Columbia Law School
Scholarship Archive

Faculty Scholarship Faculty Publications

2015

Perspectives on the Restatement (Fourth) Project

William S. Dodge
University of California Hastings College of the Law

Sarah H. Cleveland
Columbia Law School, scleve@law.columbia.edu

Paul B. Stephan
University of Virginia School of Law

Harold Hongju Koh
Yale Law School

John Bellinger
Arnold & Porter

See next page for additional authors

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

Part of the International Law Commons

Recommended Citation
William S. Dodge, Sarah H. Cleveland, Paul B. Stephan, Harold Hongju Koh, John Bellinger & Campbell A. McLachlan, *Perspectives on the Restatement (Fourth) Project*, 109 AM. SOC'Y INT'L L. PROC. 209 (2015).
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/3749

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu, rwitt@law.columbia.edu.

Authors

William S. Dodge, Sarah H. Cleveland, Paul B. Stephan, Harold Hongju Koh, John Bellinger, and Campbell Alan McLachlan

This article is available at Scholarship Archive: https://scholarship.law.columbia.edu/faculty_scholarship/3749

PERSPECTIVES ON THE RESTATEMENT (FOURTH) PROJECT

The panel was convened at 9:00 a.m., Friday, April 10 by its moderator William S. Dodge of the University of California, Hastings College of the Law, who introduced the panelists: John Bellinger of Arnold & Porter LLP; Sarah Cleveland of Columbia Law School; Harold Hongju Koh of Yale Law School; Campbell Alan McLachlan of Victoria University of Wellington School of Law; and Paul Stephan of the University of Virginia Law School.

REMARKS BY WILLIAM S. DODGE*

Good morning, and welcome to this roundtable on the American Law Institute's (ALI) *Restatement (Fourth) of Foreign Relations Law*. My name is Bill Dodge. I am one of the reporters for the *Fourth Restatement*'s project on jurisdiction and I will be moderating this morning's session. We have a very distinguished panel, and to save time I am going to introduce them only briefly.

Sarah Cleveland is Louis Henkin Professor of Human Rights and Constitutional Rights at Columbia Law School and a member of the UN Human Rights Committee. She is one of the coordinating reporters for the *Fourth Restatement* and a reporter for its project on treaties.

Paul Stephan is John C. Jeffries, Jr. Distinguished Professor of Law at the University of Virginia School of Law. He is the other coordinating reporter for the *Fourth Restatement* and a reporter for its project on jurisdiction.

Harold Hongju Koh is Sterling Professor of International Law at Yale Law School. From 2009 to 2013 he served as Legal Adviser at the U.S. State Department. He is a member of the ALI Council and a Counselor to the *Fourth Restatement*.

John Bellinger is a partner at Arnold & Porter. From 2005 to 2009 he served as Legal Adviser at the U.S. State Department. And he is a Counselor to the *Fourth Restatement*.

Campbell McLachlan is Professor of Law at Victoria University of Wellington School of Law. He is a foreign adviser for the *Fourth Restatement*.

I also want to acknowledge the other reporters for the project who are in the room and absent: Curt Bradley, Ed Swaine, David Stewart, Ingrid Wuerth, and Anthea Roberts.

Before we turn to our panelists, I thought I would give a brief overview of the *Fourth Restatement* as a whole. As many of you know, the *Third Restatement of Foreign Relations Law* was completed in 1986 and published in 1987. It has been enormously influential over the past twenty-five years.

In 2012, the ALI Council approved three projects under the umbrella of the *Fourth Restatement of Foreign Relations Law*—a project on treaties, a project on jurisdiction, and a project on sovereign immunity—each with a separate set of reporters. In accordance with standard ALI practice, there is a group of advisers for each project as well as a members consultative group open to any ALI member.

In addition to these groups, the ALI has appointed a set of counselors, including Harold and John, and a set of foreign advisers, including Campbell. In other words, we are blessed with advice.

* Roger J. Traynor Professor of Law at the University of California, Hastings College of the Law. He currently serves as co-reporter for the *Restatement (Fourth) of Foreign Relations Law: Jurisdiction* and as a member of the State Department's Advisory Committee on International Law.

It is expected that these three projects will conclude in 2017. Obviously these projects do not cover all of the ground that the *Third Restatement* did. At this point, no decision has been made about whether to take up additional projects or whether to publish the existing projects separately or together.

This morning's session will proceed in three phases. First, Sarah, Paul, and I will briefly address some of the key challenges for each of the individual projects. Second, Harold, John, and Campbell will talk about some of the key challenges for the Restatement project overall. Third and finally, I have asked each of the five panelists to address the Restatement from a different perspective. There are many perspectives one could take on the projects and I have assigned one perspective to each of them. Along the way, we will engage in some discussion among the members of the panel. And at the end, of course, we will leave time for questions.

So we will begin with brief presentations on the key challenges of each of the three projects. Sarah will discuss treaties. Paul will discuss jurisdiction. And I, having received input from the reporters for the sovereign immunity project, will discuss sovereign immunity. Each of us will take no more than three minutes. Sarah.

Remarks by Sarah Cleveland*

You can see who really runs this project, right?

Good morning, everyone, and thank you all for coming. It is great to have this conversation, particularly with so many people who are already helpfully contributing to this project. As Bill said, I just wanted to say a little bit about the treaty prong of the project that was approved for consideration by the ALI a couple of years ago.

First of all, I should note we get a lot of questions about whether or not we are addressing executive agreements and congressional executive agreements, in addition to Article II treaties. And the current answer is that we are not. We were originally tasked by the ALI to take up the status of Article II treaties in U.S. domestic law, and that is the current character of the project.

That said, we expect that we will eventually be taking up the other forms of international agreements that the United States enters into, and even with respect to Article II treaties, it has not really been possible to completely hermetically seal them from other forms of agreements because many of the leading Supreme Court precedents, for example with respect to supremacy of U.S. international agreements over state law, involve executive agreements and not Article II treaties. So that is just to flag what may be waiting in the wings with respect to this aspect of the project.

Now, in the last draft that we presented to our advisers, Preliminary Draft No. 3 for the treaty project, we listed a projected table of contents for the topics that we are planning to take up at this point with respect to treaties. And, in the interest of my three minutes, I will not read them, but we essentially start with treaties as law of the United States as a constitutional matter and the process for entering into treaties as a matter of domestic law and end with suspension and termination of treaties.

The major issues that we have confronted—I would say the elephant in the room for us thus far has been the domestic legal status of non-self-executing treaties outside of the courts. This is an issue that Curt, Ed Swaine, and I have grappled with at great length, in part

* Louis Henkin Professor of Human and Constitutional Rights at Columbia Law School, a member of the UN Human Rights Committee, and one of the coordinating reporters for the *Restatement (Fourth) of Foreign Relations Law*.

because there is no judicial doctrine on this issue, because, as you know, by definition, a non-self-executing treaty is one that a court cannot adjudicate.

The current approach that we have adopted in the drafts is consistent, largely, with that of the *Restatement (Third)*, which is to say that all treaties are supreme law of the land. Various aspects of treaties may be disabled from various forms of domestic enforcement by various doctrines—constitutional conflict, lack of judicial enforceability, and so forth—and self-execution is one of them. But we have looming before us issues, for example, of the relationship between non-self-executing treaties and the president's power under the Take Care Clause.

I am told my three minutes are up, but I am going to flag two other issues.

The second problem we have addressed is a package of issues relating to the question of to what extent doctrines that have been developed in the domestic law context also apply similarly or differently in the treaty context.

And just to flag two examples, one would be with respect to the later-in-time doctrine. When a later-in-time treaty supersedes an earlier-in-time federal statute, or vice-versa, do you need a clear statement by Congress, when it adopts a later-in-time statute, in order for it to displace a treaty? Or do ordinary rules that have been developed in the context of conflicts between two federal statutes apply? There are particular reasons why you might want to have a higher bar for a federal statute to displace a treaty, obviously, but there is some lack of clarity on the doctrine in that area.

And then, secondly, with respect to supremacy, similarly, do you assume that Congress—or the Senate, in agreeing to provide advice and consent to a treaty—does not intend to preempt existing state law? That is the standard that the courts have developed for preemption between federal statues and state and local law. Or is there some different standard that applies with respect to displacement of state and local law by treaties under the supremacy clause? And I think these are both areas of lack of clarity which will get me back to the role and contribution of academics later. Thank you.

REMARKS BY PAUL STEPHAN*

Thank you.

With jurisdiction we have divided our project, as the *Third Restatement* did, into discussing adjudicative jurisdiction (that is to say, the authority of courts as courts), prescriptive jurisdiction (the power of a state to impose its substantive rules), and enforcement jurisdiction.

Within enforcement jurisdiction, we have run through the ALI process a piece of that, which is recognition and enforcement of foreign judicial judgments. When I say we have run through, that means that the membership, as well as the council, has signed off, but that does not bar us from revising. We are hard at work on the prescriptive jurisdiction piece and contemplating the adjudicative jurisdiction piece to come. We hope we will make some headway on that before our next encounter with our advisers in October.

As to prescriptive jurisdiction, I would say that there are pieces of that that were controversial in the 1980s. I see Davis Robinson here, who was a participant in those controversies from the other side. And some issues have become controversial after the fact—not the existence of universal jurisdiction, but its scope.

* John C. Jeffries, Jr. Distinguished Professor of Law at the University of Virginia School of Law and a coordinating reporter for the *Restatement (Fourth) of Foreign Relations Law*.

And I will say, since we have not come to rest with either of those issues, the challenge that I think we have encountered is to be fair to international practice and to be fair to U.S. practice. And we are trying assiduously to avoid finding ourselves in a box where we are declaring, based on our understanding of international law, that U.S. practice might be inconsistent with international law.

There are situations where the United States might be out in front of the international community on some of these issues, but that does not necessarily lead to the conclusion—at least we do not want to be the ones saying it—that the United States is acting inconsistently with its international obligations. Squaring that circle is challenging at times. And I think that is what we will be focusing on in the next few months.

William S. Dodge

Thank you, Paul.

I am going to say a word about the immunities project. As with the project on jurisdiction, one of the challenges for sovereign immunity has been to describe the relationship between international law and the law of the United States, principally as codified in the U.S. Foreign Sovereign Immunities Act (FSIA). The FSIA reflects the restrictive theory of foreign sovereign immunity, which is the predominant theory in international law. The FSIA is also the most detailed and most extensively interpreted domestic law governing immunity.

The *Restatement (Third)*'s provisions on sovereign immunity typically led with a subsection setting forth the rule of international law, followed by a subsection or subsections restating the corresponding provisions of the FSIA. In the *Fourth Restatement*, this order is reversed, which may be of greater assistance to U.S. courts, which are the primary audience for the restatement.

The *Fourth Restatement* sections typically begin with the provisions of the FSIA and then include a subsection covering the rule of international law, but in some instances the black-letter text of the *Fourth Restatement*'s drafts includes no restatement of international law, which is relegated either to the comments or to the reporters' notes. In part, this reflects the difficulty of determining what the actual practice of foreign states in this area is. Many states have not codified their rules of state immunity, and in many of these states, the courts have not been required to address the full range of issues that are addressed by the FSIA.

So it is sometimes difficult to develop a clear picture of what foreign law and foreign practice is. Even when there is a controlling statutory provision or judicial decision, it can be challenging to determine whether the particular rule is followed out of a sense of international legal obligation or whether the foreign country has extended or curtailed immunity beyond what may legitimately be viewed as the requirements of customary international law.

Describing the relationship between U.S. law and international law has been particularly challenging in those instances where U.S. practice finds few counterparts in other states. For example, in 1988, Congress amended the FSIA to create an exception for state sponsors of terrorism currently codified at 28 U.S.C. 1605A. The reporters' notes in the current draft explain that although only Canada has a similar exception, it is not clear that 1605A contravenes any presumptive jurisdictional constraint. The reporters' note also notes the International Court of Justice's (ICJ) statement in the jurisdictional immunities case that states are generally entitled to immunity in respect of *acta jure imperii* without regard to the illegality of those acts.

And finally, there is the challenge of keeping up with the U.S. Supreme Court. In January the Court granted certiorari in *OBB Personenverkehr v. Sachs*, a tort case involving the FSIA's commercial activities exception. This caused the reporters to delay finalizing their sections on commercial activities and non-commercial torts pending the outcome.

Of course this is a problem that bedevils all restatements. The law is always changing and it does not stop changing simply for the convenience of the ALI. But the problem is particularly acute in areas that have a large component of federal law. With a common law subject, it may be possible to downplay the significance of any particular state supreme court decision, but an interpretation of the FSIA by the U.S. Supreme Court is hard to ignore.

We are going to broaden our view now from the trees to the forest, and I am going to ask Harold, John, and Campbell each to speak about one of the challenges of the restatement project overall. Each will take no more than six minutes.

After each has finished, we will then open it up for some discussion among the members of the panel before we proceed to the third section. Harold, let me begin with you. The foreign relations law of the United States is a combination of international law and domestic law that is relevant to foreign relations. In drafting a *Fourth Restatement*, what weight should be given to each?

Remarks by Harold Hongju Koh*

Well, in the words of John F. Kennedy, it depends.

There is a tip and an iceberg. You have heard about the tip. The beginning that we have is a good start, but it is only a start, and the iceberg is much more important. I think restatements have to reflect the time that they are in if they are going to shape the time they are in. And so we have three moments in time and three legal snapshots, and the question is how to make this one interactive with our time, so that it has more staying power.

The *First Restatement* in 1965, let us face it, was done in the dead of the Cold War. International rules were mainly interstitial, and so was foreign relations law. And it emphasized the rules of domestic law that prevent international law from permeating into U.S. behavior.

If you think of these three snapshots in terms of concept, scope, and degree of hybridity, the concept of the *Second Restatement* was "billiard ball," the scope limited, the degree of hybridity modest. The basic idea that ran through the whole thing was: We do not interfere or pass judgments on others' conduct, which led to some huge anomalies. For example, as you know, in *Sabbatino*, the U.S. Supreme Court enforced a decree by Castro that would have violated the Fifth Amendment if it was done by a U.S. actor. So in that, domestic law dominated.

Snapshot number two is 1986. The concept is now bridges, interdependence, the scope greatly expanded, and the degree of hybridity is growing. We have four gigantic figures as reporters, Louis Henkin, Louis Sohn, Detlev Vagts, and Andy Lowenfeld. And the main theme is interdependence and the commercial revolution and the human rights revolution, which leads to the recognition of transnational law.

But because of the growth of international law, a big part of the *Third Restatement* is sketching out bodies of international law that did not previously exist. So rather than being

* Sterling Professor of International Law at Yale Law School. From 2009 to 2013 he served as Legal Adviser at the U.S. State Department. He is a member of the ALI Council and a Counselor to the *Restatement (Fourth) of Foreign Relations Law*.

interstitial, it was constitutive in rules of jurisdiction, international economic law, international, and environmental law. And the question is how does the United States plug and play into this emerging global environment?

Now we are at moment number three, where the concept has to be the Web, the scope has to be at least as big as the last one—although there are so many more topics to cover—and the hybridity has to be intense. And we have three revolutions: one, obviously technological; two, the end of the Cold War, but now growing tensions again, which have led to unusual political dysfunction internationally and domestically; and then the third, multiplication of influential global actors, empowered individuals, nonstate actors who defy public and private labels. And, you know, we are all transnationalists now, even a six-year-old Nigerian kid who downloads a Korean video game onto a Chinese-made iPad under a U.S. contract provision that he clicks through.

Given this, it is clear that the three sections that have been done, and done well—treaties, jurisdiction, and immunity—are limited to the traditional topics that were state to state and that endured from stage one to stage two. They can be done very well and still say virtually nothing about the iceberg. Sarah has given a good example. They have addressed some issues about treaties when everybody knows most of the agreement-making now is not even happening in the treaty space.

I think this leads us now to a couple of key principles. First, if it ain't broke, don't fix it. If the *Restatement (Third)* got something basically right, and the world is still adjusting—is there a reason to restate it unnecessarily? Number two, the positive question—what the state of the law is—gets mixed with a normative question, which is do we have a distinctively American national approach to foreign relations law that is, on one hand, sufficiently nationalist to reflect our core constitutional values, but on the other hand, sufficiently transnationalist so it allows us to adapt to an increasingly complex world?

And my suggestions would be that in defining the terms of engagement, this *Fourth Restatement*—if it becomes a big one—has to stress points of connectivity between domestic and international outpoints, of receptivity of U.S. law to international standards, and points of commonality. And this is arising at a moment where, in this setting, the ASIL, we are talking a lot about whether there is actually comparative international law as opposed to a common international law.

My key thoughts are these: We need a Restatement that meets the demands of this time—technology, human rights, empowered non-state actors, and political dysfunction. If it ain't broke, don't fix it. The stress will be on hybridity of domestic and international law. Most of the rules that have been stated thus far do not even get to these issues. And we will genuinely need to tread carefully if we want to capture the changes that are rapidly transpiring. And so the areas of drafting that are the most difficult, which may well come as late as ten years from now, will require this group's very, very close attention.

William S. Dodge

Exactly six minutes. Perfect.

John, let me turn to you next. One of the challenges for restatement of foreign relations law is explaining international law rules to domestic lawyers and judges who may not be familiar with them. How might the *Fourth Restatement* best accomplish this?

REMARKS BY JOHN BELLINGER*

The first question really, to me, is the $64,000 question, which is, how does the *Restatement* balance international law and domestic law?

The *Third Restatement* took, as Harold said, more of a global perspective answering questions, not as the law was codified at the time but the way an international tribunal—either the ICJ or some other international tribunal—might answer certain questions. As we go into the *Fourth Restatement*, this really is the big question: What is the purpose of the restatement? Should it codify the law as it is now? Should it progressively develop the law? Should it try to anticipate where international law is going?

The ALI and ASIL convened a meeting a couple of years ago to scope out this very question, whether we should have a *Fourth Restatement*, and there were some real differences of opinion on that, in part because the experience of the *Third Restatement* had been a bitter experience where the views of the Legal Adviser's Office were ignored in many ways. And Davis Robinson, who was Legal Adviser at the time, I am sure will have something to say about this.

The acrimony between the U.S. government and the ALI got to be so great at the time of the *Third Restatement*, that the Secretary of State and the Attorney General wrote to the ALI asking the ALI to put off the project, which was a remarkable thing. Davis will have to tell us how he actually managed to get a Secretary of State to write the ALI about the *Restatement*.

So there was some trepidation about taking on this new project. I thought this would actually be a useful thing because the *Third Restatement* was clearly out of date and it just was not providing good guidance to judges anymore. As Harold said, there were things that were useful, but a lot of it was just out of date.

And so I was convinced that people working together in good faith could, in fact, both state the law as it is now for judges while also stating international law as it is developing. And this is where I have got to really hand it to Lance Liebman for setting up the structure that we have. And there is a real method to this madness from the top to the bottom, of having two coordinating reporters from the top and through every chapter sort of balancing out the different perspectives.

I am just convinced that we as lawyers, even if we come at these issues from a different perspective, can write our way around it so that judges can then take a look at the restatement and practitioners and say, well, this is where the law is precisely now; this is where it may be evolving in the United States; this is where it may be evolving elsewhere.

So my one comment on that is I do think that we have not actually yet said upfront in the Restatement—we just have not written this part—as to what is the purpose of the Restatement? What is the standard that we are adopting? And I think that is going to be important. So now, in my remaining minute-and-a-half, let me answer Bill's question, which is how to translate international law for a domestic audience. I found myself, as Legal Adviser, having to do this constantly in the dialogue that I was having on different issues. I see Marie Jacobsson here in the room. Often I would go and have conversations with other countries about the state of international law and then would have to bring it back into the United States to explain what was going on.

That is going to be perhaps the most important purpose of this Restatement, is to have, in a single place, in addition to a statement of U.S. domestic law, a statement of international

* Partner at Arnold & Porter LLP. From 2005 to 2009 he served as Legal Adviser at the U.S. State Department. He is also a Counselor to the *Restatement (Fourth) of Foreign Relations Law*.

law as it is developing because, as Bill said, very few of our judges and very few of our practitioners are really aware of what is going on around the rest of the world. And so of course they can go and look at various treatises and law clerks can go and look for these things, but it is extremely useful to collect the international sources and then to show where international law perhaps diverges from U.S. domestic law.

Finally, the point is, in addition to showing where international law is developing perhaps differently from U.S. law, some U.S. statutes like the Foreign Sovereign Immunities Act, like the Alien Tort Statute, actually incorporate international law. So it is extremely important to state in one place what international law actually is so that a judge who was trying to interpret the Foreign Sovereign Immunities Act or interpret the Alien Tort Statute can, in fact, look to a single place at least to get started as to where international law is on a particular subject.

I think our reporters have done a very good job on that. David Stewart is in the front row. The Foreign Sovereign Immunities Act has collected some of the different international agreements: the UN Convention, the EU Convention, the Canadian Sovereign Immunities Act, the British Sovereign Immunities Act. And then the chapter on jurisdiction has got pages and pages of developments in other countries on jurisdiction.

I think the Restatement needs to be revised to take into account the last thirty years, and that it is, in fact, possible to capture both the state of the law in the United States right now as well as stating how it is developing outside.

William S. Dodge

Thank you, John. Campbell, let me turn to you next. U.S. approaches to foreign relations issues sometimes differ from those in other countries. The United States may even sometimes take a different view on international law itself. What rule should a *Fourth Restatement* play in explaining U.S. approaches to non-U.S. audiences?

Remarks by Campbell McLachlan*

Well, thank you very much, Bill. It is a great honor to be here. I hope, as the only non-American citizen on the panel, this does not turn me into the American Society equivalent of a Martian landing in this particular debate. I simply do not feel like one, being both a member of the American Society and the American Law Institute. So, in my six minutes I have got five quick points to make.

I think the first point is really a question: is foreign relations law a peculiarly American preoccupation? Put another way, has the U.S. Restatement actually been too successful in carving out this field? That actually seems to have been the final verdict of Professor Vagts, one of the reporters of the *Third Restatement*, who wrote in 2005 lamenting the preoccupation of American scholars on foreign relations law to, as he thought, the exclusion of international law.

Now, of course, I am not saying that the issues which are concerned with the interaction between international law and the constitutional law of any country are unimportant. It would be rather hypocritical of me to say that since I have just published a book on that very subject in the context of British and Commonwealth foreign relations law. On the contrary,

* Professor of Law at Victoria University of Wellington School of Law and a foreign adviser for the *Restatement (Fourth) of Foreign Relations Law*.

I think that every country should be concerned with the issue of the subjection of the external exercise of public power to law, which is the core question with which foreign relations law is concerned.

You cannot answer that question within a national legal system without being able to engage with the combination of international law and national constitutional law. Those issues are only going to get more important. In fact, I would say that one of the key questions of our time is the role of international law within national legal systems and the means to make the interface work better. So that is the first point.

The second point, we should remember that both the sources of foreign relations law in the United States affect international as well as national interests. International law is inherently multilateral, but national constitutional law in this country, as in any other, can also have a real effect on non-citizens as well as on citizens. One only needs to reflect on the U.S. Supreme Court jurisprudence in relation to detainees at Guantánamo Bay, the extent of the *habeas corpus* power, to see the potential significance of that.

My third point is about the value of the Restatement project as a whole. We should remember, as I am sure many in this room do, that the American Law Institute, like this Society, was founded by Elihu Root, one of the 20th century's greatest international lawyers, and was founded in order to address a need to find agreement on fundamental principles. In the field of international law, dare I say it, in this country I think that is a particularly important idea to recall at a time when at least some strands of American scholarship on international law have sought to dispute the fundamentally legal character of international law itself.

I found this passage in the *Third Restatement* particularly refreshing after several decades of the American realist movement. The reporters observed that it is commonly said that the absence of essential legislative institutions and the like has led to the skepticism about the legal quality of international law: "These impressions," said the reporters, "are mistaken. International law is law, like other law, promoting order; guiding, restraining, and regulating behavior." It seems to me that this point is one which we should not lose sight of in this very important project.

The fourth point: The question that I am directly asked is, well, what if a non-U.S. audience disagrees with the views arrived at through this Restatement process? Those charged with taking this process forward seem to be concerned about this. It was noted in the very first reporters' memorandum when the process started. The point here is that international law is made out of the collectivity of the normative practice of 190 states so we cannot always expect universal agreement on all issues.

U.S. views are particularly important not so much, I would hazard to say, because of the political power of the United States, but it is because of its long commitment to the international rule of law, including what the Senate Intelligence Committee in this country recently described as its longstanding global leadership on human rights. This means, of course, that it is particularly important for the rest of the world, as for the United States, that you get this Restatement right, because the *Restatement (Fourth)*, if done well, will have the same kind of larger impact that the *Third Restatement* had, as teachings of the most highly qualified publicists of this country.

Fifth and final point: So how should we measure the extent of the potential influence of this project? I think we can measure it according to three factors.

Firstly, it will be influential to the extent that it engages with issues of contemporary pressing importance affecting international relations. Here I definitely agree with the proposition that

Harold has put forward that we must make sure that we are dealing with the contemporary important issues and not merely the issues with which it is easier to deal.

Secondly, it will be influential to the extent that it explains the fundamental principles behind the rules without giving undue weight to particular judicial decisions in a way that will endure over time.

Thirdly, it will be influential to the extent that it integrates United States foreign relations law within the larger body of international law, and in so doing reflects both the multilateral manner in which international law is generated and the multinational manner in which it applies to international relations. Thank you very much.

William S. Dodge

Great. Thank you to all of our panelists. I would like to open it up now for some discussion of what we have already covered. And I am going to let each of you volunteer. Who wants to begin? Harold.

Harold Hongju Koh

Let me agree with John first. This is an important project, and we have to look back to the '80s. But this is not the '80s, so while those debates are instructive they have limited applicability in many areas, and one which I will get to is that the State Department is now no longer the only governmental player on these issues.

Second, I could not agree more with Campbell that we have to, in some way, keep this within a zone of reasonable people and exclude some of the fringes of both ideological spectra that see law as a mask for power or law as largely a projection of power. After all, if international law is not law of the United States, then what is the American Law Institute doing restating it?

And then, third, it seems to me that the focus—not overly focusing on particular judicial decisions—makes sense because whoever is in charge politically will determine who is on the Court, and that will affect the way in which particular judicial decisions are run. I mean, take a look at, for example, *Sosa v. Alvarez-Machain*, on the one hand, a 6-to-3, and *Kiobel*. You know, these are coalitions that, over time, came to a very different view on the exact same statute with the exact same wording, existing since 1789. So it would be wrong to take a particular decision or the most recent decision as the strongest expression of the current state of American law.

Paul Stephan

Since we are throwing out big picture, I just want to agree with what has been said and just raise another perhaps even more fundamental consideration, which is the category of foreign relations law about which we are writing a Restatement, about which Campbell has written a book. It is, I think, considerably more problematic than it was fifty years ago when the first Restatement, called the *Second Restatement*—I know that is confusing—was first launched.

My impression at least, in the world today, it is all law and saying that distinct rules apply because foreign relations is entailed just does not work as a category. There are particular contexts where the international and foreign and comparative dimensions matter importantly, but we cannot do what, for example, the Supreme Court seemed to do forty-five years ago

in *Zschernig* and say: "Foreign relations, it is a category. We know what we mean. We apply it. It has constitutional significance."

So I think that is one of our challenges, that the boundaries of our remit itself is problematic in light of the fundamental structural changes in the world that we see today.

WILLIAM S. DODGE

Sarah?

SARAH CLEVELAND

Thank you.

On the issue of international law and how much international law is addressed in the Restatement, I think it is important to remember that they are really two different audiences with two quite different sets of interests and needs at stake here. One is the domestic audience and one is an international audience.

With respect to the domestic audience, an important function of the Restatement is simply to explain international law and how it interfaces with the U.S. domestic system to judges and other decision makers who may not be familiar with international law and this area of law as a whole. And there are many areas, for example in jurisdiction, in immunities and in treaty interpretation, where international law directly speaks to the issues that are also regulated by domestic statutes and otherwise in the domestic context. So it is important for the Restatement to address those issues at a minimum and to get them right as a matter of international law.

The second audience is the international audience. And as Georg Nolte explained in this forum last year very eloquently, there are people in the rest of the world who are deeply mystified by aspects of the United States' approach to international law and how the United States thinks about international law.

So while the Restatement should not be a treatise on public international law, areas where the United States may take a somewhat different approach from other actors in the international community are particularly appropriate for the Restatement to try to grapple with. And one example would be the United States' relationship with the United Nations Convention on the Law of the Sea (UNCLOS), the persistently unratified Convention on the Law of the Sea, which nevertheless is extremely important and increasingly so for many areas of U.S. engagement from the Arctic to piracy and so forth.

I think an important function of the Restatement could be to explain the extent to which the United States recognizes a treaty like UNCLOS as customary international law, and also to explain the body of doctrine that U.S. courts have developed in piracy and other areas under that body of law to the international community. So that strikes me as two important functions that the Restatement could fill without being a general treatise, and that is why we are particularly grateful to have this international advisory panel to keep us honest and to test our understanding of international law with that of the international community.

William S. Dodge

Thank you. John or Campbell, would you like to add anything before we move on?

John Bellinger

Let me say I think that for judges and practitioners, it is extremely important for the Restatement to, in fact, state what the law is now. This is not an academic treatise, again, if we start at basic principles, very few judges in this country—you could probably count them on one hand—have any experience in international law and they just do not know what the sources are. They do not know what is going on in different countries. So it is important to have a place to start where it is stated in a single place what the U.S. law rules are and then what the international law rules are.

Now, I started by saying I am a big believer in this project, because I think this Restatement can do both things. It is also important—and this is where I agree with Harold, who was agreeing with me—that it is also important for judges to understand that we are part of an interdependent system of laws developing around the world, and we need to be aware of what is going on in other countries, particularly where international law is, in fact, directly incorporated into U.S. law, such as the Foreign Sovereign Immunities Act.

So the Restatement, in my view, has to do both. It has to state both. And that is the challenge here—which I think should not be that difficult a challenge if a people approach it in good faith—to state where the law may be developing differently outside, and where U.S. law is at a particular point in time, so that the judge or practitioner who is looking at a particular question can decide which direction that they want to go.

Harold's right that the Legal Adviser's Office is not the sole voice inside the U.S. government with respect to international law. I gave a talk, actually, at Columbia Law School when Harold was sole Legal Adviser—and Sarah was there—entitled, *Why the Legal Adviser Doesn't Always Get What He Wants*, and that is because there are, in fact, many other voices inside the U.S. government. But still, the legal adviser does have pride of place and it is important to hear what the Legal Adviser's Office says.

It is my understanding right now that, unlike the *Third Restatement*, the Legal Adviser's Office is pretty comfortable with where this project is going. Now, we have not gotten into some of the most difficult topics, but members of the Legal Adviser's Office are incorporated on all of the chapters and have been providing a lot of input. And I think there is a pretty good dialogue going on with the Legal Adviser's office.

Let me just say one last thing: even at the Supreme Court amongst some of our most conservative justices who say that they really do not care what international law says, they still look to it. One of the cases that several of us were involved in was the *India-Mongolia* case, which involved whether tax liens could be placed on diplomatic property of UN missions in New York. And it was a Foreign Sovereign Immunities Act question.

Justice Thomas actually wrote the decision. And after starting with U.S. law, the Foreign Sovereign Immunities Act, Justice Thomas then went on to say "oh, and by the way, other countries in fact interpret immunity rules just as we do," and then gave a long string of citations with respect to where other countries came out on the interpretation of various immunity principles.

William S. Dodge

So the Restatement can be considered from a number of different perspectives. I am going to ask each of our panelists to make a few observations from a particular perspective, and then we will open it up to discussion again. Each of the panelists, I allotted three minutes for this. If you can keep it shorter we will have more time for questions and discussion. We will save the discussion until each has spoken. The five perspectives are: U.S. practitioners, U.S. courts, the U.S. government, the U.S. legal academy, and non-U.S. perspectives. John, can I ask you to start by addressing this from the perspective of U.S. practitioners?

John Bellinger

Sure. For the last six years I have worn my practitioner's hat, being out of the Legal Adviser's Office, and in writing briefs it is very useful to go to a single place at least to start for a statement of what U.S. law and foreign relations law is. So that is very important. It is not the end, but it is a good place to start. And that is why we really do need a *Fourth Restatement*. The only thing I will say here is that we do have to be honest about what the law is or it becomes misleading for both practitioners and ultimately for judges. And this gets in, of course, to the question of customary international law and what really is the law?

I see in briefs a lot—practitioners saying that: "A UN General Assembly resolution is binding international law." Of course all of us know that is just false. Some voluntary principles I see will be written into a brief to say: "That is binding international law." That is not true. It is voluntary principles that may be very important.

So all of these things may be relevant, but it is going to be important for the Restatement to state clearly what the law is and what it is not. It also has to state clearly whether law is evolving. There may be one or two countries that have adopted a particular principle, but if it is just one or two countries, then the Restatement is going to need to state that—to say several countries have adopted a rule. And that is going to be the challenge for our reporters who, again, I think are doing a very good job right now. You know, one ought to be able to state these facts without misleading either practitioners or judges about the state of the law.

William S. Dodge

Thank you. I have asked Paul to address the Restatement from the perspective of U.S. courts.

Paul Stephan

I think judges tend to want two different things—probably more than two but let me be categorical here.

Partly there is looking for help, information—John has already touched on this—and to the extent that we can, we should provide them accurate information about problems that they confront. Sometimes those problems are so down in the weeds that it is hard for us to address them. I saw a letter from a judge who was eager to learn more about the relevance of what currency applies to determining the value of a judgment, for example. And I have to admit, although we have done recognition and enforcement of judgments, we have not gotten to the currency issue yet, maybe never will.

Then of course the other general use is just to back up priors that they already have. When it is about prior reinforcement versus prior disruption, the Restatement tends to be—I will not say less helpful, but at least not as consistently helpful—so that we certainly see in the *Third Restatement* where the same Supreme Court justice will criticize the Restatement when it is convenient to that justice and embrace it and deride his colleagues when they do not follow it when he likes what the *Restatement* says.

So how can we address those needs? I think more the former than the latter. Again touching on something that John raised, with the growth of international law production—my words—expanding beyond official actors with the rise of NGOs and particularly the proliferation of amicus briefs telling judges what the content of international law is, one potential role for the Restatement is to give judges some place to turn to in order to figure out whether the claims the amici are making are credible or not, because my impression is that there are some wonderful amici briefs and then there are some that are making very odd claims.

To the extent that the Restatement can help judges in sorting through that, and the growth of information about international practice and law that they are getting, I think that can be helpful.

William S. Dodge

Great. Harold, could you please address the Restatement from the perspective of the U.S. government?

Harold Hongju Koh

First, the U.S. government is a critical player but it is only one of many. And a good reason to have this panel is that many others are gathered here at the American Society who should get engaged. Secondly is that, unlike the previous Restatements, the *Second Restatement* was really a State Department project. The *Third Restatement* was State and Justice, and I was in the Justice Department at the time.

This Restatement is the whole of the U.S. government, and there are some agencies that did not even exist, like Homeland Security, the whole international economic and financial governance apparatus of the U.S. government, that are going to have to be engaged—the communications agencies with regard to cyber issues, et cetera. So what the U.S. government's position is—and brokering a single position—is going to be much, much harder.

A third point, which I made earlier, is that the level of engagement from the political U.S. government as opposed to the institutional U.S. government is going to be absolutely critical. Over the course of time this will play out, there will be a number of administrations, probably, and so there will be some continuity and some change of positions, depending on the level or degree of political engagement as opposed to institutional engagement.

And then finally, I think it comes down to four kinds of issues in declining order of difficulty. The ones that we can do pretty easily are coordination, harmonization, unification, and standard internalization rules where there is not a lot of controversy over the substance.

The second kind, though—and I would argue that there is a significant number of those—are conflict situations which are manageable—for example, common substance but differing procedures—extradition procedures or international judicial assistance, and the like.

The third, though, is what I call conflicting worldviews, or where the United States is really expressing an exceptionalist view—for example, say, the Second Amendment or issues like that.

And then finally, those in which international law categories are based on physical concepts, like territory, that are collapsing. And those are going to be extraordinarily difficult to restate, particularly when you are talking about private actors in private space using proxies and sending signals across traditional borders.

William S. Dodge

Thank you. So, Sarah, what does this all look like from the academy?

Sarah Cleveland

We all have multiple hats up here, right?

I think academics are probably the least likely of any of the constituencies that Bill has mentioned to go to the restatement as the first stop for trying to answer a question, and that is frequently because people writing in this area as legal academics already know a good bit about the field and therefore they will not go to the restatement to try to answer the threshold questions.

And I think academics may err in not looking at the Restatement often enough because there are, in fact, many quite complex issues that the *Restatement (Third)* and the *Restatement (Fourth)* grapple with at a quite deep level, and therefore can be useful to academics. So, quickly, three contributions and roles that I see for academics.

First, the contribution to the actual crafting of the *Fourth Restatement* for academics is huge. Every single reporter on the project is an academic and a number of our advisers are academics. We are benefiting tremendously not only from prior scholarly writing on the issues that we are addressing, but also from input from academics who are providing us with memos on particular issues as they arise. Now, in this it is very important to try to separate what the law is, as John has stressed, from what academics think that it might be, should be, was, or otherwise. And we are all, I think, very sensitive to that distinction. We are not here to impose our own academic views on the *Restatement (Fourth)*.

Second, academics are guaranteed to test this afterwards, right? There was a great deal of academic commentary about the *Restatement (Third)*. There will be about the *Restatement, (Fourth)*. This is why we want you to buy in early, so you do not criticize us too badly afterwards.

And then finally, this is a very rich source for potential scholarly projects. Just in the treaty portion of the restatement project we are encountering, daily, issues that have not been addressed by anyone, by academic literature, by courts, by anyone. And they are large issues, and so if you are looking for a project, watch the restatement. Call us and we can give you plenty to do. Thank you.

William S. Dodge

Great. And finally, Campbell, from outside the United States what does this all look like?

Campbell McLachlan

I thought I would use my three minutes to give a couple of personal perspectives because I obviously cannot speak, and would not claim to speak, for the rest of the world.

The first is just a point about demystifying foreign relations law. I guess what motivated me to investigate this field in the British and Commonwealth context was a feeling that the field, at least in our law, was rather enshrouded in a set of old doctrines that served to exclude law and rational thought: non-justiciability, the prerogative act of state, and even immunity. They are really reasons for non-law. Some of this thinking, I think, still applies in the United States despite the refreshing enlightenment influence on the Framers of the Constitution. I am thinking, for example, of the Political Question and Act of State Doctrines.

So then the key insights that I sought to offer myself in this field were, firstly, one which I borrowed from Lauterpacht, which is the idea that all international disputes, irrespective of their gravity and political consequences, are susceptible to being decided according to law. Secondly, I developed the idea that the function of foreign relations law is really allocative. In other words, it is all about sorting out public law issues in terms of jurisdiction or applicable law, either internally between the organs of government or externally between states and between the national and international legal system. I think if we think about it in that way it might help to strip away some of the confusion in the topic.

The second point is about engaging with international law. One of the conundrums of going into the history of this field for me was that set against all those old exclusionary doctrines that I have just mentioned was the breath of fresh air inaugurated by Blackstone and Lord Mansfield, the notion that the Law of Nations, wherever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law and is held to be part of the law of the land.

The fundamental premise upon which a foreign relations law is built, therefore, is not one of exclusion but one of engagement with the international legal system, and that of course is something which U.S. law inherited as much as English law. I was struck, looking again at the *Third Restatement* in preparation for coming over—I did not try to bring it in my hand luggage—is how much of it is devoted to the exposition of international law on the issues that, as Blackstone said, are, quote, "properly the object of its jurisdiction," and how meticulously it negotiates the relationship between international law and the law of the United States.

A couple of examples that have not yet been taken up by the ALI are, in Volume One, the whole consideration of persons and international law: what is a state, state succession, nationality, international organizations; and in Volume Two, the protection of persons: human rights, diplomatic protection, and individual rights in foreign relations—an area which is a crucially important prism. After all, foreign relations are not just an abstract power game. The external exercise of public power vitally affects the lives of real people, both citizens and foreigners.

So what I want to submit to you, in conclusion, is that after some decades of focus on the domestic elements in U.S. foreign relations law, at least as a broad survey of the scholarship might suggest, the current *Restatement* can and should provide a basis for a close reengagement with the key elements of international law in which the scholarly guidance of the legal

academy here, as elsewhere, is much needed in the exposition of the shared general principles that must guide our common future. Thank you very much.

WILLIAM S. DODGE

Well, thank you all. We have about half-an-hour left. I know that John wants to add a few words on the perspective of judges. And I would invite other panelists, if they have something to add, to do so, but I think we are going to want to move to questions fairly quickly. John?

JOHN BELLINGER

This may be a question in a number of people's minds. The Restatement is focused and directed primarily, or largely, to judges who are deciding cases. And we have a number of judges—probably that handful that I mentioned—who are participants in the project and who are some of the most distinguished judges who have decided these foreign relations law cases: Diane Wood—who of course is an alumna of the Legal Adviser's Office—Pierre Leval, Royce Lamberth.

I have encouraged them in the different sessions to speak up more. I guess I, frankly, would like to hear more from the judges as to what would be helpful to them. And of course they want to be cautious about any cases that they have or getting into the substance, but I, at least personally, would like to hear a bit more procedurally since we are going about this big exercise as to what they found useful about the *Third Restatement*, what they would like to have more from the *Fourth Restatement*.

Our judicial participants have been largely pretty cautious, but as we finalize the project I think I, at least—but I defer to our reporters here—would like to try to nudge the judges a bit to say what—how can we be of more service to you?

WILLIAM S. DODGE

Good. I would like to ask if our reporters, who are in the audience, have anything that they would either like to add or ask. Curt and David, do not feel an obligation, but—

CURT BRADLEY

I will briefly describe one question that I often receive. This comes more out of the treaty project that Ed and Sarah and I have particularly worked on. I often get the question, particularly from academics who have watched the debates in these areas over the years—how can you possibly reach agreement, given the ideological differences in the community and the highly charged debates that people see in the academic area? Part of the answer is, of course, appointing wise and eminent reporters who are quite reasonable. . . . Okay, that may not entirely satisfy people about that concern.

We, at least I, have found that one way of bridging issues and differences and actually making real progress is being highly inductive, at least as a starting point, and not beginning with grand theory about all of foreign relations law or globalism or anything else. This involves really thinking about not just cases, although certainly including the cases, as well as the practices of governmental actors, historical trends, and trying to think from the ground up. At least I have found, in working with Sarah and Ed, that this is a way we can actually

make a lot of progress in terms of legal craft. This is obviously a very different starting point than a lot of law review articles, which often begin with their theory of the world and then tell you how it cashes out in particular ways. To be sure, this inductive approach does not solve all problems. So the other question that came up in the panel was what do you do about cases that a lot of people do not like or that they have differing views about. *Medellín*, just to give you one example, is a case that comes up in the context of the treaty project.

But there is an inductive approach to that too, which is trying to reconcile readings of the case with all of the other materials one has, looking—you know, people just talked about the judges—how lower court judges have tried to grapple with this, because our judicial advisers do not want us to ignore cases that they themselves must apply. At the same time, a lot of these cases are uncertain, ambiguous, and need to be reconciled with a lot of other materials. So we both pay attention to them but also try to do it in a broad-based, inductive way. So that is one way I would answer that particular question.

William S. Dodge

Campbell?

Campbell McLachlan

Can I just strongly second that approach from my experience with trying to write similar sort of work, except with just one of me and not a whole bunch of other scholars—

William S. Dodge

You debate with yourself?

Campbell McLachlan

Yes, I did debate with myself extensively, because one of the guiding principles which I took was disaggregate. In other words, do not try and start from the big theories, but actually see what are the real problems on the ground that the law is encountering in this field. Often what I found was that when you broke up the big categories into the specific problems, that the apparent doctrinal clashes disappeared, or at least were minimized, or at least you were able really to focus on finding solutions that might work for those particular problems.

One thing that happened in the course of that, just in terms of my writing process, was that I ended up with a very different structure than the one that I originally planned because the focus on the individual problems actually built a structure for me. So I think I strongly second that.

William S. Dodge

I know Harold wants to add something too, Harold?

Harold Hongju Koh

I agree on the last two comments, but only to a point. I think the inductive method is a way to start and a way to make progress, but at a certain point there are going to have to

be some big decisions made. Campbell, your book has a lot of rules in it, but the guiding principles of the book—and you are sole author—are the ones that shape how much of it is about what the law is and how much of it is about what promotes progressive development.

And we are going to have to make those decisions. Somebody is going to have to make those decisions down the road for the thing to get finished. And so I do not think that we should pretend that those decisions are not there to be made or that everything can be resolved by an inductive method. I think an inductive method can create working patterns, cooperation, canons, et cetera, but then at a certain point there will be big choices about what topics to include or exclude from the previous *Restatement*. And those kinds of things will come up for big examination in forums like this one, and then before the ALI Council, which is going to have to vote on it, and then the ALI membership, which is going to have to vote on it.

William S. Dodge

Okay, thank you.

Harold Hongju Koh

While we are talking about the Restatement I just wanted to mention that Vagts is in the room. And it is not Detlev Vagts, but Karen Vagts, his daughter, who with her family has generously funded a program at the ASIL for future conferences about issues of transnational law. So I just thought we could give a round of applause, it is wonderful.

William S. Dodge

Thank you for coming, and please help me thank the panelists.