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FOREWORD

INTERNATIONAL LAW AND THE NEW COLD WAR

*Michael P. Scharf**

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I.

This double issue of the *Case Western Reserve Journal of International Law* contains articles generated from the Frederick K. Cox International Law Center’s 2022 annual symposium, titled “International Law and the New Cold War.”

After the dissolution of the Soviet Union in 1991, foreign policy experts optimistically declared that the world had entered the “post-Cold War age.”¹ Within the U.N. Security Council and other international organizations, it was a heady period of unprecedented collaboration and accomplishment.² That all ended when Russia invaded neighboring Ukraine in the early hours of February 24, 2022,³ prompting *The Bulletin of Atomic*

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1. *See generally* CHARLES WILLIAM MAYNES & WILLIAM G. HAYLAND, THE NATURE OF THE POST-COLD WAR WORLD 5, 23-29 (1993), https://www.globalsecurity.org/military/library/report/1993/ssi_maynes-hyland.pdf [<https://perma.cc/6Z8X-6NN3>].
2. *See* KENNETH MANUSAMA, THE UNITED NATIONS SECURITY COUNCIL IN THE POST-COLD WAR ERA: APPLYING THE PRINCIPLE OF LEGALITY 2-3 (2006).
3. *See, e.g.*, Travis Andersen, *Does Russia’s Invasion of Ukraine Signal the Start of a New Cold War? Foreign Policy Specialists Weigh In*, BOS. GLOBE, <https://www.bostonglobe.com/2022/03/02/metro/does-russias-invasion-ukraine-signal-start-new-cold-war-foreign-policy-specialists-weigh/> (Mar. 2, 2022, 2:10 PM) [<https://perma.cc/WT96-NZKA>]; Elliot Abrams, *The New Cold War*, COUNCIL ON FOREIGN RELS. (Mar. 4, 2022, 7:36 AM), <https://www.cfr.org/blog/new-cold-war-0> [perma.cc/4Y36-RF79].

Scientists to reset its famous Doomsday Clock to 90 seconds to midnight, the closest to apocalypse in its 76-year history.⁴

As in the last Cold War, countries around the globe were forced to choose sides in a clash characterized “as a struggle between democracy and authoritarianism, between the rules-based order set up after World War II and the law of the jungle where might makes right.”⁵ Described as “a major breaking point in history,”⁶ the invasion and international response triggered a succession of novel international legal responses.

First, Ukraine brought a case before the International Court of Justice, which ordered provisional measures to protect Ukraine from being subject to the use of force by Russia based upon Russia’s false allegations of genocide under the Genocide Convention.⁷ Then, the International Criminal Court (ICC) swung into action, immediately announcing the launch of a sweeping investigation into Russian atrocities.⁸ At the same time,

Author Elliot Abrams served as President George W. Bush’s Deputy National Security Advisor for Global Democracy Strategy. See also John Simpson, *Ukraine Invasion: Is This a New Cold War, Asks John Simpson*, BBC (Feb. 24, 2022), <https://www.bbc.com/news/world-europe-60515342> [<https://perma.cc/7A4M-96H8>]. The author, John Simpson, is BBC’s World Affairs Editor.

4. Ben Turner, *Doomsday Clock Advances to 90 Seconds to Midnight — the Closest to Apocalypse it’s Ever Been*, LIVE SCIENCE, Jan. 24, 2023, <https://www.livescience.com/doomsday-clock-moves-90-seconds-to-midnight>
5. Dan De Luce, *A New Cold War Without Rules: U.S. Braces for a Long-Term Confrontation with Russia*, NBC NEWS, March 6, 2022, <https://www.nbcnews.com/news/investigations/new-cold-war-rules-us-braces-long-term-confrontation-russia-rcna18554>.
6. Dan De Luce, *A New Cold War Without Rules: U.S. Braces for a Long-term Confrontation with Russia*, NBC NEWS (Mar. 6, 2022, 4:30 AM), <https://www.nbcnews.com/news/investigations/new-cold-war-rules-us-braces-long-term-confrontation-russia-> (quoting Mary Elise Sarotte, professor of history at the Johns Hopkins University School of Advanced International Studies) [<https://perma.cc/D86F-JLWS>].
7. See *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.)*, Order (Mar. 16, 2022), <https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf> [<https://perma.cc/5PAD-KLAD>].
8. *War Crimes Court Prosecutor Opens Ukraine Investigation*, REUTERS, March 2, 2022, <https://www.reuters.com/world/europe>

proposals were being developed for a groundbreaking ad hoc tribunal to prosecute the crime of Russian aggression, a crime outside the ICC's jurisdiction.⁹ Meanwhile, the United States and its European allies imposed hard-biting sanctions on Russia and its leaders.¹⁰ For its part, the United Nations General Assembly performed a brazen end-run around a Security Council paralyzed by the Russian veto by resurrecting the seldom-used Uniting for Peace mechanism.¹¹ It then deployed that mechanism to condemn Russia's act of aggression,¹² reject as illegal the Russian annexation of territory in Eastern Ukraine,¹³ suspend Russia from participating in the U.N. Human Rights Council,¹⁴ and establish

/war-crimes-court-prosecutor-opens-ukraine-investigation-statement-2022-03-02/.

9. On April 28, 2022, the Parliamentary Assembly of the Council of Europe (PACE) adopted a resolution proposing the establishment of an ad-hoc international tribunal investigate and prosecute the crimes of Russia's military aggression in Ukraine. *PACE calls for an Ad Hoc International Criminal Tribunal to Hold to Account Perpetrators of the Crime of Aggression Against Ukraine*, COUNCIL OF EUR. (Apr. 28, 2022), <https://www.coe.int/en/web/portal/-/pace-calls-for-an-ad-hoc-international-criminal-tribunal-to-investigate-war-crimes-in-ukraine> [<https://perma.cc/C76A-RZHJ>]; Jennifer Trahan, *U.N. General Assembly Should Recommend Creation of Crime of Aggression Tribunal For Ukraine: Nuremberg Is Not the Model*, JUST SEC. (Mar. 7, 2022), <https://www.justsecurity.org/80545/u-ngeneral-assembly-should-recommend-creation-of-crime-of-aggression-tribunal-for-ukraine-nuremberg-is-not-themodel/> [<https://perma.cc/N842-FW6U>].
10. Stefan Meister & David Jalilvand, *Sanctions Against Russia*, DGAP (June 8, 2022), <https://dgap.org/en/research/publications/sanctions-against-russia> [<https://perma.cc/JW2X-PNB8>].
11. *See* G.A. Res. ES-11/1 (Mar. 2, 2022).
12. Humeyra Pamuk & Jonathan Landay, *U.N. General Assembly in Historic Vote Denounces Russia over Ukraine Invasion*, REUTERS, <https://www.reuters.com/world/un-general-assembly-set-censure-russia-over-ukraine-invasion-2022-03-02/> (Mar. 2, 2022, 7:25 PM) [<https://perma.cc/R3AY-BAJ6>].
13. G.A. Res. ES-11/4 (Oct. 12, 2022) (adopted by a vote of 143 in favor, 5 against, 35 abstentions).
14. G.A. Res. ES-11/3 (Apr. 7, 2022) (adopted by a vote of 93 in favor, 24 against, 58 abstentions).

a register to catalogue the damage to Ukraine for eventual compensation.¹⁵

In the midst of these historic developments, on September 30, 2022, Case Western Reserve University School of Law's Cox International Law Center brought together two-dozen leading experts from the academy, the U.S. government, and international organizations to examine how the Ukraine crisis and other recent events are transforming international law and international institutions. In addition to four panels featuring leading international law experts, highlights included a morning keynote address by Professor Sean Murphy, member of the U.N. International Law Commission; a lunch keynote address by Ambassador Beth van Schaack, U.S. Ambassador at Large for Global Criminal Justice; and a closing address by Judge Chile Eboe-Osuji, the former President of the International Criminal Court.

II.

This volume of the *Case Western Reserve Journal of International Law* is organized around the 2022 symposium titled "International Law and the New Cold War." It begins with articles generated from a panel discussion on the role of international law in the Russia/Ukraine conflict. Paul Williams and Nicole Carle detail the methodology utilized by the Public International Law and Policy Group to remotely document and collect witness statements from victims of Russian violence in Ukraine. Next, Rebecca Hamilton explores the implications of a new tribunal to prosecute crimes of aggression in the context of Russia's invasion of Ukraine. Then, Michael Kelly investigates how traditional notions of *jus ad bellum* and contemporary international judicial processes may produce differing outcomes for Ukraine's sovereignty. Jennifer Trahan explores the concept of *jus cogens* in light of the past and present impact of Russia's veto power. Finally, Margaret DeGuzman investigates the conditions required for the moral legitimacy of supra-national adjudication in international law, ultimately exploring how the

15. Chiara Giorgetti et al., *Historic UNGA Resolution Calls for Ukraine Reparations*, JUST SECURITY (Nov. 16, 2022), <https://www.justsecurity.org/84146/historic-unga-resolution-calls-for-ukraine-reparations/> [https://perma.cc/3GKD-DCAS].

requirement of comparative benefit could be applied to situations in Ukraine and Colombia by the ICC in the future.

Growing out of the second panel, the next group of articles focus on the “power shift” between organs of the United Nations due to Russian abuse of the Security Council veto. First, Todd Buchwald explores the history of the “original” Cold War and Uniting for Peace Resolution through the lens of the career of John Maktos, the State Department’s first Assistant Legal Adviser for United Nations Affairs. Then, Michael Scharf analyzes the history of the Uniting for Peace Resolution and how its contemporary resurgence in various contexts represents a power shift away from the Security Council towards the General Assembly. Carsten Stahn then surveys the various mechanisms associated with the General Assembly’s power to unite for peace, as well as the legality, effectiveness, and potential adverse consequences of actions taken through the Uniting for Peace Resolution. Finally, Ved Nanda argues that the Security Council has become paralyzed due to the vetoes of its members, and that the Uniting for Peace Resolution is one of many ways in which the General Assembly is able to now act more aggressively on issues related to international security.

The articles generated from the third panel explore the “new Cold War” through the lens of information operations and technology. Hannah Bailey uncovers the motivations and effects of state based social media posts from the People’s Republic of China and how state-based narratives reflect the PRC’s foreign policy aims. Then, David Sloss utilizes data trends on the global rise of autocracy to analyze how China’s discourse power and media impact global regimes.

Articles from the fourth panel explore a new era of international courts and tribunals in light of recent geopolitical developments. Yvonne Dutton investigates the principle of universal jurisdiction, accountability mechanisms, and the potential effects of prosecuting Russia. Then, Stuart Ford compares and contrasts the “original” cold war with today’s “new” cold war, utilizing the lessons of the past to more deeply understand present and future conflicts. Finally, Milena Sterio turns her attention to the future of international accountability mechanisms, exploring how the Ukraine crisis exemplifies the various international mechanisms and bodies required to bring justice in subsequent conflicts.

This content related to the conference topic concludes with a transcript from Talking Foreign Policy, broadcast on October 24,

2022. This episode of Talking Foreign Policy features Michael Scharf, Paul Williams, David Crane, Jennifer Trahan, and Milena Sterio. These experts came together to discuss the Russian Invasion of Ukraine, exploring the potential paths for holding Russian leaders accountable as well as obstacles to achieving justice for Ukraine.

This volume of the Journal of International Law also features four student Notes covering a wide range of topics relevant to international law today. First, Thaddeus Cwiklinski explores the history of Olympic doping and weighs potential solutions to combat criminal doping in sports. Gabriel Kaufman then argues that the commercial activity exception to the Act of State doctrine has survived in light of narrowing Supreme Court decisions, and offers guiding principles for determining when state conduct is “official.” Emma Peters addresses the need for museums to adopt a new approach to handling the return of disputed colonial cultural objects, and expands upon past propositions to adapt the Washington Principles on Nazi Looted Art to the context of items wrongfully taken during the colonial era. Finally, Jon Ziga confronts the unanswered question of how international law should handle the commercialization of extraterrestrial mining, arguing that the United Nations Convention on the Law of the Sea provides the best template for future legal approaches to the final frontier.

III.

Many students, scholars, practitioners, and supporters made this Symposium issue possible. We would like to thank all participants and organizers of the “International Law and the New Cold War” Symposium for helping to make the day 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 *Case Western Reserve Journal of International Law*, who worked tirelessly to make this publication possible.