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FOREWORD: THE INTERNATIONAL LAW LEGACY OF THE OBAMA ADMINISTRATION

Michael P. Scharf

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I.

When President Obama entered the White House in 2009, many believed he would make a commitment to the rule of law a centerpiece of his foreign policy agenda. As his presidency was drawing to a close, the Cox Center's September 18, 2015, symposium – “New Beginnings, Resets & Pivots: The International Legal Practice of the Obama Administration” -- examined to what extent the Obama Administration complied with, challenged, or sought to refashion international law. As the attention of the American public turns to issues of foreign policy during the 2016 presidential campaign, the theme of the conference -- the international law legacy of the Obama Administration -- could not be more timely or relevant. From the international attacks by ISIS to the Chinese economic crisis to the surprising results of the Paris Climate Conference, the panel topics were literally ripped from the headlines.

This double symposium issue, containing the articles generated from the September 2015 Conference, celebrates the 25th anniversary of the endowment of Case Western Reserve University School of Law's Frederick K. Cox International Law Center. Twenty-five years ago, Case Western Reserve received a multi-million dollar gift from the Gund Foundation to establish one of the most innovative and ambitious international law programs in the world. In 2016, the Cox Center was ranked as the 11th best international law program in the nation via the *U.S. News and World Report* annual survey of American international law professors.

In partnership with the *Case Western Reserve Journal of International Law*, the Cox Center hosts an annual conference and several lecture series which have featured speeches by some of the most important figures in the field of international law, including:

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1. Michael Scharf is Dean of the School of Law, Director of the Frederick K. Cox International Law Center, and Joseph C. Hostetler -- BakerHostetler Professor of Law at Case Western Reserve University School of Law.
 2. Julia Liston, J.D. 2016, was the Editor in Chief of the *Case Western Reserve Journal of International Law* from 2015-2016.

- two Judges of the International Court of Justice: Christopher Greenwood, and Thomas Buergenthal;
- three judges of international criminal tribunals: Philippe Kirsch of the International Criminal Court, Christine van den Wyngaert of the International Criminal Court, and Geoffrey Robertson of the Special Court for Sierra Leone;
- six Chief Prosecutors of international criminal tribunals: Luis Moreno-Ocampo of the International Criminal Court; Fatou Bensouda of International Criminal Court; Richard Goldstone of International Criminal Tribunals for the Former Yugoslavia and Rwanda, David Crane of the Special Court for Sierra Leone; Brenda Hollis of the Special Court for Sierra Leone, and Robert Petit of the Khmer Rouge Tribunal;
- two UN High Commissioners for Human Rights; Navanethem Pillay and Prince Zeid Ra'ad Al Hussein;
- several top U.S. diplomats: Harold Koh, State Department Legal Adviser; Samantha Power, U.S. Ambassador to the United Nations, and Stephen Rapp, US Ambassador at Large for War Crimes Issues; and
- many of the world's leading human rights figures such as Albert L. Sachs, anti-apartheid activist and Judge of the Constitutional Court of South Africa; Aryeh Neier, President of the Open Society Institute; Kenneth Roth, Executive Director of Human Rights Watch; Michael Reisman, President of the Inter-American Commission for Human Rights; Philippe Sands, best-selling author and human right advocate; Mark Ellis, Executive Director of the International Bar Association; David Talbert, Executive Director of the International Center for Transitional Justice; and Elizabeth Anderson, Executive Director of the American Bar Association's Rule of Law Initiative.

The September 2015 Cox Center Conference organized under the leadership of Professor Tim Webster, broke prior attendance records with over 170 participants. The conference served as International Law Weekend Midwest for the International Law Association's American Branch, and was made possible by a generous grant from the Wolf Family Foundation.

The highlight of the Conference was the Keynote Address by Stephen Rapp, U.S. Ambassador at Large for War Crimes Issues and former Chief Prosecutor of the Special Court for Sierra Leone, who described the delicate *pas de deux* the Obama Administration has performed with the International Criminal Court.

Conference panels examined the Obama Administration's response to crisis and conflict in the Middle East, the Administration's efforts

regarding climate change, the Administration's executive action on immigration reform, American influence in the Asian-Pacific, the Obama Administration's legacy with respect to International Criminal Law, and the Administration's Contributions to International Tax Law and Policy. The archived webcast of the Conference is available for viewing anytime at: http://law.case.edu/Lectures-Events/lec_id/417.

II.

This symposium issue of the *Case Western Reserve Journal of International Law* contains eleven articles generated from the 25th Anniversary Conference, followed by the transcript of the "Talking Foreign Policy" broadcast devoted to the issue of the U.S.-Iran Nuclear Accord. It also contains the winning and two runner-up submissions from the Benjamin Ferencz International Essay Contest, which was hosted by the Cox Center in partnership with the Planethood Foundation. Finally, the issue contains four Notes by the student editors of the *Journal* on salient issues of international law.

The first set of articles come from the panel on the Obama Administration's legacy with respect to crisis and conflict in the Middle East, which featured a discussion between Dr. Gregory Noone, Director of Fairmont State University's National Security and Intelligence Program; Michael Scharf, Dean of Case Western Reserve University School of Law; Milena Sterio, Associate Dean of Cleveland State's Marshall College of Law; and Dr. Paul Williams, President of the Public International Law & Policy Group. Dr. Noone's essay evaluates what the "military option" means in practice with regards to destroying Iran's nuclear program. Dean Michael Scharf's piece examines the evolution of the right to use force in self-defense against non-state actors and makes the case that events in 2015, with respect to ISIS, triggered a "Grotian Moment": a fundamental paradigm shift that will have broad implications for international law. Professor Sterio's article examines the Iran Nuclear Agreement by focusing on the events which led to the imposition of sanctions against Iran and to the ultimate negotiation of the Agreement, discussing the most significant advantages and disadvantages of the deal, and concluding that the Iran Nuclear Agreement could become one of President Obama's biggest foreign policy accomplishments in the Middle East. Finally, Dr. Williams' submission argues that the White House has been practicing a policy of Strategic Absence in regards to the Middle East, describes the six core tenets of Strategic Absence, and demonstrates through case studies, that the Obama Administration has responded to challenges and threats to the United States' strategic interests in Iraq, Egypt, Libya, Yemen and Syria according to the parameters of the doctrine of Strategic Absence.

The next two pieces come from a panel which addressed climate change under the Obama Presidency and included a discussion

between the lead climate change lawyer for the United States Department of State, Susan Biniarz; Professor Uma Outka of University of Kansas School of Law; and Professor Jonathan Adler of Case Western Reserve University School of Law. Ms. Biniarz's essay examines issues that affected discussions shortly before the final negotiations at the United Nations Climate Change Conference in Paris in 2015. Professor Outka's article discusses the Obama Administration's Clean Air Act regulatory agenda in the context of longstanding domestic obligations of signatories to the United Nations Framework Convention on Climate Change as well as positioning for the 2015 Conference of the Parties in Paris.

From the panel on Executive Action and Immigration Reform comes two pieces from David Thronson, Associate Dean of Michigan State University School of Law; and Shoba Sivaprasad Wadhia, Director of the Center for Immigrants' Rights at Penn State University. Professor Thronson's essay highlights gaps between U.S. immigration law and its international human rights obligations and identifies ways in which the use of discretion can advance rather than undermine the rule of law. Professor Wadhia's remarks place the President's executive actions on immigration issued in November 2014 into a larger context by providing a brief history of prosecutorial discretion in immigration cases and also describes how law students at Penn State Law School used the President's announcement of executive actions as a platform for local change in the State College community.

One article comes from the panel "The Pivot Dissected: Did Obama Rebalance US Interests towards Asia?" In his piece, University of Pennsylvania Law Professor Jacques deLisle's discusses the Obama Administration's "pivot" toward East Asia which pushed East Asia-related questions much more toward the center of the U.S.'s practice of, and approach to, international law. He also argues that the Obama administration's response to disputes over territorial sovereignty and maritime rights in the South China Sea (and the East China Sea), and its quest for the Trans-Pacific Partnership as a "twenty-first century" trade agreement are primary legal aspects of the pivot or rebalance.

The final two articles from the symposium are born of a panel which critiqued the Obama Administration's Approach to the ICC and International Criminal Law. Temple Law School Professor Margaret deGuzman's article argues that the current U.S. policy concerning international justice both inhibits global justice efforts and undermines the U.S. claim to global moral leadership and asserts that the next U.S. administration should assert full membership in the global justice community by joining the ICC and providing unequivocal support for all efforts to address serious international crimes. Middlesex University Law Professor Don Ferencz's piece examines current U.S. policy on the crime of aggression, highlighting

the historic role that the U.S. played in establishing aggression as an international crime after World War II, and concluding that activation of ICC jurisdiction over the crime of aggression would be a significant step forward in the development of international law.

In addition to the symposium articles, this volume of the *Journal of International Law* features the winning and two runner-up submissions from the Benjamin Ferencz International Essay Contest. The contest asked participants to address the relationship between *jus ad bellum* and *jus in bello* in the context of modern war crimes trials. First, the winner, Professor Rachel VanLandingham, explores whether the crime of aggression can be prosecuted as a war crime by exposing the intersection of war's two legal regimes within the war crime of disproportionate attack. It concludes that, exclusively for those State leaders responsible for crimes of aggression, the resultant collateral damage caused by such aggression—the civilian deaths and property destruction otherwise allowed by the international laws governing warfare—could be considered criminally excessive by building upon the contextual approach inherent in both bodies of law. The two runner-up pieces were student submissions. Thomas Harris's article demonstrates that the ICC is prohibited from considering *jus ad bellum* in a war crimes trial, therefore precluding "aggressor discrimination" and suggests that lowering the humanitarian bar can surely not be the answer to ultimate humanitarian concerns. Mbori Otieno, Emmah Wabuke, and Smith Otieno co-wrote an article that argues that there is need for fusion between *jus ad bellum* and *jus in bello* particularly in relation to modern war crimes trials in order to ensure that both principles have practical significance. They assert that greater convergence between these two concepts must be embraced in all fora, including, the conceptualization of the crime of aggression and distinguishing between combatants and civilians.

As mentioned above, a transcript of a production of *Talking Foreign Policy*, a current affairs radio program produced by WCPN 90.3 FM ideastream, Cleveland's NPR affiliate, is included in this issue. The September 2015 edition of the program featured host Michael Scharf, Milena Sterio, Avidan Cover, Dr. Paul R. Williams, and Col. Mike Newton, discussing the controversial Iran Nuclear Accord.

Finally, this volume includes four student Notes. Three Notes come from graduating staff members of the *Journal of International Law*, and one other from another graduating student of Case Western Reserve University School of Law. The first, written by Executive Notes Editor Ameera Haider, outlines the tension arising from the differing incentives that underlie patent and traditional knowledge systems, and recommends methods of reconciling those tensions. The second, written by Executive Notes Editor Kristen Lease, examines whether the WTO is the best mediator between a government's right to implement health-based restrictions and an intellectual property

holder's guaranteed right of freedom from restrictions. The third, written by Executive Articles Editor Maura Nuno, argues that universal access to drugs requires not only collaboration between nations and patent holders, but also the creation of a neutral international panel. Ms. Nuno's Note was awarded as Note of the Year for 2015. Finally, the fourth, written by Brendan Saslow, seeks to analyze jurisprudence, primarily developed at the International Criminal Tribunal for Rwanda, on how to determine whether incitement to commit genocide is public and ultimately concludes with several suggestions on how factors for finding whether speech is public or private should evolve in order to account for modern forms of communication.

The articles, edited transcript, and student Notes contained in this special double issue of the *Journal of International Law* were the combined effort and support of many people. We would like to thank all of those who participated in and helped organize the Cox Center's 25th Anniversary Conference on September 18, 2015 for their scholarly insights. We would also like to extend a very special thank you to the Wolf Family Foundation for its support in making the conference possible. Finally, we would like to thank the student editors of the *Journal of International Law* who diligently worked to make this publication possible.