. L. Rev. 83 (1966); Metzger, *The Restatement of the Foreign Relations Law of the United States: Bases and Conflicts of Jurisdiction*, 41 N.Y.U. L. Rev. 7 (1966); Murphy, *State Responsibility for Injuries to Aliens*, 41 N.Y.U. L. Rev. 125 (1966); Oliver, *The American Law Institute's Draft Restatement of the Foreign Relations Law of the United States*, 55 Am. J. Int'l L. 428 (1961); Pugh & McLaughlin, *Jurisdictional Immunities of Foreign States*, 41 N.Y.U. L. Rev. 25 (1966); Rosenne, *Interpretation of Treaties in the Restatement and the International Law Commission's Draft Articles: A Comparison*, 5 Colum. J. Transnat'l L. 205 (1966); Sweeney, *The Restatement of the Foreign Relations Law of the United States and the Responsibility of States for Injuries to Aliens*, 16 Syracuse L. Rev. 762 (1965); Almond, *Book Review*, 53 A.B.A. J. 355 (1967); Briggs, *Book Review*, 61 Am. J. Int'l L. 213 (1967).

On the Revised Restatement, see Baxter, *A New Restatement of the Foreign Relations Law of the United States*, 72 Am. J. Int'l L. 875 (1978); Goldklang, *Customary International Law and U.S. Laws*, Int'l Prac. Notebook, Apr. 1983, at 16-17; Henkin, *Restatement of the Foreign Relations Law of the United States (Revised)*, 74 Am. J. Int'l L. 954 (1980); Henkin, *Restatement of the Foreign Relations Law of the United States (Revised): Tentative Draft No. 2*, 75 Am. J. Int'l L. 987 (1981); Henkin, *Restatement of the Foreign Relations Law of the United States (Revised): Tentative Draft No. 3*, 76 Am. J. Int'l L. 653 (1982); Murphy, *Customary International Law in U.S. Jurisprudence*, Int'l Prac. Notebook, Oct. 1982, at 17-18.

sources of the law of S.R.I.A. Given the radical character of these modifications, it is difficult to see how they can avoid having substantive implications.

The rationale for the reorientation in approach and substance seems to be both clear and sensible. The Reporters were seeking to cast the rules relating to the protection of aliens in a more contemporary form by merging the traditional law of S.R.I.A. with the more recently elaborated, and still evolving, international human rights law.¹⁰ Their objective was to achieve an amalgam of legal principles under which each legal doctrine would conserve its substantive integrity while being merged in a new synthetic set of concepts. In some respects, this goal was foreshadowed by the work of García-Amador who, as the International Law Commission's Special Rapporteur on State Responsibility from 1955 to 1961, sought to attenuate the conflict between the international minimum standard and the national treatment doctrine (and thereby achieve a wider acceptance of S.R.I.A.) by couching the former in language reflecting contemporary international human rights norms.¹¹ Moreover, other scholars, both prior to and following García-Amador's efforts, advocated such cross-fertilization.¹²

Assuming that this analysis accurately characterizes the Reporters' aim, and that such aim is perceived as an acceptable goal, the critical question becomes whether the infusion of human rights language into the proposed language of section 711 constitutes a successful synthesis of the old law with the new. Stated differently but more pointedly, does the purported human rights gloss, in effect, subsume entirely the law of S.R.I.A. and undermine its status as a corpus of well-settled principles of customary international

10. As stated by the Reporters:

Part VII, Protection of Persons (Natural and Juridical), looks substantially different from the treatment of those matters in the previous Restatement. It includes the international law of Human Rights, which has developed considerably in the past decades and has influenced the traditional law of state responsibility for injury to aliens. That law, especially as it relates to economic injury, is in some disarray but this draft does not differ from the previous Restatement in major respects on substantive issues (although the subject is presented differently and treated in briefer compass, in accordance with the over-all plan of the revised Restatement).

Restatement (Revised), *supra* note 1, at xxiv.

11. See Lillich, *The Current Status of the Law of State Responsibility for Injuries to Aliens*, in *International Law of State Responsibility for Injuries to Aliens* 1, 17 (R. Lillich ed. 1983).

12. See *infra* notes 26-29 and accompanying text.

law? As one distinguished scholar has cogently noted, “[t]o argue that a limited but nevertheless relatively effective regime governing aliens should be scrapped for an unrealized ideal one covering all persons hardly seems consistent with a genuine concern for the promotion and protection of human rights.”¹³

It is the thesis of this Article that the proposed content of section 711 fails to mediate properly between the convergent developments and to create a new set of juridical principles in a synthesis which preserves each development’s own specificity and allows the law of S.R.I.A. to gain greater contemporary currency in the world community. The incorporation of human rights language is unfortunate because it is largely uncontrolled; it so collapses the recognized rules of S.R.I.A. that nearly no guidance is now available, for example, on what constitutes a “denial of justice.” No matter how acceptable the theoretical objective, there is a clear need for a better (in the sense of more balanced) accommodation of the two developments—an accommodation, in effect, which would allow the law of S.R.I.A. to conserve some measure of substantive autonomy.

I. THE CONVERGENT DOCTRINES

A. *The Law of International Human Rights*

The concept of human rights¹⁴ has longstanding general antecedents, dating back to the Code of Hammurabi, running through Greek philosophy, Roman Law, as well as the Judeo-Christian tradition, and resurfacing in the humanism of the Reformation, the Enlightenment, and in the liberal democratic tradition of Western Europe.¹⁵ The French Declaration of the Rights of Man and the Citizen of 1789 represents an early European codification; human rights principles guided the First Continental Congress to the Declaration of Rights of October 14, 1774; finally, and perhaps most significantly, the U.S. Bill of Rights unequivocally advocates the protection of the individual against the state.¹⁶

Prior to the Second World War and the advent of the United

13. See Lillich, *supra* note 11, at 9.

14. See A. Gewirth, *Human Rights* 1-4 (1982); Henkin, *Rights: Here and There*, 81 *Colum. L. Rev.* 1582 (1981).

15. A. Robertson, *Human Rights in the World* 3, 8 (2d ed. 1982).

16. See *id.* at 4, 6-7; see also McKay, *What Next?*, in *Human Dignity* 65, 65-66 (L. Henkin ed. 1979); Wyzanski, *The Philosophical Background of the Doctrines of Human Rights*, in *Human Dignity* 9, 9-13 (L. Henkin ed. 1979).

Nations, the view that human rights consisted of a relationship between an individual and a state impeded the emergence of an international body of human rights law.¹⁷ Since states and inter-state conduct were the only proper subjects of international law, a relationship implicating a private person was not envisaged as part of traditional international law.¹⁸ For example, the rule of national sovereignty dictated that, except in a situation of humanitarian intervention, the way in which a state treated its own nationals was solely within that state's jurisdiction.

In the aftermath of the Second World War, under the U.N. Charter, the concept of international human rights achieved a more solid footing in terms of legal doctrine.¹⁹ The very existence of the United Nations and its subsequent work began eroding the hegemony of the national sovereignty rule.²⁰ The U.N. Charter, for instance, reflects an international consensus on the protection of certain core rights against violative conduct, namely, "genocide, mass killings, torture, and severe cases of racial discrimination."²¹ The gravamen of the Charter is to offer protection against "gross violations of human rights."²² Also, under article 56 of the Charter, states are obligated to protect human rights.²³

The work of the United Nations ultimately led to a general acknowledgement of international human rights in the form of international treaties and conventions. By the late 1970's, the vast majority of states had recognized the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights,

17. See Humphrey, *The International Law of Human Rights in the Middle Twentieth Century*, in R. Lillich & F. Newman, *International Human Rights: Problems of Law and Policy* 1 (1979).

18. See A. Robertson, *supra* note 15, at 2 ("[T]he 'so-called rights of man' not only do not, but cannot enjoy any protection under international law, because that law is concerned solely with relations between States and it cannot confer rights on individuals."); Starke, *Human Rights and International Law*, in *Human Rights* 113 (E. Kamenka & A. Tay eds. 1978). "The classical expression of the doctrine is that a State is responsible to another State for internationally wrongful conduct only when such conduct is attributed to the State itself." Christenson, *The Doctrine of Attribution in State Responsibility*, in *International Law of State Responsibility for Injuries to Aliens* 321, 347 n.4 (R. Lillich ed. 1983).

19. See D'Amato, *The Concept of Human Rights in International Law*, 82 *Colum. L. Rev.* 1110, 1110 (1982). See generally M. McDougal, H. Lasswell & L. Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (1980).

20. See A. Robertson, *supra* note 15, at 24-35.

21. McKay, *supra* note 16, at 67.

22. See *id.*

23. U.N. Charter art. 56; see Schachter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 *Vand. L. Rev.* 643, 646-53 (1951).

the International Covenant on Economic, Social, and Cultural Rights, and the Optional Protocol Relating to Implementation of the Covenant on Civil and Political Rights—known together as the “International Bill of Rights.”²⁴ Regional action, most notably the European Convention on Human Rights, accompanied the U.N. activity. The European Convention, which was ratified by all members of the Council of Europe except Liechtenstein, protects nineteen separate rights; its objective is to promote the political rights contained in the Universal Declaration.²⁵

These developments illustrate that human rights considerations have become a significant factor in the mind of the international community and are having an important impact upon world public opinion. Indeed, the emerging law of international human rights has become the linchpin concept in the international protection of the individual against state interference. Despite the greater specificity and deeper historical basis of the law of S.R.I.A., the parallel between it and international human rights is striking. Their similarity of purpose—providing essential guarantees to persons against improper state action—probably incited the Reporters of section 711 to consider synthesizing the two developments.

It should be underscored that this idea and approach, despite the paucity of contemporary attention it has received and García-Amador’s unsuccessful earlier attempt to implement it, had been espoused by a number of prominent commentators prior to the revision of the Restatement. For example, in 1951, the late Professor

24. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948); International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966); International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966). See M. McDougal, H. Lasswell & L. Chen, *supra* note 19, at 179-80; J. Sweeney, C. Oliver & N. Leech, *The International Legal System* 592-93 (1981). See generally Buergenthal, *Codification and Implementation of International Human Rights*, in *Human Dignity* 16 (L. Henkin ed. 1979).

25. European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 211 (entered into force Sept. 3, 1953). See F. Jacobs, *The European Convention on Human Rights* (1975); Robertson, *supra* note 15, at 80-82. See generally C. Morrisson, Jr., *The Dynamics of Development in the European Human Rights Convention System* (1981); Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, in *The European Convention on Human Rights* 1 (Brit. Inst. Int’l & Comp. L., Int’l L. Ser. No. 5, 1965); cf. American Convention on Human Rights, opened for signature Nov. 22, 1969, O.A.S. T.S. No. 36, reprinted in *Inter-American Commission on Human Rights, Handbook of Existing Rules Pertaining to Human Rights*, O.A.S. Doc. OEA/Ser.L/V/II.50, doc. 6, at 27 (1980).

Fenwick asserted that the international minimum standard applying to the protection of aliens "now finds expression in the Universal Declaration of Human Rights."²⁶ Professor McDougal, like other writers,²⁷ asserted that "contemporary human rights prescriptions . . . would indeed appear, however these prescriptions may ultimately be synthesized with the older doctrine of State responsibility, to have importantly increased the transnational protection that world constitutive process affords aliens."²⁸ Professor McDougal then concluded that the human rights movement awards aliens and nationals the same protection, thus raising the international standard for all people.²⁹

B. *The Law of S.R.I.A.*

The law of state responsibility for injury to aliens protects individuals living in another country by assessing liability upon that country for harm done to them.³⁰ It developed from a "body of principles which, through being repeatedly invoked diplomatically and by international commissions during the nineteenth century, gradually hardened into a set of rules. . . ."³¹ As early as 1758, Vattel called for the elaboration of a set of legal principles (in the form of diplomatic protection) designed to afford protection to

26. Fenwick, *The Progress of International Law During the Past Forty Years*, 79 *Recueil des Cours* (Hague Academy of International Law) 1, 44 (1951), cited in Lillich, *Duties of States Regarding the Civil Rights of Aliens*, 161 *Recueil des Cours* (Hague Academy of International Law) 329, 391 (1978) [hereinafter cited as Lillich, *Hague Lectures*].

27. See Lillich, *Hague Lectures*, supra note 26, at 391 n.394 (listing, *inter alia*, Amerasinghe, Brownlie, Humphrey, Jennings, Moseler, McDougal, Murphy, and Waldock).

28. McDougal, Lasswell & Chen, *The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 *Am. J. Int'l L.* 432, 456 (1976), cited in Lillich, *Hague Lectures*, supra note 26, at 393.

29. [T]he principle thrust of the contemporary human rights movement is to award nationals the same protection formerly accorded only to aliens, while at the same time raising the standard of protection for all human beings, nationals as well as aliens, far beyond the minimum standard developed under the earlier customary law. . . . The consequence is thus, as Dr. Garcia-Amador insisted, that continuing debate about doctrines of the minimum international standard and equality of treatment has now become highly artificial; an international standard is now authoritatively prescribed for all human beings.

McDougal, Lasswell & Chen, supra note 28, at 464.

30. See Bishop, *Foreword*, in *International Law of State Responsibility for Injuries to Aliens* x (R. Lillich ed. 1983); Christenson, supra note 18, at 347 n.4; M. McDougal, H. Lasswell & L. Chen, supra note 19, at 181; Root, *The Basis of Protection to Citizens Residing Abroad*, 4 *Am. J. Int'l L.* 517 (1910). For a discussion of the historical background of S.R.I.A., see Lillich, *Hague Lectures*, supra note 26, at 343-56.

31. Lillich, supra note 11, at 2-3.

aliens.³² In fact, with hindsight, one can ascertain that, during the period in which the rule of national sovereignty applied and international human rights had not yet been recognized, the law of S.R.I.A. served as a critical source of protection for aliens as individuals.³³ The rules that were articulated progressively, defining a standard of conduct meant to embody an enlightened view of justice,³⁴ satisfied the need to provide transnational protection of individual rights by defining an international minimum standard of treatment for aliens.³⁵ According to Professor Lillich:

The substitution of diplomatic protection for private reprisals and the elaboration of norms governing the Responsibility of States for Injuries to Aliens that not only embraced but went well beyond the older denial of justice concept constituted a significant step forward by the international community. Indeed, most of the rules generated by this process . . . were accepted as and remain today good international law—those rules, for instance, governing the eligibility of claimants, the attribution of responsibility and the measure of damages.³⁶

Confiscatory policies and ensuing wealth deprivation claims, however, blurred the consensus and brought revisionist opposition, especially from Latin American countries. There, the law of S.R.I.A. was perceived as a smoke screen for the promotion of Western imperialist interests, especially in the property area.³⁷ Emphasizing the absolute prerogatives stemming from state sover-

32. See M. McDougal, H. Lasswell & L. Chen, *supra* note 19, at 746. Vattel stated: whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed, and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.

Id. (quoting Vattel, *Classics of International Law: The Law of Nations or the Principles of Natural Law* 136 (C. Fenwick trans. 1916)).

33. See M. McDougal, H. Lasswell & L. Chen, *supra* note 19, at 181.

34. See Lillich, *supra* note 11, at 3.

35. See M. McDougal, H. Lasswell & L. Chen, *supra* note 19, at 181.

36. Lillich, *Hague Lectures*, *supra* note 26, at 347.

37. See Lillich, *supra* note 11, at 2-4. According to Dr. Castañeda, "[t]he doctrine of responsibility of states . . . was merely the legal garb that served to cloak and protect the imperialistic interests of the international oligarchy during the nineteenth century and the first part of the twentieth." *Id.* at 2 (quoting Castañeda, *The Underdeveloped Nations and the Development of International Law*, 15 *Int'l Org.* 38, 39 (1961)). See also Lillich, *Hague Lectures*, *supra* note 26, at 347-50; Lillich, *The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack*, 69 *Am. J. Int'l L.* 359 (1975).

eignty, the Calvo Doctrine argued for the exclusivity of local remedies and advocated that the national treatment doctrine supplant the international minimum standard as the applicable rule.³⁸ The substantive differences between the two standards appear irreconcilable: the national treatment doctrine eliminates international accountability of the state for injuries to aliens.³⁹ It is "a scheme of non-responsibility" under which the States would be immune from the claims of the international legal order."⁴⁰ In effect, since an alien is not afforded a higher standard of treatment than a national, the doctrine serves to protect the state from the alien rather than the contrary.⁴¹ In contradistinction, the international minimum standard provides, as a corollary claim to the state sovereignty rule, that the practice of civilized nations posits a standard of basic treatment for aliens which applies regardless of how a state may treat its own nationals.

The controversy generated by these competing interpretations of the law of S.R.I.A. quite evidently imperiled the international status and viability of the traditional alien protection rules. Ultimately, due to the body of normative rules that had evolved in the area, the debate was premised upon larger grounds epitomizing the fundamental conflict, namely, the rift between the actors in the North-South axis and the view that an "inequality of strength" amounted per force to an "inequality of rights."⁴² The obvious in-

38. See Lillich, *supra* note 11, at 4; M. McDougal, H. Lasswell & L. Chen, *supra* note 19, at 751. See generally C. Calvo, *Le Droit International Théorique et Pratique* (5th ed. 1896); F. Dawson & I. Head, *International Law, National Tribunals and the Rights of Aliens 15-19* (1971); D. Shea, *The Calvo Clause* (1955); Hershey, *The Calvo and Drago Doctrines*, 1 *Am. J. Int'l L.* 26 (1907).

39. See A. Roth, *The Minimum Standard of International Law Applied to Aliens* 117 (1949).

40. Lillich, *supra* note 11, at 5 (citing Goebel, *The International Responsibility for Injuries Sustained by Aliens on Account of Mob Violence, Insurrections, and Civil Wars*, 8 *Am. J. Int'l L.* 802, 831 (1914)). According to Professor Lillich, "the national treatment doctrine as advanced by the Latin American States became essentially a protective shield against potential international responsibility for the maltreatment of aliens." Lillich, *Hague Lectures*, *supra* note 26, at 350.

41. A. Roth, *supra* note 39, at 117; see M. McDougal, H. Lasswell & L. Chen, *supra* note 19, at 752. See generally A. Freeman, *The International Responsibility of States for Denial of Justice* 456-61 (1938); Lissitzyn, *The Meaning of the Term Denial of Justice in International Law*, 30 *Am. J. Int'l L.* 632 (1936).

42. See M. McDougal, H. Lasswell & L. Chen, *supra* note 19, at 760. See generally Brower & Tepe, *The Character of Economic Rights and Duties of States: A Reflection or Rejection of International Law?*, 9 *Int'l Law.* 295 (1975); White, *A New International Economic Order?*, 16 *Va. J. Int'l L.* 323 (1976).

tersection between the law of S.R.I.A. and the emerging international human rights norms fostered the view that the ostensibly more universal human rights principles should be adopted as the standard by which to establish the international protection of the individual, whether the individual was perceived as a foreign national or, more generally, as a human being.⁴³

Despite the fact that human rights norms had not been formally acknowledged by all states, the International Law Commission (I.L.C.), through the work of García-Amador as Special Rapporteur,⁴⁴ attempted to eliminate the opposition between the advocates of the national treatment doctrine and the proponents of the international minimum standard "by treating both theories as having been superseded by the new international human rights norms that had emerged since World War II."⁴⁵ The adversaries of such an approach, however, prevailed; many countries were reluctant to accept García-Amador's proposal to include a non-exhaustive list of fundamental human rights in the codification of the law of state responsibility. In fact, his commission expired without any action being taken on his proposals.⁴⁶ As Professor Lillich contends, the lack of support given to García-Amador's efforts stems from the fact

that he was not so much "bridging the gap" between the international minimum standard and the national treatment doctrine as he was adopting the former and then progressively developing it by vouching in contemporary international human rights norms. The "noble synthesis" being advanced, in short, was not really the one articulated by the Special Rapporteur but instead one between the traditional law governing the treatment of aliens (subsumed under the rubric of the international minimum standard) and the newly emerging international law of human rights.⁴⁷

It appears that the text of section 711 attempts to renew these ef-

43. See Lillich, *supra* note 11, at 9.

44. See *id.* at 17.

45. *Id.* See Lillich, *Hague Lectures*, *supra* note 26, at 373-79. See also Ago, *First Report on State Responsibility*, U.N. Doc. A/CN.4/217 & Add.1 (1969), reprinted in [1969] 2 Y.B. Int'l L. Comm'n 125, 127, 133, U.N. Doc. A/CN.4/SER.A/1969/Add.1.

46. See M. McDougal, H. Lasswell & L. Chen, *supra* note 19, at 763.

47. Lillich, *supra* note 11, at 18-19 (citations omitted).

forts and to function as a more fertile breeding ground by which to achieve a synthesis of the two developments in international law.

II. RESTATEMENT NEUTRALITY: A QUERY

In terms of its sources and objectives, the Restatement is neither a code (in the civil law sense of that word) nor a statute. It represents the private efforts of distinguished American jurists, specialists in the field, to fulfill the neutral mandate of "stat[ing] and clarify[ing] existing law, international and domestic,"⁴⁸ essentially to prophesy what an international tribunal would do were it faced with the issue under consideration.⁴⁹ The Restatement is the product of "[t]he American Law Institute, a private body in the United States dedicated to the clarification and improvement of the law;" it "has no official standing as a statement of the position of the United States;" "[n]or does it propose rules of law for adoption."⁵⁰ Its influential stature stems from the considerable scholarly and professional prestige of the members of the Institute. By way of rough comparison, the Restatement, although presented in codified form rather than in the usual scholarly analytic medium, could be viewed, systematically and substantively, as generally similar to the work of *la doctrine* in the French legal system.

In an age in which there is mounting concern about the extraterritorial application of domestic concepts of legality, and in which the North-South rift is widening and becoming increasingly conspicuous, the domestic origin of the Restatement, as well as its unofficial standing and elaboration in an advanced Western country, could limit its effectiveness as a statement of international law. Especially in the area of the law of S.R.I.A., the differing cultural, juridical, ideological, and moral assumptions between developed and developing states can be, and as previously noted, are, acute.

Mindful of these difficulties and potential limitations, the Reporters of the Restatement (Second) of Foreign Relations Law emphasized their neutral objective "to state and clarify" the U.S. law in this area, while acknowledging that the law in question was not

48. Restatement (Second), *supra* note 3, at xi.

49. *Id.* at xii. "Thus the Restatement of this Subject, in stating rules of international law, represents the opinion of The American Law Institute as to the rules that an international tribunal would apply if charged with deciding a controversy in accordance with international law." *Id.*

50. *Id.* at xi.

merely domestic:

The Foreign Relations Law of the United States includes portions of international law, as that term is used to describe the legal aspects of relations between nations, and that part of the domestic law of the United States that is involved in the conduct of the foreign relations of the United States, including constitutional law and some portions of conflict of laws.⁵¹

While the foregoing statement allays some of the concern and, to some extent, renders transparent the objective of predicting how an international tribunal such as the International Court of Justice would reason and rule when confronted with a particular question, its taxonomic orientation minimizes the true difficulties and leaves essential problems unresolved. It is one thing to state that the U.S. Executive and Senate share responsibility in the area of treaties. It is quite another thing, however, to deal, for example, with the controversial issue of defining the role of domestic courts in articulating international law norms or applying public policy provisions of domestic statutes in international cases. The very statement of domestic policies, or even a framing of the issues in national legal terminology, could generate conflict and misunderstanding in the international community and undermine the credibility of the prophesizing document.

More particularly, in attempting "to state and clarify existing law, international and domestic," must the Restatement provisions envisage rules exclusively from a domestic perspective, stating the U.S. position with the view of having it forge a consensus position in the international community? Or should the Restatement articulate rules which are broadly acknowledged and accepted among states, thereby guiding national U.S. policies toward an alignment with an existing international consensus? Should the provisions be stated in broad language which promotes agreement or be articulated in terms of specific and detailed national concerns and preoccupations? In a word, is the Restatement intended to acquiesce in developments in the international community, or is it intended to mold emerging trends in the light of perceived U.S. interests and values?

Given the context in which the Restatement is destined to oper-

51. Id.

ate, it is difficult to see how even the most studied effort can maintain full neutrality. It is even more difficult to see how a radical change in methodology and terminology cannot but have an impact upon the basic orientation of the document and its substantive content or represent some veering of position on an essential and delicate question.

III. AN ASSESSMENT OF THE SECOND RESTATEMENT PROVISIONS

At first blush, sections 178 through 183 of the Second Restatement, when referring to an international standard of justice,⁵² appear to define and discuss that standard in terms of concepts that are characteristic of U.S. legal analysis. For example, the calculus that is devised to assess the international legality of, and liability for, state conduct which causes injury to aliens is addressed in part in terms of a "denial of procedural justice"⁵³ (as well as by reference to circumstances involving a taking without compensation⁵⁴). Also, the elements of a cause of action, stated in some detail in a black-letter format,⁵⁵ appear to be formulated in terms of U.S. constitutional due process concerns. In light of these features of the black-letter provisions, one wonders whether the rules, grounded as they appear to be in the specificity of a particular national legal tradition, are expressive of a truly international standard. The concept of procedural justice, it could be argued, is inextricably tied to the common law tradition that espouses and consecrates the view that there can be "no rights without remedies." When seen in the light of the systemic, ideological, and economic tensions that plague the contemporary world community, the Second Restatement's ostensible American bent and cachet might breed accusations of cultural and ideological imperialism, and lessen considerably its viability as a document stating gener-

52. For example, section 178 of the Second Restatement provides:

As used in the Restatement of this Subject, "denial of procedural justice" means conduct, attributable to a state and causing injury to an alien, that departs from the *international standard of justice* specified in § 165 with respect to the procedure followed in enforcement of the state's law as it affects the alien in criminal, civil, or administrative proceedings, including the determination of his rights against, or obligations to, other persons.

Id. § 178 (emphasis added). See also id. § 179 (cause for justifying arrest under the "international standard of justice").

53. Id. § 178.

54. Id. § 180 comment c, illustration 1.

55. See id. §§ 179 (arrest and detention procedures), 183 (protection from private injury).

ally recognized rules and accepted principles of international law.

However, upon further scrutiny, the references and discussion in the Second Restatement's comments and Reporters' notes indicate that, while some of the phrasing and terminology of the black-letter provisions may appear to be particularly American, their substance reflects a much broader consensus (in theory if not in practice) as to applicable principles. Despite procedural differences among civil law, common law, and soviet-socialist legal systems, sections 178 through 183 of the Second Restatement elaborate principles of adjudicatory justice which have attained an agreed-upon customary status among the community of nations and to which all states at least pay lip service. The references used to corroborate the existence of these principles include: international arbitral decisions,⁵⁶ various bilateral and multilateral agreements,⁵⁷ domestic constitutions of states,⁵⁸ the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms,⁵⁹ and the U.N. Universal Declaration of Human Rights.⁶⁰

There appears to be wide international agreement, not localized exclusively in the developed West, but including Latin American countries and soviet-socialist states, that, in principle, it would be wrong to deny aliens the rights provided for in the Second Restatement. To some extent, the European Convention and the subsequent American Convention on Human Rights (the 1969 Pact of San José, Costa Rica)⁶¹ go beyond the provisions of the American due process view and are, in fact, more liberal and supportive of the procedural rights of human beings against state encroachment. In this sense, the provisions contained in the Second Restatement perhaps represent a statement of the early development of human rights law. In regard to the Revised Restatement, the critical question becomes one of how to pursue and refine this convergence of doctrine.

56. See *id.* § 179 Reporters' notes 1-5 (discussing international arbitral decisions involving denial of procedural justice); *id.* § 182 Reporters' note 1 (unjust determinations); *id.* § 183 Reporters' note (failure to provide protection from private injury).

57. See *id.* § 179 Reporters' notes 1, 2 (citing bilateral and multilateral agreements providing for preliminary hearings and information as to charges); *id.* § 180 Reporters' note (citing bilateral agreements providing for alien access to courts).

58. See *id.* § 179 Reporters' note 2 (citing constitutions of Albania, Brazil, Costa Rica, and Czechoslovakia, providing for preliminary hearings).

59. See *id.* § 179 Reporters' note 1; *id.* § 180 Reporters' note.

60. See *id.* § 180 Reporters' note.

61. See *supra* note 25.

IV. THE NEED FOR A CONTEMPORARY RECONSIDERATION

In the Reporters' view, growing interest in the acceptance of international human rights law appears to account principally for the "cosmetic" changes in the law of S.R.I.A. proposed in section 711 of the Revised Restatement. According to the Reporters' "Introductory Note,"⁶² two factors explain the influence of human rights provisions: first, a perceived similarity of purpose and orientation between human rights law and the law dealing with the rights of aliens, and second, the adoption and incorporation of international human rights documents into U.S. law.⁶³

As the Reporters admit, there is no doubt that the law of state responsibility has an older origin than the law of human rights, has undergone a separate historical development, and to some extent, responds to different conceptual concerns.⁶⁴ Also, rather than focusing upon the conduct or rights of individuals, the law of S.R.I.A. implicates directly the juristic personality of the state. "In legal principle the injury to the person has been seen as an offense to the state of his nationality. The offense being to the state, the remedy for the violation also runs to the state. . . ."⁶⁵ The law of human rights is a much more recent phenomenon ("developed largely since the Second World War"),⁶⁶ and focuses its attention upon natural persons and their rights as human beings and not merely as aliens:

62. Restatement (Revised), *supra* note 1, introductory note at 137.

63. Professor Lillich expands upon and ultimately persuasively qualifies the significance of this second factor. See Lillich, *Hague Lectures*, *supra* note 26, at 397-99. He states, for example, that "the Universal Declaration, a United Nations resolution not requiring ratification, has become over the past thirty years a part of customary international law." *Id.* at 397. "[I]t may be argued that the norms contained in the two International Covenants and other international human rights instruments . . . have become transmuted into norms of customary international law binding even States which have not ratified them." *Id.* at 397-98. He also argues that the content of human rights instruments are at least part of the "general principles of law recognized by civilized nations." *Id.* at 399.

64. Restatement (Revised), *supra* note 1, introductory note at 137. See generally E. Borchard, *The Diplomatic Protection of Citizens Abroad* (1915); A. Freeman, *The International Responsibility of States for Denial of Justice* (1938 & photo. reprint 1970); Lillich, *Hague Lectures*, *supra* note 26, at 343-56; Spiegel, *Origin and Development of Denial of Justice*, 32 *Am. J. Int'l L.* 63 (1938). For a discussion of early English attempts to make foreign sovereigns responsible for injuries to English subjects, see Clark, *English Practice with Regard to Reprisals by Private Persons*, 27 *Am. J. Int'l L.* 63 (1933).

65. Restatement (Revised), *supra* note 1, introductory note at 137. See generally L. Sohn & T. Buergenthal, *International Protection of Human Rights* (1973).

66. Restatement (Revised), *supra* note 1, introductory note at 138.

It reflects general acceptance that every individual should have rights in his or her society which the state should recognize, respect and ensure. . . . It reflects general acceptance, too, that how a state treats individual human beings, including its own citizens, in respect of their human rights, is not the state's own business alone . . . , but is a matter of international concern and a proper subject for regulation by international law.⁶⁷

Despite these differences between the law of S.R.I.A. and the law of human rights, the Reporters opine that there is an "essential affinity" and an "increasing convergence" between the older and newer law.⁶⁸ Both are based upon the concept of a universal standard of justice which is anchored in long-standing natural law principles and which transcends the systematic and substantive differences among various legal systems. As the Reporters state:

The law of responsibility to aliens posited, and invoked, an international standard of justice to individuals, even if dogmas of the international system limited the application of that standard to foreign nationals. That standard of justice, like contemporary human rights law, derived from historic conceptions of natural law, as reflected in the conscience of contemporary mankind and the major cultures and legal systems of the world.⁶⁹

The two juridical developments "converged" in the characterization of the state's breach of duty in regard to the treatment of aliens. In many instances, the breach of duty was deemed to be violative of the alien's human rights:

As the law of human rights developed, the law of responsibility for injury to aliens, as applied to natural persons, began to refer to violation of their "fundamental human rights," and states began to invoke contemporary norms of human rights as the basis for claims for injury to their nationals.⁷⁰

A merger of the older and newer doctrines, the Reporters allege,

67. *Id.* See, e.g., E. Haas, *Human Rights in the Modern World* (1948); H. Lauterpacht, *International Law and Human Rights* (1968).

68. *Restatement (Revised)*, *supra* note 1, introductory note at 139.

69. *Id.*

70. *Id.* at 139-40.

would not rob the law of S.R.I.A. of its autonomy and separate utility, but would merely give a different and more recognizable substantive expression to one of its cardinal objectives.⁷¹

The Reporters also justify their recourse to a human rights orientation in section 711 of the Revised Restatement in terms of the incorporation of human rights provisions and documents into U.S. law. "The U.N. Charter and the Charter of the Organization of American States, both of which include human rights provisions, are treaties of the United States."⁷² In addition, the United States is a party to some of the human rights conventions; these conventions are U.S. treaties and therefore, the law of the land. Federal statutes refer to "internationally recognized human rights."⁷³ Finally, the Reporters note that "[t]he customary international law of human rights . . . is also law of the United States."⁷⁴

In terms of assessing the impact of the Revised Restatement, it is equally significant to note the Reporters' disposition in regard to the relevance of U.S. constitutional law concepts and terminology to the elaboration of S.R.I.A. norms. The Reporters recognize the vital role which the U.S. Constitution plays in the domestic legal system in safeguarding individual rights.⁷⁵ Given the magnitude of

71. The Reporters state:

The traditional law of responsibility for injury to aliens, however, retains independent vitality, providing an additional foundation for protecting the human rights of foreign nationals, as well as continued protection for injuries that may not be seen as violations of human rights. The traditional law of responsibility for injury to aliens also continues to protect juridical persons, which do not have human rights.

Id. at 140. The latter sentence may well reflect only the Reporters' views and may be quite erroneous. Corporations or juristic persons may have human rights. For example, under the European Convention on Human Rights, corporations and shareholders are protected. See, e.g., Fatouros, *Transnational Enterprise in the Law of State Responsibility*, in *International Law of State Responsibility for Injuries to Aliens* 361, 371 (R. Lillich ed. 1983).

72. Restatement (Revised), *supra* note 1, introductory note at 145. See Lillich, *The Role of Domestic Courts in Promoting International Human Rights Norms*, 24 *N.Y.L. Sch. L. Rev.* 153 (1978).

73. See, e.g., Foreign Assistance Act of 1961, §§ 116(a), 502(b), 22 U.S.C. §§ 2151n(a), 2304 (1982); Agricultural Trade Development and Assistance Act of 1954, as amended, § 112(a), 7 U.S.C. § 1712 (1982); International Financial Institutions Act of 1977, §§ 701(a), 703, 22 U.S.C. §§ 262c note, 262d (1982).

74. Restatement (Revised), *supra* note 1, introductory note at 146. For a discussion of human rights law in the United States, see Henkin, *Rights: American and Human*, 79 *Colum. L. Rev.* 405 (1979).

75. See Restatement (Revised), *supra* note 1, introductory note at 147. "The principal safeguards for individual rights in United States law are those provided by the Constitution and laws of the United States and of the States." *Id.*

its domestic stature, the constitutional law heritage " 'has substantial significance for the foreign relations of the United States or has other substantive international consequences.' " ⁷⁶ In fact, one could opine that one of the strengths of the traditional law of S.R.I.A. resides in the fact that some of its content has been derived from concepts of procedural due process, which were developed under constitutional standards. Such recognition would seem to preclude any restrictive attitude that would minimize or seek to eliminate from a statement of the law of S.R.I.A. those concepts and terms which have a constitutional law substratum, and which traditionally have figured in the articulation of S.R.I.A. rules.

V. A CRITICISM OF THE ADOPTED METHODOLOGY

The shift in focus from the Second Restatement provisions to the content of section 711 is indeed considerable. Subsuming much of the law of S.R.I.A. (that part dealing with injury to natural persons) into the emerging and established provisions of human rights law has the effect of subordinating the law of state responsibility as a legal doctrine and destabilizing its established basis. By burying the traditional rules of S.R.I.A. in their notes, the Reporters achieve a result opposite from and inapposite with their stated intent. In effect, in their attempt to buttress the law of S.R.I.A., they have actually weakened it. Breach of the state's duty in this regard is no longer defined according to the usual juridical categories specifically applying to the law of state responsibility, but rather in terms of customary and conventional human rights principles. This is not a mere "convergence" or merger of two doctrinal currents; it represents, in effect, a devaluation of the law of state responsibility.

Nonetheless, as noted by the Reporters,⁷⁷ there is no doubt that some of the law generated by the development of human rights has become an official part of applicable U.S. law through the process of ratification. However, "[s]everal major human rights agreements have been signed by the United States but not yet ratified."⁷⁸ Al-

76. *Id.* (quoting Restatement of Foreign Relations Law of the United States (Revised) scope note at 1 (Tent. Draft No. 1, 1980)).

77. *Id.* at 145-48.

78. *Id.* at 146. See generally Schneebaum, *Human Rights in the Federal Courts: A Review of Recent Cases*, 44 *U. Pitt. L. Rev.* 287 (1983); Shestack, *The Rise and Decline of Human Rights in U.S. Foreign Policy*, 15 *Colum. Hum. Rts. L. Rev.* 19 (1983); Note, *Application of International Human Rights Agreements in the United States Courts: Customary Interna-*

though it could be argued that some of those human rights instruments which have not been ratified by the United States are nevertheless part of U.S. law since they have become part of customary international law,⁷⁹ it remains that the United States is a party to only a few human rights conventions.⁸⁰ Consequently, we might not be so far removed from the point at which at least one U.S. court has referred to human rights as idealistic nonsense—"gobbledygook."⁸¹ In addition, despite their desire to establish an interface between international human rights and those aspects of the law of S.R.I.A. (such as the international minimum standard) which reflect U.S. constitutional norms,⁸² the Reporters' concern with giving first billing to the law of human rights has led them to minimize (perhaps inadvertently) that aspect of U.S. legal culture which is unequivocally protective of individual rights—its constitutional procedural heritage.

The abandonment of specific procedural considerations and the general reduction, if not elimination, of the usual state responsibility language in section 711 have led to the statement of broad-gauged human rights concepts, serving as an ersatz for otherwise established and more precise S.R.I.A. rules. These changes bring up the question of what they imply as to the purpose of the Restatement. During the 59th Annual Meeting of the American Law Institute, Professor Henkin took pains to emphasize that "the

tional Law Incorporated into American Domestic Law, 8 *Brooklyn J. Int'l L.* 207 (1982); Note, *Toward A New U.S. Human Rights Policy: An Interim Proposal*, 15 *Case W. Res. J. Int'l L.* 397 (1983); Symposium on International Human Rights Law in State Courts, 18 *Int'l Law.* 57 (1984).

79. See *supra* note 63. To some (if not a very considerable) extent, the Reporters confirm the thesis advanced by Professor Lillich. See Lillich, *Hague Lectures*, *supra* note 26, at 397-99. In discussing the major human rights agreements that have not been ratified by the United States, the Reporters state that:

Even in the absence of U.S. ratification, some provisions of these covenants and conventions reflect principles of customary international law and thus are a part of the law of the United States. See § 702. The acts forbidden by the covenants and conventions generally are acts that are prohibited by the United States Constitution or by federal or state law; the obligations imposed on the United States by those instruments are in fact generally honored pursuant to federal or state law.

Restatement (Revised), *supra* note 1, introductory note at 147. See also *id.* at 153-56.

80. *Id.* at 145-147, 151, 153-155.

81. See *Turner v. Ward*, No. 30-77 (N.Y. Sup. Ct. 1977), summarized in *Int'l Prac. Notebook*, Oct. 1977, at 5.

82. See, e.g., Henkin, *Rights: Here and There*, 81 *Colum. L. Rev.* 1582 (1981). See also Henkin, *supra* note 74.

coming of human rights" has influenced the law relating to the treatment of aliens, and that the drafting pattern for the Restatement was in the process of being changed to "fairly stark and lean black letter and fuller Comments and still fuller Reporters' Notes."⁸³ Elaborating on the latter point, Professor Henkin stated that "[w]e are satisfied that we propose no major change of substance" and that "[t]he distribution between black letter and Comment and Reporters' Notes is partly a matter of taste and style."⁸⁴ Henkin also was of the opinion that black letter had become, in many instances, an inappropriate vehicle by which to state the law "when the situation in international law is so different from what it was twenty-five years ago."⁸⁵ Finally, on this score, he stated that "we have here . . . minimized the use of black letter. We find that black letter is the Institute shouting. It does not say very subtle things. On Comment we can converse, and the Reporters whisper down in the Notes. The experience with the black letter in the first Restatement was really not encouraging. . . ."⁸⁶

These changes, at least as they are felt in section 711, seem to indicate that the basic stature and objective of the Restatement have been modified. It no longer appears to be a statement, conceived in the fundamental juridical tradition of the national legal system, of what international law is, but rather the expression of the view that human rights law not only has come of age, but is a dominant force in the international legal system and, as a consequence, in the American conception of international law. If the changes proposed in the Revised Restatement are implemented, the Restatement could be viewed more as a restatement of the law as one might hope it will become in a global context rather than what international law provides or how an international tribunal would rule on a given issue. Rather than a clarification of the law, it seems that an implied objective of section 711 is to generate and achieve consensus on the importance of human rights law in the international system, including its indirect impact in such areas as the law of S.R.I.A.

To some extent, these implied objectives may explain (and really work hand-in-hand with) the insistence upon the modification of

83. A.L.I. Proceedings, *supra* note 2, at 227.

84. *Id.* at 243.

85. *Id.*

86. *Id.*

drafting techniques. It goes without saying that, if the objective is to increase the international currency of the Restatement and have it act as a tool for building international consensus on a given issue of international law, then the use of black letter to deliver a statement of the status of the law might well be counterproductive and invite failure. The use of or reference to the general language of international agreements may be a more effective way in which to proceed. "Shouting" would be inappropriate; "conversing" and "whispering" in the ancillary materials would allow for the quiet and diplomatic statement of possible disagreements, possibly fostering resolution.

To some degree, this shift in drafting technique and basic methodology in the Revised Restatement regarding the law of S.R.I.A. is reminiscent of the veering of approach which took place in the I.L.C.'s work on state responsibility. Following the departure of García-Amador, Professor Ago, appointed as Special Rapporteur on State Responsibility in 1963,⁸⁷ successfully recommended to the I.L.C. that it "drop the subject of State responsibility for injuries to aliens and take up a new and markedly different subject—the international responsibility of States in general."⁸⁸ However, some members of the I.L.C. Sub-Committee on State Responsibility expressed serious doubts during the Sub-Committee deliberations about the utility of codifying the "general and rather theoretical aspects of State responsibility."⁸⁹ Although Professor Ago subsequently defended the merits of this more abstract approach,⁹⁰

87. See Report by Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility (approved by the Sub-Committee), U.N. Doc. A/CN.4/152 (1963), reprinted in [1963] 2 Y.B. Int'l L. Comm'n 227, U.N. Doc. A/CN.4/Ser.A/1963/Add.1 [hereinafter cited as Ago Report].

88. Baxter, Reflections on Codification in Light of the International Law of State Responsibility for Injuries to Aliens, 16 Syracuse L. Rev. 745, 746 (1965).

89. Ago Report, supra note 87, at 11, reprinted in [1963] 2 Y.B. Int'l L. Comm'n at 231.

90. See Ago, First Report on State Responsibility, U.N. Doc. A/CN.4/217 & Add.1 (1969), reprinted in [1969] 2 Y.B. Int'l L. Comm'n 125, U.N. Doc. A/CN.4/SER.A/1969/Add.1; Ago, Second Report on State Responsibility, U.N. Doc. A/CN.4/233 & Add. 1 (1970), reprinted in [1970] 2 Y.B. Int'l L. Comm'n 177, U.N. Doc. A/CN.4/SER.A/1970/Add.1; Ago, Third Report on State Responsibility, U.N. Doc. A/CN.4/246 & Add.1-3 (1971), reprinted in [1971] 2 Y.B. Int'l L. Comm'n 199, U.N. Doc. A/CN.4/SER.A/1971/Add.1 (Pt.1); Ago, Fourth Report on State Responsibility, U.N. Doc. A/CN.4/264 & Add.1 (1972), reprinted in [1972] 2 Y.B. Int'l L. Comm'n 71, U.N. Doc. A/CN.4/SER.A/1972/Add.1; Ago, Fifth Report on State Responsibility, U.N. Doc. A/CN.4/291 & Add.1-2 (1976), reprinted in [1976] 2 Y.B. Int'l L. Comm'n 3, U.N. Doc. A/CN.4/SER.A/1976/Add.1 (Pt.1); Ago, Sixth Report on State Responsibility, U.N. Doc. A/CN.4/302 & Add.1-3 (1977), reprinted in [1977] 2 Y.B. Int'l L. Comm'n 3, U.N. Doc. A/CN.4/SER.A/1977/Add.1 (Pt.1).

prominent legal scholars, some noting that the Ago reports and draft articles received scant attention in practice and scholarly literature,⁹¹ criticized the approach as being pitched "at such a high level of abstraction as to shed but dim light upon specific controversies."⁹² According to one commentator, the work done by Ago, when compared to García-Amador's efforts, "offers little or no guidance to persons concerned with fashioning a contemporary international law governing the treatment of aliens."⁹³ Under the generalized abstraction of the Ago approach, the established rules and doctrines of S.R.I.A. "have now the appearance of unwanted orphans in the United Nations family."⁹⁴

While the full thrust of such a pointed critique cannot in all fairness be levied at proposed section 711, it does by analogy demonstrate the deficiencies of recasting so entirely the elaborate body of specifically tailored S.R.I.A. rules into the more fluid abstractions of human rights law. If properly implemented, such a reformation would be an acceptable means (if not in fact a laudable one) by which to integrate rules with a proven past into the contemporary fabric of the international legal system. As it stands, however, section 711 deprives a workable set of rules of its autonomy and utility as established law. Too many issues of vital practical significance, such as questions relating to the nationality of claims, the exhaustion of local remedies, and the measure of damages, are completely neglected in the formal rule content of section 711. The drastic reduction in the number of rules, the accompanying subordination of key issues to the comment and notes, and the nearly exclusive reliance upon the general language of human rights law leaves too much unsaid and unspecified.

VI. CONCLUSION

The modifications brought to the law of state responsibility for injury to aliens in section 711 reflect a methodological change with substantive implications. Compared to the Second Restatement, the black-letter provisions in the Revised Restatement are considerably reduced, and their economical form permits the statement

91. Lillich, *Hague Lectures*, supra note 26, at 379.

92. M. McDougal, H. Lasswell & L. Chen, supra note 19, at 762 n.92.

93. Lillich, *Hague Lectures*, supra note 26, at 379.

94. Goldie, *State Responsibility and the Expropriation of Property*, 12 *Int'l Law* 63, 73 (1978).

of only the most generalized, and therefore, neutral, of rules. Such a statement of the law allows for the widest possible agreement on principles, and possibly indicates that an attempt is being made to achieve an international consensus among countries from both the developed and developing world on the law relating to the treatment of aliens.

The progression from the black-letter provisions of section 711 to the comment and Reporters' notes is a progression from the least controversial subject matter to those issues which can trigger debate and are genuinely controversial. It is the omission of much of the content of the Second Restatement (*i.e.*, the reduction of emphasis in space and detail) from the express formulations of the Revised Restatement, as well as the exclusive reliance on human rights language, which constitute the Revised Restatement's principal defects in section 711. Moreover, the abandonment of explicit due process concerns ("denials of justice" are not subsumed among violations of human rights") appears to point to a shift in emphasis from East-West considerations to a North-South focus, thereby attempting to bridge the gap between these various areas of the world.

Given these features, and the Reporters' avowed objective of stating the law of S.R.I.A. as it would be perceived and applied by an international tribunal, one wonders whether a large part of the law of state responsibility for injury to aliens should be muted entirely and replaced by a reference to similar yet distinct human rights provisions. Is this an adequate statement of the law?

The objective of amalgamating human rights norms with the rules of S.R.I.A., given the similarity and convergence between the two doctrines, is certainly a goal worth pursuing. The proposed substance of section 711, however, engenders disequilibrium rather than fusion. Human rights considerations not only become the centerpiece of the statement of the rules for S.R.I.A., but also literally engulf the whole of these provisions. It is indeed true that the law of S.R.I.A. is supported by human rights norms, that it was an early expression of human rights goals, and that there is generally a remarkable affinity between the two doctrines. The attempted synthesis, however, results in a radical excising of the law of S.R.I.A.—in effect, a considerable downplaying of a set of legal rules that has proven to be of unquestioning utility in the past. The recognition attributed to the convergence between the two doctrines is turned on its head when it leads to a severe neglect and implied discrediting of the law of S.R.I.A. No policy reasons

exist to justify, nor do editorial or drafting considerations explain, this sacrificing of the specificity of state responsibility principles. One might speculate that the single-minded focus on wealth deprivation issues in subsequent sections⁹⁵ led the Reporters to assess insufficiently the implications of a new methodology in the treatment afforded to non-wealth-deprivation injuries. In many respects, the proposed substance of section 711 represents an attempt to instill imagination and creativity in the evolution of the law of S.R.I.A. In the last analysis, however, the proposed text, because of its exaggerated emphasis upon human rights law, is emptied of its potential. The goal envisioned can be achieved only through a greater methodological poise that reduces the drastic imbalance between the convergent doctrines. One hopes that the possible reconsideration of section 711 will yield revisions which will not miss out on the opportunity to achieve a "noble synthesis."⁹⁶

95. See Clagett, *Protection of Foreign Investment Under the Revised Restatement*, 25 *Va. J. Int'l L.* 73 (1985); Robinson, *Expropriation in the Restatement (Revised)*, 78 *Am. J. Int'l L.* 176 (1984); Schachter, *Compensation For Expropriation*, 78 *Am. J. Int'l L.* 121 (1984).

96. See Lillich, *supra* note 11, at 19.

