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The US Context of the Restatement of the Law (Fourth): The Foreign Relations Law of the United States

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Abstract

This article describes the creation and development of the Restatement of the Law (Fourth): The Foreign Relations Law of the United States *from the perspective of its coordinating reporter. The article first describes how the American Law Institute goes about creating restatements of the law, emphasizing aspects of the process that a European audience might find unfamiliar. It looks at aspects of the US legal system, especially the significant role of the judiciary as authors of law, and explains how this role shapes a document that has US judges as one of its significant audiences. It then discusses how conflict over the content of foreign relations law and the role of international law in US domestic law affects the* Restatement *and how the reporters seek to navigate these troubled waters. Finally, it explores the areas where the new* Restatement (Fourth) *parts company with its famous predecessor, the* Restatement (Third), *supervised by the late professor Louis Henkin. The article argues that the changes represent two things: a transformation of the world of foreign relations in the 35 years since the earlier work and a corresponding move towards modesty on the part of the professors who made this* Restatement.

The assessments and critiques of the *Restatement of the Law (Fourth): The Foreign Relations Law of the United States* by Hélène Ruiz Fabri and Anne Peters are welcome.[1] I propose

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[1] *Restatement of the Law (Fourth): The Foreign Relations Law of the United States* (2018). Ruiz Fabri, 'The Limits and the Appeal of the *Restatement*', 32 *European Journal of International Law (Eur. J. Int'l L.)* (2021) 1399; Peters, 'The American Law Institute's *Restatement of the Law*: Bastion, Bridge, and Behemoth', 32 *Eur. J. Int'l L.* (2021) 1377.

to supplement their articles rather than rebut them. I offer dual perspectives – that of a comparativist and an international lawyer – to show how aspects of US legal culture affect the style and substance of restatements in general and the restatements of foreign relations law in particular. I then offer a few observations on how features of national legal cultures may affect what we talk about when we talk about international law.[2]

1 Does This Text Have an Author?

Consider first the implications of footnote 10 of Peters' referring to an '(institutional) author'. As Ruiz Fabri elaborates, the authorship of the *Restatement*, as well as the authority that goes with authorship, is a bit confusing. The reporters report, the various advisory committees and the Council review and advise and the attendees at the American Law Institute's (ALI) annual meetings review and approve.[3] No individual's name appears on the book's cover or title page. If the author is institutional, what kind of institution is it? Unpacking the nature of the ALI itself takes some work. It is a private organization that receives no public funding (to my knowledge) and does not coordinate its activities with any public bodies. Many judges and public officials belong to the ALI, which contributes to its prestige, but they do so in their private capacity. The 'author' of the *Restatement*, in other words, is a sizeable and completely private organization, although the role of individuals in the development of the work is also spelled out.

Consider further the ALI's status as a private entity. No governmental body has any role in selecting its officers or members or in shaping its agenda. It does not undertake projects commissioned by governmental bodies. It swims in the waters of public debates over legal policy, but it cannot enact or implement any law.[4] This particular kind of separation of private and public authority is a distinctly US feature. The ALI, in its

[2] With apologies to R. Carver, *What We Talk About When We Talk About Love: Stories* (1981).

[3] Throughout the six years of work leading to a final membership vote, our team of reporters presented more or less annually to advisory committees (one for each piece of the project, plus a committee of international advisers for the entire project), the membership of which the coordinating reporters selected with the advice and consent of the American Law Institute's (ALI) leadership and a members' consultative group, self-selected from the institute's membership. In practice, we faced the advisory committees and consultative group in the same meeting and did our best to take on board the reactions of all participants, regardless of which group they belonged to. We met with the international committee twice, both on the outskirts of an American Society of International Law's annual meeting. For a useful overview of the dynamics of the restatement process, see Schwartz and Scott, 'The Political Economy of Private Legislatures', 143 *University of Pennsylvania Law Review* (1995) 595.

[4] Contrast this with the Uniform Law Commission, formerly the National Conference on Uniform State Law. This body proposes model laws for states to adopt, many of which have become law. Each state's government, as well as those of the District of Columbia, Puerto Rico and the US Virgin Islands, appoints a commissioner. The commission then recruits private lawyers, typically academics, to work on its projects, much as the ALI does. On some projects, the two organizations collaborate, such as the drafting of proposed amendments to the Uniform Commercial Code. One also might note the American Bar Association (ABA), a voluntary association of qualified lawyers that advises presidents (whether they want to listen or not) on the nomination of federal judges and sponsors law reform projects. Any qualified lawyer can join the ABA, while the ALI selects new members based on a cooption process that relies on confidential nominations from its current members. The ABA's membership is roughly two orders of magnitude larger than the ALI's.

components as well as in its entirety, is an élite institution within the legal profession and US society generally. Depending on one's perspective, it represents either a benign Lockean distribution of power among elements of the élite that protects against concentrated authority or a form of Marcusean repressive tolerance that masks the domination of society by such élite structures. Its premise is a separation of public politics and private expertise, with the latter meriting deference but not exercising coercive power. The private institution operates relatively transparently: its membership is a matter of public record and its work proceeds openly. If one believes that claims of expertise represent politics carried out by other means (with apologies to Carl von Clausewitz), these institutions will seem noxious. If one regards fields of knowledge as having internal dimensions that can be both interesting and useful, one might respond to institutionalized private technocrats with less hostility, even if one keeps in reserve a certain scepticism.

2 External and Internal in the Law

Law in the USA is a field where the internal and external mingle, perhaps to a greater extent than in other parts of the world. Peters notes the largely US origins of law and economics and critical legal studies, two external projects that, she rightly observes, overlap significantly in their rule scepticism. Certainly in the US academy, 'pure' doctrinal scholarship is disfavoured. Yet the restatements present themselves as doctrinal projects, addressing 'law' as a hermetic enterprise while recognizing its social consequences. Generalizing a lot, we see a fair amount of talk in these documents about law's impact on society, but not much about society's impact on law.

One feature of legal practice in the USA that might explain this duality – exuberant rule scepticism alongside obeisance to formal legal rules – is what one might call the cult of the judge. This is not a general common law feature: presidential campaigns in no other common law jurisdiction, as best I know, feature promises about judicial appointments. Clerkships with federal judges are a mark of prestige that lawyers carry for their entire career. A large portion of public law scholarship by the US legal academy treats judges and their clerks as its primary audience. Reinforcing this cult is the fluidity of career boundaries within the legal profession: not only do academics and practitioners become judges, but judges also become academics and practitioners.[5] Even when academics draw on other fields to illuminate their arguments, many shape their work so as to persuade judicial actors.

US judges in turn have a certain style of both receiving and dispensing wisdom that is somewhat different from what one sees in other common law countries. They balance the traditional common law method that works closely with precedent (doctrine),

[5] Consider the example of David Levi, the current president of the ALI. He served as a federal judge for many years and a federal prosecutor before that, before becoming the dean of Duke Law School, a job he performed with distinction for more than a decade. In 2017, the start of his final year as Duke Law's dean, Levi became the ALI's president. He remains a member of the Duke Law faculty. Most recently, President Joe Biden selected him for a commission to consider US Supreme Court reform. Throughout his significant professional career, he has made important scholarly contributions.

much as do judges in other legal systems with English roots, with a self-conscious and fully articulated openness to policy arguments that seems distinctive, if not unique. Sitting judges have been important participants in the development of significant US jurisprudential movements, including legal realism (think of Jerome Frank on the US Court of Appeals for the Second Circuit) and law and economics (think of Richard Posner and Frank Easterbrook of the US Court of Appeals for the Seventh Circuit).[6] The US Supreme Court, in particular, has used its power to interpret the Constitution to shape a number of fundamental policy debates, including the eradication of racial segregation,[7] the reform of legislative design,[8] the promotion of female equality,[9] enforcing the law of war,[10] protecting sexual minorities against discrimination[11] and authorizing same-sex marriage.[12] These initiatives in turn have moved judicial selection, especially as to the Supreme Court, into the arena of mass politics and culture war, not always with edifying results.

Thus, when restatements speak to judges, as they do mostly, they use the language of doctrine layered on an understood, if implicit, subtext of policy differences and political contestation. They do not hide the non-legal implications of their propositions about the law so much as understate them. This style is not necessarily about mystification, although a critic might see it that way. Rather, it adopts the general approach that US lawyers mostly use when they address the courts, especially the federal judiciary.

3 Foreign Relations Law as a Site of Contestation

A related feature of US culture deserves noting. Fundamental issues of foreign relations law have had great political salience throughout the nation's history. During the quarter-century struggle between Great Britain and revolutionary, then Napoleonic, France, the prevailing political factions (not yet parties in the modern sense) gravitated towards opposite sides: the Federalists, seeking greater ties with Great Britain, and the Jeffersonian Democratic-Republicans, sympathizing with the French. This tension played out in both the Alien and Sedition Acts and the development of the law of captures. As the USA emerged as a world power at the end of the 19th century, the two parties split on how to approach the accompanying challenges. Thus, the 1897 Olney-Pauncefote Treaty with

6 Critical legal studies has no counterpart of which I am aware, in part because its influence in the USA has not left the academy to any great extent. A recent Westlaw search of the federal court opinion database, with the search terms '(critical +2 studies) & deconstruct', turned up one hit, a court of appeals mocking that methodology. The same search in the state court opinion database turned up nothing.

7 *Brown v. Board of Education*, 347 U.S. 483 (1954); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

8 *Baker v. Carr*, 369 U.S. 186 (1962); *Miller v. Johnson*, 515 U.S. 900 (1995).

9 *Reed v. Reed*, 404 U.S. 71 (1971); *Roe v. Wade*, 410 U.S. 113 (1973); *United States v. Virginia*, 518 U.S. 515 (1996).

10 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Boumediene v. Bush*, 553 U.S. 723 (2008).

11 *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003).

12 *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

Great Britain, a remarkable attempt to replace politics with law in international dispute resolution, fell prey to the hostility of some Democrats to Great Britain's Irish policy and of others to its commitment to the Gold Standard.[13] The Treaty of Versailles suffered a similar fate, this time Republican nationalists opposing a Democratic president's international ambitions.[14] When Republicans finally returned to power in 1952 after the long Roosevelt-Truman interregnum, the Taft Republicans sought to entrench the overthrow of Democratic internationalism, including through a near-thing constitutional amendment that would have sharply limited the impact of treaties in the US legal system.[15] So the political divides we see today over the legal institutionalization of foreign policy have long histories. A restatement of foreign relations law, whatever its doctrinal aspirations, must appreciate the unsettled politics of the field. I appreciate that other liberal democracies may not have as openly politicized foreign policies, and, therefore, foreign policy law, as does the USA, although one might see recent scepticism in Europe about immigration and the European Union as the beginning of such a trend there.

A recognition that nominally doctrinal work can trigger sharp political debates explains the limited scope of the *Restatement (Fourth)*, limits that Ruiz Fabri and Peters question.[16] The *Restatement (Third)*, unlike the *Restatement (Second)*, had a special part focused on particular areas within international law, including the law of the sea, law of the environment, protection of persons and remedies.[17] When a new restatement first emerged as a proposal, conversations among the prospective reporters and the ALI leadership made clear that no one wished to take on that task. The content and significance of those subjects had changed, none of the reporters felt competent to address all of those subjects and some topics (protection of foreign investors and human rights, in particular) seemed to us to have become deeply and widely controversial. We also appreciated that several positions taken by the *Restatement (Third)* – perhaps first and foremost that international law counts as federal law for the purposes of the US legal system – had provoked strong criticism and lost substantial judicial support but still enjoyed passionate adherence among many academics and practitioners.[18]

[13] Blake, 'The Olney-Pauncefote Treaty of 1897', 50 *American Historical Review* (1945) 228, at 230.

[14] Treaty of Versailles 1919, 225 Parry 188.

[15] Some have seen the Bricker Amendment episode as a last-gasp struggle of southern segregationists. Much of the support for the amendment, however, came from midwestern and western anti-internationalists, and Senate Majority Leader Lyndon Johnson, a fellow traveler of the southern segregationists, led the effort to defeat the measure. D. Tannenbaum, *The Bricker Amendment Controversy: A Test of Eisenhower's Political Leadership* (1988), at 191–214 (describing defeat); R.A. Caro, *Master of the Senate: The Years of Lyndon Johnson* (2002), at 527–541 (detailing Johnson's role).

[16] Peters, *supra* note 1, at 1386–1389; Ruiz Fabri, *supra* note 1 at 1406–1409.

[17] *Restatement of the Law (Third): Foreign Relations Law of the United States* (1987); *Restatement of the Law (Second): Foreign Relations Law of the United States* (1965). One should note the strange numbering rule for restatements that the ALI until recently followed. Once any restatement of an area of law reached a number, all subsequent restatements, no matter what subject, had to have the same number. So the *Restatement (Second)* is actually the first produced by the ALI and is called the second only because it got under way after the commencement of the Second Restatement of Torts. During the last decade, the ALI abandoned this peculiar convention.

[18] For a review of where US law seems to stand on this issue, see P.B. Stephan, 'One Voice in Foreign Relations and Federal Common Law', 60 *Virginia Journal of International Law* (2019) 1.

The ALI leadership and the proposed coordinating reporters agreed that we would organize the *Restatement (Fourth)* as a kind of test. We would take on what we considered the least contested subjects. We reasoned that if we could navigate the policy and political conflicts that surround even these matters, we would have reason to believe that we could later deal with the more difficult ones. We also hoped that another decade (remember that we made this decision in early 2012) would allow more doctrine to emerge in these areas, providing some protection from accusations that we had a naked policy agenda. We made these choices with the understanding that, by not taking up the challenging topics, we would as a formal matter leave the unaddressed claims of the *Restatement (Third)* as the official views of the ALI.[19]

Moreover, we organized ourselves with these controversies in mind. Every person we invited to serve as a reporter had a distinguished scholarly reputation and identified as a moderate in politics and policy. The latter limitation of course represents a political choice: we avoided radical challenges to our project from the inside. Most of us also had interrupted our academic careers with short tenures as executive branch international law specialists. The position that five of us had held – counselor on international law to the State Department's legal adviser – is technocratic to its core but still political, in the sense that the legal adviser is a Senate-confirmed political appointee and his or her choice of counselor comes with the blessing, or at least the indifference, of the White House. Thus, it seemed important that the two coordinating reporters held that job separately in a Republican and a Democratic administration and that, of the three other reporters who had worked in that slot, two came from Republican and one from Democratic administrations. Even though we were all friends and colleagues who had collaborated on other projects in the past, the appearance of political balance seemed important.[20]

Finally, the development of foreign relations law within the USA since publication of the *Restatement (Third)* explains another feature of the *Restatement (Fourth)* that Ruiz Fabri has noted – namely, the paucity of references to scholarly works.[21] The four *Restatement (Third)* reporters stood astride the field, if not exactly as *colossi* then

[19] Ruiz Fabri notes the tension, bordering on contradiction, between, on the one hand, the formal rule that those portions of the *Restatement (Third)* not revised by the *Restatement (Fourth)* remain the position of the ALI, and, on the other hand, the brute fact that the ALI's recognition that the law had passed by some of the positions of the *Third* casts a shadow on those that went unrevised. Ruiz Fabri, *supra* note 1, at 1401–1402. The tension, from my point of view, was understood by all participants in the *Restatement (Fourth)*, with resolution of potential contradictions left to possible future projects.

[20] In the same spirit, the ALI created a small group of counselors to advise the reporters, a mechanism unique to the *Restatement (Fourth)*. Of the seven counselors, who were all distinguished international lawyers, two had been legal adviser in Democratic administrations, one in a Republican administration and one the principal deputy legal adviser in a Republican administration as well as acting legal adviser in a Democratic one. The ALI selected them for their accomplishments and wisdom, not their politics, but still was mindful of the need to appear balanced.

[21] Ruiz Fabri, *supra* note 1, at 1407. The ALI regards the black letter and the comments as a statement of its position but considers the Reporters' Notes as an expression of the reporters' distinctive views. Hence, as a general matter, one sees in restatements most references to authority and all scholarly citations only in those notes.

certainly as great eminences. They had a distinct common point of view, as Europeans who had come to the USA in the face of the Bolshevik revolution and German National Socialism.[22] In part because they tackled subjects that, in some instances, had not received much judicial attention, they relied on scholarship, often their own, as secondary authority.[23] That scholarship for the most part was Olympian rather than argumentative, self-confident pronouncements about what was, or what they hoped would become, the common wisdom. We took a different path. All of the reporters for the *Restatement (Fourth)* had published prolifically in the field, and we could have filled the reports with references to our work. But much of our scholarship had appeared in the context of debates, a few rather heated, and did not rely to the same extent on the detached and authoritative style that our predecessors had employed. We could not use our work without including our adversaries', yet choosing among adversaries seemed daunting and embracing them all seemed excessive. Both judicial authority and academic writings had exploded over the decades since the *Restatement (Third)*. Taking comfort in the proliferation of court decisions, we mostly avoided scholarship, except for the rare piece that documented the emergence of a doctrine that the *Restatement (Fourth)* covered.

4 Foreign Relations Law and International Law

This brief review of the distinctive features of US legal culture from a comparative perspective points to some reasons why a treatment of the foreign relations law of the USA necessarily must reflect particular national practices and interests rather than universal values and aspirations. Both Ruiz Fabri and Peters seem concerned, perhaps even alarmed, when they observe the tension that arises when this national project becomes enmeshed with the field of international law. They both wonder whether dwelling on the parochial ways in which a state, especially a great power with internationalist aspirations, approaches international law undermines the foundations of international law as a universalist project.

One particular aspect of US law, addressed by the *Restatement (Third)* but so far not by the *Restatement (Fourth)*, illustrates the problem. As Peters notes, US law for some purposes lumps together international and foreign law.[24] Without elaboration, such statements might seem to ignore the special significance of international law. Someone embedded in the US legal culture, by contrast, would understand these statements as

[22] Louis Sohn left Poland after earning his first law degree and shortly before the German invasion. Andreas Lowenfeld and Detlev Vagt's families left Austria and Germany, respectively, when they were young and as a result of Hitler's ascendancy. Louis Henkin's family emigrated from what is now Belarus when he was very young, but he did not consider them refugees from the Bolsheviks as such.

[23] The reporters did cite one of my early articles. *Restatement (Third)*, *supra* note 17, § 432, Reporters' Note 2. The citation was generous, as I had defended a position that the *Restatement* later rejected (although even later the US Supreme Court rejected the *Restatement*'s view). The reporters' generosity was slightly tempered by misspelling my name, a bit hurtful to a young scholar hungry for recognition.

[24] Peters, *supra* note 1, at 1387.

arising in a context that closely resembles the function fulfilled by the conflicts of law. For many purposes – establishing federal court jurisdiction, determining a legal rule's hierarchical position, applying interpretive rules – the US legal system requires a distinction between federal and all other law. Federal law comprises the Constitution, the enactments of Congress, treaties to which the Senate has consented to ratification, executive branch measures such as international agreements and administrative regulations authorized by the enactments of Congress and, since the famous 1938 US Supreme Court decision in *Erie Railroad Co. v. Tompkins*,[25] a body of judge-made federal common law. For this purpose, US law divides all law into two parts: federal and non-federal. When applying this distinction, US law may regard international law as sometimes falling into the latter category, as foreign law uncontroversially does.[26] One should not see this specific technical inquiry as tantamount to deprecation, unless one believes that any state that in its domestic law does not adhere to full-blown monism, including giving hierarchical priority to international law over domestic law, thereby detracts from the international law project.

As for the *Restatement (Fourth)*, its approach to international law differs from that of the *Restatement (Third)*, but not necessarily in a way that deprecates. The earlier restatements devoted considerable space to addressing international law as such, attempting to decontextualize that discussion from the particular nature of US law. Perhaps the most direct example is both the *Restatement (Second)*'s and the *Restatement (Third)*'s assertion that they sought to express 'the opinion of the American Law Institute as to the rules that an impartial tribunal would apply if charged with deciding a controversy in accordance with international law'.[27] Importantly, the statement takes in all impartial tribunals, not just the courts of the USA. The reporters believed that the ALI had the capacity to make informed pronouncements about a body of international law that applied universally and thus independently of the particular views of US actors.

The *Restatement (Fourth)*, by contrast, is more modest. It agrees with the *Restatement (Second)* and *(Third)* that the views of US officials – those of the State Department, in particular – do not necessarily and in all cases represent what international law is. It says less than its predecessors did, however, about what the ALI believes about the views of impartial tribunals regarding international law. It also repudiates particular claims about the content of international law that the *Restatement (Third)* made but

[25] 304 U.S. 64 (1938). Before *Erie*, federal courts would develop and apply a body of judge-made law called general law. Confusingly, federal judges developed this law, but it did not fulfil any of the distinct functions of federal law, such as establishing federal court jurisdiction or occupying a superior place in the legal hierarchy compared to state law.

[26] To be clear, US law recognizes that particular domestic legal acts, such as legislative enactments or judicial decisions, may borrow rules of international law and thus convert them into rules of federal law. Moreover, a ratified treaty may contain rules that a court must apply, and those rules also have the status of federal law. Some scholars and practitioners believe that international law in some particular contexts does count as federal law for some, but perhaps not all, purposes. But most agree that, for at least some technical purposes derived from the particular aspects of the US constitutional structure, international law sometimes counts as non-federal law, just as foreign law does.

[27] *Restatement (Second)*, *supra* note 17; *Restatement (Third)*, *supra* note 17, at 3, introduction.

that then attracted criticism from international lawyers both domestic and foreign.[28] It does not replace these controverted views with new assertions about international legal obligations but, rather, indicates that no consensus has emerged on those issues.

Some might see the *Restatement (Fourth)*'s modesty as cowardice, as an unwillingness to defend international law in the face of both domestic and foreign attacks. Another way of looking at its stance is as an effort to increase transparency. A reluctance to insist on what international law requires or forbids may expose and question claims about international law that US lawyers – official and unofficial alike – make for reasons that rest on US, rather than universal, conditions and concerns. Not pronouncing on international law may indicate a willingness to listen to the views of others rather than monopolizing the conversation. One thing that we aspired to do was to inform our foreign readers about US approaches to international law (recognizing separation between our perceptions and the officials positions of the government) without insisting that these approaches lead to widely accepted outcomes.[29] It is true that this endeavour presumes conflict over the scope and content of international law, conveys a sense of contingency rather than security and, to that extent, undermines claims for the universality and determinability of international law. But is this a problem?

My views on this are well known.[30] I am allergic to *pas devant les enfants* approaches to most things, but especially to international law. The *pas devant* concern rests on two assumptions, both of which strike me as problematic. First, it assumes the subject's fragility. If an observer focuses on discord within the international law community and pushback outside it, does that person bring the regime closer to collapse? Second, it assumes that silence works. Will the rebels quit if we ignore them? It seems to me that, notwithstanding the turmoil of the last decade, international law does more work in the world today than it did at any time in history before the 1990s. The criticism and resistance that has emerged in the 21st century reflects its strength and importance, not its irrelevance. Concerns about fragility thus seem unfounded. Nor do I understand how to deal with criticism and resistance other than through reasoned engagement. There is no need to take international law on faith. It does a great deal of work and affects many lives, transactions and programmes. The conversation should centre on the accomplishments and shortcomings of this work, not on the existential

[28] E.g. *Restatement (Fourth)*, *supra* note 1, § 407, Reporters' notes 3, 6 (rejecting *Restatement (Third)*'s formulation of an international legal standard for reasonableness in the extraterritorial prescription of national law). I thus must disagree with Cedric Ryngaert's assertion that the 'Fourth Restatement does not formally repudiate Section 403 of Third Restatement'. Ryngaert, 'The *Restatement* and the Law of Jurisdiction', 32 *Eur. J. Int'l L.* (2021) 1455, at 1459. We did it quietly, but we did it. Dodge, 'A Modest Approach to the Customary International Law of Jurisdiction', 32 *Eur. J. Int'l L.* (2021) 1483, at 1485–1487.

[29] In doing this, we had the benefit of a superb Australian colleague well versed in the British as well as US approaches to international law. We also had the chance to hear from counselors and advisers from around the world. Indeed, between the counselors and the international advisory committee, we got guidance from three of the current members of the International Court of Justice, two of whom were elected after our project concluded.

[30] E.g. Stephan, 'Comparative International Law, Foreign Relations Law and Fragmentation: Can the Center Hold?', in Anthea Roberts *et al.* (eds), *Comparative International Law* (2018) 53. I am grateful to Ruiz Fabri for her engagement with this piece.

need for some kind of international cooperation. International lawyers should regard calls for accountability as a welcome recognition that the field exercises power and should answer for its consequences.

That said, the last decade has clarified at least one thing. International law is not inevitably and necessarily in the service of particular constitutional principles. Peters argues that 'the achievements of constitutionalism will get lost if they are not projected to the international and transnational sphere'.[31] The difficulty is that only some in the international community regard the West's realization of the features of which she speaks – the rule of law, human rights, democracy and social solidarity – as achievements. Not a few influential actors, inside as well as outside the West, see the wielding of these concepts by North Americans and Europeans as a means to disguise domination and exploitation. One cannot simultaneously wrestle with these views and insist on the universality of international law, except as an aspiration.

To be clear, since the end of World War II, many states have used international law as a means to entrench their initially fragile commitment to the version of constitutionalism that Peters embraces. This has been a noble enterprise, nowhere more so than in Europe. It is a leap, however, to see the development of this *lex specialis* as a basis for claims about *lex lata* in international law. What one can do is argue that these experiences should point the way towards a possible future. This, however, entails arguments to be made, and effective argumentation requires recognition and refutation of the opposition. One cannot, in other words, discard the critics as heretics without undermining the constitutionalism project.

5 Summing Up

What the three *Restatements* have accomplished in the USA is helping people in the US legal establishment to think about international law in the context of the foreign relations of the USA.[32] From the outside, framing the enterprise this way may seem to diminish international law, and the particular claims about international law that result may seem parochial. What the *Restatement (Fourth)* sought to do, perhaps more clearly than its successors, is to indicate to its foreign readers what it was not trying to do – namely, make many strong claims about general international law as such. We thought that foreign readers could make up their own minds about what was going on in the USA and determine for themselves how that affected their views of international law. One can see this move not as disrespecting international law but, rather, as respecting our foreign readers.

[31] Peters, *supra* note 1, at 1390.

[32] Some might think the *Restatement (Fourth)* is too new to have had much impact. But many judicial decisions, not only in the USA, have referred to it. As of 9 November 2021, four decisions of the US Supreme Court, 37 decisions of the lower federal courts, six published decisions of the state courts and one decision of the Court of Appeals of the United Kingdom have cited the *Restatement (Fourth)*. The Westlaw database of US law reviews, a modest subset of all legal scholarship worldwide, contains 236 publications that refer to the *Restatement (Fourth)*. Although cite counts are a crude and unsatisfactory means of measuring impact, they mean something.