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# FOREWORD: ATROCITY PREVENTION: THE ROLE OF INTERNATIONAL LAW AND JUSTICE

*Ambassador Todd F. Buchwald<sup>1</sup> & Jody M. Aremband<sup>2</sup>*

## I.

It is a particular honor and pleasure to contribute the forward to this volume of the Case Western Reserve Journal of International Law, dedicated to the issue of the Role of International Law and Justice in Atrocity Prevention that was the centerpiece of the much-anticipated Conference that the Law School hosted in September 2019.

The issue of atrocity prevention has taken something of a beating in the last few years, a victim perhaps of the transactional approach to security and other foreign policy issues that seem to be engulfing us. Yet this is an issue that cannot go away. Its staying power is a testament to its deep moral roots. The horrors of the Holocaust and the knowledge of the capacity of man for cruelty to his fellow man will haunt the world forever. The experience of our modern history— in Yugoslavia, Rwanda, Sudan, South Sudan, the Central African Republic and elsewhere — leave no doubt that mankind has not yet fulfilled to pledge of “never again” to the kinds of horrors that one would have hoped had been relegated to the dust heap of history. Men and women of good conscience must not avert their attention.

But the security dimension is every bit as compelling. We have had to learn and re-learn that the threat to international peace and security posed by those responsible for large-scale atrocities is profound. Atrocities by a government against its own people that once might have been relegated to treatment as internal matters -- in which the international community had no legitimate, and certainly no legal, say -- affect our security in increasingly vivid ways. One look no further than the crisis of persons dislocated from conflicts in Syria, Libya and

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1. Todd F. Buchwald served as Special Coordinator for the State Department’s Office of Global Criminal Justice from December 2015-July 2017 and was conferred the rank of Ambassador by President Obama in July 2016. He is currently Chair of the American Society of International Law’s Signature Topic initiative on Atrocity Prevention: The Role of International Law and Justice, which co-sponsored the Atrocity Prevention Conference at Case Western Reserve University School of Law in September 2019.
  2. Jody Aremband is Editor in Chief of the Case Western Reserve Journal of International Law, Case Western Reserve University School of Law (‘20).

elsewhere that has driven European societies to what can rightly be called a state of crisis. Regrettably, this is just one example among many.

We see the recurring affirmation of the commitment of the international community to not tolerate atrocities in seminal documents. The Responsibility to Protect principles incorporated into the 2005 World Summit Outcome Document may be too modest for the tastes of many, and are surely insufficiently vindicated in practice, but nevertheless make clear the basic principles that all states have the responsibility to protect their populations from atrocities, and that the international community has a parallel responsibility to do what it can toward the same objective.<sup>3</sup> And the importance of the issue is reflected in seminal documents in the U.S. domestic context, including notably the report of the Albright-Cohen Task Force that established a blueprint for coping with the problem and<sup>4</sup> President Obama's Presidential Study Directive on Mass Atrocities.<sup>5</sup> The basic idea finds a home more recently in the statement in President Trump's National Security Strategy of December 2017 that "[w]e will not remain silent in the face of evil. We will hold perpetrators of genocide and mass atrocities accountable,"<sup>6</sup> to say nothing of such high-profile decisions like that of President Trump in ordering military strikes following use by the regime of Bashar al-Assad of chemical weapons against besieged civilians in Douma.<sup>7</sup> That support remains bipartisan is evidenced, at least in principle, by congressional passage and adoption into law in 2019 of the Elie Wiesel Genocide and Atrocities Prevention Act,<sup>8</sup> underscoring that the prevention of atrocities is in the United States

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3. G.A. Res. 60/1, 2005 World Summit Outcome (Sept. 16, 2005).
  4. ALBRIGHT-COHEN GENOCIDE PREVENTION TASK FORCE, PREVENTING GENOCIDE: A BLUEPRINT FOR U.S. POLICYMAKERS (2008), <https://www.usip.org/publications/2008/12/preventing-genocide-blueprint-us-policymakers>.
  5. Presidential Study Directive/PSD-10 (April 4, 2011). See OFF. OF THE PRESS SECRETARY, FACT SHEET: A COMPREHENSIVE STRATEGY AND NEW TOOLS TO PREVENT AND RESPOND TO ATROCITIES (2012). See STEPHEN POMPER, U.S. HOLOCAUST MEM'L MUSEUM, ATROCITY PREVENTION UNDER THE OBAMA ADMIN.: WHAT WE LEARNED AND THE PATH AHEAD (2018).
  6. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES (2017).
  7. See Helen Cooper, Thomas Gibbons-Neff & Ben Hubbard, *U.S., Britain and France Strike Syria Over Suspected Chemical Weapons Attack*, N.Y. TIMES (April 13, 2018), <https://www.nytimes.com/2018/04/13/world/middleeast/trump-strikes-syria-attack.html>.
  8. Elie Wiesel Genocide and Atrocities Prevention Act of 2018, S. 1158, 115th Cong., 132 Stat. 5586 (2019) (enacted).

national interest, that we needed to work with allies to pursue it, and that the United States needs to focus on the issue, with a government organized in a way that provides the tools to reach our goals.

For nearly two years, the American Society of International Law has been conducting one of its two “Signature Topics” on the issue of atrocity prevention. The purpose of the initiative has been to bring focus and attention to the broad range of international legal issues that are implicated, and to foster greater interest and discussion. The Symposium sponsored by Case Western has made a truly important contribution in this regard.

At the same time, it is clear that “atrocity prevention” does not stand readily as a discrete legal topic. That is not to say that lawyers play a small role, but it is a broad and amorphous area, touching on a broad range of legal issues that are typically taught separately in law schools, and thought of as discrete in and of themselves – human rights law, international humanitarian law, refugee and migration law, sanctions law, and state responsibility, just to list what could be the start of a very long list.

Yet, there is something essential that the “atrocity prevention” lens brings to the study and understanding of these issues. So much of international law developed in the context of an international community that was focused almost entirely on the relations between states. Yes, the way that states treated individuals might be a cause for international concern, but – at least traditionally – only in that it might affect those state-to-state relations. The direct victim of a state’s expropriation of private property might, for example, be an individual, but it was only insofar as the act caused damage that was considered to be inflicted a foreign state – perhaps a state with an interest in protecting investors who carried its nationality – that it became a matter cognizable in international law.

That paradigm no longer suffices. It is inconsistent with our basic values. It is premised on a kind of reality that no longer matches what we feel in our hearts or the prism through which we see the world around us – sensibilities about the inherent value of human life, human rights, and human dignity. And we observe how unchecked atrocities undermine the international security that the old kind of reality was supposedly geared to protect.

Under the scrutiny of this evolving prism, the rules that have come to define our international order are being considered afresh. Some may stand up, some may need to be adjusted, and some may need to be replaced – but they all warrant reflection rather than unthinking obedience. We have to ask questions. Are there some that are based on premises that we no longer accept? Are there ways to work more creatively within the rules? Are their tools that international law gives us that could be better used to protect vulnerable populations? For it is only upon such reflection that lawyers and policymakers will equip

themselves with the ways and means to pursue the noble and necessary goal of preventing atrocities.

It is in this context that I believe the symposium sponsored by Case Western is so important. The selection of topics did a remarkable job of focusing on the key pivotal issues – issues that affect the key legal architecture upon which so much of the efforts to prevent atrocities are based. It, of course, is true that no daylong (or for that matter week-long or month-long) program can wrestle to the ground all the legal issues that require attention. But this daylong effort went a remarkable way, and made a remarkable contribution.

## II.

This 52<sup>nd</sup> volume of the *Case Western Reserve Journal of International Law* is organized in four parts. First, the volume begins with eighteen articles and two speeches born out of this year's Symposium. Each article fits within one of the symposium's four thematically-arranged panels. Next, this volume includes our annual Klatsky Endowed Lecture, delivered this year by Dr. Paul R. Williams, President of the Public International Law & Policy Group. The third section of this volume contains transcripts from our law school's radio program, "Talking Foreign Policy," which includes a discussion of the crisis in Yemen and the crimes committed against the Rohingya people in Myanmar. This volume's final section includes four student notes and three student comments discussing a broad range of salient issues in international law.

The first panel of our symposium discussed the legal challenges to the Security Council veto in the context of atrocity crimes. An article by Ambassador Christian Wenaweser proposes and analyzes several possible mechanisms to restrain the misuse of the veto. Professor Jennifer Trahan of New York University raises the question in her article of whether use of the veto in the context of atrocity crimes is consistent with the principles of international law, and how the veto might be subject to legal challenge. Professor Michael J. Kelly of Creighton University School of Law, discuss potential structural modifications to address the misuse of the veto. An article by Professor Ved Nanda of the University of Denver Sturm School of Law, examines the past use of the veto in cases where the Uniting for Peace mechanism may have been used to protect the victims of atrocity crimes. Todd Buchwald, the former Ambassador for Global Criminal Justice at the U.S. Department of State, also contributed his expertise to the panel's discussion.

The second panel discussed the regulation of social media that impacts or incites atrocity crimes. Jenny Domino, Satter Human Rights Fellow at Harvard University, contributes an article exploring Facebook's role in the incitement of violence against the Rohingya people in Myanmar and the application of tort liability. An article by David Sloss of Santa Clara University School of Law proposes a

statutory exception to a U.S. law that protects Facebook from civil liability. In her article on the new role of social media as custodians of evidence, Professor Rebecca Hamilton of The American University Washington College of Law, analyzes Youtube's struggle to properly categorize videos posted by humanitarian activists in the Syrian conflict.

The third panel explored atrocity prevention in Yemen. Margaux J. Day, Vice President and Senior counsel of the Public International Law and Policy Group (PILPG), and Eian Katz, Assistant Counsel at PILPG, discusses the ambiguous status of agreements, such as the Stockholm Agreement, between states and non-state armed opposition groups. Dr. Laura Graham, Director of the Yemen Accountability Project and an Associate Editor of this volume, explores the evidence supporting the prosecution of starvation crimes in the Yemeni conflict. Sandy Hodgkinson, Senior Vice-President and Chief of Staff of DRS Technologies and Leonardo North America; Dr. Paul R. Williams, President of PILPG and Professor at The American University Washington College of Law; Associate Dean Milena Sterio, of the Cleveland Marshall College of Law; and Professor James Johnson, Director of the Henry King War Crimes Research Office at Case Western Reserve University School of Law, contributed their expertise to the panel's discussion.

The fourth panel discussed The International Law Commission's Draft Convention on Crimes against Humanity. In his article, Visiting Professor Yaron Gottlieb of *Université* Lyon III, proposes elevating the destruction of cultural heritage from a war crime to a more serious crime against humanity by including it as such in the Draft Convention. Professor Charles Jalloh of the Florida International University College of Law and a member of the UN International Law Commission, analyzes the Draft Convention within the context of the ILC's two-pronged mandate of codification and progressive development, and its potential impact on modern international criminal law. Professor Juan Mendez, of The American University Washington College of Law and former UN Special Rapporteur on Torture; Professor Sean Murphy, of the George Washington University School of Law; and Professor Leila Sadat, of the Washington University School of Law, contributed their expertise to the panel's discussion.

The fifth and final panel of the symposium discussed the threats and challenges confronting the International Criminal Court. David Crane, Former Chief Prosecutor of the Special Court for Sierra Leone sets the stage with a discussion of the developments in accountability in international criminal law and the beginning of a new era of accountability. Former Ambassador Todd Buchwald discusses the technical and inherently political challenges the Court faces. Associate Director of the International Justice Program at Human Rights Watch Elizabeth Evenson highlights the events of 2018 that brought the ICC under global scrutiny and makes structural recommendations for

furthering the goal of international justice. Jessica C. Levy, a Research Fellow at PILPG, and Dr. Paul R. Williams, discuss the imperative of evidence collection to the successful prosecution of atrocities. Associate Dean Milena Sterio of the Cleveland Marshall College of Law presents several recommendations to improve the ICC's ability to successfully prosecute criminals, and thus fulfill its ultimate purpose of providing accountability. Head of Investigations of the Special Court for Kosovo, Alex Whiting provides a plan of action for the next ICC Prosecutor.

Two distinguished figures delivered keynote speeches at this year's symposium, both of which are included in this volume. Roy Gutman, an American journalist and author, recipient of the Pulitzer Prize, Selden Ring Award, and a special Human Rights in Media Award from the International League for Human Rights, discuss the atrocities committed in Syria and calls on the international community and the US government to act. The conference keynote address was delivered by Professor Sean Murphy of the George Washington University Law School, President of the American Society of International Law, and a member of the International Law Commission. Professor Murphy discusses the codification of six key international obligations for preventing atrocities that were included in the ILC's Draft Convention on Crimes Against Humanity.

In addition to the symposium-derived articles, this volume includes our annual Klatsky Endowed Lecture, delivered this year by Dr. Paul Williams. Dr. Williams, the Co-Founder of PILPG, has participated in two dozen peace negotiations. This lecture explores the development of accountability into international criminal law and the need to further embed accountability into peace processes.

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. The program is broadcast quarterly from Cleveland's NPR station, WCPN 90.3 Ideastream. Both broadcasts were hosted by Case Western University School of Law's Dean Scharf and included several guests with expertise in international law.

The final section of this year's volume includes four student Notes written by graduating editors of the *Case Western Journal of International Law* and three student Comments written by editors who graduated in 2019. The first Comment, written by Rebecca Cambron, examines a shift in the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms by the European Court of Human Rights within the context of family and parental rights. The first Note, written by Senior Editor Emily Davis, examines the use of social media as an alternative for service of process, how social media has been used for this purpose, and suggests that such use will become routine. Ms. Davis' Note received the *Case Western Journal of International Law* Distinguished Note Award. The following Comment, written by Shannon Doughty, advocates for the Supreme

Court to review War Powers Resolution claims under the limited scope of the political question doctrine as stated in *Zivotofsky v. Clinton*. The next Note, written by Executive Notes Editor Julie Menke, explores the political issues involved in the Attorney General's use of the referral power in immigration cases, how this power was used by Attorney General Jeff Sessions, and suggests a limitation of such authority to protect against abuses of authority that harm the balance of power within the federal government. The final Note, written by Managing Editor Renee Monzon, explores the adoption of private-property rights into Cuba's 2019 Constitution and looks at economic theories and case studies to recommend modification to the legal and political systems to achieve economic growth. The final Comment, written by John Wrench, analyses the European Court of Human Rights' recent decisions which showcase the Court's struggle to balance values of religious tolerance and freedom of expression, suggesting the adoption of a different theory of causation to resolve these tensions.

### III.

Many students, scholars, practitioners, supporters, and advisors made Volume 52 of the *Journal of International Law* possible. We would like to thank all participants and organizers of the "Atrocity Prevention" Conference on September 20, 2019, for helping to make the day a success. We also thank the Law School's Frederick K. Cox International Law Center, the Signature Topic initiative of the American Society of International Law on the Role of International Law and Justice in Atrocity Prevention, the American Branch of the International Law Association, the International Association of Penal Law, the Cleveland Council for World Affairs, the International Law Section of the Cleveland Metropolitan Bar Association, and the Greater Cleveland International Lawyer's Group for co-sponsoring the conference. A very special thank you to the student editors of the *Journal of International Law*, who worked tirelessly to make this publication possible. Finally, we are pleased to announce that Case Western Reserve University School of Law has been selected to host the American Society of International Law's 2020 Midyear Meeting and Research Forum (October 29-31, 2020). Stay tuned for the spring 2021 volume of the *Case Western Journal of International Law*.