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The American Law Institute's Restatement of the Law: *Bastion, Bridge and Behemoth*

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Abstract

This article analyses the repercussions of restating foreign relations law for international law in the current constellation of backlash, or at least fatigue, with international law and global governance. Foreign relations law – consolidated, shaped and strengthened by the exercise of restating it – partly erects a bastion against international law and partly builds bridges between international law and domestic law. The foreign relations law of a powerful state such as the USA, in particular, risks marginalizing or even swallowing up international law. The article discusses four possible strategies to mitigate or counteract that 'Behemoth' tendency – namely, the normalization of foreign relations law, more intense restating exercises in international law proper, the elaboration of restatements of other countries' foreign relations law and, finally, multi-perspectivism. The latter strategy involves seeing foreign relations law through the eyes of differently situated law appliers, notably by contemplating the consequences of the stated rules on other states and by comparing different nations' foreign relations laws. The danger of US foreign relations law becoming the Behemoth of international law can be best contained by espousing such deliberate multi-perspectivism when designing, restating and interpreting it.

> The Authority of writers, without the Authority of the Common-wealth, maketh not their opinions Law, be they never so true. … For though it be naturally reasonable; yet it is by the Soveraigne Power that it is Law.
>
> – Thomas Hobbes, *Leviathan*[1]

1 Introduction

One of my teachers, Detlev Vagts, wrote in the *Festschrift* for Jost Delbrück, 15 years ago, under the heading 'American International Law: A Sonderweg?' that the 'degree

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[1] T. Hobbes, *Leviathan* (1651; reprinted 1943), ch. 26, at 143.

of emphasis on foreign relations law' is a 'feature that distinguishes American scholarship and teaching on international law' and that '[t]he foreign relations law output of American scholars is by and large of no interest to foreign scholars and has produced no country to country dialogue'.[2] Times have changed! It is welcome that this Symposium launches a transnational dialogue on US foreign relations law.

All international lawyers know the Leviathan, the sea monster by whose name Thomas Hobbes described the state. Less known to lawyers is the Leviathan's monstrous counterpart, the Behemoth.[3] The quote from the Leviathan recalls the distinction between institutional and epistemic authority. The state and – I would add – interstate bodies possess the institutional authority to make law. In contrast, private institutions like the American Law Institute (ALI) (whose 'reporters' are mainly scholars) enjoy a purely epistemic authority to elaborate and publicize texts that may take the form of rules and principles but which remain academic outputs. Scholars cannot make law as they possess no formal law-making or law-destroying authority themselves. But, unlike lepidopterologists who cannot make butterflies, legal scholars do have a modest law-shaping role.[4] It depends on the persuasiveness of their legal arguments whether these will be taken up by the political actors or not.

As the ALI itself characterizes its work, '[a]n unelected body like the American Law Institute has limited competence and *no special authority* to make major innovations in matters of public policy. Its authority derives rather from its competence in drafting precise and internally consistent articulations of the law'.[5] Along this line, an observer characterized the ALI's restatements: 'Its work product is offered into the marketplace of legal ideas and receives whatever weight it may be given by the authoritative organs of government – judicial and legislative.'[6]

That said, the *Restatement of the Law (Fourth): The Foreign Relations Law of the United States* is an outstanding scholarly work that generates knowledge about US foreign relations law and is eminently useful for legal practice. But we should also take note of the work's problematic repercussions for, and in relation to, international law. After situating the *Restatement* in the current global constellation (section 2), this article asks more specifically where and how the *Restatement* erects a bastion against international law (section 3.A), where it builds bridges between international law and domestic law (section 3.B)[7] and where it risks marginalizing or even swallowing up

[2] Vagts, 'American International Law: A Sonderweg?', in K. Dicke *et al.* (eds), *Weltinnenrecht: Liber Amicorum Jost Delbrück* (2005) 835, at 839, 841.

[3] Job 40:18. Ironically, the Leviathan, used by Hobbes to characterize the territorial state, is a mystical monster in the sea, whereas the Behemoth is a land monster.

[4] *Cf.* Kammerhofer, 'Lawmaking by Scholars', in C. Brölmann and Y. Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (2016) 305, at 305.

[5] American Law Institute (ALI), *Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work* (rev. edn, 2015), at 6 (emphasis added).

[6] Greene, 'The American Law Institute: A Selective Perspective on the Restatement Process', 62 *Howard Law Journal* (2019) 511, at 512.

[7] I owe the image of the bridge to H.P. Aust and T. Kleinlein (eds), *Encounters between Foreign Relations Law and Public International Law: Bridges and Boundaries* (2021).

international law as a Behemoth monster (section 3.C). Section 4 discusses four strategies that mitigate or counteract the tendency to overwhelm international law by US foreign relations law (as restated by the ALI) – namely, the normalization of foreign relations law (section 4.A), restatements of international law (section 4.B), restatements of other countries' foreign relations law (section 4.C) and multi-perspectivism (section 4.D). My conclusion is that – in our constellation of post-globalism, nationalism and populism – the danger that the US foreign relations law, in its current and restated form, becomes an *ersatz* international law[8] can be best contained by espousing a deliberate multi-perspectivism in its restatement (section 5).

2 The *Restatement* in a Changing World

A preliminary question is whether an analysis of the merits and possible drawbacks of the *Restatement* must distinguish the body of foreign relations law from the restatement of that law. This is however difficult and maybe not necessary because the act of 'restating' pulls together the dispersed rules and thereby, to some extent, creates both 'a body' of foreign relations law and the concomitant field of study.[9] The risks and opportunities of foreign relations law are exacerbated by the fact of 'restating', *aka* largely creating this law as a branch or body of law in the first place.

A second preliminary point is that not every state's foreign relations law is equally relevant. A foreign relations law's potential 'Behemoth' quality is more pronounced in the case of an economic, military and cultural superpower. The foreign relations law of Trinidad and Tobago, Liechtenstein or Bhutan affects the international legal order much less than, say, a foreign relations law of the USA, the European Union (EU) and China. Besides, potential risks depend on the historic constellation. This has been described by the (institutional) author of the *Restatement* as follows: 'The world, as well as the role of the United States in the international community, has witnessed *profound changes* in the 30 years since publication of the last Restatement on this topic, but much of the work of our predecessors has held up remarkably well.'[10] These 'profound changes' seem to be the redistribution and dispersion of economic, political, military and ideational power, challenging the prior dominance of the West. The challengers are not only the rising states of the global South and Asia but also business enterprises, new regional organizations and criminal networks unfolding in the global action.[11]

[8] Aust and Kleinlein, 'Introduction: Bridges under Construction and Shifting Boundaries', in Aust and Kleinlein, *supra* note 7, 1, at 8.

[9] Along a similar line on 'anxieties' and opportunities coming with the creation of 'a field' (of comparative foreign relations law), see Knop, 'Foreign Relations Law: Comparison as Invention', in C. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (2019) 45.

[10] *Restatement of the Law (Fourth): Foreign Relations Law of the United States* (2018), Introduction, at 2 (emphasis added).

[11] Dasgupta, 'The Demise of the Nation State', *Guardian* (5 April 2018). For a popular account, see Kupchan, *No One's World: The West, the Rising Rest, and the Coming Global Turn* (2013). For the consequences for international law, see Burke-White, 'Power Shifts: Structural Realignment and Substantive Pluralism', 56 *Harvard Journal of International Law* (*HJIL*) (2015) 1.

Material and ideational shifts affect the standing of international law, and this also shapes the opportunities and risks of the *Restatement (Fourth)*.[12] Roughly speaking, the relevance and normative power of international law in international relations seems to be declining. In terms of practical relevance, there is a treaty fatigue: the states lack appetite for new multilateral treaties, although, in substance, such treaties would be necessary. Suffice to mention only some of the most pressing global problems that require an organized cooperative effort: climate change – here, the Paris Agreement is very vague and weak, foreseeing only 'nationally determined contributions' and reporting obligations.[13] Migration is mainly addressed by soft law.[14] In the field of global health, the World Health Organization's 2005 Health Regulations are binding, but they leave the 'sanitary sovereignty' of states intact and empower the organization only to collect information and to issue recommendations.[15]

This treaty fatigue probably has strategic and normative reasons. An intense post-colonial critique of the substance and legitimacy of international law has unfolded, bolstered by the rise of states formerly under European domination. In the new context and a new garb, the doubts about the quality of international law as real 'law' (as opposed to politics or comity)[16] and as being 'international' (as opposed to being only a projection of the *droit public de l'Europe*[17] to the world), for the purpose of entrenching a Western informal empire, have resurfaced. International law's historical baggage of Eurocentrism is increasingly becoming a problem.[18]

These phenomena in turn have led to the suspicion that what we call international law is in reality only a foreign relations law and politics of 'the West'. It is against this background and in this constellation that we need to assess the risks and opportunities created by the *Restatement (Fourth)* for the universality and autonomy of international law.

3 Risks and Opportunities of Restating the US Foreign Relations Law for International Law

Foreign relations law serves two broad objectives: the first is to secure the operation of the state in the international context.[19] Importantly, this does not only concern

[12] *Restatement (Fourth)*, *supra* note 10.

[13] Paris Agreement on Climate Change, UN Doc. FCCC/CP/2015/L.9/Rev.1, 12 December 2015.

[14] Global Compact for Safe, Orderly and Regular Migration, UN Doc. A/RES/73/195, 19 December 2018.

[15] WHO, International Health Regulations (2005), esp. Art. 3(4).

[16] Bolton, 'Is There Really Law in International Affairs?', 10 *Transnational Law and Contemporary Problems* (2000) 1.

[17] The term is usually traced back to Gabriel Bonnot de Mably. G. Bonnot de Mably, *Le Droit Public de l'Europe, fondé sur les traités* (1748), available at https://gallica.bnf.fr/ark:/12148/bpt6k93620t.image. Koskenniemi, 'The Public Law of Europe: Reflections on a French 18th Century Debate', in H. Lindemann *et al.* (eds), *Erzählungen vom Konstitutionalismus* (2005) 43, at 44 ('[b]y 1815, the Public law of Europe had become another name for the system of restoration enshrined in the Vienna treaties as reported and analysed especially by German academics').

[18] Fassbender and Peters, 'Introduction: Towards a Global History of International Law', in B. Fassbender and A. Peters (eds), *Oxford Handbook of the History of International Law* (2012) 1.

[19] For a nuanced account, see McLachlan, 'Five Conceptions of the Function of Foreign Relations Law', in Bradley, *supra* note 9, 21, 21.

specifically outbound activities but all kinds of legal action under the spell of globalization and post-globalization. The second function of foreign relations law is to cater to normative concerns: the state's national interest ('sovereignty'), democracy, federalism, separation of powers and the rule of law.

In order to realize these objectives, which are sometimes aligned and sometimes in conflict, states need to work in two modes: first, in the mode of gatekeeping, notably keeping unwanted international law out and down, and, second, in the mode of facilitating, enabling and smoothing out the interactions at the interface of domestic and international law. These modes are not mutually exclusive, but they are normally combined. In a specific constellation and historic period, the one or the other mode might prevail. Much depends on the overall posture of the domestic actors and institutions towards international law and global governance. The two modes and concomitant postures – of gatekeeping (closure) and of facilitating (openness) – can be described with the images of a bastion and a bridge. Foreign relations law is one building block for these bastions and bridges.

A *Bastion*

The motive to keep international law out of the domestic sphere – to fend off effects that were perceived to be negative – was an early motive for establishing the 'field' of foreign relations law[20] at the beginning of the 20th century in the first place. In Germany, a Kaiser Wilhelm Institute (now Max Planck Institute) was founded after World War I under the name of 'Institute for *Foreign* Public Law and International Law'.[21] This was around the same time that the US scholar Quincy Wright wrote his book about 'American foreign relations'.[22] Both undertakings were driven by the same motive – to study and maybe even to undergird 'scientifically' the negative appreciation of the Treaty of Versailles in the public debate of their countries.[23] The Germans, *inter alia*, deplored the excessive and 'discriminatory' reparations.[24] In the USA, the Senate had not consented to the Treaty of Versailles that had been signed by President Woodrow Wilson because the Republican majority did not desire the USA to occupy a global role.[25]

[20] Bradley, 'What Is Foreign Relations Law?', in Bradley, *supra* note 9, 3, at 8.

[21] Emphasis added; 'Ausländisches öffentliches Recht und Völkerrecht', also in the abbreviation of the journal: *ZaöRV*.

[22] Q. Wright, *The Control of American Foreign Relations* (1922).

[23] Treaty of Versailles 1919, 225 Parry 188. For the Max Planck Institute, see I. Hueck, 'Die deutsche Völkerrechtswissenschaft im Nationalsozialismus: Das Berliner Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht, das Hamburger Institut für Auswärtige Politik und das Kieler Institut für Internationales Recht', in D. Kaufmann (ed.), *Geschichte der Kaiser-Wilhelm-Gesellschaft im Nationalsozialismus: Bestandsaufnahme und Perspektiven der Forschung* (2000), vol. 2, 499, at 499; F. Lange, *Zwischen völkerrechtlicher Systembildung und Begleitung der deutschen Außenpolitik: Das Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 1945–2002* (2020), at 14.

[24] Cf. Hoeres, 'Versailler Vertrag: Ein Frieden, der kein Frieden war', *Aus Politik und Zeitgeschichte* (2019).

[25] See notably the speech by Senate Majority Leader Henry Cabot Lodge of 28 February 1919, reprinted in R.C. Byrd, *The Senate, 1789–1989: Classic Speeches, 1830–1993* (1994), at 546–564; L.E Ambrosius, *Woodrow Wilson and American Internationalism* (2017), at 142–146.

Curt Bradley recalls the genesis of Wright's thinking that ultimately led him to write the book on foreign relations: 'In the winter of 1920, with the Treaty of Versailles still unratified and unrejected by the Senate, the writer discussed before this group [of colleagues at the university of Minnesota] a subject then in the front of everyone's mind – the American system or lack of system for controlling foreign relations.'[26] For the Kaiser Wilhelm Institute, the desire to explore 'foreign' law was also motivated by the experience that the international arbitral awards of the early 20th century faced a dearth of codified public international law and therefore often drew on the domestic principles of various states that deserved to be better known.

The employment of foreign relations law as a bastion against unwanted intrusion of international law in the domestic sphere is by no means a phenomenon of the past. Kristina Daugirdas has predicted that the US Supreme Court will in the near future likely 'drive a bigger wedge' between international law and national law.[27] Such a development would not be owed to any specific substance of the *Restatement*. However, the mere fact of offering a Restatement to the judges facilitates the employment of foreign relations law in any direction, including as a bastion.

B *Bridge*

Besides forming a bastion, some parts of foreign relations law are apt to build bridges between domestic and international law.[28] This is all the more true in the constellation that 'globalization has blurred the line between foreign and domestic affairs'.[29] The *Restatement (Fourth)* conceptualizes foreign relations law not even as pure domestic law but, rather, as a conglomerate of both domestic and international law sources.[30] In some fields of what the *Restatement* calls foreign relations law, the relevant rules are so intermeshed that they are difficult to keep apart, let alone to disentangle. Here, foreign relation law is no longer simply a bridge but also tossed together with international law in a salad bowl. This is particularly true for the law of immunities. This law is a product of domestic case law because the question of immunity arises exactly before domestic courts, which have to decide whether to admit a complaint or not. They rely on national conceptions to distinguish *acta iure imperii* from *acta iure gestionis*, although the rough parameters are agreed internationally and are codified in the United Nations Convention on Jurisdictional Immunities of States and Their Property.[31] The meshed (international/domestic) quality of law is also a feature of the rules of jurisdiction, which is another issue area tackled in the *Restatement (Fourth)*.

[26] Bradley, 'Foreign Relations Law', *supra* note 20, at 12, n. 41; see also Wright, *supra* note 22, at ix.

[27] Daugirdas, 'The Restatements and the Rule of Law', in P.B. Stephan and S.H. Cleveland (eds), *The Restatement and Beyond* (2020) 527, at 535.

[28] Cf. Bradley, 'Foreign Relations Law', *supra* note 20, at 5 ('there are important *interconnections* between international law and foreign relations law') (emphasis added).

[29] Bradley, 'Foreign Relations Law', supra note 20, at 10.

[30] The *Restatement (Fourth)* mentions 'Constitution, congressional legislation, judicial decisions, actions of the executive, customary international law, international agreements, and State law' (in that order) as 'sources' of foreign relations law. *Restatement (Fourth)*, *supra* note 10, at 1.

[31] United Nations Convention on Jurisdictional Immunities of States and Their Property, UN Doc. A/59/508, 2 December 2004.

Arguably, the interaction of inter-national (interstate) law and of foreign relations law forms part of a broader global or transnational legal process that encompasses a host of actors besides nation states.[32] Bradley (who otherwise defines foreign relations law as purely domestic law) also takes note of the transnational character of this field of study. According to him, foreign relations law is not only about state-to-state interactions but also about relations between one state and the citizens of another state.[33] Such, so to speak, 'diagonal' relations arise from the extraterritorial repercussions of domestic policies and may result in transboundary litigation. Examples are the complaint by a Peruvian peasant claiming to be a victim of greenhouse gas emissions by the German energy corporation RWE before the German civil courts[34] and, of course, investor–state arbitration.

In combination with international law, the bridges are made of the domestic rules that govern the state's participation in international forums, which integrate the rules of international law into its domestic law, and principles that require courts to apply international law directly ('direct effect') or indirectly (construing domestic law in the light of international law). Where such bridges are missing, international law is without effect. As Anne-Marie Slaughter and William Burke White have written, '[t]he future of international law is domestic',[35] or, we might add, it has no future at all.

Unsurprisingly, the image of the bridge is popular in the German analysis of the relationship between domestic law and the law of the EU, as coined by my Heidelberg colleague Paul Kirchhof. The German Constitution – the 1949 Basic Law,[36] which was designed to prevent backsliding into totalitarianism and a repetition of the prior outraging breaches of international law and morality, was motivated by a keen desire to secure the transformation of Germany from a rogue state into a good citizen of the international community. These circumstances gave rise to the idea of the 'international law friendliness' of the Constitution, a principle of openness towards the world and international law.[37] As Kirchhof writes in the *Handbuch des Staatsrechts*, the

[32] I use the terms 'global' and 'transnational' law and legal process as synonyms.

[33] Bradley, 'Foreign Relations Law', *supra* note 20, at 3 ('interactions between a nation and the citizens or residents of other nations').

[34] Oberlandesgericht (OLG) Hamm, *Lliuya v. Rheinisch-Westfälisches Elektrizitätswerk (RWE)*, Case I-5 U 15/17 (pending). The Court of First Instance (Landgericht [LG]) had rejected the claim as partly inadmissible and partly on the merits since the claimant was not able to establish a sufficient causal relationship between the defendant's conduct (production of greenhouse gases) and the potential risk of flooding. Huaraz (LG Essen (2. Zivilkammer), Judgment of 15 December 2016, 2 O 285/15, BeckRS 2016, 114262. Although this is a private law-based litigation between two private actors, it is connected to the German legislation on greenhouse gas emissions and concerns the eminently political issue of global warming.

[35] Slaughter and Burke-White, 'The Future of International Law is Domestic (or, the European Way of Law)', 47 *HJIL* (2006) 327.

[36] German Basic Law (Grundgesetz), 1949, available at www.gesetze-im-internet.de/englisch_gg/index.html.

[37] K. Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit* (1964). Seminally, German Federal Constitutional Court, BVerfGE 6, 309 (362), Judgment of 26 March 1957 – 2 BvG 1/55. See more recently BVerfGE 141, 1, Order of 15 December 2015 – 2 BvL 1/12 – on treaty override.

German Parliament must enact a statute that builds the bridge by which the law of the Union reaches Germany. This bridge is the legal basis that 'validates' Union law and allows it to deploy legal effects within the German legal order.[38] Importantly, any parliamentary statute that 'transfers' public power to the EU must respect the limits set by the German Constitution. To stay in the picture, the bridge warden sits in Germany and can close the pathway over the bridge. The bridge is therefore not always open, and it is not always stable either.

Ultimately, the image of the bridge might become outdated in the face of further intermingling, intertwinement, *métissage* or entanglement of international law and domestic law (traditionally seen as distinct 'legal orders'). These entanglements are not only, or maybe not even chiefly, guided by norms (for example, on reception and integration) but also by straddling practices or just by 'situational moves' of law-applying actors who 'navigate' through the legal complexity. Thus, the autonomy of international law from the various domestic laws, and vice versa, becomes a matter of degree.[39] The *Restatement (Fourth)*, focused as it is on the traditional legal sources and on states, might convey a slightly misleading impression of completeness and order. But this risk is inherent in any 'restatement' exercise and can be outweighed by the benefits of systematization. In the end, the conceptualization of foreign relations law as a bridge, underscored by the *Restatement*, is a useful heuristics.

C *Behemoth*

Foreign relations law, especially of the USA, can become a Behemoth of international law, swallowing it up. When the starting point of an argument about compliance with international law and with the decisions of an international court is the national scheme of a constitution, federal statute and state law, the outcome will be different from the outcome of an argument that starts with the Vienna Convention on the Law of Treaties (VCLT).[40] An apt illustration is the *LaGrand* case that revolved around the information of alien prisoners on death row about their legal options to get in touch with a consular officer of their home state. The International Court of Justice (ICJ) had ordered the USA to stay the pending executions until the Court had decided on the substance. The respondent pointed out that, under the US Constitution, 'Federal Government officials do not have legal power to stop peremptorily the enforcement of a criminal sentence by the state of Arizona'.[41] However, Article 27 of the VCLT states that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. In this treaty logic, the ICJ approached the issue as one

[38] Kirchhof, '§ 214: Der deutsche Staat im Prozess der europäischen Integration', in J. Isensee and P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (2012), vol. 10, 299–381, para. 6.

[39] Krisch, 'Entangled Legalities in the Postnational Space', *International Journal of Constitutional Law* (forthcoming).

[40] Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331.

[41] *LaGrand Case (Germany v. United States)*, US Counter Memorial, 27 March 2000, ICJ Reports (2000), para. 124; see also paras 121, 122, 125.

of international treaty law for which the domestic vertical separation of powers is immaterial and held that the USA had breached international law by not staying the executions of the brothers LaGrand.[42]

Arguably, the more we approach interstate or transnational legal disputes from the perspective of foreign relations law, as opposed to international law, the less weight the international rules will have. Therefore, even where foreign relations law aspires to be 'neutral' towards international law,[43] its mere existence will to some extent undermine this neutrality. Again, the act of restating and thus consolidating foreign relations law reinforces this effect. In addition, even independently from foreign relations law, international law has been suffering from US influence. Take as an example the current backlash against human rights. The critique reacts against human rights in the US style and against libertarian rights breathing a possessive individualism. In the US tradition, rights holders are not embedded in a community and are unconstrained by social responsibility.[44] Such an Americanized model of international human rights indeed deserves critique. We could strengthen other legal traditions of rights and conceptualize international human rights as bound up with solidarity, encompassing a range of social and economic rights, finding their limits in overriding, pressing social needs and giving rise to positive state obligations. Such embedded rights are important and useful legal institutions. There is no need to trash them in an overreaction against a US caricature of rights, thus throwing the baby out with the bathwater.

Another feature of the US legal discourse, transported partly through US foreign relations law into international law, is rule scepticism. Such rule scepticism has its origins in US legal pragmatism, which bred legal realism.[45] This approach in turn fuelled both economic analysis of the law and critical legal studies. Both types of analysis are distinct and even antagonist to each other in terms of ideology and political *Vorverständnis*. Nevertheless, they share one feature – namely, their doubts about the actual power or value of law as an autonomous sphere, independent and distinct from other modes of governance. For law and economics, law is just a tool or resource among others to reach efficient outcomes. For critical legal studies, law is never more than the silk glove to hide the iron fist of power. In other words, both approaches reduce law to an epiphenomenon of economic or political power.

Such rule scepticism is, generally speaking, a salutary antidote against naïve beliefs in normative power. However, international law is too precarious – notably, too

[42] Cf. *LaGrand Case (Germany v. United States)*, Order, 3 March 1999, ICJ Reports (1999), para. 28.

[43] Bradley, 'Foreign Relations Law', *supra* note 20, at 7–8 ('even though the focus of foreign relations law is on domestic law rather than international law, there is nothing inherent in such a focus [8] that requires valuing domestic law over international law or resisting the domestic incorporation of international law').

[44] See the traditional literature and approach as criticized in J. Nedelsky, *Law's Relations* (2011); K. Sikkink, *The Hidden Face of Rights: Toward a Politics of Responsibilities* (2020).

[45] Cf. Harold Koh who depicts the *Restatement* as an heir to the 'transnationalist' legal thought cultivated both in Yale and Harvard, and the *Restatement (Fourth)* as the work of 'reporters sympathetic to the "new" New Haven school'. Koh, 'American Schools of International Law', 410 *Recueil des Cours* (2020) 23, at 43.

little institutionalized – to temper the destructive effects of rule scepticism.[46] More than a decade ago, Guglielmo Verdirame warned that the cultivation of rule scepticism by international lawyers might amount to 'a sort of jurists' hara-kiri, creating a carte blanche to be exploited by the executive sooner or later'.[47] What Verdirame predicted in 2007 has fully materialized. The executive branches of numerous states have undertaken to destroy international law. And this happens not only in authoritarian states such as Hungary and Brazil but also in the motherland of democracy, where the Northern Ireland secretary of the United Kingdom (UK) has announced to 'break international law in a very specific and limited way' – that is, to deliberately breach the binding Brexit treaty that had been painstakingly negotiated and concluded between the UK and the EU.[48]

The risk of an engulfment of international law by the domestic law of powerful states is even bigger where the parallel (or, rather, the entangled) rules of international law are themselves not codified. This is largely the case with immunities (given that the UN Convention is not in force and the European Convention on State Immunity has only a few parties)[49] and with the rules on jurisdiction. The shaping power of the domestic rules is bigger here. It is possible, for example, to identify a '*changing international* law of sovereign immunity through *national* decisions'.[50] A factor fuelling the danger of a submersion of international law specifically by US-foreign relations law are academic institutional practices and career constraints. US scholars, instead of writing on international law 'proper', might be tempted to publish on foreign relations law in order to increase their chance of publishing in a (general) US law journal, which they need for promotion and tenure. The turn to foreign relations law (as opposed to international law) is exacerbated by the practice of 'workshopping' the papers in general faculty workshops whose audience is not versed and is less interested in international law proper.[51] It has also been noted that, in particular, the US-authored casebooks on international law stand out 'for being highly nationalized compared with the others. They strongly emphasized domestic case law, US executive practice, US academics and publications, and international cases and controversies involving the United States'.[52]

[46] But see Stephan, 'The US Context of the *Restatement of the Law (Fourth): The Foreign Relations Law of the United States*', 32 *European Journal of International Law (Eur. J. Int'l L.)* (2021) 1415, who finds the concerns about the fragility of international law 'unfounded'.

[47] Verdirame, '"The Divided West": International Lawyers in Europe and America', 18 *Eur. J. Int'l L.* (2007) 553, at 567.

[48] S. Talmon 'Thou Shalt Not "Break International Law in a Very Specific and Limited Way"', *Völkerrechtsblog*, 15 September 2020.

[49] UN Convention, *supra* note 31, Art. 30(1). It has 22 state parties, 28 signatories and is not in force (needs 30 ratifications). European Convention on State Immunity 1972, ETS no. 074. It has eight state parties.

[50] Damrosch, 'Changing International Law of Sovereign Immunity through National Decisions', 44 *Vanderbilt Journal of Transnational Law* (2001) 1185, at 1185 (emphasis added). See recently *Opati v. Republic of Sudan*, 590 U.S. ___ (2020) on the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act and the federal cause of action under para. 1605A(c).

[51] A. Roberts, *Is International Law International?* (2017), at 104–105.

[52] *Ibid.*, at 146.

The danger of engulfment is further increased by the tendency in US legal discourse and case law to mention 'international law and foreign law' in the same breath or even to conflate and confuse it.[53] Even the eminent coordinating reporters of the *Restatement* – Sarah Cleveland and Paul Stephan – define the field of foreign relations law as 'the legal institutions, rules, and norms that govern a state's engagement with foreign persons, transactions, and activity, *counting the international legal system as "foreign"*.'[54] By putting international and foreign law in one basket, there is the risk of glossing over the specific and distinct quality of international law.

A related contemporary phenomenon that exacerbates the danger of creating a Behemoth is epistemic nationalism. With this, I mean the twofold phenomenon that both foreign relations scholars and international legal scholars often espouse positions that can be linked to their prior education in their domestic legal system and/or that serve the national interest.[55] The first variant, thinking along one's familiar legal tradition, often occurs unconsciously, while the second variant, supporting one's home country, may happen both unconsciously or in full deliberation. A parallel issue is the persistent segregation of research institutions along national lines. It is for this reason, too, that we nowadays doubt that the 'invisible college of international lawyers', as invoked by Oscar Schachter in the 1970s,[56] is really a global college. It rather seems to be an elite college of scholars of the developed world, a college in which academics from the so-called global South are relegated to the role of eternal students.

The mentioned trends all have similar effects. They privilege a foreign relations law approach to international and transnational legal problems as opposed to an international law-based approach. This risks diluting the normative power and autonomy of international law. Once swallowed up, international law becomes indeed a mere '*äusseres Staatsrecht*' ('external state law'), as Georg W. F. Hegel called it.[57] The mentioned trends are superficially unrelated to the *Restatement*. However, the exercise of restating foreign relations law in such a climate, accompanied by the broadly speaking nationalist trends, may have the effect of an *Over-statement* of foreign relations law.

[53] See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005), at 21 of the slip opinion; Amy Coney Barrett nomination hearing of 14 October 2020, available at www.judiciary.senate.gov/meetings/nomination-of-the-honorable-amy-coney-barrett-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states-day-3.

[54] Cleveland and Stephan, 'Introduction: The Roles of the Restatements in U.S. Foreign Relations Law', in Stephan and Cleveland, *supra* note 27, 1, at 1 (emphasis added).

[55] Peters, 'Die Zukunft der Völkerrechtswissenschaft: Wider den epistemischen Nationalismus', 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law* (2007) 721; Peters, 'International Legal Scholarship under Challenge', in J. d'Aspremont *et al.* (eds), *International Law as a Profession* (2017) 117, at 118–126.

[56] Schachter, 'The Invisible College of International Lawyers', 72 *Northwestern University Law Review* (1977) 217, at 226 ('the professional community of international lawyers … constitutes a kind of invisible college dedicated to a common intellectual enterprise'). The expression 'Invisible College' was used by Robert Boyle in 1646 in relation to a predecessor society to the Royal Society, which was founded in 1660. See Lomas, *The Invisible College* (2002), at 63; *The New Encyclopedia Britannica*, 32 vols. (15th edn, 2002), vol. X, at 220.

[57] G.W.F. Hegel, *Grundlinien der Philosophie des Rechts, oder Naturrecht und Staatswissenschaft im Grundrisse* (1821; reprinted 1972), para. 330. G.W.F. Hegel, *Elements of the Philosophy of Right* (1991).

4 Mitigating the Risks of Overstating Foreign Relations Law

This section discusses four strategies to outbalance the risk of a foreign relations law overstatement that undermines international law.

A *Normalizing US Foreign Relations Law*

The first antidote against the marginalization of international law by an overly dominant foreign relations law might be the so-called normalization of foreign affairs law, which would in due course also be reflected in a new Restatement. The question debated under this heading is whether foreign affairs are, and should properly be, governed by distinct rules, different from the legal rules, principles and institutions that govern domestic affairs. Notably, should the usual constitutional constraints – for example, the federalist division of competences, restraints on the executive branch and on the president and judicial review – apply to acts relating to 'foreign' affairs ('normalism') or not ('exceptionalism')?[58]

However, the way in which the debate is set up now in the USA is too parochial to bolster international law. Therefore, the US debate additionally needs to be put into perspective. The 1987 *Restatement (Third)* has been called the 'apogee of foreign relations exceptionalism'.[59] This exceptionalism took hold in a historical context and global power constellation when the executive needed an 'unencumbered hand in dealing with its Cold War adversaries'.[60] The exceptionalists' desire to be free from constraints was directed against the legislature and against the courts, also at the state level. The idea that foreign affairs automatically became federal law (as opposed to state law) was likewise motivated by a perceived need to speak with one voice in order to make the states disappear in the arena of foreign affairs. Once the Cold War had ended, the need for executive dominance, hindered neither by the judiciary nor by the US federal states, lost much if its urgency.[61] A 'normalization' of foreign affairs, taking place notably in the US federal courts, was documented and praised as the adequate response to the changed political context.[62] In this logic, the onset of a 'new cold war' would demand a new exceptionalism, however.

Superficially, these debates are familiar in other democratic and rule of law-based states. The habit of a relaxed, more lenient judicial review in matters touching foreign affairs is especially widespread because judges fear 'political questions', and the

[58] For a very instructive exposition with examples, see Bradley, 'Foreign Relations Law', *supra* note 20, at 13–18.

[59] White, 'From the Third to the Fourth Restatement of Foreign Relations: The Rise and Potential Fall of Foreign Affairs Exceptionalism', in Stephan and Cleveland, *supra* note 27, 23, at 46.

[60] Cleveland and Stephan, 'Introduction', *supra* note 54, at 6.

[61] Paul Stephan points out that the *Restatement (Third)*'s position that international law counts as federal law for the purposes of the US legal system had attracted strong criticism. Stephan, *supra* note 46.

[62] Seminally, Sitaraman and Wuerth, 'The Normalization of Foreign Relations Law', 128 *Harvard Law Review* (2015) 1897.

separation of powers is said to require juridical restraint. But a closer look reveals that the US debate on the exceptionalism of foreign affairs differs in important respects from the seemingly parallel debates in other states. So in a transnational comparison, it is again exceptional. A strategy of normalization of foreign relations law *à l'Americaine* is no antidote against the hegemony of foreign relations law over international law because it is not necessarily beneficial for the effectiveness and normative power of international law and does not necessarily foster compliance with international rules. Rather, it can cut both ways. Exceptionalism can be 'bad' for international law because the limitation of judicial review may allow the executive branch to breach international law unfollowed by sanctions. But normalism in the US style can also be 'bad' for international law, in that it denies additional competences of the federal authorities including federal courts to the detriment of state competencies and state courts.

The argument that international law should only occupy its 'normal' place in the federal hierarchy, depending on whether the substantive matter would, from a US perspective, fall in the competences of the states or the federation, seeks to protect the states' competences and in a way 'normalizes' international law. But the denial of an automatic 'federal law' quality, of course, weakens international law because it will then be ranked below the nation's federal law and may be superseded. Therefore, the idea of normalization would need to be brought more in line with other countries' normalization attempts in order to strengthen international law.[63] And this would be possible, I submit, because the quest for a 'normalization' of foreign relations law is not dependent on particular features of US law but, rather, has a much broader rationale. The rationale is the blurring of inside and outside (in a world characterized by global flows of information and digital hyper-connectivity, global supply chains, intense global trade, foreign investment and migration). It is this blurriness (and not any national idiosyncrasy) which suggests that the point of departure of any legal analysis should be that foreign affairs are not a categorically distinct type of government activity and that international law (despite specific legal forms, persons and institutions) is not categorically distinct from other law in terms of functions, effects and, notably, its need for legitimacy.

Moreover, it is a fact that international law is increasingly shaping the domestic legal realm. This shaping may be beneficial from the standpoint of constitutionalism, for example, when international human rights standards are brought into national

[63] The problem of undermining the political sub-units competences through internationalization is familiar in other federal states, notably in Germany *vis-à-vis* the law of the European Union (EU). The Länder have long complained that EU law-making risks scooping out their competences when it comes to regulating matters that would normally, in the German federal set-up, fall in their competence. The guiding idea here is that it is unavoidable that regulation happens on the 'higher' (that is, EU) level, so that the original competences of the federal sub-units cannot be preserved. Therefore, complicated schemes of involving the Länder in EU law-making, through procedural participation for their loss of power, have been designed. See German Basic Law, *supra* note 36, Art. 23 GG and the Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union (Statute on the Cooperation of the Federation and the States in Matters of the EU), 12 March 1993, BGBl. 1993 I, at 313, last amended by Integrationsverantwortungsgesetz, IntVG, 22 September 2009, BGBl. 2009 I, at 3022.

constitutions.[64] On the other hand, the effects of international law may also be pernicious because they may result in a 'hollowing out' of domestic constitutions. Even if a given state's constitution requires state acts to have a sufficient legal basis, mandates democratic procedures of law-making and offers access to courts against acts of public authority, these constitutionalist guarantees do not cover the measures taken by international organizations and by other states. Put the other way round, the traditional constitutional functions, such as guaranteeing the rule of law and the protection of human rights, have to some degree escaped the confines of the nation state and, thereby, also the umbrella of domestic constitutions.

Another problem is the overall indifference of international law towards internal rules concerning treaty making. International treaties are valid international law when they are concluded by actors who represent the state in its outbound actions.[65] The domestic legitimacy of those representatives and of the entire process leading to signature and ratification – whether it is transparent, involving a parliament and so on – is completely ignored by international law.[66] Such blindness seeks to realize the universal reach of international law and also contributes to conceptualizing it as a proper and autonomous body of law. But this indifference also risks hollowing out both the 'horizontal' and 'vertical' (federalist) domestic allocation of powers. The neglect of internal treaty ratification procedures not only contributes to the process of an internal de-constitutionalization but also affects the social legitimacy of international law-making based on treaties. An underexplored cause of the resistance against international law that we are witnessing today might be the fact that the expansion of the material scope of international law was not accompanied by a deeper involvement of domestic actors (for example, parliaments) in the making of international law.[67]

On the normative premise that, as a general matter, constitutionalist achievements are worth upholding, the diagnosis of an emptying of domestic constitutional guarantees through the scooping out of national constitutions leads to the normative quest for 'compensatory' or 'supplementary' constitutionalism.[68] In our contemporary world, the achievements of constitutionalism will get lost if they are not projected on to the international and transnational sphere. This also implies that foreign relations law should be informed by constitutionalism. Measures taken by a constitutional

[64] Peters, 'The Globalisation of State Constitutions', in J. Nijman and A. Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (2007) 251, at 272.

[65] Cf. VCLT, *supra* note 40, Art. 7.

[66] The VCLT makes only a minor exception. *Ibid.*, Art. 46.

[67] I thank Angelo Golia for this observation. Therefore, the current Swiss debate about involving Parliament in the approval of soft law deserves closer attention. See the governmental report, Bericht des Bundesrates vom 26. Juni 2019 betreffend Konsultation und Mitwirkung des Parlaments im Bereich von Soft Law, 26 June 2019.

[68] Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', 19 *Leiden Journal of International Law* (2006) 579; Dunoff and Trachtman, 'A Functional Approach to International Constitutionalization', in J.L. Dunoff and J.P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009) 3, at 14–18.

state in its foreign relations should, from this perspective, pay due regard to the rule of law, human rights, democracy and, notably, in the face of the enormous collateral social damage resulting from hyper-globalization, the constitutional principle of social solidarity. Also, nation states should relate those principles (and the mechanisms that realize them) not primarily to the nation but also to the international community at large. These normative considerations make a foreign relations law 'exceptionalism' appear suspect to the extent that exceptionalism results in mitigating or downscaling constitutional demands, such as democratic procedures, respect for the rule of law and for human rights and judicial review.

At this point, Paul Stephan objects that these principles are not shared by all members of the international community.[69] Indeed, the implementation of the said constitutional principles is deficient in many countries. However, in their verbal statements, all states have repeatedly espoused these principles. Notably, the heads of states and governments have in the United Nations (UN) General Assembly proclaimed: 'We reaffirm that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations.'[70] Although these declarations are to some extent cheap talk, they allow international and transnational actors to confront governments with their own words and thereby to reclaim respect for the constitutionalist principles. In the end, a normalization of foreign relations law seems warranted, but only in the more 'universalist' and constitutionalist variant just sketched out. Such a normalization would be appropriately critical towards those international legal processes and institutions that fall short of constitutionalist principles and, at the same time, would foreclose nationalist repudiations of international law. Such a normalization would have to be depicted and could to some extent be promoted by a new Restatement. The *Restatement (Fourth)* does not seem to follow this line.

B *Ever More Restating of International Law?*

A second, complementary strategy to contain the dangers of foreign relations law gaining the upper hand over international law are restatements of international law 'proper' from a universalist standpoint. Such restatements seem all the more necessary as international law shares a characteristic that is mentioned as a key reason for restating the law at all – namely, its 'fragmentation'.[71] Indeed, international law is in many ways akin to the common law: it is similarly constituted by case law and thinly codified. Moreover, the functioning of international law – which is dependent on implementation by national law and national institutions – bears resemblance to the multi-level quality of the law in a federal state. International law is even more

[69] Stephan, *supra* note 46 ('only some in the international community regard the West's realization of … the rule of law, human rights, democracy, and social solidarity – as achievements').

[70] United Nations General Assembly, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UN Doc. A/67/PV.3, 30 November 2012, para. 5.

[71] Akchurin, 'American Restatements of Law: Nature, Concept and Axiological Value', 5 *Russian Journal of Comparative Law* (2018) 73, at 79.

fragmented than any given domestic legal system due to a number of features. These are the absence of a unitary lawmaker, the diplomatic technique of drafting treaty texts vaguely and ambiguously in order to facilitate agreement, the multiplicity of law-interpreting actors, the scarcity of case law that could clarify and settle understandings, the lack of an apex court to harmonize the law and, finally, the law's evolution through accretion in which new layers of legal principles and mechanisms have been added on top of older ones without clearing the table of the remnants. These characteristics actually call for restatements of international law that could to some extent compensate for the said ruptures and inconsistencies and thereby bolster the normative force of international law.

With regard to international law, the importance of academic restating has been recognized from the beginnings of the discipline. Writing in 1878, the Swiss scholar Johann Caspar Bluntschli diagnosed the 'lack of legislative organs' in international law and drew the conclusion that 'stating anew' (*neu aussprechen*) both past and contemporary international legal norms was all the more urgent and could 'through such restatement contribute to the recognition and validity' of the legal opinion of the time.[72] After 150 years of growth and refinement of international law, it has been asserted that a comprehensive restatement of this body of law 'is *de facto* impossible'.[73] Nevertheless, a wealth of institutions – both academic and semi-governmental – have been tasked with restatements on subfields and specific themes. The prime institution is the International Law Commission, whose mandate is to codify and progressively develop international law.[74] The members of this body are a mix of scholars and diplomats, elected by the UN General Assembly upon proposal by the member states. Although there is no formal guarantee of independence, practice seems to assume that the members speak in their personal capacity and not on behalf of their governments.[75] And the requirement of regional geographic distribution surely helps to secure this body's universal outlook.[76]

Two other purely academic institutions regularly produce restatements in international law even if the texts are not called 'restatements'. These are the 'elitist'[77]

[72] J.C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt* (1878), preface ['Vorwort'], at v (author's translation) ('[d]ie Rechtswissenschaft darf daher meines Erachtens nicht bloss die schon in frühern Zeiten zur Geltung gelangten Rechtssätze protokolliren, sondern soll auch die in der Gegenwart wirksame *Rechtsüberzeugung neu aussprechen und durch diese Aussprache ihr Anerkennung und Geltung verschaffen helfen*. Je empfindlicher der Mangel gesetzgeberischer Organe ist, welche für die Fortbildung des Völkerrechts sorgen, um so weniger darf sich die Wissenschaft dieser Aufgabe entziehn') (emphasis added).

[73] Kriebaum, 'Restatements', in M. Ruffert *et al.* (eds), *Rechtsidentifikation zwischen Quelle und Gericht* (2016), vol. 47, at 303 (author's translation).

[74] Statute of the International Law Commission (ILC Statute), GA Res. 174 (II), 21 November 1947, Art. 1.

[75] Tomuschat, 'The International Law Commission: An Outdated Institution?', 49 *German Yearbook of International Law* (2006), 77, at 80.

[76] No two members may have the same nationality (Art. 2a(2)), and the membership as a whole must represent the 'principal legal systems of the world'. ILC Statute, *supra* note 74, Art. 8.

[77] As Robert Jennings explains, '[t]he way forward is not to be found by confining the *Institut* to an elitist group just of international lawyers. I am all for elites, they are at the core of civilisation; but when one

Institut de Droit International (IDI) and the much bigger, network-type International Law Association (ILA). Both institutions were founded in the same year in two different Belgian towns – in 1873 – in response to the Franco-Prussian war of 1870–1871.[78] And both were entrusted with the private 'codification' of international law. The mandate of the IDI is laid out in its statute as follows: '1. L'Institut de Droit international est une association exclusivement scientifique et sans caractère officiel. 2. Il a pour but de *favoriser le progrès du droit international*: a) En travaillant à *formuler les principes généraux* de la science de manière à répondre à la conscience juridique du monde civilisé; b) En donnant son concours à toute tentative sérieuse de *codification graduelle et progressive* du droit international.'[79] The task of the ILA is similar, as visible in its original name, which was 'The Association for the Reform and *Codification* of the Law of Nations'.[80] These terms are still found in the ILA's Constitution after the change of name in 1895. According to the ILA Constitution, '[t]he objectives of the Association are the study, *clarification* and *development* of international law, both public and private, and the furtherance of international understanding and respect for international law'.[81]

Another relevant re-stating body is the International Institute for the Unification of Private Law, which was initially established as an auxiliary organ of the League of Nations and entrusted with the 'unification of private law'.[82] In a specific subfield, the international law of armed conflict, the International Committee of the Red Cross has, with the help of scholars, done an outstanding job of collecting, restating and commenting on the customary rules of armed conflict.[83] With regard to cyberspace, important restatements are the Tallinn Manuals 1.0 and 2.0, produced by military and legal experts under the auspices of the North Atlantic Treaty Organization's Cooperative Cyber Defense Centre of Excellence.[84] Besides these institutions, groups of academics and single scholars frequently publish rule-like texts that purport to restate and/or develop specific parts of international law. Examples range from the Lieber Code on international humanitarian law (1863),[85] the Maastricht Principles

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contemplates the *Institut*, one begins to see that those who condemn 'elitism' may sometimes have a point'. See A. Cassese, *Five Masters of International Law: Conversations with R.-J. Dupuy, E. Jiménez de Aréchaga, R. Jennings, L. Henkin and O. Schachter* (2011), at 136.

78 A. Rolin, *Les Origines de l'Institut de Droit International 1873–1923: Souvenirs d'un témoin* (1923), at 8–9; I. Abrams, 'The Emergence of International Law Societies', 19 *Review of Politics* (1957) 361, at 361, 363.

79 Statutes de l'Institut de Droit international, 10 September 1873, Art. 1 (emphasis added).

80 A. Eyffinger, *T.M.C. Asser (1838–1913): In Quest for Liberty, Justice and Peace* (2019), at 566.

81 Constitution of the International Law Association 2016, Art. 3.1 (emphasis added).

82 As expressed in its official name. See also Statute of the International Institute for the Unification of Private Law 1940, Art. 1.

83 International Committee of the Red Cross, *Database Customary IHL*, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/home.

84 Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare* (2013); Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2017).

85 General Orders no. 100: Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863. This code was revised by a group of military officers and adopted by then secretary of war, Ed Townsend, assistant adjutant general, in form of an executive order.

on Extraterritorial Application of Social Human Rights (2011),[86] to the SHARES Principles on Shared Responsibility (2020).[87] We can conclude that the fragility of international law is not due to the absence or dearth of restatements. Ongoing restatement of international law is important but not sufficient as a counterweight against the overpowering of international law by a well-restated and thus consolidated foreign relations law.

C *Provincializing the USA: Restating the Foreign Relations Law of (All) Other States*

A third complementary strategy to mitigate the risk of the 'one-sided' restatement of US foreign relations law, to paraphrase Dipesh Chakrabarty, would be to provincialize the USA.[88] This strategy to some extent responds to the call to de-colonize international law.[89] Legitimate as it is, this quest should take into account that there is no uniform block of 'colonizers'. As Verdirame has explained in a profound analysis of international lawyering in Europe and the USA, 'the intellectual divide in Western international legal scholarship runs deep'.[90] As simplistic as it is to speak of 'the' West, it is problematic to speak of 'the' North. The US *Restatement* is exactly a manifestation of divergent approaches to foreign relations and to international law among the various communities and states pertaining to the 'divided West'[91] and to the 'divided North'.

The provincializing of the USA can be done by restating (all) other states' foreign relations law. To my knowledge, no other state has undertaken a similar semi-official restatement of its foreign relations law.[92] Some states possess national law institutes, such as the British Institute of International and Comparative Law or the Rule of Law Institute of Australia, but I am not aware of any restatements issued by those institutions. Upon the initiative of the UN in the 1990s and boosted by the 1993 Vienna Conference on Human Rights, national human rights institutions have been created and, meanwhile, exist in more than 80 states. Their mandate is the implementation and internalization of universal human rights but not codification.[93]

[86] Maastricht Principles on Extraterritorial Application of Social Human Rights, 28 September 2011. Text with commentary by some of the 40 signatory authors of the principles in Schutter *et al.*, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', 14 *Human Rights Quarterly* (2012) 1084.

[87] Nollkaemper *et al.*, with the collaboration of Jacobs, 'Guiding Principles on Shared Responsibility in International Law', 31 *Eur. J. Int'l L.* (2020) 15.

[88] D. Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (2000).

[89] S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011).

[90] Verdirame, *supra* note 47, at 554.

[91] J. Habermas, *The Divided West* (2006).

[92] As said at the beginning, the ALI is a formally private institution. Its academic membership might render its output comparable to scholarly works in other states. In Germany, for example, a wealth of textbooks and university classes on the topic 'Staatsrecht III' exist. The subject covered in those books is foreign relations law.

[93] Principles Relating to the Status of National Institutions, GA Res. 48/134, 20 December 1993. See United Nations, National Human Rights Institutions: History, Principles, Roles and Responsibilities (2010).

On the European level, a European Law Institute (ELI) was founded in 2011 in order 'to study and stimulate European legal development in a global context'.[94] However, the ELI has not yet tackled any restatement of EU foreign relations law or the member states' foreign relations law. Given that the EU is not a state but, rather, a legally and politically more fragmented polity than the USA, the ELI's main preoccupation is the consolidation of a pan-European legal space.[95] It is probably not yet ready to restate the EU's foreign relations law.

China is starting to evolve from a norm taker to a norm shaper. For example, in 2018 it codified the idea of a 'Community of Shared Future for Mankind' in its constitutional preamble, the first important constitutional amendment on China's foreign policy since the promulgation of China's Constitution in 1982: 'As an overall objective of China's foreign policy, this idea will guide and reshape China's practice in international law.'[96] However, there is no overall restatement of Chinese foreign relations law in sight. Scaling up the restatement activity of other states and the EU is highly desirable to mitigate the current lopsidedness of foreign relations laws, which risks distorting international law.

D *Multi-perspectivism*

A final antidote against the Behemoth is multi-perspectivism. This posture demands that the shapers and appliers of foreign relations law see their foreign relations law through the eyes of differently situated law appliers, notably outside the USA. Multi-perspectivism acknowledges that perspectives matter. As the philosopher Hilary Putnam has pointed out, '[t]here is no God's Eye Point of view that we can know or usefully imagine' but only 'the various points of view of actual persons reflecting various interests and purposes that their descriptions and theories subserve'.[97] Feminists have further developed this insight into a standpoint epistemology, which celebrates situated knowledge(s)[98] and thus seeks to avoid a 'totalizing' single vision,

[94] European Law Institute (ELI), Articles of Association (2011; as amended by Council Decision 2019/8, 25 May 2019), Art. 3(1).

[95] ELI, *Manifesto*, 16 April 2011 ('[b]y its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge and taking a genuinely pan-European perspective').

[96] Chinese Constitution, amended on 11 March 2018, preamble (official English version available at http://english.www.gov.cn/archive/lawsregulations/201911/20/content_WS5ed8856ec6d0b3f0e9499913.html). Jia, 'Editorial Comment, New China and International Law: Practice and Contribution in 70 Years', 18 *Chinese Journal of International Law* (2019) 727, at 746–747. Jia asserts: 'We constructively participate in the formulation of international rules in all areas, actively advocate more democratic international relations, insist on equal and uniform application of international law for all, and speak for justice on key international and regional issues. We have become the mainstay in upholding international peace and justice, as well as in promoting the development of international law' (at 727).

[97] H. Putnam, *Reason, Truth and History* (2nd edn, 1997), at 50. For the concept of 'perspectivism', see König and Kambartel, 'Perspektive, Perspektivismus, perspektivisch', in J. Ritter, K. Gründer and G. Gabriel (eds), *Historisches Wörterbuch der Philosophie* (n.d.), available at https://doi.org/10.24894/HWPh.5343.

[98] Seminally, Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective', 14 *Feminist Studies* (1988) 575.

on the one hand, and a sterile and unsustainable epistemic relativism, on the other hand.[99] Notably, the law, in itself, is inevitably a multi-perspectival phenomenon. In other words, 'problems of perspective [are] … a central and determinative element in the discourse' of law.[100] Because arguments about law are influenced by the perspective of the lawyer, the legal concepts (which exist in the minds of those who create, apply, interpret and criticize the law) depend on those actors' (diverging) perspectives. Kaarlo Tuori has spelled out this insight for transnational law:

> [P]erspectivism is an inherent feature of all law. Legal actors always approach the law from a particular perspective, which inevitably affects what they identify as law and how they interpret and apply it.… Law exists only as identified and interpreted by situated legal actors: that is, legal actors embedded in a particular social and cultural context. Although a general characteristic of law, perspectivism, is particularly pronounced in transnational law.… This is due to the great variety of legal actors and the great variety of the situatedness of these actors.[101]

Besides the idea of 'perspectivism', 'situationality' expresses that the law applier and interpreter is 'not absolutely constrained by contexts and circumstances that can never be overcome' while steering away from 'falling into relativist particularisms or homogenizing universalism'.[102]

Multi-perspectivism is the opposite of the (futile) attempt to clinically strip off one's particular point of view that roots in a specific educational background, political and cultural tradition and that is embedded in national discourses. Also, multi-perspectivism acknowledges better than the pursuit for 'neutrality' that not all perspectives and standpoints from which the rules are interpreted and applied are equally influential[103] and that, therefore, conscious attempts to build up a discursive counter-power are warranted. Multi-perspectivism has been most discussed with regard to international law, not with regard to foreign relations law.[104] I submit that multi-perspectivism is also helpful for examining and restating a given state's foreign relations law, especially

[99] For a short and accessible refutation of epistemic relativism, see Searle, 'Why Should You Believe It?', *New York Review of Books* (24 September 2009).

[100] Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law', 26 *Harvard International Law Journal* (1985) 411, at 411 (with a view to comparative law, not international law).

[101] K. Tuori, *European Constitutionalism* (2015), at 78 (emphasis added).

[102] O. Korhonen, *International Law Situated: An Analysis of the Lawyer's Stance Towards Culture, History and Community* (2000), at 9 (emphasis added).

[103] For international law (not foreign relations law), see C. Focarelli, *International Law as a Social Construct* (2012), at 136 (highlighting 'countless variations in a law that is deemed common to all peoples… . Doubtless, a variety of views is frequent in all human affairs and does not preclude international law from forming a common set of rules. However, if international law is socially constructed, this social construction is the combination and the result of a variety of very different perceptions, each of which have a *different weight* in the end result') (emphasis added).

[104] See, e.g., Yasuaki Onuma's call for a 'transcivilizational perspective' on international law – that is, a 'perspective from which people see trans-boundary or global affairs in terms of civilizations, including cultures and religions'. Y. Onuma, *International Law in a Transcivilizational World* (2017), at 19–20 ('[t]he transcivilizational perspective is a perspective from which people see, sense, (re)cognize, interpret, assess, and seek to propose solutions for the ideas, activities, phenomena and problems transcending national boundaries by adopting a cognitive and evaluative framework based on the recognition of the plurality of civilizations and cultures that have long existed throughout history') (*ibid.*).

in its interaction with international law. Any restatement of the USA's foreign relations law and of other states can and should avoid the real and present danger of swallowing up international law. This can be done by espousing multi-perspectivism. The *Restatement (Fourth)* has gone in a good direction when hearing 'counselors and advisers from around the world'.[105] An even stronger and deliberate espousal of multi-perspectivism would leave some traces in a new Restatement, for example, by contemplating the consequences of the stated rules on other states and by comparing the US foreign relations law to other states' foreign relations laws.

5 Conclusions

The foreign relations laws of powerful states inevitably bear the risk of marginalizing or even swallowing up international law. This 'Behemoth' risk can be exacerbated by restatements because the consolidation of foreign relations law into a quasi-codification makes the 'restated' law more powerful. Given that the US foreign relations law is the only one that is systematically restated, it occupies a special position of power. In an overall political climate of nationalism and populism, the deployment of this power should be accompanied by a heightened sense of responsibility. On the premise that an autonomous body of international law (as opposed to just an encounter of all states' foreign relations law) is desirable, deliberate strategies to mitigate the 'Behemoth' risk are warranted. Some of these strategies could be undertaken by the US *Restatement* reporters; others are incumbent on various other actors. I have argued that the strategy of 'normalizing' foreign relations law, especially in the way that is discussed in the USA, does not unequivocally strengthen international law. We have also seen that there is no lack of restatements of international law proper. But scaling up the restatement activities of the foreign relations law of other states would counteract the current uneven landscape of foreign relations laws and is therefore welcome.

Most importantly, restatements can make the bridges to international law more stable when reporters deliberately espouse multi-perspectivism and acknowledge their situatedness in a particular geo-political time and space. Such a posture would in no case lead to an altogether different restatement, but it would lead to nuances that would be beneficial for international coexistence and cooperation.

[105] Stephan, *supra* note 46, at 1423.