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The Limits and the Appeal of the Restatement

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Abstract

The limits and the appeal of the restatement method, in general, and of the Restatement of the Law (Fourth): The Foreign Relations Law of the United States, *in particular – understood as the reasons why, or not, other countries (or legal communities) would be incited to follow the same path and have the same kind of instrument regarding their own system – are in fact intertwined. Any alleged appealing aspect can give way to questions about the limits of the exercise and the other way around. The analysis will therefore proceed with questions more than with answers, in seven steps intended to increasingly show the ambivalence of the* Restatement (Fourth), *beginning with its scope, before considering its authors, its addressees and, therefore, the* Restatement's *reach, its nature, its topic or subject matter, its context and, finally, its underlying ideology.*

A basic definition of a US restatement recalls a few useful characteristics to assess the limits and the appeal of the *Restatement of the Law (Fourth): Foreign Relations Law of the United States*.[1] Thus, according to a description provided by Harvard Law School Library:

> [r]estatements are highly regarded distillations of common law. They are prepared by the American Law Institute (ALI), a prestigious organization comprising judges, professors, and lawyers. The ALI's aim is to distill the 'black letter law' from cases to indicate trends in common law, and occasionally to recommend what a rule of law should be. In essence, they restate existing common law into a series of principles or rules … Restatements are not primary law. Due to the prestige of the ALI and its painstaking drafting process, however, they are considered persuasive authority by many courts.[2]

This is an American discourse, just as restatements are an American tool and type of approach to law, linked to the common law roots of the system and especially the role

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1 *Restatement of the Law (Fourth): The Foreign Relations Law of the United States* (2018).

2 C. Biondo, 'Secondary Sources: ALRs, Encyclopedias, Law Reviews, Restatements, and Treatises', *Harvard Law School Library*, available at https://guides.library.harvard.edu/c.php?g=309942&p=2070280.

of precedents. However, although written like a praise, such discourse points to several interesting features that can be used as starting points, while considering not only the criticisms addressed to restatements[3] but also the specificities of the *Restatement (Fourth)*, among the various US restatements: 'Restatements typically rest their summaries of the state of the law in a particular field on a combination of court decisions, statutory reactions to those decisions, and academic commentary',[4] and their primary purpose 'is assumed to be that of providing an authoritative overview of (the) controlling doctrines' of a legal field.[5] However, one oddity of the *Restatement* within the American Law Institute's (ALI) suite of products is how 'un-common-law-like' it is within that scheme, as a unique mix of international law (international agreements as well as customary international law), the Constitution, congressional legislation and statutes, judicial decisions and actions of the executive, which are different in type and scale from the usual restatements on contracts, torts and so on. At the same time, it is said to be (or at least the *Restatement (Third)* was said to be) 'the most influential of all the Institute's projects'.[6] The question that comes immediately to mind is: influential in which regard and to whom? More especially, to what extent does such a statement consider the *Restatement*'s echo outside the United States? And even if only inside influence is considered, does or should the extent of this influence be considered as an incentive to follow suit and develop the same kind of tool?

The limits and the appeal of the restatement method, in general and of the *Restatement (Fourth*), in particular – understood as the reasons why, or why not, other countries (or legal communities) would be incited to follow the same path and have the same kind of instrument regarding their own system – are in fact intertwined. Any alleged appealing aspect can give way to questions about the limits of the exercise and the other way around. The analysis will therefore proceed with questions more than with answers in seven steps that are intended to increasingly show the ambivalence of the *Restatement (Fourth)*, beginning with (i) its scope, before considering (ii) its authors, (iii) its addressees and, therefore, the *Restatement*'s reach, (iv) its nature, (v) its topic or subject matter, (vi) its context and, finally, (vii) its underlying ideology.

1 A Limited Scope

With the discussion of substance set aside, a first obvious limit lies in the limited scope of the *Restatement (Fourth)*, compared to its predecessors, especially the *Restatement (Third)*. What has been published so far concerns 'selected topics' under the three

[3] Adams, 'Blaming the Mirror: The Restatements and the Common Law', 40 *Indiana Law Review* (2007) 206, at 210 ('[t]hese criticisms often center on the membership of the Institute, the scope and goals of Institute projects, the perception that the Restatements have not incorporated the knowledge of other disciplines, the widespread conception that the Institute is anti-reform, and the view that the Restatements represent antiquated Formalist thought that is not useful to modern lawyers').

[4] White, 'From the Third to the Fourth Restatement of Foreign Relations: The Rise and Potential Fall of Foreign Affairs Exceptionalism', in P.B. Stephan and S.H. Cleveland (eds), *The Restatement and Beyond: The Past, Present, and Future of U.S. Foreign Relations Law* (2020) 23, at 58.

[5] *Ibid.*, at 23.

[6] Cleveland and Stephan, 'Introduction', in Stephan and Cleveland, *supra* note 4, 1, at 3.

headings of treaties, jurisdiction and sovereign immunity.[7] Admittedly, these are important topics, and an update is certainly more than welcome. However, this raises several questions. First, one can wonder why the ALI authorized only this limited revision, instead of a fully-fledged new *Restatement*.[8] The decision was undoubtedly controversial, as some people thought that touching the *Restatement (Third)* would be opening a Pandora's box, whereas others supported the idea that the US consensus was eroding on many issues, the influence of the *Restatement (Third)* was waning and a revision was therefore needed. The limited scope of the *Restatement (Fourth)* should probably be understood as a compromise.[9]

However, a second question immediately arises: does this limited scope mean that the rest of the *Restatement (Third)* still stands, while being more than 30 years old (as it was published in 1987 after more than 15 years of work and almost as many drafts), and that the proponents of the *Restatement (Fourth)* were only partially convincing in their statement that the *Restatement (Third)* 'no longer reflected the present state of the law'?[10] The official answer is that, formally, everything that is not replaced still stands and, even more, that the *Restatement (Third)* seems still strongly supported within the ALI. At the same time, one can wonder whether the extent to which the *Restatement (Fourth)* departs from the *Restatement (Third)*, as well as from its spirit, might not serve to cast a shadow on the untouched parts of the *Restatement (Third)*, thus blurring the landscape. In any event, even though the US Supreme Court's case law seems to have rebutted some of the most innovative aspects of the *Restatement (Third)*, the related topics, which have triggered the fiercest debates and criticisms of the latter – especially customary international law as federal common law – are not directly and explicitly included in the *Restatement (Fourth)*, even if this does not exclude creeping changes through the tackled topics. In addition, the fact that the *Restatement* selects some topics while it inevitably interferes with others, which are therefore touched upon but without being much explained, may have some inconveniences, especially in terms of consistency.[11]

Third, the completion of the *Restatement (Fourth)* is expected but when? The project to launch some complementary work before 2023 existed until the COVID-19 disruption.[12] What will happen is therefore on hold, but it has to be thought of in relation to

7 See the various articles related to these substantive topics in this issue.

8 Leila Sadat, for example, questioned this fragmented approach in Sadat, 'The Proposed Restatement (Fourth) of the Foreign Relations Law of the United States: Treaties – Some Serious Procedural and Substantive Concerns', *Brigham Young University Law Review* (2016) 1673.

9 For an insider's explanation, see Stephan, 'The US Context of the *Restatement (Fourth): Foreign Relations Law of the United States*', 32 *European Journal of International Law* (*Eur. J. Int'l L.*) (2021) 1415; Peters, The American Law Institute's *Restatement of the Law*: Bastion, Bridge, and Behemoth', 32 *Eur. J. Int'l L.* (2021) 1377.

10 Cleveland and Stephan, 'Introduction', *supra* note 6, at 4.

11 Kristina Daugirdas cites the example of international responsibility. In her view, this is an overarching topic which is all the more important given that '[t]he more insulated U.S. law becomes from international law, the greater the risk of international responsibility'. Daugirdas, 'The Restatements and the Rule of Law', in Stephan and Cleveland, *supra* note 4, 548.

12 Cleveland and Stephan, 'Introduction', *supra* note 6, at 5.

the feasibility of a global restatement in view of the expansion of the field in general (what would be the ideal scope?) as well as the temptation to promote specific restatements for specific areas of law.[13] To split the work is probably wise, if only to ensure that the parts that are ready are not kept waiting too long. A single undertaking is probably out of reach nowadays, as the restatement is obviously a slow process.[14] The *Restatement (Fourth)* has already taken six years (2012–2018). This factual statement aims at raising the issue of means and time. Making a restatement is a big endeavour that must be worth the effort it requires (the comment above refers to a painstaking drafting process,[15] so one can wonder if it is also a painful process). It seems to be the case in the United States, but is this the case elsewhere? The general risk of such an endeavour is to lag behind the real world, whereas the option of publishing in bits and pieces, just like the abovementioned multiplication of restatements dealing with specific or specialized areas, raises issues such as a risk of fragmentation and a loss of homogeneity, which depend, at least partially, on the authors.

2 The Diversity/Representativity of the Authors

Formally, the author of the *Restatement (Fourth)* is the ALI, which selected reporters to prepare it. The latter are only contractors who have no copyright and, although they admittedly can eventually sneak their views into the notes with their own voice, the black letter law and the comments are the ALI's voice. This is because:

> [p]roject drafts must be approved by both ALI's Council and membership before they are considered the position of the Institute. The membership and Council are a diverse group of lawyers, judges, and academics, and reflect a broad range of specialties and experiences. The Council is ALI's governing body, which determines projects and activities to be undertaken by the Institute, and, reflecting the Institute itself, is nonpartisan and independent.[16]

One question is whether a task such as the restatement accomplished by a private and supposedly independent organ (non-profit organization) is an appealing perspective or a limit, whereas the counterpoint would be that such an inventory of practice related to international law and foreign relations would better be made by a governmental or public body.

Although comparison is difficult inasmuch as, in most countries, there is no notion of what the field of foreign relations law means and reference is instead made to its practice regarding international law or to the role and place of international law in the domestic system, there are examples of more or less functional equivalents, like Halsbury's *Laws of England*, a private initiative that is anchored in tradition, which includes a volume devoted to international law, or *The Laws of Scotland: Stair Memorial Encyclopaedia*, while the Dutch government established a standing body that restates

[13] *Ibid.*, at 19.
[14] White, *supra* note 4, at 50.
[15] For details, see www.ali.org/about-ali/how-institute-works/.
[16] See www.ali.org/about-ali/story-line/.

the law in discreet fields and is often cited.[17] Therefore, there seems to be no obvious answer to the question of who is the legitimate author for such an endeavour, except that an independent body seems preferable, and a state-sponsored organ could, especially in some countries, trigger strong reluctance especially on behalf of judges who would fear for their independence. In this regard, the ALI, as a well-established and powerful organization, seems to fit, but things are of course a bit more complex than the mere legal status of the umbrella institution. This is so, first, because '[i]n each restatement, the American Law Institute has its own *dédoublement fonctionnel*: It digests available sources and evidence, while at the same time aspiring to count as evidence, or maybe even a source, in its own right'.[18] Second, the question of who does, or who contributes to, the actual work as well as the methodology should also be considered.

One obvious strength of the ALI's approach lies in the mix of judges, practitioners, officials and academics, among the members, reporters and experts, in addition to the strong, although not exclusive, feature of the American system wherein most of these people have worn several of these hats in the course of their careers. Admittedly, many reporters are renowned and prestigious people. According to some views, they are overwhelmingly elite and tend to be elitist.[19] However, it is difficult to know how they are selected, except that the ALI director plays an important role. Availability may be an important aspect, even if not explicated. Being selected is undoubtedly still considered an honour nowadays and would as such take over other commitments,[20] but it is also a burden at a time of generalized over-commitment and overload of work, and reporters tend to think that they receive little credit for this work. Among the incentives of the ALI's contribution would be the desire to support the main function of the *Restatement*, which is to avoid the fact that US courts, which are generally unaware of international law, make some, or too many, mistakes. In this regard, the assumption is that the *Restatement* has an influence that no academic article can have.

Regarding more specifically the *Restatement (Fourth)*, it seems that it was considered important to take on board reporters who would guarantee the representation of a diversity of points of view as an echo to a changing context admittedly less harmonious, including at the academic level, than it was for the *Restatement (Third)*, although the attempt at diversity did not exceed the limits of what would be usually qualified as mainstream (see the discussion below). At the same time, the selected reporters, some of whom had been among the fiercest critics of the *Restatement (Third)*,

[17] Commissie van advies inzake volkenrechtelijke vraagstukken (CAVV) or Advisory Committee on Public International Law, available at www.advisorycommitteeinternationallaw.nl/. Parties, advocate generals and courts are often reluctant to cite particular authors, but they use collective products, like International Law Commission (ILC) articles or CAVV opinions.

[18] Swaine, 'Consider the Source: Evidence and Authority in the Fourth Restatement', in Stephan and Cleveland, *supra* note 4, 509, at 524.

[19] A view confirmed by some of the reporters of the *Restatement (Fourth)*. See Cleveland and Stephan, 'Introduction', *supra* note 6, at 5 ('[t]he American Law Institute comprises the U.S. legal élite and expresses the views of leading members of the profession, which need not be the same as those of the rank and file').

[20] Although it does not, according to some views, bring much academic credit.

at least in some respects,[21] also overwhelmingly had experience with positions at the State Department (or other ministries of foreign affairs), which gave to the group of reporters a Ministry-of-Foreign-Affairs focus.[22] And, yet, since foreign relations law supposedly involves not only international law but also domestic law, especially constitutional law, the disciplinary representativeness of the reporters and advisers might also be key.

This notion leads me to wonder about the discretion of the reporters. When talking about the *Restatement (Third)*, people insisted on the influence of Louis Henkin on its orientation and choice of approach. Therefore, some 'leeway' cannot be excluded as a matter of principle. However, that it is apparent depends on several factors. The first factor involves the reporters' understanding of the role of the restatement and the methodology to be used. It seems that the *Restatement (Fourth)*'s reporters tend to downplay their role and leeway, speaking of good legal craft, of the aim to support black letter law and not to depart from it and to try to adopt positions that will last, with reference only to the discretion left by the material. In any event, the outcome relies on teamwork, and, although there is a claim of diversity, it is plausible that all reporters are moderates even if they are able to disagree. They nevertheless face difficult methodological (although with political consequences) questions, such as the fact that 'reasonable people will differ … regarding the quantum of evidence that is required before reporters may consider a given proposition to be established, including as to when it is tenable to reason from more basic or related propositions to address a different one'.[23] The second factor involves not only the polishing role of the ALI Council as its members, although not all experts in the field, have their say, but also the dialogue with the State Department, which is an important constituency and very active in attending meetings and discussing the drafts. Thus, stakeholders take part in the process, with the risk that they look for (too much) deference – for example, in the case of the State Department because of its influence over the course of practice.[24]

These multiple layers of discussion (there were eight tentative drafts for the *Restatement (Fourth)*)[25] can also be risks: the work can take more time than expected, and it becomes more and more difficult to find reporters. It is all the more an issue that reporters are not numerous in relation to the breadth of the endeavour (eight are named by the ALI), even if they are supported by some 'experts'. It has also been noted – and criticized – that it is an 'only lawyers' endeavour,[26] which does not incorporate

[21] See White, *supra* note 4, at 51, nn. 87–90.

[22] Sarah Cleveland was counsellor on international law to the legal adviser at the US Department of State during the Obama administration, and Paul B. Stephan held the same position during the Bush administration.

[23] Swaine, *supra* note 18, at 522.

[24] It seems that the *Restatement (Third)* triggered much frustration in this regard. Swaine, *supra* note 18, at 522, n. 78. Kristina Daugirdas notes that, 'unlike the Third Restatement, the Fourth reflects a more collaborative approach with the U.S. government'. Daugirdas, *supra* note 11, at 538.

[25] White, *supra* note 4, at 23.

[26] Swaine, *supra* note 18, at 514. Swaine notes the *Restatement*'s focus on law – 'that is, authority that would be regarded as binding in any dispute regarding a foreign-relations topic'.

insights from other disciplines and does not even consider 'soft law', although the latter can play an important role, especially through the actions of the executive.[27]

In any event, and this is true or at least asserted, for each layer of discussion, the sociological norm is consensus. Indeed, the reporters expressed their confidence that the *Restatement (Fourth)* is a consensus-based outcome, which echoes an idea of neutrality as opposed to a game of power between big players. Such contention can only reinforce the credibility, and maybe the authority, of the *Restatement*. However, it faces several kinds of doubt. Thus, some criticisms point to the *Restatement* as being more or less the voice of the State Department disguised as an epistemic discourse. A bit differently, some question the 'epistemic plausibility of discovering consensus about the existing state of public law'.[28] Others are sceptical regarding not only the idea of 'consensus' but also its durability – it can be due to apathy at some point but subject to disruption later,[29] it can result from the absence of deep disagreement or it can simply come from a 'political stalemate'.[30]

Moreover, consensus as method leads to the exclusion of the most controversial issues (including for reasons of time or under the pretext that the state of law is too unstable). Can the *Restatement* play the reference role to which it pretends if some controversies are downplayed or some problems kept silent,[31] especially if one considers that the fact that a topic is controversial does not mean that its analysis, including the terms of the controversies, is not needed? Last but not least, it seems that the reporters avoid saying that American law is not compatible with international law. Thus, according to Paul Stephan, the reporters of the *Restatement (Fourth)* tried 'assiduously to avoid finding (themselves) in a box where (they) are declaring, based on (their) understanding of international law, that U.S. practice might be inconsistent with international law'.[32] This makes for quite a lot of silence.

However, the issue arises of who is able / has the available means to develop such an endeavour. Provided they would wish to individualize such a corpus of foreign relations law, which country or organization would be in a position to do so: great powers like the European Union (EU)[33] or China?[34] The EU is, to a certain extent, the best

[27] *Ibid.*, at 517ff, underlines that the *Restatement (Fourth)* 'has to date taken up only a few discrete subjects. Even so, the tendency to defer to political branch practices are already on display, as are some of the quandaries this poses' (at 518).

[28] Nzelibe, 'Can the Fourth Restatement of Foreign Relations Law Foster Legal Stability?', in Stephan and Cleveland, *supra* note 4, 551, at 560.

[29] *Ibid.*

[30] Nzelibe, *supra* note 28, at 553.

[31] Daugirdas, *supra* note 11, at 542, cites the example of the contested status of the terrorism amendments and states that '[s]trikingly, the Fourth Restatement omits any mention of scholarship or protests by foreign governments charging that these exceptions violate international law. Instead, the Fourth Restatement adduces reasons to doubt a violation', at 546.

[32] Stephan, 'Perspectives on the Restatement (Fourth) Project', 109 *American Society International Law Proceedings (ASILP)* (2015) 209, at 212 (remarks by Paul B. Stephan), cited by Daugirdas, *supra* note 11, at 538.

[33] Larik, 'EU Foreign Relations Law as a Field of Scholarship', in 'Symposium on Comparative Foreign Relations Law', 111 *AJIL Unbound* (2017) 321.

[34] Cai, 'Chinese Foreign Relations Law', in 'Symposium on Comparative Foreign Relations Law', 111 *AJIL Unbound* (2017) 316.

analogue due to the federal dimension. It is also interesting inasmuch as most of the people working on EU external relations are European lawyers and not international lawyers, whereas European law has become a more and more specialized field of expertise – that is, somehow blind to international law. However, there already exist reference books on EU external relations that can be considered as paving the way for an eventual restatement.[35]

3 The Diversity of Addressees

It is commonly understood that the *Restatement* is, first and foremost, addressed to the US legal profession,[36] especially judges and parties appearing before them, according to the logic of a common law system. A stake appears here if the *Restatement* is the only, or at least the first or the major, contact judges have with international law, as most domestic judges, not only in the USA, barely know international law.[37] Having a ready-made comprehensive account is undoubtedly appealing and can even contribute to promoting compliance with the law.[38]

The number of cases in which the *Restatement* is referenced in judicial decisions is for that matter carefully registered, undoubtedly as an indicator of authority. One reason why the *Restatement* is considered 'the most influential of all the Institute's projects'[39] comes first and foremost from the fact that the ALI's metric to assess a restatement's success is the number of judicial citations (more than a thousand by various American courts for the *Restatement (Third)*), which shows that the ALI itself is very focused not only on the domestic audience but also on the impact on the judiciary. However, the reach is broader, and there are several audiences. These include academia and the students who are educated and trained with this tool, with the stake that foreign relations law substitutes for international law in education. Despite the insistence on the fact that many of the solutions included in the *Restatement (Fourth)* are US specific, audiences also include all foreign actors having relations with the USA or in the USA and even beyond. One cannot ignore the idea that one of the appeals of the *Restatement* is that it is a tool of influence. When trying to fix similar issues, actors of other countries might be tempted to look at the USA as a reference, and, thus, the *Restatement* stands as a privileged tool for investigation, although not conceived as comparative in nature.

[35] The European Law Institute has been mentioned. However, it deals mostly with what is considered in civil law systems as private law. The most plausible is that a corpus equivalent to a restatement of foreign relations law is prepared by the European Commission, with the risk of a political agenda (see below).

[36] 'Restatements Are Primarily Addressed to Courts', *American Law Institute*, available at www.ali.org/about-ali/how-institute-works/.

[37] This can even be the case of judges appointed to international courts or tribunals. One can remember the controversies triggered by the subpoena issued by Judge Gabrielle Kirk McDonald to the Republic of Croatia in the *Blaskic* case.

[38] Daugirdas, *supra* note 11, at 528.

[39] Cleveland and Stephan, 'Introduction', *supra* note 6, at 3.

Nevertheless, foreigners face an issue of readability in two respects. Reading and using the *Restatement*, in particular, presupposes a correct knowledge and understanding of the US system. The *Restatement* does not take care of whether the legal notions that are used are specific or not. Likewise, the assumption that the *Restatement* is read all over the world is difficult to accept due to the issue of language. The assumption is more valid for the English-speaking world than for the rest of the globe. This is not only about the language, but it is also intertwined with the previous argument since the understanding of the system is closely linked to language. Some concepts or legal notions of common law cannot be easily translated. Just think about comity. More generally, the *Restatement* might not be as known as many Americans think. Indeed, another limit that can seem crude but nevertheless exists is accessibility. Admittedly, besides the book format, the *Restatement* is accessible online but through expensive databases, which are not available everywhere. Is the effort of getting access worth it?

4 The Nature of the *Restatement*

Beyond readability and accessibility lies an issue of intelligibility. Although made under the auspices of a private organization, the *Restatement* claims to be persuasive, if not authoritative. It is cited as 'secondary law' because it is supposed to give account of 'black letter law', and this is why it is referenced in a system functioning with the rule of binding precedent. These classifications are troubling for a non-common law lawyer who might question further the status and nature of the *Restatement*. What is it exactly and from what source does it derive its alleged authority?

Questioning the nature of the *Restatement* confronts observers with ambivalence, first with regard to its authors and second with regard to its content. The authors – a private organization with academics as reporters – make one think of epistemic authority, although the *Restatement (Fourth)* includes few academic references, only on specific points and not on theoretical aspects, whereas the reporters' notes on the *Restatement (Third)* were peppered with reference to scholarship. This observation can probably be tied to the desire to appear as a 'pragmatic', realist enterprise, in addition to avoiding the selection of references that becomes a battlefield in the face of scholarship the volume of which alone is already a challenge. In addition, the 'painstaking' process described above and the wide-ranging consultations that it involved as well as the filtering process that the various drafts underwent calls for an institutional authority, although not public by origin. Some will insist on the mostly constitutional/US law dimension of the *Restatement*, whereas others will feel it is speaking mostly of international law. At no moment does this major ambiguity recede.

In regard to the content and methodology, the *Restatement* involves reiteration of something already stated and even firmly established (as implied by the notion of black letter law). It looks like codification – without the name – and has the same ambiguities: looking backward and running the risk of conservatism. Indeed, not only is the process of restating long, but the fact of considering case law in the first place, which already consists of looking at life in a rear-view mirror, also increases the

risk of lagging.[40] Criticisms have even gone further to include the assertion that the *Restatement* essentially reifies the law by putting rationality in a case law that could be messier and that it protects the law against reform. Restating foreign relations law runs a risk of 'ossification'[41] and not adapting to the fluidity of international relations. Critics also wonder if the pretention to stability is not a fallacy,[42] and, provided legal stability makes the professional lives of judges and diplomats easier, whether such an 'insulating strategy' also serves the public interest.[43]

The contention of the *Restatement* as a secondary law bestows a kind of regulatory dimension on it. The fact that the coordinating reporters of the *Restatement (Fourth)* edited *The Restatement and Beyond: The Past, Present, and Future of U.S. Foreign Relations Law*, whose advertisement by Oxford University Press declares that it 'provides a definitive, authoritative analysis in the Fourth Restatement as a source of law',[44] is interesting in that it seems to add a second layer of authority to the alleged authoritative character of the *Restatement* itself. Nevertheless, could the fact that this book exists, and has been felt necessary by its editors, mean that the legitimacy of the *Restatement* is not taken for granted; another possible explanation being that the authors increase the credit they may get for their work by publishing an academic work on it? In any event, a comparison with the reports of the International Law Commission (ILC) would be interesting,[45] the latter being considered, including by the ILC, as 'subsidiary means of determination of the law', just like international judicial decisions – that is, secondary in the sense of Article 38(1)(d) of the Statute of the International Court of Justice.[46] Admittedly, the ILC could not claim that its reports and conclusions are a source of law or even black letter law, although it is the impression that it would like to convey. Comparable to the ILC reports, the *Restatement* also includes reporters' notes that are a commentary. The reference to black letter law seems to imply an ecumenical vision or, at least, something descriptive. This does not fit with the criticisms that find the *Restatement* either too progressive or too conservative, which is not surprising as, unlike other American restatements, this one does not involve only American law but tackles a controversial topic – foreign relations law.

5 The Subject Matter of the *Restatement*

Two aspects can be considered here: the subject matter as such – that is, the field of 'foreign relations law' – but also the understanding of what a restatement is or ought to be in this regard, keeping in mind that the field and its vehicle should not be

40 White, *supra* note 4, at 50, notes that 'when the Third Restatement of Foreign Relations Law was officially endorsed and published by the ALI in 1987, the long hegemony of foreign affairs exceptionalism had begun to exhaust itself'.

41 Nzelibe, *supra* note 28, at 552.

42 *Ibid.*, at 560.

43 *Ibid.*, at 562.

44 Stephan and Cleveland, *supra* note 4.

45 Including regarding the credit brought by a related academic publication. One cannot but think of the much-cited books that James Crawford edited both in English and French on the ILC's Articles on State Responsibility.

46 Statute of the International Court of Justice 1945, 33 UNTS 993.

confused. Foreign relations law may have several very different functions, and the US *Restatement* does not necessarily accomplish all of them. In other words, foreign relations law and its restatement could be very different elsewhere. Moreover, even in the USA, there are controversies, reflected in the contrast between the *Restatement (Third)* and *(Fourth)*, about the exact object of the *Restatement*.

The field of 'foreign relations law' was invented in the USA in the 1950s.[47] Campbell McLachlan considers that it 'is not a legal term of art' and that 'outside the United States, the term enjoys only limited currency and no commonly accepted scope'.[48] However, as Karen Knop rightly puts it, inventing a field is also framing it.[49] The issue is not whether rules corresponding to what is called foreign relations law in the USA exist elsewhere. They do. Many, if not almost all, relationships involving an element of foreignness or otherness involve such rules. The issue is more whether foreign relations law is a field in its own right that would justify being promoted as such beyond the USA.[50] Should the corresponding rules be individualized in their own corpus? To answer this question presupposes not only identifying if foreign relations law is a subset of domestic law or also encroaches on international/transnational law, and, by the same token, identifying what is considered as 'foreign', but also reflecting on the functions of this corpus of rules. It seems that the US vision is dominantly that foreign relations law is domestic law[51] and that it deals not only with international law but also with transnational law, meaning that it reaches beyond international law in the traditional sense and mostly focuses on interstate relations. At the same time, the richness of the sources as enumerated in the *Restatement (Fourth)*, even if limited to law and with the limits that are stated above, does not mean that the methodology is transparent. In fact, it is not clear if some sources are not favoured over others.

Although it is difficult to conceive of foreign relations law as purely domestic, it is not necessary to directly take a side on this definition or to wonder whether such a corpus of rules plays the role of a bridge or a wall. Indeed, it is easy to see that the US concept of foreign relations law has triggered criticisms and even 'anxieties' over time. Generally speaking, not only does the creation of a new field necessarily impact the existing ones, but, in the case of foreign relations law, as suggested by Knop's analysis, its development as a field would be especially assumed to mean a turn away from international law, with the risk of 'displacing' it (that is, marginalizing it in academia), of

47 Stephan, 'Comparative International Law, Foreign Relations Law, and Fragmentation: Can the Center Hold?', in A. Roberts *et al.* (eds), *Comparative International Law* (2018) 55.

48 McLachlan, 'Five Conceptions of the Function of Foreign Relations Law', in C. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations law* (2019) 21, at 21.

49 Knop, 'Foreign Relations Law: Comparison as Invention', in Bradley, *supra* note 48, 45, at 45. She notes that 'fields of law are inventions, and that fields matter as analytical frames'.

50 One attempt in France with a '*manuel*' by Elizabeth Zoller, *Droit des relations extérieures* (1992), directly inspired by the US experience (she was also known in France as an expert in American law). Much more influential, but different in vision, was a previous book by Guy de Lacharrière, *La politique juridique extérieure* (1983), which was oriented to analysing how states could influence international law.

51 Bradley, 'What Is Foreign Relations Law?', in Bradley, *supra* note 48, 3, at 3; see also Bradley, 'Foreign Relations Law as a Field of Study', in 'Symposium on Comparative Foreign Relations Law', 111 *AJIL Unbound* (2017) 316.

'discounting' it (that is, doubting its nature as a real law) and/or of 'distorting' it (that is, impacting its internal workings).[52]

In fact, it is necessary to distinguish between the question of foreign relations law and the question of foreign relations law as it is approached and shaped in the *Restatement*. The distinction might look artificial because, 'as the best-stocked cabinet of issues and ideas',[53] US foreign relations law is likely to be considered as a template or a model. However, the distinction allows one to use hindsight and envisage that there can be various approaches to foreign relations law. Thus, McLachlan suggests a functionalist approach through which he finds that foreign relations law can perform five different functions: '(1) *exclusionary*: to *separate* the international from the national, taking the exercise of foreign relations out of the purview of national law; (2) *internationalist*: to *mediate* the inward reception of international law into the domestic legal system; (3) *constitutional*: to *distribute* the exercise of the foreign relations law between the organs of government; (4) *diplomatic*: to *facilitate* the diplomatic relations of the state with other states; and (5) *allocative*: to *allocate* jurisdiction and applicable law in matters concerning the exercise or enforcement of the public power of states.'[54] The interest of such a list is to show not only that the field can be approached differently, as it is in the USA, but also that it might offer opportunities like encompassing more than public international law in the traditional sense or playing the role of a gateway for international law to penetrate more easily in domestic law.

The appeal and limits of a restatement are also tributaries of the diversity of its possible functions. One cannot exclude that the *Restatement* is used as a way of looking critically at international law and react against or resist an international law that is not ideal. However, once again, there is the ambiguity of what a restatement is meant to be. In this regard, the ambition 'to restate "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"[55]—not just the views that might be held by U.S. courts … proved controversial'.[56] This was not only because of the 'truth-in-labeling argument'[57] as the *Restatement* is entitled 'Foreign Relations Law of the United States' but also because, in the international legal system, any document 'purporting to represent the U.S. view of international law … is not just politically salient, but actually contributes to rules formed by state practice and *opinio juris*'.[58] This secondary potential effect is indeed to be considered and might explain the deep interest of the State Department in participating in all the ALI's discussions around successive drafts. In other terms, foreign relations law is a tool whose usefulness might be contingent, and whose conception depends, on the political agenda that

52 Knop, *supra* note 49, at 51; see also Peters, *supra* note 9.

53 Knop, *supra* note 49, at 45.

54 McLachlan, *supra* note 48, at 21.

55 *Restatement of the Law (Third): Foreign Relations Law of the United States* (1987), introduction, at 3.

56 Swaine, *supra* note 18, at 511.

57 *Ibid.*

58 *Ibid.*; see also Daugirdas, *supra* note 11, at 536, about the potential of the *Restatement* to be a subsidiary means for identifying rules of customary international law.

it serves. In this regard, assessing the appeal and limits of the *Restatement* is highly context dependent.

6 The Context of the *Restatement*

Some authors point out that the context has dramatically changed from the *Restatement (Third)* to the *Restatement (Fourth)*. The comparison between both texts shows how context dependent they are, to the point that some authors have pointed to a 'historical burden'.[59] First, the *Restatement (Third)* (which was in fact the second) has the reputation of having interpreted international law progressively[60] and having promoted it in the USA. According to some views, the *Restatement (Third)* did not just describe, but also created, a vision. This better knowledge, especially by domestic judges, would have logically triggered a multiplication of domestic decisions dealing with international law and a correlative move of internalization especially under the form of precedents. This could even explain why the *Restatement (Fourth)* emphasizes its domestic sources,[61] although this sounds like a rather optimistic explanation. Indeed, some argue that, even if the *Restatement (Third)* was 'an excessive and unfounded embrace of this body of law as federal common law, … the Fourth Restatement goes too far in the other direction'.[62]

Second, the *Restatement (Third)* developed in a US context where 'the stressing of human rights and of the international rule of law more generally would be in the national interest – despite Nicaragua',[63] whereas the *Restatement (Fourth)* developed in a context that was 'somewhat the reverse'. Georg Nolte underlined already in 2014 that, 'within the United States, international law is now much contested, not just certain of its rules, but also with respect to its basic functions'.[64] It seems that this remains true in 2021. International law is much more contested and not only in the USA. This also points to another discourse in support of the *Restatement (Fourth)*: that the US Supreme Court has become more conservative, that executive practice has diverged from the *Restatement (Third)* and that the US community of international lawyers has diversified. Which brings us back to the issue of consensus under another angle. Jide Nzelibe notes that there was a time when:

> a relatively bipartisan consensus on liberal internationalism prevailed. Under those conditions, the drafters of both the *Restatement (Third)* in 1987 and the *Restatement (Second)* in 1965 might have hoped that the product of their efforts would help stabilize the rule of law in foreign policy. However, today, the conditions that produced that moderate bipartisan consensus no

[59] Cleveland and Stephan, 'Introduction', *supra* note 6, at 6; see also White, *supra* note 4, at 23–64.

[60] Nolte, 'The Fourth Restatement of Foreign Relations Law of the United States: Select Remarks by Georg Nolte', 108 *Proceedings of the ASIL Annual Meeting* (2014) 27–30.

[61] Stephan, *supra* note 47, at 57.

[62] Cleveland and Stephan, 'Introduction', *supra* note 6, at 12; Lee, 'Customary International Law and U.S. Judicial Power: From the Third to the Fourth Restatements', in Stephan and Cleveland, *supra* note 4, 251, at 251–264.

[63] Nolte, *supra* note 60, at 28.

[64] *Ibid.*

> longer hold, and thus the quest to foster stability in foreign relations law is likely to face even more of an uphill battle.[65]

Third, the *Restatement (Fourth)* faces a competition that did not exist to the same extent before the 2000s. Other bodies make works in international law that are equivalent to restatements. The ILC, for instance, since it moved away from its main work of codification to dedicate a substantial part of its activity to the study of general issues such as the fragmentation of international law or customary international law, can be considered as restating full sections of international law and has done it in a way that might satisfy even those states that look to international law reluctantly. It can come at a price since, 'in a time of deformalization in international law, in particular due to the increasing role of soft law, the ILC may be seen as symbolizing a too "old-fashioned" way of approaching international law, based mostly on an assessment of existing hard obligations and neglecting more flexible conceptions'.[66] However, the fact that the ILC's 'restatements' are considered conservative only shows that the body is also driven by a political agenda and does not discount the nature of the work that the body does. In addition, it is only one example. There are many others, like various commentaries, encyclopaedias or handbooks. Of course, it could be argued that speaking of competition is wrong since what is restated is completely different (international law versus domestic law). Let us consider that there exists at least a challenge since these various endeavours contribute to making international law more readily available. The challenge is whether the *Restatement* considers these sources of knowledge (if not considers them more) and eventually defers to them.

In the same spirit, the context has not changed only because there would a backlash or pushback against international law. The facts are that international law has developed and expanded, thanks to the multiplication of international adjudicatory or quasi-adjudicatory bodies and the correlative expansion of an international case law. This case law, just like domestic case law, to be accurate, is typically the type of material considered by the ILC. Here, the challenge is the extent to which the *Restatement*, especially as it is supposed to speak to judges, gives account of this international case law, even with the necessary caution regarding its binding character. But, of course, this is speaking of foreign relations law as a gateway and involves an entire vision of international law.

7 The Political Agenda of the *Restatement* (and Even Ideology)

Can there be a credible contention of neutrality in the *Restatement*, as could be derived from the statement that the *Restatement (Fourth)* is not an effort of rationalization in which reporters would have made the practice fit but, rather, an effort to explain

[65] Nzelibe, *supra* note 28, at 552.

[66] Forteau, 'Comparative International Law Within, Not Against, International Law: Lessons from the International Law Commission', in Roberts *et al.*, *supra* note 47, 162, at 166.

what happens in practice, like neutral observers may do? Or should one believe that the constraints of the review process within the ALI imply a complex navigation that prevents it from achieving a specific normative goal? Several indicia point to another direction. The reporters of the *Restatement (Fourth)* acknowledge that it is governed by a certain vision,[67] which appears to mix a vision of the role of the *Restatement* and a vision of international law. This is especially striking because of the sharp contrast with the *Restatement (Third)*. It is not just about updating but also about displaying a rather radical change. Or, to put it in other words:

> it is primarily about why the Third Restatement, arguably the most authoritative embodiment of a particular approach to the law of foreign relations in America to appear in the twentieth century, should have had that authority suddenly, and decisively, questioned at that century's end, and subsequently repudiated, at least in part, by judicial decisions and commentary in the first two decades of the twenty-first century.[68]

However, the point here is not to enter into the debate on the rise and fall of the US foreign relations exceptionalism but, rather, to underline the historical contingency of a restatement. In this regard, the *Restatement (Fourth)* is perceivable as bastioning against international law, whereas the *Restatement (Third)* was felt to be establishing a bridge to international law.[69] But the *Restatement (Third)* was also seen as misappropriating international law, inasmuch as calling something international law could leverage the power of judges to legislate, or, at least, to increase their interpretive power, by providing a legal basis to read statutes narrowly, thus preventing the criticism of a lack of authority (as seen in the previous section, the same phenomenon could happen elsewhere).

The *Restatement (Fourth)* openly displays the filtering function of foreign relations law. It works in favour of a relativization of international law and an acceptance of its contingency (at least in a US perspective, although it is argued that other states or entities also use this filtering function).[70] The issue is whether foreign relations law contributes to the contingency of international law or just duly records it and provides the state's answer. In this regard, it is striking that some of the reporters for the *Restatement (Fourth)* have also actively contributed to the rise of comparative international law and the questioning about whether international law is indeed international,[71] which also followed the debate about the fragmentation of international law. The outcome of these reflections is known: the dream of universal international law runs into the hurdle of parochialism. But, more than that, international law is shown as being relative, and this relativization would be inevitable, if not anticipated, by international law itself in accepting the fact that 'some of the work, and perhaps

67 Cleveland and Stephan, 'Introduction', *supra* note 6, at 11.

68 White, *supra* note 4, at 24.

69 On this issue, see especially Peters, *supra* note 9.

70 According to Stephan, 'a kind of foreign relations law derived from European law filters the impact of international legal obligations on both the European Union and its constituent states'. Stephan, *supra* note 47, at 60.

71 A. Roberts, *Is International Law International?* (2017).

the most important work, of international law takes place within, rather than among, nation-states' and that, when international law operates as part of domestic law, it 'becomes a hybrid. As it enters domestic law, it responds to the demands of the domestic legal system in ways that change its content, and ultimately its identity'.[72] In this perspective, foreign relations law is the corpus of rules or principles with which, or by which, each and every state can implement its margin of appreciation regarding the domestic operation of international law. This is a plea for pluralism or at least a certain understanding of pluralism.

What is interesting in a context where foreign relations law seems subversive to international law – maybe as a logical consequence of international law having become more intrusive in domestic law – is that it might trigger its own subversion under the form of comparative foreign relations law. The latter tells us at least two things: foreign relations law can be conceived very differently from the *Restatement*, although the latter has the appeal of a ready-made template; therefore, that foreign relations law will lead to a system closure is not inevitable. And, yet, it might well be that a Restatement more focused than before on domestic sources favours such a closure, bringing back under a new guise the old reverse monism. These are at least elements to take into consideration and weigh and balance when reflecting on the limits and appeal of the *Restatement*.

[72] Stephan, *supra* note 47, at 62.