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Foreword: The Academy and International Law: A Catalyst for Change and Innovation

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FOREWORD

THE ACADEMY AND INTERNATIONAL
LAW: A CATALYST FOR CHANGE
AND INNOVATION

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I.

This double issue of the *Journal of International Law* contains articles generated from the Frederick K. Cox International Law Center’s 2021 annual symposium, titled “The Academy and International Law: A Catalyst for Change and Innovation.” Perhaps more than in any other legal field, academic institutions and organizations run by academics have had a significant influence on the development of international law. In the two-day conference, two dozen expert panelists from international organizations, NGOs, and academic institutions explored how academia and NGOs run by academics have influenced war crimes prosecutions, peace negotiations, and the pursuit of human rights since the Second World War.

The 2021 Symposium celebrated the 25th Anniversary of the founding of the Public International Law & Policy Group (“PILPG”) by CWRU School of Law Co-Dean Michael Scharf and Dr. Paul Williams. PILPG is a Nobel Peace Prize-nominated NGO that provides legal assistance to parties involved in peace negotiations, drafting post-conflict constitutions, and war crimes prosecution/transitional justice. Since its founding in 1995, PILPG has provided legal counsel to over two dozen peace negotiations, helped draft a dozen post-conflict constitutions, and assisted every international and hybrid criminal tribunal, as well as helped to create a number of domestic transitional justice mechanisms.

A striking example of the theme of the conference occurred as this issue of the *Journal of International Law* was going to press, when one of PILPG’s projects, led by several CWRU School of Law faculty members, produced a profound effect on American foreign policy. When

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U.S. Secretary of State Antony Blinken announced on March 21, 2022, that the United States has determined that Myanmar's army has committed genocide against the Rohingya people,¹ he indicated that the determination drew on a 2018 study by the Public International Law & Policy Group, which was commissioned by the State Department. The study, "Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar's Rakhine State,"² was prepared for the State Department by a team led by CWRU Adjunct Professor Gregory Noone, which interviewed over 1,000 Rohingya refugees in Bangladesh. Co-Dean Michael Scharf and CWRU War Crimes Research Office Director Jim Johnson helped draft the report, which made the legal determination that, based on the findings of the PILPG investigative mission, "there are reasonable grounds to believe that crimes against humanity, genocide, and war crimes were committed against the Rohingya" in Myanmar.

Echoing the language of the PILPG report, Secretary of State Blinken said the attacks against Rohingya were "widespread and systematic" and that evidence pointed to a clear intent to destroy the mainly Muslim minority. The International Criminal Court ("ICC") in The Hague cited the same PILPG report in its November 2019 decision³ authorizing the ICC prosecutor to pursue the case of crimes against humanity against the Rohingya of Myanmar. Yet, when PILPG sent its report to the State Department in 2018, the Trump Administration chose not to label any of these crimes as genocide, thereby excusing the United States from any legal or moral obligation to take action.

In a June 1, 2021, article in *The Diplomat*, a magazine read by many in the State Department, Co-Dean Scharf, PILPG co-founder Paul Williams, and PILPG Managing Director Milena Sterio called on the Biden Administration to correct that mistake:

The Biden administration is faced with an historic opportunity. By labeling the atrocities committed against the Rohingya in

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1. Antony J. Blinken, U.S. Sec'y of State, Genocide and Crimes Against Humanity in Burma, Address at the Holocaust Memorial Museum in Washington, D.C. (March 21, 2022), <https://www.state.gov/secretary-antony-j-blinken-at-the-united-states-holocaust-memorial-museum/> [<https://perma.cc/Q3D3-7RWS>].
 2. See generally DANIEL J. FULLERTON ET AL., DOCUMENTING ATROCITY CRIMES COMMITTED AGAINST THE ROHINGYA IN MYANMAR'S RAKHINE STATE: THE PUBLIC INTERNATIONAL LAW & POLICY GROUP'S 2018 HUMAN RIGHTS DOCUMENTATION MISSION (2018).
 3. Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Case No. ICC-01/19-27, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation (Nov. 14, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF [<https://perma.cc/Q5C5-3ZLP>].

Myanmar's Rakhine State as genocide, the Biden administration has a chance to reassert the United States' moral authority on human rights and to lead the international community on issues of justice and accountability.⁴

Eight months later, Secretary of State Blinken made his historic announcement, bolstering efforts to hold the Myanmar generals accountable and help prevent further atrocities.

II.

This volume begins with one speech and thirteen articles born out of this year's Symposium. Each article fits within one of the Symposium's four thematic panels. The next section of this volume contains a transcript from our law school's radio program, "Talking Foreign Policy," which includes a discussion of the adventures of international lawyers who work on war crimes prosecutions, human rights cases, and peace negotiations. This volume's next section celebrates students' impact on the field of international law. It includes five student notes discussing a broad range of salient issues in international law. The final section contains a transcript from an alumni panel of former editors of *Case Western Reserve Journal of International Law*.

The first section kicks off with the keynote speech by Dr. Mark Ellis, Executive Director of the International Bar Association. Dr. Ellis sets the tone for the panels by recalling a pivotal event that took place in November 1989: the fall of the Berlin Wall. As the last of the Holocaust survivors near the end of their lives, Dr. Ellis calls on the next generation to commit to upholding international justice.

The subsequent articles, derived from the first panel titled "The Academy and Grotian Moments," trace scholars' impact on defining moments in customary international law. Michael Scharf notes that academics have had a profound influence on the development of international law, but one name stands out above all others: Hugo Grotius. Scharf describes the theory of Grotian Moments, which explains the accelerated formation of customary international law during times of fundamental change. Omri Sender cautions writers on international law to remain earnest in order to promote the credibility of the field more broadly. Milena Sterio dives further into the Grotian Moment theory to assess whether an evolution in specific elements of statehood have resulted in such paradigm-shifting Grotian Moments.

4. Michael P. Scharf, Paul R. Williams & Milena Sterio, *Why the US Should Recognize the Rohingya Genocide*, THE DIPLOMAT (June 1, 2021), <https://thediplomat.com/2021/06/why-the-us-should-recognize-the-rohingya-genocide/> [<https://perma.cc/69AZ-TCQK>].

The second panel of the Symposium honored the 75th Anniversary of the Nuremberg Judgment and the Academy's impact on war crime prosecutions. Leila Nadya Sadat argues that a long-stalled global treaty on crimes against humanity would be a step forward in the fight against impunity and a symbolic completion of the legacy of the Nuremberg trials, where crimes against humanity first materialized. Next, Jennifer Trahan argues that if the United Nations wants to ensure that the Security Council will act in situations of genocide, crimes against humanity, or war crimes, then it must address legal limits to the veto power. Finally, Timothy Webster highlights an array of scholars, lawyers, and activists who laid the groundwork for East Asia's war reparation litigation.

The third panel provided a twenty-year retrospective of the effects on international law of the post-9/11 wars. Deborah Pearlstein breaks down academics' impact on legal policy during the post-9/11 wars, while noting how the Global War on Terror transformed the study of international and national security law in the U.S. legal academy. Beth Van Schaack, who was confirmed as Ambassador-at-Large for International Criminal Justice at the State Department shortly after the Symposium, asserts that teaching international law has never been more stimulating. In her article, she walks readers through a case study based on the harrowing story of Khalid El-Masri to visualize the moving parts of the international human rights system. Jessica Wolfendale calls for the public acknowledgment of, and reckoning with, the true history of torture by the United States of America.

The fourth and final panel commended the pursuit of peace and human rights by academic institutions and organizations run by academics. Aleksandar Cuic asks readers whether the U.S. immigration system, riddled with outdated laws and policies, will ever get the surgical fix it requires. The final three articles are dedicated to PILPG's impact on human rights. Dr. Paul Williams and Isabela Karibjanian trace the origin story of the "pocket NGO" that was later nominated for the Nobel Peace Prize. Darin E.W. Johnson examines the contributions that legal scholars have made to the pursuit of peace and human rights through the development of applied theories on peace negotiation, constitutional reform, and accountability for human rights abuses. Lastly, Andrew C. Mann and Nicole Carle provide a behind the scenes look at PILPG's 2018 Rohingya Documentation Project.

The next section of this year's volume includes five student notes written by editors of the *Case Western Reserve Journal of International Law*. The first note, written by our Managing Editor Caroline Zrinka Dzeba, analyzes tort liability for corporations under international human rights law and argues that recent North American court decisions reflect emerging global norms. The following note, by Rachel L. Emerson, calls for the United States to adopt the United Kingdom's transparent system for artificial reproductive technology. Emerson's Note received the Journal's Outstanding Note Award. Next, Connor

Gibbons examines the risks associated with equity crowdfunding and proposes a framework for necessary regulation to grow the emerging economies of Africa. Mackenzie Kern assesses the new wave of climate litigation that may form a pathway to corporate accountability. Finally, Alireza Nourani-Dargiri argues that the current bail system in the United States violates international human rights standards.

Finally, the alumni panel, titled “Making an Impact,” provides an inside look into what it is like to practice international law from Niki Dasarathy, Philip Hadji, Katelyn Masetta-Alvarez, Douglas Pilawa, and Christopher Rassi—all former *Case Western Reserve Journal of International Law* editors. The panel includes advice on everything from international opportunities in law school to networking and professional presentation.

We hope that this Symposium issue sheds new light on how the academy has influenced the field of international law and will continue to stimulate new paths of inquiry.

III.

Many students, scholars, practitioners, and supporters made this Symposium issue possible. We would like to thank all participants and organizers of the “The Academy and International Law: A Catalyst for Change and Innovation” Symposium on September 24 and 25, 2021, for helping to make the conference a success. We also thank the Law School’s Frederick K. Cox International Law Center and the American Branch of the International Law Association for co-sponsoring the Symposium. Last but certainly not least, we thank the student editors of the *Journal of International Law*, who worked tirelessly to make this publication possible.