THE FOURTH RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES

This panel was convened at 3:30 pm, Wednesday, April 9, by its moderator, Lance Liebman of Columbia Law School, who introduced the panelists: Sarah Cleveland of Columbia Law School; Georg Nolte of Humboldt University; and Paul Stephan of the University of Virginia Law School.[*]

Remarks by Georg Nolte[†]

Most lawyers think in terms of continuities. By saying that a Restatement should be undertaken once ''every generation,'' we are presuming continuity, but we also invite reconsideration. Such reconsideration should not be limited to specific rules or principles, but should also involve the context and the character of the project itself—at least in the beginning. One way of starting a broader reconsideration is to compare the circumstances in which the Restatement Third was produced, with the situation in which we are today. Under this approach, three factors appear to be particularly important for the *international law* dimension of the Restatement Fourth:

1. The most obvious factor is that the Restatement Third could only draw on a comparatively limited amount of national and international case law. It is astonishing, for example, how small the sample of case law was on the basis of which the Restatement Third postulated its reasonableness standard concerning the exercise of effects-based jurisdiction, as a rule of customary international law.[1] While some treaty regimes are more judicialized than others, there is today certainly much more judicial practice than there was in the 1980s. This raises not only the question of quantity but also of quality, in particular whether the discretion of the Restatement's authors is thereby reduced or enhanced.

2. A second factor is somewhat less obvious. At the international level there were few alternatives to the Restatement Third. It is true that the Institut de Droit International and the International Law Association produced important fragments, but these did not easily reach U.S. courts and practitioners. Today, however, other Restatement efforts are more widespread. Consider, for example, the customary international law study of the International Committee of the Red Cross.[2] The International Law Commission has also moved considerably from drafting treaties to restating international law, also with the aim of reaching practitioners at the national level.[3] Think, for example, of the current projects on the immunity of state officials from foreign criminal jurisdiction and on the identification of customary international law, but also of the draft articles on state responsibility. And finally, the international legal

[*] Professors Cleveland and Stephan did not contribute remarks for the *Proceedings.*

[†] Professor of Public International Law, Humboldt University Berlin; Member of the International Law Commission.

[1] 1 Restatement (Third) of Foreign Relations Law para. 403 (1987).

[2] 1 Int'l Comm. of the Red Cross, *Customary International Humanitarian Law* (2005).

[3] Georg Nolte, *The International Law Commission Facing the Second Decade of the Twenty-first Century, in* From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma 781–93 (Ulrich Fastenrath et al. eds., 2011).

https://doi.org/10.5305/procannmeetasil.108.0027 Published online by Cambridge University Press

profession has embraced ''Commentaries,'' a category of legal literature which formulates a serious claim to authoritative restatement.[4] All these alternative forms of restatement are more readily available today, and litigants are more prepared to invoke them and to explain their relevance.

3. My third aspect concerns the general context, or the *Zeitgeist*. When the Restatement Third was elaborated, international law was in a different situation both within and outside the United States. The Restatement Third has the reputation of having interpreted international law progressively. Such an outcome was not a matter of course, given the state of international relations and international law in the 1970s and early 1980s. After all, this was a time of major tensions—North-South over the so-called New International Economic order, East-West over Afghanistan, the missile crisis, West-West over the U.S. extraterritorial pipeline sanctions, and even South-South over the Iran-Iraq war. The 1970s and the early 1980s were also not such a good time for international law generally, the major exception being the conclusion of UNCLOS. Thus, the reason why the Restatement Third came about in the way it did was probably due less to a consolidated situation at the international level and due more to U.S. domestic politics, which included a bipartisan expectation in and beyond the legal community that the stressing of human rights and of the international rule of law more generally would be in the national interest—despite Nicaragua. Today the situation seems to be somewhat the reverse: *within* the United States, international law is now much contested, not just certain of its rules, but also with respect to its basic functions. At the international level, on the other hand, many see the past twenty-five years, in particular the 1990s, as a period of progress. Some voices—not only from Europe—even speak of an emerging global constitutionalism. Even those who point to informalization, contestation, and pluralism tend to assume a large amount of background stability and common values.

So how should these three factors—judicialization, alternative restatements, and *Zeitgeist*—influence the Restatement Fourth?

1. Concerning judicialization, the authors should not try to find one general response to the question of whether to modestly distill the essence from the available case law, or to more ambitiously give the case law a spin into what they think is the right direction. It is necessary to distinguish between three types of case law:
   - Case law by specialized international courts and tribunals should not be second-guessed too much, except where there are serious reasons for disagreement. In such areas a Restatement is hardly necessary, at least not a national Restatement, and it is even questionable whether the Restatement Fourth should include certain fields, such as international trade or international criminal law, in which a specialized international judiciary operates.
   - National case law, including that of the U.S. Supreme Court, should be critically identified as what it is: national case law. Today there are more authoritative pronouncements by international courts and tribunals in many areas than there were thirty years ago, for example, in the area of the law of state immunity. It would be an important function of the new Restatement to ''translate'' pronouncements and developments at the international level, which sometimes national

[4] *Cf.* Oxford Commentaries on International Law.

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judges have difficulty in approaching or digesting. International case law would thereby be made less foreign to national adjudicators.

- The case law of general international courts—that of the International Court of Justice in particular—should be treated delicately, because it is neither as ''thick'' as the jurisprudence of some specialized international bodies, nor is it as tainted by specific national preconceptions as national case law. In this area, the function of the new Restatement should be to indicate where the case law is settled and where, on the other hand, it leaves margin for serious and reasonable disagreement. The Restatement should also, in my view, point out the possible considerations of how to fill this margin—including by considerations of enlightened national interest.
- A final observation regarding judicialization: the new wealth of case law is a mixed blessing. It can exert a pull towards ossification of the law by restatement, and it can also contribute to a ''dethroning'' of the ''publicists'' from their somewhat privileged position in international law, as it is reflected in Article 38(d) of the ICJ Statute. However, the diversity of the case law can also trigger and reinforce the classical role of a Restatement exercise since the time of the Romans: to make sense of apparent diversity and to identify some ordering pattern in it, including by reading the judicial practice through the prism of general principles and considerations. Such creative ordering can then encourage the national judges to consider general principles of law and international law.

2. Concerning the second factor—the new alternatives—the Restatement Fourth may appear, at first sight, to be in a relatively comfortable position. There is certainly no competitor for a Restatement which would be as comprehensive as the previous Restatement Third—if it were indeed the goal of the Restatement Fourth to become so comprehensive again. An episode from the International Law Commission suggests some caution in this respect: in 2010 one of our most eminent colleagues reminded the Commission's Working Group on Long Term Planning that the original mission of the Commission was to progressively develop and to codify ''international law'' (as a whole). He then made the visionary proposal that the Commission should now finally embark on a comprehensive ''Restatement of International Law.'' The reaction of the other members ranged from skepticism to astonishment. So perhaps the Restatement Fourth project should be limited to certain core areas and some basic principles. These core areas and basic principles should be selected according to whether it is possible to either confidently restate existing international law, or whether the ALI can confidently make a particular point in a debate at the international level in which it is important for interpreters to know a considered and broadly based view from the United States. In any case, the authority of the Restatement Fourth will depend, at least at the international level, on visibly engaging with other restatements.

3. And finally *Zeitgeist*: Given the uncertain status of international law in the United States, and the complicated decisionmaking process within the American Law Institute, the new Restatement will probably not produce results that will be criticized as being too progressive. All other things remaining equal, it is more likely that the main critique will this time around come rather from those who advocate progress and the recognition of what they perceive to be trends, including critique from European-style thinkers who see us on our way to a more constitutionalized system. This outlook should not, of course, inhibit the project, but it should give cause to reflect about its scope. Those who advocate progressive development, but see little

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> likelihood of this, may want to aim at reducing the scope of the project in order to leave room for further debate in the U.S. context. After all, restatements, by consolidating the law, tend to freeze it. On the other hand, there are times when it makes good sense, even for progressives, to consolidate the law by ''locking in'' past developments. We may have entered such a phase. It was not merely the lapse of about thirty years which gave rise to the initiative for a Restatement Fourth on Foreign Relations. There are indications that a post-Cold-War growth phase for international law which lasted about one generation is coming to an end. We may need to review the state of international law in the face of a general context in which the United States, and perhaps the West generally, is retreating somewhat in its ambitions and capabilities at the international level. If that is the case, then a Restatement Fourth which is conservative in substance, but progressive in its procedure to translate international developments for the U.S. legal system, would be timely.

The Restatement Fourth project comes at an important time not only for the U.S. legal system, but also for international law and international relations in general. This new Restatement will continue the Restatement tradition of being noted worldwide. The more the Restatement Fourth comes across as taking relevant acts from outside the United States into account, the more influence it will exert back at the international level. But its primary purpose is, of course, to get it right for the United States, and thus to enable international law to play its role in the U.S. legal system.