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## A Transatlantic Symposium on *The Restatement (Fourth)*

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To a beginning lawyer trained outside the United States, it can be a memorable moment of curiosity: what is that thing that US-based authors or US courts cite as if it is part of the canon of legal holy books: what is a ‘Restatement’?<sup>1</sup> Moreover, what is ‘Foreign Relations Law’ and how does it relate to International Law? Even if these questions linger on, one quickly learns that *The Restatement on US Foreign Relations Law* is a special beast in the international legal literature: although instigated by a private organisation (the American Law Institute), it seeks to restate ‘the law’ authoritatively; whilst prepared by academics, it avowedly aims to shape legal practice; and it may originate from within one jurisdiction, but it is consulted around the globe.

The release in late 2018 of a new volume of the Restatement on the Foreign Relations Law of the US – *the Restatement (Fourth)* – provides an occasion for a new and informed encounter with the phenomenon of the Restatement on US Foreign Relations Law and to address lingering questions concerning the role of this monumental US institution in the international legal discourse. To that end, the European Journal of International Law organized in October 2020 a literal – albeit online - encounter among on the one hand US scholars intimately familiar with the Restatement, namely its key authors, and Europe-based scholars who are intimately familiar with the issue areas covered by this Restatement: treaties, jurisdiction and immunities. This ensuing Symposium aims to shed light on *the Restatement (Fourth)* at three levels: (1) the project of ‘restating’ the law (2) the concept of ‘foreign relations law’ and its relationship to international law and (3) the substance of law as ‘restated’ in the Restatement: how does the *Restatement (Fourth)* approach the law of treaties, jurisdiction and immunities; does it get the law ‘right’, and how does it compare to its illustrious predecessor, the *Restatement (Third)*?

### 1. ‘Restating’ the Law

A first exploration of restatements can provide some answers to the question of what is involved in restating the law: a restatement aims to set out, with authority, what the law is, and thereby to streamline, structure and crystallize previously uncertain rules. All this is to be achieved, as Benjamin Cardozo noted almost a century ago, through ‘unique authority, not to command, but to persuade’, and through this persuasion, ‘to unify our law’.<sup>2</sup> In the context of US domestic common law, such an approach has obvious appeal.

But new questions immediately emerge when seeking to apply this to the *Restatement (Fourth)*: if the project of ‘restating’ is primarily about common law in the sense of domestic *customary* law, why does this Restatement engage in extensive discussions of international agreements and statutory law, for instance, on immunities? And if it is a restatement of *domestic* customary law, do other common law countries also have restatements? Could Halsbury’s Laws of England be considered as such? And indeed, can one find parallels even

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<sup>1</sup> The reaction may be comparable to a beginning lawyer trained in the Common Law system who encounters in case law and the literature references to “*la doctrine*” - and equivalent phraseology in other systems – and who wonders what is “*la doctrine*” and where does one find it?

<sup>2</sup> Benjamin N. Cardozo, *The Growth of the Law* (New Haven: Yale University Press 1924), 9.

in civil law countries, for instance the famous German *Kommentar* literature? In terms of influence, too, the Restatement is not necessarily unparalleled: the impact of the writings of Eduardo Garcia de Enterría on Spanish administrative law practice may be inspirational for authors of US Restatements aiming to shape US case law. At the international plane, the work of the International Law Commission, International Law Association and Institut de Droit International appears comparable in terms of working methods (reporters, drafting by committee, no names of individuals on the spine of the ensuing product). But they claim to set forth ‘pure’ international law, not ‘foreign relations law’.

## 2. Foreign Relations Law

The contributions in the Symposium suggest that it is the concept of foreign relations law that provokes the strongest reactions. To the Europe-based international lawyer, US foreign relations law looks familiar: one recognises classic topics of international law such as treaties, jurisdiction and immunities. Yet, it also looks strangely tinted: inseparably intertwined with US federal law, this is international law as seen through American sunglasses. The critics could probably imagine with equanimity a Restatement on, say, the American law of commercial transactions. But they oppose US Foreign Relations Law’s usurpation of international law, whether it is in the Restatement or in law school courses that elsewhere would be taught under the title International Law. A key concern is that US foreign relations law gives insufficient normative weight to international law, presenting international law as dependent on US law, with US law-appliers as gatekeepers. Another concern is one of legitimacy: foreign relations law is based on the practice of only one state; international law – at least general international law - is supposed to be made by almost 200 states. To non-Americans, a Restatement of US Foreign Relations Law may look like what a Restatement of US Constitutional Law would look like to US lawyers had it been drafted only by Texas-based lawyers.

Others in this Symposium, however, are more relaxed about the phenomenon of US Foreign Relations Law. They recognize that most domestic legal orders have a filter to receive international law into that order, while Anthea Roberts’s work has shown that even textbooks on ‘International Law’ in fact set forth particular, nationally inspired, conceptions of international law.<sup>3</sup> Calling this law ‘Country X’s Foreign Relations Law’ may in fact be a more accurate description than a universalistic label such as ‘International Law’. Moreover, making international law part of American law through the concept of *US Foreign Relations Law* means that courts, judges and general legal discourse cannot easily dismiss international law as “foreign”. What Sally Engle Merry has observed with respect to the vernacularization of international human rights norms can also be seen here in the context of the infiltration of international law in the US legal order: what gets lost in normativity, is gained in acceptability.<sup>4</sup>

Yet again others acknowledge that US foreign relations law is different from international law and can therefore deviate from it, but point out that divergences between the two risk undermining compliance with international law. The concerns are in part inspired by the Restatement’s potential impact. While its direct target is US law, its impact may radiate

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<sup>3</sup> Anthea Roberts, *Is International Law International?* (Oxford: Oxford University Press, 2017).

<sup>4</sup> Sally Engle Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, 108 *AMERICAN ANTHROPOLOGIST* 38 (2006).

outwards: US law is likely to shape US state practice. The Restatement could also be received as a ‘teaching of the most qualified publicists’ in the sense of article 38(1)(d) of the Statute of the International Court of Justice and thus shape international law as a subsidiary source of international law. For authors of the Restatement, this potential impact is part of the prestige of participating in the Restatement; for those seeing the Restatement as a Behemoth (see Anne Peters in this Symposium), the potential impact is a cause of apprehension. The different perceptions then also give rise to a wide range of metaphors: bridge or a bastion? Behemoth? Filter? Or, as suggested above, sunglasses?

Whether inducing fear or admiration, foreign relations law can also be considered as a phenomenon pursued elsewhere. Can we identify such in Europe’s past? Was the international law of Grotius a Dutch law of foreign relations?<sup>5</sup> Navigating various levels of authority like Foreign Relations Law in the US, can EU external relations law be considered as such? Should all states develop their own ‘foreign relations law’, or would this in civil law countries be no more than a renaming of the section in the textbook now labelled ‘international law & domestic law?’ One purpose of our symposium is to flesh out these issues and understand the *raison d’être* and pros and cons of Foreign Relations law to which the Restatement gives voice.

### 3. Foreign relations law and international law as restated in the Restatement (Fourth) and as compared to the Restatement (Third)

Last but not at all least, the Symposium engages with the *Restatement (Fourth)*’s actual legal formulations in the areas of international law that it covers. The *Restatement (Fourth)* aims to reflect developments since 1987, when the *Restatement (Third)* appeared. At the same time, the *Restatement (Fourth)* covers only three of the many topics covered in the *Restatement (Third)* and even within those topics it does not treat all the sub-topics. The exercise in ‘re-restating’ is purposefully selective and, as is brought out in the subsequent contributions, the *Restatement (Fourth)* departs from the *Restatement (Third)* in a number of ways.

The subsequent contributions also make clear that restatements are a product of their time. In the symposium one can get the impression of a juxtaposition between the ‘good old universalist *third*’ and the ‘conservative, backlashed, America-first *fourth*’. Released in 1987, the *Restatement (Third)* had a strong end-of-history flavour, opening the gates of the US legal order to an international law that corresponded with US values and interests. The gatekeepers of 1987 were thus in a permissive mood: a much-cited review thought they had sought “to give as much effect as possible to the basic tenets of public international law in the domestic sphere.”<sup>6</sup> To support their approach, the authors of the *Restatement (Third)* drew heavily on scholarship, often their own - scholarship that was, as Paul Stephan notes in his contribution “Olympian rather than argumentative, self-confident pronouncements about what was, or what [the authors] hoped would become, the common wisdom.” The *Restatement (Fourth)* seems to reflect a different era, possibly an era of fragmentation, pluralism and comparative

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<sup>5</sup> See Martti Koskenniemi, *To the Uttermost Parts of the Earth*, Cambridge, Cambridge University Press, 2021, chapter 4.

<sup>6</sup> Matthias Herdegen, ‘Restatement Third, Restatement of the Foreign Relations Law of the United States’, 39 *American Journal of Comparative Law* (1991) 207, at 211.

international law - but above all, an era that, for better or worse, has become more cautious, more vigilant, of international law. The *Restatement (Fourth)* is not ‘Olympian’; it is densely argued, reflecting an ‘explosion’ of domestic decisions on treaties, jurisdiction and immunities.

#### 4. Structure of the Symposium

In the interview that opens the Symposium we ask Paul Stephan, one of the project’s two coordinating reporters, about the selection of the reporters, the writing process, the Restatement’s intended audience and about the relationship with the *Restatement Third* and the rest of the world. The phenomenon of the US Restatement is then commented on and critiqued in contributions by Hélène Ruiz-Fabri and Anne Peters. Paul Stephan responds to these two articles, observing that national legal cultures shape how we talk about international law. The Symposium then turns to a discussion of the substantive law as treated in the *Restatement (Fourth)*. Alina Miron and Paolo Palchetti argue that in the area of the law of treaties, the *Restatement (Fourth)* is more inward-looking than the *Restatement (Third)* was - a view that reporters Curtis Bradley and Edward Swaine dispute. Cédric Ryngaert, too, focuses on the differences between the *Restatement (Third)* and *(Fourth)*, finding the latter to have adopted a ‘parochial’ approach to the law of jurisdiction. In his response, William Dodge differentiates between ‘parochial’ and ‘modest’ approaches to the customary international law of jurisdiction, and defends the virtues of modesty. The Symposium concludes with a substantive discussion between Roger O’Keefe and reporters David Stewart and Ingrid Wuerth on the Restatement’s treatment of the law of immunities: the discussion highlights the domestic law grounding of the law of immunities, codified notably in the 1976 Foreign Sovereign Immunities Act, and suggests how, despite focusing on a domestic statute, the *Restatement (Fourth)* could still inform the international legal discourse.

The ten contributions set out in the following are not a review of the *Restatement (Fourth)* in a classical sense. They offer ten perspectives: five by Europe-based expert commentators who were asked to react to an important work and encouraged to be selective, even impressionistic, in their treatment; and five responses by authors of the *Restatement*. These ten perspectives, read together, make for an important conversation — about a significant book, and about the possibilities and limits of ‘restating foreign relations law’ for a domestic and global audience.