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Foreword: International Law and Policy in the Age of Trump

Michael P. Scharf* and John G. Wrench◊

I.

A self-styled disruptive innovator, when he became president Donald Trump promised to make radical changes to America’s relationship with international law and its institutions. To that end, in the first two years of his presidency, Trump instituted an immigration ban from six predominantly Muslim states,¹ initiated a trade war with China,² withdrew the U.S. from the Paris Climate Accord,³ the Iran Nuclear Deal,⁴ and the U.N. Human Rights Council,⁵ engaged in a presidential summit with Kim Jong-Un of

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◊ J.D., 2019; Editor in Chief of the Case Western Reserve Journal of International Law.


North Korea, and launched airstrikes against Syria’s chemical weapons facilities. In the midst of these tumultuous developments, on September 14, 2018, Case Western Reserve University School of Law hosted a conference featuring two dozen former government officials, NGO officers, distinguished academics and leading practitioners from all sides of the political spectrum who engaged in discussion and debate about what the Trump Administration’s policies have meant for the future of international law.

In the few months since our Conference, President Trump has continued to shake up the international system by denouncing the International Migration Compact withdrawing the United States from the 1987 U.S.-Russia Intermediate Range Nuclear Treaty, declaring a national emergency to fund construction of a wall on the Mexican border and banning officials from the International Criminal Court from entering U.S. territory. More sweeping changes are likely during his administration. In that context the insights of our expert panelists, as memorialized in this special double issue of the Case Western Reserve Journal of International Law, are as important as they are timely.


II.

This 51st volume of the Case Western Reserve Journal of International Law is organized in four parts. First, the volume begins with eleven articles and two speeches born out of this year’s symposium topic: “International Law and Policy in the Age of Trump.” Each article fits within one of the symposium’s four thematically-arranged panels. Next, this volume includes our annual Klatzky Endowed Lecture, delivered this year by Catherine Marchi-Uhel. The third section includes two transcripts from our law school’s unique radio-program, “Talking Foreign Policy,” which include discussion of U.S.-North Korean relations and its policies toward rogue states. This volume’s final section includes five student notes discussing a broad range of salient issues in international law.

The symposium’s first panel centered on the Trump administration’s influence on financial integrity and foreign entanglements. This panel was the foundation for an article on the enduring role of international regulatory cooperation, written by Professor David Zaring of the Wharton School at University of Pennsylvania. Professor Zaring’s fellow panelists included the Honorable Sue Eckert—former Assistant Secretary of Commerce for Sanctions and fellow at the Center for a New American Security, as well as Professor Richard Gordon—Director of the Institute for Financial Integrity at Case Western Reserve University School of Law.

The second panel discussed impacts of the United States’ withdrawal from treaties and accords, generating lively discussion and three articles. An article by Professor Eugene Kontorovich of Antonin Scalia Law School discusses constitutional distinctions between treaties, congressional-executive agreements, and sole executive agreements, concluding that the Paris Climate Accord did not bind the United States prior to President Trump’s withdrawal. In his article on the Trump administration’s approach to international agreements, Richard Cunningham, a Senior International Trade Partner at Steptoe & Johnson LLP, analyzes the Trump administration’s approach to international agreements as a means to leverage trade goals. Professor Jamil Jaffer, Director of the National Security Law & Policy Program at Antonin Scalia Law School, contributed an article suggesting that the Obama administration’s failure to ratify the Iran Nuclear Agreement facilitated President Trump’s subsequent withdrawal. Attorney Laurence Herman, former head of the Legal Bureau of the Canadian Department of External Affairs’ Economic and Treaty Law Section, contributed his expertise to the panel’s discussion.

The third panel discussed ways in which the Trump administration’s policies have interacted with immigration law and human rights. In his article, Professor Josh Blackman of the South
Texas College of Law Houston explores five unanswered questions following the Supreme Court’s ruling on the Trump administration’s travel ban in *Trump v. Hawaii*. Additionally, Aleksandar Cuic—partner at Robert Brown Immigration Law and Adjunct Professor at Case Western Reserve University School of Law—examines the potential impacts of former Attorney General Sessions’ policies on future asylum claims. An article by attorney Lisa Scott, President of Scott Global Migration Group, explores increased obstacles for would-be immigrants and practitioners due to changes in the United States’ immigration policies. This panel’s discussion was enriched by the contributions of David Leopold, former President of the American Immigration Lawyers Association and current chair of Ulmer & Berne’s Immigration Practice Group.

The fourth and final symposium panel discussed the Trump administration’s approach to the use of force and rogue states. An article by Case Western Reserve University School of Law’s Michael Scharf, Co-Dean and Joseph C. Hostetler--BakerHostetler Professor of Law, suggests that the United States’ April 2018 airstrikes in Syria may manifest an emerging norm of humanitarian intervention. Milena Sterio, Professor of Law and Associate Dean for Academic Enrichment at Cleveland-Marshall College of Law, writes that the Trump administration’s current approach to the International Criminal Court is counter-productive to both the interests of the United States and the broader global community. The third article is by Ambassador Todd Buchwald, the inaugural Tom A. Bernstein Genocide Prevention Fellow at the United States Holocaust Memorial Museum, and former U.S. Ambassador and Special Coordinator for the Department of State’s Office of Global Criminal Crime. Ambassador Buchwald’s article addresses obstacles to a universal doctrine guiding humanitarian intervention, suggesting the absence of a unifying principle may be due more to a failure of political will than unworkability. Lastly, Dr. Paul Williams—President of the Public International Law & Policy Group and Rebecca Grazier Professor of Law and International Relations at Washington University—writes about a seven-point framework for countries to follow when seeking to justify the use of military force in humanitarian crises, absent authorization from the United Nations.

Two distinguished guests delivered speeches at this year’s symposium, both of which are included in this volume. The keynote address was delivered by John B. Bellinger III, partner at Arnold & Porter and former Legal Adviser of the U.S. State Department. Mr. Bellinger’s keynote address suggested various ways in which both President Trump and those within the President’s administration have deteriorated norms in international law, while increasing tension between the United States and the International Criminal Court. The second speech in this volume was delivered by Elisa Massimino, former President and CEO of Human Rights First, and a Senior
Fellow at Harvard Kennedy School of Government’s Carr Center for Human Rights Policy. Ms. Massimino’s speech explored incidents of anti-refugee rhetoric and policies furthered by the Trump administration, noting various ways in which critics of the President can promote alternative policies.

In addition to symposium-related articles, this volume includes our annual Klatsky Endowed Lecture, delivered this year by Catherine Marchi-Uhel. Marchi-Uhel is the Head of the United Nations International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011. This lecture explores the Mechanism’s mandate, the obstacles it faces in discharging its duties, and the allegations of international crime in Syria.

Two transcripts from the law school’s international law radio-broadcast, “Talking Foreign Policy,” related to the Symposium topic are also included in this volume. Both broadcasts were hosted by Case Western Reserve University School of Law’s Dean Scharf and included several guests with various expertise in the pertinent area of international law. The first broadcast focuses on issues related to the U.S.-North Korea Nuclear Summit and includes the perspectives of several esteemed guests. Shannon French is the Director of Case Western Reserve University’s Inamori Center for Ethics and Excellence and has written extensively in the area of military ethics. Professor Timothy Webster is the Director of East Asian Legal Studies at Case Western Reserve University School of Law. Milena Sterio is a Professor of Law and the Associate Dean for Academic Enrichment at Cleveland-Marshall College of Law. Paul Williams joined the discussion as President of the Public International Law and Policy Group. The second “Talking Foreign Policy” transcript stems from a broadcast revolving around responding to rogue states. In this discussion, Dean Scharf and Dean Sterio were joined by two panelists who contributed articles to this volume—Ambassador Todd Buchwald and Dr. Paul Williams. James Johnson, former Chief of Prosecutions of the Special Court of Sierra Leone and current director of the War Crimes Research Office at Case Western Reserve University, was also welcomed to the broadcast as a new guest.

The final section of this year’s volume includes five student Notes written by graduating editors of the Case Western Reserve Journal of International Law. The first Note, written by Executive Notes Editor Rebecca Cambron, suggests the adoption of an aiding and abetting standard under which a blend of international and national enforcement could hold social media platforms liable for terrorist activity occurring on those platforms. The following Note, by Executive Articles Editor Daniel Criswell, explores how the increased prosecution of commercial sex buyers, in combination with a reformed mental state requirement, would effectively reduce demand—and
thereby the prevalence of sex-trafficking. In the third Note, Executive Notes Editor Alex Lilly argues that Congress should amend the 2009 Military Commissions Act to create an exception to the Councilman abstention doctrine for military commissions. Next, a Note written by Executive Articles Editor Douglas Pilawa grapples with several arguments in favor of enforcing a more diverse pool of international arbitrators, concluding that more organic alternatives would achieve better results. The final Note, written by Editor-in-Chief John Wrench, contends that the Outer Space Treaty’s distinction between sovereign claims and resource extraction creates a workable boundary for space-faring nations to conduct future resource extraction in outer-space. Mr. Wrench’s Note received the Case Western Reserve Journal of International Law Distinguished Note Award.

III.

Many students, scholars, practitioners, supporters, and advisors made Volume 51 of the Journal of International Law possible. We would like to thank all participants and organizers of the “International Law in the Age of Trump” Conference on September 14, 2018, for helping to make the day a success. We also thank the Law School’s Frederick K. Cox International Law Center, the Law School’s Center for Professional Ethics, the Inamori International Center for Ethics and Excellence, the American Society of International Law, the Cleveland Council on World Affairs, and the Cleveland International Lawyer’s Group for co-sponsoring the conference. Last but certainly not least, we thank the student editors of the Journal of International Law, who worked tirelessly to make this publication possible. Volume 52 of the Journal will be dedicated to the fall 2019 Symposium, “Atrocity Prevention: The Role of International Law and Justice,” which we are co-sponsoring with the American Society of International Law.