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International Law and the "New Cold War": An Opportunity for Reflection on International Law and the "Old" Cold War

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Abstract

The inspiration for this presentation is an oral history interview of the person, John Maktos, who served as the State Department's first Assistant Legal Adviser for United Nations Affairs[1] – a position in which I would come to serve nearly five decades later. The bulk of the interview concerns what he considered the five most noteworthy international law issues on which he worked. What is striking about the list is the familiarity of the issues to this day—to me, as a subsequent incumbent of the position, and to international lawyers generally. These were issues that arose in the course of the first wave of Cold War legal issues, but they were not necessarily tied particularly closely to the dynamics of the Cold War. This led me to think more carefully about whether our experience of the "old Cold War" is likely to be a good predictor of our experience in the years ahead, and also about why that would (or would not) be true. My thesis

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1. Interview with John Maktos, Former Assistant Legal Adviser for Int'l Org. Affs., U.S. State Dep't, in Washington D.C. (May 28, 1 973), https://www.trumanlibrary.gov/library/oral-histories/makt osj [https://perma.cc/AZ9R-55AJ].

for the presentation this morning is that the old Cold War will be a surprisingly good predictor of the kinds of issues that we are likely to face, but not because the period we are entering is particularly similar to the Cold War.

The presentation below has four parts. Part I sets the stage by very briefly explaining that the overall political dynamics of the old Cold War are similar only in limited ways to the dynamics of the situation that we are likely to face in the years ahead. As discussed in Part II, there was in fact a vast and eclectic range of issues that required the attention of international lawyers, but only a portion of them were driven primarily—or at all— by Cold War dynamics. In those limited areas where the dynamics today are similar, the Cold War experience is likely to be a good predictor. As discussed in Part III, however, a broad range of other issues that commanded the attention of international lawyers during the Cold War were primarily driven by separate dynamics. It is of course impossible to enumerate or summarize all these "other issues" and we thus turn to the five issues that Maktos considered the most noteworthy to illustrate the point. It is these other drivers, each of which has a certain timeless quality, that make them useful for helping us predict the kinds of issues that we will face in the years and months ahead. Part IV then offers some modest observations and conclusions.

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I. The fundamental dynamics of the old Cold War are similar to the dynamics we face in the years ahead only in limited ways.

The notion that the "old" Cold War is a useful analogy for thinking about the period that lies before us hides more than it reveals.

On the one hand, there are parts of the dynamic from the old Cold War that can be expected to affect the nature of the issues on which international lawyers will need to focus. Chief among these are the obstacles to using the Security Council to promote international peace and security in a period when the Soviet Union and the United States were at loggerheads. Another important part of that dynamic was the pressure to make decisions on a broad range of issues with at least one eye on how it would affect the struggle with the Soviet Union, as opposed to strictly on their own merits.

On the other hand, we should be cautious about reflexively accepting the Cold War analogy as many key features of the old Cold War are not present today. For one thing, global challenges – including notably climate change – in which all sides have interests on issues incapable of being tackled alone are relatively more important to all the states involved. For another, and particularly with respect to China, the huge levels of trade and commerce reflect enormous incentives to find paths to an environment in which the economies of both sides can prosper.[2]

2. *The People's Republic of China*, Off. of the U.S. Trade Rep., https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china [https://perma.cc/D698-AZAX]; Henry M. Paulsen, *America's China Policy is Not Working: The Dangers of a Broad Decoupling*, Foreign Affs. (Jan. 26, 2023) https://www.foreignaffairs.com/china/americas-china-policy-not-working [https://perma.cc/PQ8M-PFD3].

Whereas the objective of the United States in the Cold War was routinely seen as ultimately "to defeat" the Communists, the prosperity of the United States and China are so thoroughly intertwined that the idea of one "defeating" the other would be perilous for both. At the same time, the old Cold War was seen as an existential struggle, with an implacable foe ideologically driven to export its system of government and destroy our way of life.[3] Today, however, the Chinese government appears intent on expanding its role and preventing what it calls U.S. interference in its internal affairs, but asserts no interest in exporting its ideology.[4] In short, this new era is not the same kind of zero-sum game that the Cold War was conceived to be.

Indeed, the dangers of "Cold War thinking" are recognized by both sides, even if they might have different visions of what those dangers are. Thus, the Chinese routinely criticize "Cold War thinking" as being antithetical to the interests of both sides,[5] while Secretary Blinken's recent speech on "The Administration's approach to the People's Republic of China" went out of its way to affirm that "[w]e do not seek to transform China's political system." In Blinken's words, a new Cold War is something that "we are determined to avoid."[6]

3. Henry Kissinger, *Reflections on Containment,* Foreign Affs., May-June 1994, at 113, 117-18 (1994).

4. Oscar Almén et al., Great Power Perceptions: How China and the U.S. View Each Other on Political, Economic, and Security Issues 36 (2021).

5. Natalia Drozdiak, *China Urges NATO Allies to Abandon 'Cold War Thinking'*, Bloomberg (June 30, 2022, 5:04 AM), https://www.bloomberg.com/news/articles/2022-06-30/china-urges-nato-allies-to-abandon-cold-war-thinking [https://perma.cc/3Z74-KLF4]; *China's Comprehensive, Systematic and Elaborate Response to Secretary Antony Blinken's China Policy Speech*, Embassy of China in the U.S. (June 6, 2022, 10:52 AM), http://us.china-embassy.gov.cn/eng/zmgx/zxxx/202206/t20220619_10706097.htm [https://perma.cc/56T4-PMNY] ("The US should stop viewing this relationship through a Cold War, zero-sum mindset[.]").

6. *See* Antony J. Blinken, Sec'y of State, Address at the George Washington University: The Administration's Approach to the People's Republic of China (May 26, 2022), https://www.state.gov/the-administrations-approach-to-the-peoples-republic-of-china/ [https://perma.cc/TVH5-GQ2F].

At the end of the day, notwithstanding the many tensions and conflicting interests, the interdependent economic interests of both China and the United States provide a far stronger incentive than existed between Cold War adversaries to find workable common ground. If nothing else, important business constituencies will be advocating to find that common ground and to find ways to avoid the kind of extensive usage of linkages that was a hallmark of the long ideological battle with the Soviet Union. Even if that were not true of constituencies within the United States, it will be true of constituencies in its partner countries, and their governments will thereby be incentivized to push us to promote a climate that is hospitable to expanded trade and that avoids excessive linkage.[7] The fact that all this will be happening while the overall United States share of the world's "power" is shrinking will complicate any hope of leading by fiat. At the same time, the strong indications that the United States political system will be more polarized and fractious suggest that the American body politic will be less able to rally around any particular course of action in the kind of sustained manner that was the hallmark of U.S. foreign policy for the better part of the Cold War.[8] Meanwhile, that same polarization and fractiousness may greatly complicate the ability of the United States to hold itself out as a model for others to emulate or to inspire others to rally around its leadership.[9]

In short, there are strong indications that the environment that stands to shape the climate in which international law is practiced in the period ahead will likely be very different from that which shaped the environment during the Cold War.

II. A vast range of issues emerged during the Cold War, but only a limited range of such issues were really products of Cold War dynamics.

However similar or dissimilar the old Cold War environment may be to our situation today, it is not as if the climate of the

7. *See* Paulsen, *supra* note 2.

8. Stephen M. Walt, *America's Polarization is a Foreign Policy Problem, Too*, Foreign Pol'y (Mar. 11, 2019, 5:18 PM), https://foreignpolicy.com/2019/03/11/americas-polarization-is-a-foreign-policy-problem-too/ [https://perma.cc/GK48-MN4J].

9. *Id.*

old Cold War produced a single type of issue that we can readily identify. Instead, there was an incredible diversity of international law issues, both across the more-than-forty-year period of the Cold War and at any particular time. Some of the issues that emerged can fairly be said to have been products of the Cold War in the sense that they were products of the dynamic particular to the Cold War era. Others may not have been Cold War issues, *per se*, but were viewed at least in some part through a Cold War lens. Still, other issues had relatively little or nothing to do with the Cold War besides the fact that they arose during the period in which the Cold War was happening.

For example, with respect to the first category, the State Department would not have stationed lawyers in Berlin and Bonn for over four decades but for the Cold War creating an unremitting deadlock over the status of Berlin. An entire Arms Control and Disarmament Agency, with its own legal office separate from the State Department, was established in part because of the disarmament and nonproliferation negotiations that were spawned by the Cold War struggles between the United States and the Soviet Union. And generations of law students would not have would not have struggled to discern the differences between a "quarantine" and a "blockade" if the Cold War had not brought the world to the brink of nuclear war during the Cuban Missile Crisis.[10]

But other key issues were driven at least partly, and in many cases primarily, by separate dynamics. For example, the process of decolonization took place in the midst of the Cold War— and the main Cold War adversaries frequently calculated their approaches to decolonization with an eye towards how it would affect the perceptions of emerging states towards the struggle between them—but the primary force propelling decolonization came from other sources. As another example, the anti-apartheid movement was fundamentally a reaction to racism that happened during, but not because of, the Cold War, and indeed the reaction was strong enough to overcome, at least at times, the sidelining of the Security Council in the efforts of the international community against apartheid.[11] As another example, the

10. *See* Abram Chayes, *Law and the Quarantine of Cuba*, 41 Foreign Affs. 550, 550 (1963).

11. *See generally* Newell M. Stultz, *Evolution of the United Nations Anti-Apartheid Regime*, 13 Hum. Rts. Q. 1, 1-23 (1991).

dynamics of the Arab-Israeli conflict were clearly affected by the Cold War—the two superpowers were hardly oblivious to how their posture toward the conflict would be perceived by others—but it was rooted fundamentally in the relationship between Arabs and Israelis, rather than the relationship between Washington and Moscow.[12] As a final example, perhaps the most profound transformation in international law over the last three-quarters of a century, the revolution in the way the international legal world views human rights, was driven primarily by a moral yearning for ensuring the respect of individuals that even a force as strong as the Cold War was unable to suppress.[13]

The emergence of such a broad array of issues over more-than-forty years of the Cold War should make us cautious about generalizing about how things were during this period. To the contrary, the issues that arose over the course of the Cold War differed in type, varied over time, and were diverse at any one time. Thus, there is no one thing that international law was "like" during the Cold War, and hence there is no one thing that international law in the period ahead might be the same as.

One upshot of this is that only a limited set of issues will likely be driven by those elements of the Cold War environment that we see re-emerging today. The Security Council's adoption of resolution 2623 in February 2021 stands as a striking example of such an issue.[14] Immediately following Russia's invasion of Ukraine, the United States joined with numerous other U.N. Member States to put forward a resolution that would have condemned Russia's actions as "aggression" and required it to withdraw its forces from all Ukrainian territory.[15] The resolution garnered eleven affirmative votes but, predictably, was not adopted because Russia exercised its right to veto.[16] The Security

12. *See generally* Graham E. Fuller, *The Middle East in US-Soviet Relations*, 44 Middle E. J. 417, 417-30 (1990).

13. Frans Vilijoen, *International Human Rights Law: A Short History*, UN Chronicle, https://www.un.org/en/chronicle/article/international-human-rights-law-short-history [https://perma.cc/LGZ7-BTA7].

14. S.C. Res. 2623 (Feb. 27, 2022).

15. *See* S/2022/155 ¶¶ 2-4 (Feb. 25, 2022).

16. *Russia Blocks Security Council Action on Ukraine*, UN News (Feb. 26, 2022), https://news.un.org/en/story/2022/02/1112802 [https://perma.cc/33JZ-HYGS].S/PV.8979 (Feb. 25, 2022).

Council then – on a procedural vote not subject to veto – adopted resolution 2623, saying that it was acting because "the lack of unanimity of its permanent members . . . [had] prevented it from exercising its primary responsibility for the maintenance of international peace and security." On this basis, the Council decided to call for an emergency special session of the General Assembly.[17] The General Assembly thereupon convened an emergency session and adopted by overwhelming vote a resolution – based largely on the proposed Security Council resolution that Russia had vetoed – that characterized Russia's military operation as "aggression" and demanded Russia's withdrawal from all Ukrainian territory.[18] The approach – moving the issue to the General Assembly as a way to deal with the Russian veto that made progress in the Security Council impossible – was based squarely on the 1950 Uniting for Peace resolution that had been developed in the face of the impossibility of overcoming future Russian vetoes as the Security Council faced the Korean War.[19]

For purposes of this discussion, the point is not to evaluate the merits of Uniting for Peace, but rather simply to highlight how the underlying dynamics from 1950 were again at work in the adoption of resolution 2623. The Uniting for Peace resolution was among the most important pieces of legal craftsmanship developed through the careful legal work of Leonard Meeker,[20] later famous as the State Department's Legal Adviser in the 1960's, but notable also as the *second* person to serve as Assistant Legal Adviser for United Nations Affairs.[21] The same legal tools that Meeker developed for a classic stalemate of the old Cold War were used to overcome a stalemate caused by the same kind of

17. S.C. Res. 2623, *supra* note 14.

18. G.A. Res. ES-11/L.1 (Mar. 1, 2022).

19. *See* G.A. Res. 377 (V), Uniting for Peace (Nov. 3, 1950).

20. For Meeker's account of drafting and developing the Uniting for Peace resolution, see Interview with Leonard Meeker, Former U.S. Ambassador to Romania (July 24, 1990).

21. *See* Peter Vankevich, *Leonard Meeker, 1916-2014: An Extraordinary Life*, Ocracoke Observer (Dec. 4, 2014), https://ocracokeobserver.com/2014/12/05/leonard-meeker-1916-2014-2/ [https://perma.cc/9EUQ-MJ7A].

obstacles to Security Council action today.[22] Indeed, less than two months after the General Assembly resolution, the Assembly took the same basic idea a step further when it established a "Standing Mandate" for a General Assembly debate whenever a veto is cast in the Security Council.[23]

The same pressures that had shaped the legal work of practicing international lawyers in the 1950s shaped international legal work in 2022 in similar ways, and are likely to continue doing so in the period ahead. Thus, as during the Cold War, we are likely to see reduced use of the Security Council, accompanied by the rise in importance of other mechanisms that are not subject to being paralyzed by use of the veto.

III. A great range of issues emerged during, but not because of, the Cold War.

A. John Maktos's Five Most Noteworthy Issues

As I will attempt to illustrate in this section, there were numerous other issues that were shaped by dynamics not specific to the Cold War, or that were affected by those dynamics only to a limited extent. I will make this point only in an anecdotal way, however, using an admittedly idiosyncratic point of departure drawn from the annals of one of the offices in the State Department that I headed for more than a decade: the Office of the Assistant Legal Adviser for United Nations Affairs. That idiosyncratic point of departure is the work of John Maktos.

Who, you may ask, is John Maktos?

John Maktos is not today a particularly famous figure, but neither is he altogether obscure. Maktos published various contributions to the American Society of International Law,[24] was active in the Society for many years,[25] participated in and provided legal advice for numerous delegations to important

22. *See* Interview with Leonard Meeker, *supra* note 20.

23. G.A. Res. 76/262, ¶ 1 (Apr. 28, 2022).

24. *See, e.g.*, T.J. Maktos, *Nationality and Domestic Questions*, 24 Am. Soc'y Int'l L. Proc. 46, 46 (1930).

25. *See, e.g.*, *Officers for the American Society of International Law,* 36 Am. Soc'y Int'l L. Proc. v, v (1942).

multilateral conferences,[26] and was well-remembered in a laudatory obituary in the *Washington Post.*[27] He was of more than passing significance in the development of international law, appearing as a significant figure in William Schabas's classic treatise describing the negotiation that led to the Convention on the Prevention and Punishment of the Crime of Genocide, during which he chaired the Ad Hoc Committee that was instrumental in achieving a final negotiated text.[28] He even today has a Wikipedia page, albeit a brief one.[29]

Of considerable importance to this discussion is that John Maktos was in fact the predecessor to Leonard Meeker and was the *first* person to serve as the State Department's Assistant Legal Adviser for United Nations Affairs – the very position, as it happens, that I came to hold over five decades later. He initially served as in-house counsel for the newly formed Division – later the Bureau — of International Organization Affairs that was created to deal with the era of multilateral issues ushered in by the establishment of the United Nations.[30] He then moved to the new office within the revamped Office of the Legal Adviser as part of the process of bringing lawyers who had served in-house with various State Department bureaus under the umbrella and

26. *See John Maktos Dies, Helped Draft Charter for the U.N.*, The Wash. Post (Mar. 1, 1977), https://www.washingtonpost.com/archive/local/1977/03/01/john-maktos-dies-helped-draft-charter-for-the-un/53eff8ec-6ad8-40a1-9c09-c842b292097e/ [https://perma.cc/57YS-PSWM]; William W. Cox, *Reservations to Multipartite Conventions*, 46 Am. Soc'y Int'l L. Proc. 26, 33 n. 31 (1952).

27. *John Maktos Dies, Helped Draft Charter for the U.N.*, *supra* note 26.

28. William Schabas, Genocide in International Law: The Crimes of Crimes 181 (2d ed. 2009).

29. *John Maktos*, Wikipedia, https://en.wikipedia.org/wiki/John_Maktos [https://perma.cc/LHD5-GT8H].

30. The Bureau of International Organization Affairs was established by Secretary of State Acheson as a formal State Department bureau in 1949. It was soon thereafter renamed the Bureau for United Nations Affairs, but the name reverted to the Bureau International Organization Affairs in 1954, which is the name it is known by today. *History: IO Bureau; the U.S. and the UN,* U.S. Dep't of State, https://2009-2017.state.gov/p/io/c34723.htm [https://perma.cc/Y496-UY6V].

supervision of a single Legal Adviser responsible for providing legal advice Department-wide.[31]

Maktos was deeply involved in many of the legal issues implicated in the negotiation of the text of the U.N. Charter[32] and there would certainly be many more such issues as the new United Nations organization began operations. The State Department had created the new "IO" bureau in recognition of the need to organize itself in a way that could deal with the issues that participation in the new United Nations would present, and the creation of "L/UNA" was a key component of supporting that effort.[33] John Maktos was a natural choice to head that office, and he was soon situated as the key lawyer on legal issues related to the UN on which the United States was involved at the dawn of the *actual* Cold War.

What in fact were the issues that he described as most important, and what do his choices for inclusion on the list tell us about the practice of international law? Most helpfully, Maktos left a specific record of what he considered his most important work when he sat for an oral history interview in 1983 with the

31. *See* Richard B. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 Am. J. Int'l L. 633, 635 (1962) ("[T]he process of absorbing legal positions within the Department into the Office was not completed until after World War II. Prior to that time, a number of attorneys were hired by, and worked directly for, the various Departmental bureaus and were not under the direct supervision of the Legal Adviser").

32. As examples of some of the issues that were being encountered at the time, there had been extensive legalistic discussion about: the inclusion of language in the new Charter on the inherent right of self-defense, Ruth B. Russell, A History of the United Nations Charter: The Role of the United States, 1940-1945 694-706 (1958); the extent to which the new Organization would be prevented from playing a role in matters within the domestic jurisdiction of Member States, *id.* at 907-08; the status of regional arrangements under the new UN system, *id.* at 711; the relationship that the new Organization would have with the defeated Axis powers, *see* 1 The Charter of the United Nations: A Commentary 107 (Bruno Simma et al. eds., 3rd ed. 2012); and the terms for the new International Court of Justice to replace the former Permanent Court of International Justice that had existed under the League of Nations regime, *see* Green H. Hackworth, *The International Court of Justice*, 13 Dep't State Bull 203, 216 (1945).

33. *History: IO Bureau; the U.S. and the UN*, *supra* note 30.

Harry S. Truman Presidential Library to recount his experiences in the early days of old Cold War.[34] In addition, in preparation for the oral history interview, Maktos prepared a memorandum as a guide for his interviewer in which he identified five specific issues as worthy of note.[35] The memorandum and the interview are remarkably illuminating and present a unique glimpse into both the issues that were of concern then and how the State Department's lawyers related to those issues.

In particular, the five issues on the list would be remarkably familiar to practitioners of international law during the many different phases of the Cold War, during the ensuing post-Cold War period, or today. In each case, the issues were of a type with which international lawyers have needed to deal regardless of whether they were or were not operating in a Cold War environment at any particular time.

As explained in more detail below, the five issues implicated questions of statehood and recognition, human rights, and specifically, genocide, the then-contemplated but now very real International Criminal Court, the International Law Commission, and questions related to the use of force, specifically, the question of defining "aggression."[36] All are virtually certain to remain important in the period ahead, regardless of whether one believes we will or will not be operating in a Cold War environment.

B. Maktos's Involvement in United Nations Issues

Maktos graduated from Harvard Law School in the mid-1920's and, after studying for two years at Oxford, joined the State Department in 1929.[37] Well before the prominent role he played on legal issues in the early years of post-World War II diplomacy – indeed, well before the United Nations had become even a twinkle in the eyes of the likes of Cordell Hull and Leo Pasvolsky, much less the eyes of Franklin Roosevelt and Harry Truman – he worked for many years on claims issues,[38] which formed then, and continue to form, a significant part of the work

34. *See* Interview with John Maktos, *supra* note 1.

35. *See id.* at 1-16.

36. *Id.*

37. *Id.* at 17.

38. *Id.* at 18.

of what became the State Department's Office of the Legal Adviser.

The trajectory of his career changed dramatically when World War II erupted.[39] Soon after Germany invaded the Soviet Union, but even before Pearl Harbor, President Roosevelt met with Prime Minister Churchill off the coast of Newfoundland and set out common principles to guide a post-war world. In broadly sketched strokes, Roosevelt and Churchill agreed on the pillars of what we now think of as the liberal economic order. Included in these pillars were the ideas of free trade, economic cooperation, freedom of the seas, and the abandonment of the use of force as a means for settling disputes.[40]

Also in these principles, which history knows as the Atlantic Charter, was a seed for what would become the United Nations: the first mention of a "wider and permanent system of general security."[41] From this language can be traced a solid line to the Moscow Declaration of 1943, in which the British and the Americans joined with the Soviet Union and China in recognizing "the necessity of establishing at the earliest practicable date *a general international organization*, based on the principle of sovereign equality of all peace-loving nations, and open to membership by all such states," with the purpose of this endeavor being "the maintenance of international peace and security."[42] From there the line continued, with stops at places such as Cairo, Tehran and Dumbarton Oaks, all the way to the Charter of the United Nations that was eventually agreed in San Francisco.[43]

It was in the internal planning for San Francisco that Maktos began his connection with U.N. issues. He was drawn into the State Department's preparations for the conference in San Francisco, and then the conference itself. His work led to his move to what was initially the "Division" of International Organization

39. *See John Maktos Dies, Helped Draft Charter for the U.N.*, *supra* note 26.

40. *See* Atlantic Charter, Aug. 14, 1941, 55 Stat. 1603.

41. *Id.*

42. Joint Four Nation Declaration at the Moscow Conference, China-U.K.-U.S.-U.S.S.R., ¶ 4, Oct. 30, 1943, U.S. Dep't of State, A Decade of American Foreign Policy: Basic Documents, 1941-49 (1950) (emphasis added).

43. Russell, *supra* note 32, at 147-204.

Affairs[44] where he served as the head of *its* legal office.[45] After that, it was as part of the consolidation of State Department legal functions into what is now the Office of the Legal Adviser that he formally became the first Assistant Legal Adviser for United Nations Affairs.[46] He eventually moved on to other work, retired from the State Department in 1962, and sat down for the oral history interview for the Truman Library twenty years afterwards.[47]

C. The first of the Five Maktos Issues: Statehood and Recognition

The first of the issues from Maktos's memorandum involves statehood and recognition. These issues recur frequently and are among the most interesting yet difficult issues that practicing international lawyers must face. They are underpinned by certain well-known but difficult to apply legal standards, but are typically shrouded in a political context that involve strong policy priorities and imperatives.[48] The situation faced by Maktos involved the well-known but very odd case of membership in the United Nations for Ukraine and Belarus.

(1) The Odd Case of Ukraine and Belarus and Membership in the United Nations

To be clear at the outset, the question of UN membership for Ukraine and Belarus arose while World War II was ongoing,[49] so

44. The "Division" of International Organization Affairs was the predecessor of the "Bureau" of International Organization Affairs, which was only established as a separate Department bureau by Secretary of State Acheson in June 1949. *See Administrative Timeline of the Department of State*, Off. of the Historian, https://history.state.gov/departmenthistory/timeline/1940-1949 [https://perma.cc/BPL7-JHDH]. As was common at the time, the Division of International Organization Affairs had its own legal office, which did not report to the State Department's Legal Adviser. *See* Interview with John Maktos, *supra* note 1, at 19.

45. Interview with John Maktos, *supra* note 1, at 3, 19.

46. *Id.*

47. *Id.*

48. *See generally* James R. Crawford, The Creation of States in International Law (2d ed. 2007).

49. *See* William Dunkerley, *How Ukraine and Belarus Failed to Qualify for UN Membership*, Eurasia Rev. (Aug. 17, 2022),

it cannot really be said to have arisen *during* the Cold War, yet it can readily be seen as sufficiently tied to what became the Cold War relationship between the United States and the Soviet Union that it fits the discussion here. While the issue of the status of Belarus and Ukraine arose in the context of that relationship, the broader international law issues of statehood and recognition on which Maktos worked are by no means confined to that relationship.

The basic background is as follows. President Roosevelt had made U.S. participation in a new United Nations organization among his highest priorities for the post-World War II world.[50] A key Soviet concern, however, involved the role to be played by the proposed General Assembly, and the risk that the composition of the Assembly would result in the Soviets being routinely outvoted.[51]

In the course of the negotiations, the Soviets proposed a seemingly outlandish idea: separate membership for each of the constituent Soviet republics, in addition to membership of the "USSR" as such, with the result that the Soviet Union would have 16 votes in the Assembly. The proposal at the time was considered so explosive that it was referred to internally as the "X-Matter," and a fear that disclosure of the issue would turn Congress and the public against the idea of a United Nations resulted in discussion of the issue being permitted only in narrow circles. In any event, a famous but odd political compromise was eventually reached under which Belarus and Ukraine, in addition to the USSR, would become UN members. The USSR agreed to the new Charter and the X-Matter was handled in a way that did not de-rail public or congressional support for the United States to join the new organization.[52]

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https://www.eurasiareview.com/17082022-how-ukraine-and-belarus-failed-to-qualify-for-un-membership-oped/ [https://perma.cc/L42J-AW6Z].

50. *See* Russell, *supra* note 32, at 1-8. David Carlin, *Roosevelt, Churchill and the Creation of the United Nations*, Forbes (Sept. 17, 2019, 4:01 PM) https://www.forbes.com/sites/davidcarlin/2019/09/17/roosevelt-churchill-and-the-creation-of-the-united-nations/?sh=14f5e07d528e [https://perma.cc/VKU5-67SD].

51. David L. Bosco, Five to Rule Them All 22-23 (2009).

52. *Id.*

It was here that poor John Maktos was given the unenviable task of analyzing whether it was permissible under international law to treat Belarus and Ukraine as states that could become members of the United Nations.[53] His oral interview does not go into great detail but, as would any L/UNA attorney, he readily understood that neither Belarus nor Ukraine had the international law attributes of statehood. His analysis doubtlessly referred to the same kind of precedents and legal texts, including the Montevideo Convention of 1933,[54] in which international lawyers anchor their reasoning when similar statehood and recognition questions arise today, and from which virtually any international lawyer would conclude that the two republics lacked the necessary attributes to be considered states under international law. Yet, Maktos's straightforward analysis led him to precisely the "wrong" answer: not necessarily analytically or logically wrong, but clearly not the answer that policymakers wanted or needed!

As history played out, Belarus and Ukraine both joined the United Nations as original members. By the time that I had arrived in L/UNA, there had in fact developed a conventional wisdom legal explanation for this entire episode, focused on the fact that the creators of the Charter were free to include as original members any entities they wanted. Indeed, the wisdom was so conventional that I was not even aware of the fact that State Department lawyers — in particular the person who had first held the position in which I had come to serve — had in fact challenged the conclusion.

By the time I arrived, the conventional wisdom as relayed to me was that the drafters had specifically provided, in Article 3 of the Charter, that the original Members of the United Nations would include all states that participated in San Francisco and signed the Charter. Two of those signers were Belarus and Ukraine and that – in the understanding conveyed to me – had been dispositive of the issue. Indeed, the conventional wisdom explanation went further than Ukraine and Belarus, as there were similar questions about the original status of the Philippines and India, both of which were understood to be destined for independence in the then-near future, but neither of which was in

53. Interview with John Maktos, *supra* note 1, at 1-2.

54. Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

fact recognized as independent when the Charter was negotiated.[55]

The logic in the conventional wisdom explanation could have gone something like this. The inclusion of original members under Article 3 was a different question than the admission of new members, which was governed by Article 4. Under Article 4 of the Charter, membership for additional members was open only to "peace-loving *states*" and an entity could not be a peace-loving state unless it was in fact a "state." The International Court of Justice later confirmed this requirement for an entity to be a state in order to become a member of the United Nations when it rendered its advisory opinion in the *Admissions* case.[56]

As one reflects on the oral history interview, however, it becomes apparent that that explanation is anything but obvious, and that the conclusion reached by John Maktos was not logically wrong. This is because Article 3 actually says only that "states" that signed the Charter in San Francisco could be original

55. The status of India was complicated by the additional fact that India had in fact been a member of the League of Nations. The wording of the Covenant of the League of Nations was, however, more amenable to the result. Specifically, Article 1 of the Covenant provided that the League that the League's original Members "shall be those of the *signatories* which are named in the Annex to this Covenant." An entity thus did not need to qualify as a "state" in order to be a member of the League of Nations. *See* Covenant of the League of Nations art. 1, June 28, 1919, 3 Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference 321-330 (Joseph Fuller ed., 1943). There were further questions about the status at the time of Lebanon and Syria. Both had been under French mandate at the outset of the war. By 1941, the Free French and British governments had declared them independent, but independence was subject to conclusion of treaties to redefine French rights. Russell, *supra* note 32, at 627. Final emancipation thus came only after the end of World War II, and both of them were invited to the conference in San Francisco only after the Arab League protested their omission. *See* Abid A. Al-Marayati, *The Question of Syria and Lebanon Before the United Nations*, 21 Pak. Horizon 116, 116-18 (1968); Pope Brewer, *San Francisco Ban Fought By Arabs*, N.Y. Times, Mar. 22, 1945, at 17.

56. *See* Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 57, 62 (May 28).

members, but on its face says nothing about other entities that signed the Charter in San Francisco being accorded that status.[57]

Indeed, the fact that Article 3 uses the word "states" turns out to have been no accident. The use of that word stands in notable contrast to the wording of the 1942 Declaration by the United Nations that introduced the term "United Nations," which spoke of the signers of the Declaration as "governments" – not necessarily governments of states – and about being open to future adherence by "nations."[58] The possibility of utilizing a word like "governments" or "nations," and thereby avoiding this awkward issue, was thus readily available to the Charter's drafters, but the drafters chose not to avail themselves of it.[59]

Upon reflection, one can also see that the prospect of having entities as members that were not "states" raised logical issues about the meaning to be ascribed to other Charter principles, including the Charter's assurance that the United Nations would be based on the principle of the "sovereign equality of *all* its Members."[60] How could the Charter be read to be based on the principle of sovereign equality of members if the members were not in fact sovereignly equal?

The negotiating history turns out to be even more remarkable because the specific issue raised by the use of the word *states* in Article 3 did not go unnoticed in San Francisco. In particular, the Philippines sought to avoid the problem by modifying Article 3 to use the word "nations" rather than "states."[61] But the Philippines' efforts were rebuffed, based on what is reported to be a conscious decision to use the word "states" consistently

57. U.N. Charter art. 3 (emphasis added) ("The original Members of the United Nations shall be the *states* which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of 1 January 1942, sign the present Charter and ratify it in accordance with Article 110.").

58. Declaration by United Nations, Jan. 1, 1942, 55 Stat. 1000.

59. *Compare id. and* Atlantic Charter, *supra* note 40 *with* U.N. Charter arts. 3-4.

60. U.N. Charter art. 2, ¶ 1 ("The Organization is based on the principle of the sovereign equality of all its Members.").

61. Russell, *supra* note 32, at 927-28.

throughout the Charter.[62] The explanation given — though not a particularly powerful one — was that the Coordinating Committee in San Francisco wanted "to employ only and consistently the more conventional treaty usage of the word 'states.'"[63]

So, John Maktos's conclusion seems right after all!

When we think about this issue today, whatever issue might have existed at the time has become water under the bridge, and all four of the members mentioned – Ukraine, Belarus, the Philippines and India – have universally been accepted as states.[64] Indeed, even if their legal characteristics had remained the same as they were in 1945, the subsequent practice of the members of the United Nations in the application of the Charter clearly established their agreement that Belarus and Ukraine were to be treated as original members regardless of whether they satisfied the traditional international law tests.[65] Even as of 1945, the episode may be seen as involving a special meaning ascribed by the parties to the use of the term states in Article 3. At least under the modern law of treaty interpretation, the existence of such subsequent practice or special meaning provides an "authentic means" for interpreting and applying the terms of a treaty.[66]

62. *Id.*

63. *Id.*; *see also* W. Michael Reisman, *Puerto Rico and the International Process*, 11 Rev. Juridica U. Interamericana P.R. 533 (1977).

64. *See Member States*, U.N., https://www.un.org/en/about-us/member-states [https://perma.cc/CG43-5AAW].

65. Interview with John Maktos, *supra* note 1, at 30 (stating that the member states treated Ukraine and Belarus as member states post-ratification notwithstanding the original tenuousness of their membership).

66. *See* Vienna Convention on the Law of Treaties art. 31, ¶¶ 3-4, May 23, 1969, S. Exec. Doc. L, 92-1, 1155 U.N.T.S. 331 ("There shall be taken into account, together with the context . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" and "special meaning shall be given to a term if it is established that the parties so intended.").

(2) What This Episode Shows

Taking a step back, this history may be seen as illustrating several phenomena that are a recurring part of the life of an international lawyer working in the service of a Foreign Ministry.

First, it may be seen as testament to the fact that statehood and recognition questions are among the thorniest issues on which international lawyers must work. In most cases, the question of whether an entity is a state is so self-evident that no questions are ever asked. No one thus doubts that Argentina and Belgium and Canada are states or that Ohio, Ontario, and Oslo are non-states. The practicing international lawyer is quite unlikely to get promoted to a higher position by identifying them as such. But when questions do come up, they are almost always entangled with political considerations that make the legal components of the issue exceedingly difficult to address. This feature of dealing with statehood and recognition issues is not limited to Cold War dynamics.

Second, the advice given may be seen as an example of something that is frustrating but not uncommon: a legal response that was logically sound but not really the information that the policymaker needed. President Roosevelt had concluded that the United States needed to accede to the Soviet proposal if he were to persuade the Soviets to support the creation of the United Nations. It is inconceivable that – whatever the actual wording of the various provisions in the Charter – a legal objection such as the one that John Maktos put forward would have persuaded the President to change course. The question to which the policymakers really needed a response was not whether Ukraine and Belarus were states, but whether something could be done to accommodate the imperative need to treat them as members. As suggested above, there would have been any number of ways to reach that outcome, if only the lawyer were given enough information to realize that this was the question that actually needed to be answered.

In reality, there was a point to the objection beyond just being logical: if entities like Ukraine and Belarus that signed the Charter could be treated as "states" under Article 3, it is not hard to see subsequent arguments that other entities, also lacking the attributes of statehood under international law, could press for admission as "states" under Article 4. Yet President Roosevelt presumably would have instinctively understood that such legal advice was just one of the factors he needed to weigh, and have

concluded that sufficiently imperative political factors outweighed it. The episode may thus be seen as an illustration of a distinction between legal advice that policymakers need in order to ensure they are aware of potential adverse implications of their actions, on the one hand, and legal advice that a proposed action cannot be taken, on the other hand. The difference between the two is as important to keep in mind today as it was then, but its importance is neither caused by the Cold War nor limited to issues that arise in a Cold War environment.

Third, the episode illustrates the need for practicing international lawyers to look beyond the legal question as posed. It is of course not appropriate to render legal advice simply because it comports with what a policymaker would prefer to hear. But one must also consider whether, given the legal answer to the question being asked, there are other questions that the policymaker does not realize he should be asking.

Finally, the episode may be seen as an example of the way that legal issues are seen over time can be affected by the way events play out. In this case, the conventional wisdom had gained such a foothold that, by the time that I assumed the position that John Maktos had held, the conventional wisdom explanation had lost sight of the fact that it was based on a distinction in text that did not actually exist.

As events played out, of course, the potentially adverse implications of the decision – *e.g.*, the possibility of non-states becoming members of the United Nations – never materialized. In not very long, the International Court of Justice's advisory opinion made clear that an entity had to actually be a "state" to qualify for membership under Article 4 of the Charter, without apparent concern that "state" apparently had been understood to mean something else in Article 3,[67] and there was no logical possibility of other entities becoming original members under Article 3. Nor did the principle of sovereign equality of states collapse. Rather, states simply lived with the situation as a concession that needed to be made for political reasons. In Maktos's words:

67. *See* Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 57, 62 (May 28) (explaining that applicant for admission to the United Nations must "be a State").

> Once it was decided and [Ukraine and Belarus] became members, they were treated like every other state, which again indicates how some ghosts never materialize in life, and why sometimes legal considerations may have to give way to policy matters.[68]

This too is a phenomenon of the practice of international law that is not limited to the Cold War or any other particular era. Experience demonstrates that there will be situations in which "other shoes" undeniably *could* drop but there is little real-world chance of them ever doing so. It is proper for the practicing international lawyer to make known his legal conclusions in as straightforward a manner as possible, but also important as a practical matter to recognize the likelihood of such other shoes dropping or not dropping in deciding which issues are the most important to insist upon.

(3) Statehood and Recognition Issues Today

Issues related to statehood and recognition were seminal at the outset of the Cold War.[69] They remained so thereafter and continue to remain among the most vexing that State Department lawyers must face. They have in recent years been implicated in connection with such hotspots as Kosovo, treatment of Palestine in international organizations, and relations with China and Taiwan. They have also arisen recently in connection with Russia's denial of Ukraine's status as a state within its internationally recognized borders.[70] Statehood issues may thus be maddeningly arcane but so too they can be vitally important. They can also be closely tied to pressing questions of representation – *e.g.*, who is it that should be seen as now representing the state of Afghanistan and entitled to access to its resources abroad, from whom does a state need consent to maintain an Embassy in Venezuela, and who if anyone is entitled

68. Interview with John Maktos, *supra* note 1, at 30.

69. Bosco, *supra* note 51, at 22.

70. Kataryna Wolczuk & Rilka Dragneva, *Russia's Longstanding Problem with Ukraine's Boarders*, Chatham House (Aug. 24, 2022), https://www.chathamhouse.org/2022/08/russias-longstanding-problem-ukraines-borders [https://perma.cc/X8WG-6XDG].

to represent a state such as Myanmar that has been implicated in widespread atrocities before UN bodies.[71]

Ironically, the treatment of a different former Soviet republic has in recent months received renewed attention – this time involving questions about the status of Russia itself. Under Article 23 of the UN Charter, there are of course five permanent members of the UN Security Council, one of which is specified to be "the Union of Soviet Socialist Republics."[72] This latest issue arose in the wake of Russia's veto of the Security Council resolution, discussed above, that would have required Russia to cease its use of force and immediately withdraw its military forces from Ukrainian territory, and the effort to deal with that problem by moving the locus of activity to the General Assembly.[73]

As a possible way to address the problem created by the Russian veto separate from the resort to Uniting for Peace, Ukraine's Permanent Representative challenged the right of Russia to participate in the debate in both the Security Council and General Assembly.[74] The challenge was not based on the notion that Russia was an aggressor or that it had "persistently violated" the Principles of the UN Charter and was subject to expulsion,[75] but rather on the grounds that Russia had never

71. *See, e.g.*, Rebecca Baber, *Will the Taliban Represent Afghanistan at the UN General Assembly*, EJIL Talk! (Sept. 1, 2021), https://www.ejiltalk.org/will-the-taliban-represent-afghanistan-at-the-un-general-assembly/ [https://perma.cc/K85Y-H28J]; Federica Paddeu & Alonso Gurmendi Dunkelberg, *Recognition of Governments: Legitimacy and Control Six Months after Guaidó*, Opinio Juris (July 18, 2019), http://opiniojuris.org/2019/07/18/recognition-of-governments-legitimacy-and-control-six-months-after-guaido/ [https://perma.cc/XAS5-DUXH]; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Verbatim Record, 13-15 (Feb. 21, 2022, 1:30 p.m.), https://www.icj-cij.org/public/files/case-related/178/178-20220221-ORA-01-00-BI.pdf [https://perma.cc/D8ZC-Q3HQ].

72. U.N. Charter art. 23, ¶ 1.

73. *See supra*, text accompanying notes 14-19.

74. *See generally Ukraine: UN General Assembly Demands Russia Reverse Course on 'Attempted Illegal Annexation'*, UN News (Oct. 12, 2022), https://news.un.org/en/story/2022/10/1129492 [https://perma.cc/45VG-NGPV].

75. *See* U.N. Charter art. 6, ¶ 1 (contemplating possible expulsion of a Member State "who has persistently violated the Principles contained in the present Charter").

properly been admitted to membership. In brief, Ukraine pointed out that it was the "Union of Soviet Socialist Republics" – not Russia – that signed the Charter of the United Nations in San Francisco, and that it was the "Union of Soviet Socialist Republics" that is named – in those words – as a permanent member of the Security Council under Article 23.[76] The Ukrainian argument was that no state called Russia had been either an original member of the United Nations under Article 3 or later admitted as a member of the United Nations.[77] "Please raise your hand," Ukraine's Permanent Representative plead rhetorically to the other delegates in the course of the debate, "if your country voted" to admit Russia.[78]

It was an insightful argument, perhaps put forward to make political points as part of an effort to discredit the legitimacy of Russia's resort to the veto rather than with a realistic hope of forcing Russia to apply anew for membership in the United Nations. But like the situation with Ukraine and Belarus in 1945, more had happened than was revealed on the printed page. It is clear that there was never a vote to admit Russia as a new UN member state when the Soviet Union broke up in December 1991. But it was also clear at the time that there was tacit agreement not to treat Russia as a new state, but as the continuation of the USSR, at least for purposes of the United Nations, and it followed from this treatment that Russia need not be admitted anew. That this was the position taken by Russia is to have been expected, but it was a position in fact endorsed at the time by the other former Soviet republics and accepted in practice by other UN Members.[79]

76. U.N. Charter art. 23, ¶ 1.

77. *See Ukraine–Security Council, 8974th Meeting*, UN Web TV, at 1:10:54 to 1:13:02 (Feb. 23, 2022), https://media.un.org/en/asset/k1j/k1j8unn1me [https://perma.cc/K46K-HAT9].

78. *See General Assembly: Eleventh Emergency Session (Ukraine) - 1st Plenary Meeting*, UN Web TV, at 38:40 to 40:46 (Feb. 28, 2022), https://media.un.org/en/asset/k1l/k1luiq96be [https://perma.cc/4Q29-35PS].

79. U.N. IAEA, U.N. Doc. INFCIRC/397 (Jan. 9, 1992); Larry Johnson, *United Nations Response Options to Russia's Aggression: Opportunities and Rabbit Holes*, Just Sec. (Mar. 1, 2022), https://www.justsecurity.org/80395/united-nations-response-options-to-russias-aggression-opportunities-and-rabbit-holes/ [https://perma.cc/F6AY-JPTA]. The other former republics of the USSR formally

It is true in theory that one or more states could have objected to the legal conclusion that Russia should inherit the USSR's seat. Indeed, the conclusion would have been all the more vulnerable to objection in that other contemporaneous documents agreed by the former Soviet republics spoke specifically about the USSR "ceasing to exist."[80] That formulation raised obvious questions about whether there could logically be a continuation of a state that had ceased to exist.[81]

But other states did not object and the lack of objection was not mere oversight.[82] Among other things, taking the position that Russia was not the continuation of the USSR under the Charter would have raised legal questions about whether the Security Council— which the Charter specified included the USSR as a member[83] itself continued to exist, and whether some kind of new agreement was needed if states wanted to reconstitute it. While it would have been possible in theory to admit Russia as a new member under Article 4, it would not be possible to add a new permanent member of the Security Council without a formal amendment of the Charter, and no obvious way to secure the ratifications necessary for an amendment from all five permanent members if one of them was no longer considered to exist.[84]

Once again it was right for international lawyers to ensure that policymakers were aware of all these issues, which they did. But once again – at the end of the Cold War as at its outset – in the face of arcane questions about statehood, it was for

accepted Russia's claim to be the continuation of the USSR in the Alma Ata Accords, Decision by the Council of Heads of State of the Commonwealth of Independent States, Dec. 21, 1991, 31 I.L.M. 151, ¶ 1 (all former Soviet Republics except Georgia—which did not attend the Alma Alta conference as a participant—agreeing to support "Russia's continuance of the membership of the Union of Soviet Socialist Republics in the United Nations, including permanent membership of the Security Council.").

80. Yehuda Z. Blum, *Russia Takes Over the Soviet Union's Seat at the United Nations*, 3 Eur. J. Int'l L. 354, 355 (1992).

81. *See, e.g.*, Alma Ata Agreements, Dec. 21, 1991, 31 I.L.M. 149 ("With the establishment of the Commonwealth of Independent States, the Union of Soviet Socialist Republics ceases to exist.").

82. *See* Blum, *supra* note 80, at 356.

83. U.N. Charter art. 23, ¶ 1.

84. *See id.* art. 109, ¶ 1-3.

policymakers to assess the benefits and costs of the different possible ways to proceed, and to decide whether or how nevertheless to move forward in the face of "other shoes" that might or might not ever actually come to be dropped. In this case, once again, history resolved whatever legal ambiguity there may have been, with the acceptance by other Member States over a protracted period of time of Russia's continuation of the USSR's membership. In view of this history, it should not be surprising that, however logical the objection raised by Ukraine may have been, Ukraine's objection failed to gain traction.[85]

D. The Four Other Issues that Maktos Highlighted

The other legal issues described in the Maktos Memorandum are equally striking in reflecting the continued relevance of legal issues that were at the center of UN legal work at the outset of the Cold War. All of them have an unmistakable Cold War context, but all were animated – in greater or lesser part – by drivers separate from Cold War dynamics. Thus, the continued relevance of each of the issues is unlikely to depend on whether we are or are not on the doorsteps of a new Cold War.

(1) Human Rights (and the Issue of Genocide)

The next issue mentioned in John Maktos's memorandum is the issue of "Genocide,"[86] which I take here both as an issue in and of itself and as a proxy for international human rights issues more generally.

As mentioned above, Maktos had a prominent role in the efforts to conclude the Genocide Convention, including notably as chairman of the *Ad Hoc* Committee on Genocide that was established by the General Assembly following the adoption of resolution 96(I) in December 1946 and that was mandated to prepare the text for a draft convention.[87] As Maktos noted, the

85. Joris van de Riet, *No, Russia Cannot be Removed from the UN Security Council*, Universiteit Leiden: LeidenLawBlog (Mar. 22, 2022), https://www.leidenlawblog.nl/articles/no-russia-cannot-be-removed-from-the-un-security-council [https://perma.cc/58T6-5ECQ].

86. Interview with John Maktos, *supra* note 1, at 2-5.

87. U.N. GAOR, 55th plen. mtg. at 188-89, U.N. Doc. A/RES/96(I) (Dec. 11, 1946); *see also* Schabas, *supra* note 28, at 72 (on Maktos's appointment as chairman).

Genocide Convention was the first UN human rights treaty and a truly pivotal event in the development of international law. In his words—

> "This pact is a milestone in international relations. For the first time in that field, a State is made, by treaty, criminally responsible for the treatment of its own nationals."[88]

In the course of his oral history interview, Maktos described the moral power of the issue but simultaneously recalled the practicalities that required him to find a balance between that which he wanted to include in the text of the Convention and that which could realistically be achieved — a dilemma recurringly faced by practicing international lawyers and policymakers to this day.[89] He was deeply involved in the negotiations over what conduct should be included within our understanding of the word "genocide" – a topic that continues to this day to inspire passionate debate.[90]

Interestingly, the negotiations included failed attempts by the Soviet Union to add language that would today qualify as progressive, and the gist of which have since that time become widely accepted in international law. The Soviets, for example, tried, but failed, to insert language that would prevent invoking superior orders as a defense to genocide,[91] an idea that is not reflected in the Genocide Convention but is now explicitly

88. Interview with John Maktos, *supra* note 1, at 4-5.

89. *See id.* at 30 ("I tried to be objective, as objective as I could be, but there is no doubt that the killing of millions of human beings had really moved me"); *id.* at 31 (describing unattainability of achieving a text under which conduct would be included in the definition of genocide if directed against political – as opposed to national, ethnical, racial or religious -- groups); U.N. ESCSR, 21st mtg. at 5-7, U.N. Doc E/AC.25/SR.21 (May 5, 1948) (negotiating record showing that Maktos formally proposed to amend the text to add the word political to the list of motives but that amendment was rejected).

90. *See* Todd F. Buchwald & Adam Keith, By Any Other Name: How, When and Why the US Government has Made Genoci de Determinations 10-16 (2019).

91. *See* U.N. GAOR, 3rd Sess. at 3, U.N. Doc. A/C.6/215/Rev.1 (Oct. 9, 1948).

incorporated as a fundamental principle in the Rome Statute.[92] They also pressed for recognition that this human rights issue presented a threat to international peace and security with the clear idea that these issues were of a type that would always be proper for the Security Council to address. This represented an unmistakable rejection of any argument that the Security Council and the international community lacked a legitimate interest in what historically been treated as essentially within the domestic jurisdiction of the state concerned. Specifically, the Soviet representative, who served as Vice-Chair of the Ad Hoc Committee, said:

> "The basic thought underlying the convention was that every violation was of the greatest [importance]. Any act of genocide was always a threat to international peace and security and as such should be dealt with under Chapters VI and VII of the Charter." [93]

The conclusion of the Genocide Convention marked only the beginning of an era of international human rights, and it is easy to lose track of Maktos's point about what a revolution this was. It is true that the Genocide Convention was shaped in various ways in light of particular concerns of particular countries, some of them reflecting Cold War perspectives.[94] However, the adoption of the Convention ushered in the morally-compelled idea that international law could not turn a blind eye to the way in which states treated their own nationals. The tensions of the Cold War that were descending over the world might have affected the development of international human rights in particular ways but were nowhere near strong enough to prevent this from happening.[95]

The proof is in the subsequent history. Cold War dynamics were unable to extinguish the flame that led to adoption of the

92. Rome Statute of the International Criminal Court, art. 28, Jul. 17, 1998, 2187 U.N.T.S. 90.

93. U.N. GAOR, 3d Sess., 101st mtg. at 409, U.N. Doc. A/C.6/SR.101 (Nov. 11, 1948).

94. *See generally* Buchwald & Keith, *supra* note 90, at 11.

95. *See generally* William I. Hitchcock, *The Rise and Fall of Human Rights? Searching for a Narrative from the Cold War to the 9/11 Era*, 37 Hum. Rts. Q. 80-87 (2015).

two international covenants or the adoption of the core UN human rights treaties.[96] Six of these the International Covenant on Economic, Social and Cultural Rights (1966),[97] the Convention on the Elimination of All Forms of Discrimination against Women (1979),[98] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984),[99] and the Convention on the Rights of the Child (1989)–[100] were negotiated while the Berlin Wall remained standing. All survived the end of the Cold War and are even more prominent features of the international legal landscape today than they were then. To be sure, we should not be oblivious to the threats to the enormous progress made over the year in promoting and safeguarding human rights as a matter for international concern. If past is prologue, however, the tensions in any renewed Cold War will not be strong enough to extinguish the flame.

At the same time, in speaking of what was the dawn of the era of international human rights treaties, it is hard to ignore the persistent reluctance of the United States to become a party to such treaties. This seems all the more remarkable because it was true even during the Cold War, when one might think that there would be pragmatic incentives to robustly embrace human rights efforts as part of a demonstration that the United States was unambiguously on the right side of these issues and was an unalloyed advocate of the cause. By the time Maktos sat down for his interview with the Truman Library, however, it had already been an astonishing thirty-five years during which the United States had not ratified the handiwork he had help turn into the Genocide Convention. In fact, the United States at that point had not made a serious effort for years to secure Senate advice and consent.[101] Indeed, it was only the stinging criticism of President Reagan's 1985 visit to lay a wreath at the German military cemetery in Bitburg, a cemetery that contained the graves of numerous Waffen-SS members, that created the

96. *See id.*

97. 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978).

98. 1249 U.N.T.S. 13; 19 I.L.M. 33 (1980).

99. 1465 U.N.T.S. 85, 113; S. Treaty Doc. No. 100-20 (1988).

100. 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989).

101. Samantha Power, A Problem From Hell: America and the Age of Genocide 155-63 (2013).

domestic pressure for the Reagan Administration to reverse course and to pursue ratification.[102] Even with all that, the ratification process dragged out and was not completed until 1988 – a full forty years after the Convention's text had been finalized.[103]

This history brings into focus other features that existed during, but were not limited to, the Cold War. This includes the importance of domestic politics in shaping the environment in which decisions about international legal issues are made, the concerns in many quarters within the United States about the place of treaties in the U.S. constitutional architecture, and the strong tendency of both these features to greatly complicate the ability of the United States to enter into treaties.[104] Indeed, as long ago as 1953, President Eisenhower committed that the United States would not accede to ***any*** human rights conventions as part of his administration's *quid pro quo* for defeating adoption of the Bricker Amendment,[105] which would have amended the United States Constitution to prevent the United States from entering into self-executing treaties.[106] As part of the effort to prevent adoption of the amendment, Secretary of State Dulles specifically committed:

> "[W]hile we shall not withhold our counsel from those who seek to draft a treaty or covenant on human rights, we do not ourselves look upon a treaty as the means which we would now select as the proper and most effective way to spread throughout the world the goals of human liberty to which this Nation has been dedicated since its inception. *We therefore do not intend to become a party to any such*

102. *Id.* at 161-63.

103. Steven V. Roberts, *Reagan Signs Bill Ratifying U.N. Genocide Pact*, N.Y. Times (Nov. 5, 1988), https://www.nytimes.com/1988/11/05/opinion/reagan-signs-bill-ratifying-un-genocide-pact.html [https://perma.cc/L7CW-433M].

104. *See generally* Louis Henkin, Comment, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Int'l L. 341 (1995).

105. *Id.* at 348-49.

106. *See* John W. Bricker, *Making Treaties and Other International Agreements*, 289 Annals Am. Acad. Pol. & Soc. Sci. 134, 134-38 (1953).

> *covenant or present it as a treaty for consideration by the Senate.*"[107]

Those words may seem jarring, but the trend did not begin to ease until the presidency of Jimmy Carter.[108] Even then, the United States did not ratify the International Covenant on Civil and Political Rights until 1992,[109] and still today is party to only three of the core UN human rights treaties.[110]

From this history it appears that the tepid US posture towards human rights treaties materialized during, but was not caused by, the Cold War. The U.S. stance began to relax in the

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107. In addition, Secretary Dulles went on to say—

> "This administration does not intend to sign the Convention on Political Rights of Women. This is not because we do not believe in the equal political status of men and women, or because we shall not seek to promote that equality. Rather it is because we do not believe that this goal can be achieved by treaty coercion or that it constitutes a proper field for exercise of the treatymaking power. We do not now see any clear or necessary relation between the interest and welfare of the United States and the eligibility of women to political office in other nations."

Treaties and Executive Agreements: Hearing on S.J. Res. 1 and S.J. Res. 43 Before the Subcomm. of the S. Comm. on the Judiciary, 83rd Cong. 825 (1953). Dulles asserted that he was not denying that "human rights have always been a matter for international concern," citing Abraham Lincoln as authority for that proposition. *Id.* at 898 (referring to President Lincoln's belief that the Declaration of Independence was designed to give "hope not only to the people of this country, but to all the peoples of the world for all future time," and his skepticism was only about whether it was a goal best pursued via treaty-making).

108. *See Carter's Foreign Policy*, Off. of the Historian, https://history.state.gov/departmenthistory/short-history/carter [https://perma.cc/6CJ6-7LHR].

109. Jimmy Carter, *U.S. Finally Ratifies Human Rights Covenant*, The Carter Center (June 28, 1992), https://www.cartercenter.org/news/documents/doc1369.html [https://perma.cc/2ZMY-ZXEV].

110. David Simcox, *Where Does the US Stand on UN Human Rights Conventions?*, The Enquirer (Jan. 3, 2018, 12:16 PM), https://www.cincinnati.com/story/opinion/contributors/2018/01/03/where-does-us-stand-un-human-rights-conventions/972726001/ [perma.cc/5XV7-4ATV].

Cold War's middle years of the 1970's but remains a factor today.[111] Barring unforeseen developments, it seems likely to continue for the foreseeable future as part of the legal environment in which State Department lawyers will need to navigate, regardless of whether we are or are not headed into a new period of Cold War.

(2) The International Criminal Court

The next issue highlighted in John Maktos's memorandum remains similarly timely today: the effort in which he was involved to establish an International Criminal Court.[112] The project may have seemed quixotic when he began working on the issue in the early 1950's, and even when he gave his oral history interview in 1983. But the International Criminal Court is now a centrally important feature of the international legal landscape.

Maktos's description of his work on the issue is brief, but his memories are positive. They clearly suggest the important contribution that he saw an international criminal court could make to the welfare of the international community.[113] That said, one can detect in his description the seeds of controversy that would eventually emerge as persistently difficult issues for the United States in dealing with the Court. The treaty text on which he was working was fundamentally a design for the mechanics of such a court. The specifics regarding over whom the Court would have jurisdiction were being left for resolution by future agreements.[114]

Not far beneath the surface of the need to separate the two issues lurked the question of jurisdiction over nationals of states that had not consented. Maktos said:

> I foresaw the difficulty that we would have in subjecting particular persons, or matters, to any such organ. Our position at the Committee was: let's build a car and decide who will get into it later. In other words, let's let's create the machinery by which responsibility may be established. *Who* is going to be tried need not prevent creation of the organ, because . . . this problem of who is

111. *See Carter's Foreign Policy*, *supra* note 108.

112. *See* Interview with John Maktos, *supra* note 1, at 5-7.

113. *See id.* at 35-44.

114. *Id.* at 36-37.

> to be tried would be settled by separate conventions to which the United States Senate might or might not gave consent . . . I really was quite -- well, I was married to the idea that there should be a court and later on we could have a separate convention as to *who* could be tried by it.[115]

Interestingly, Maktos goes on to raise the possibility of an eventual United States reservation under which "no citizen of the U.S. would be triable unless there was created a jury to decide his guilt or innocence."[116] It is an idea that could well be used to generate a limitless supply of hypotheticals to confound the minds of unsuspecting law students. But if the possibility of such a reservation was in play, Maktos's implicit assumption had to have been that the contemplated International Criminal Court would not have jurisdiction over the nationals of states that decided not to become parties to the treaty.

Perhaps not surprisingly for the time, the text that was reached in these never-finalized negotiations reflected precisely this. It thus included a specific article that said:

> *"Recognition of Jurisdiction.* No person shall be tried before the Court unless jurisdiction has been conferred upon the Court by the State or States of which he is a national."[117]

As we now know, later negotiations that eventually led to the conclusion of the Rome Statute resoundingly rejected the notion that the Court's jurisdiction should be limited to nationals of states that agreed to become parties.[118] The issue nevertheless still sparks debate within the United States, as many in this country do not believe any such concern about the Court's jurisdiction should preclude positive U.S. engagement or U.S. support for its

115. *Id.*

116. *Id.* at 38.

117. *Treaties and Executive Agreements: Hearing on S.J. Res. 130 Before a Subcomm. of the S. Comm. on the Judiciary*, 82d Cong. 340 (1952) (Article 27 of Draft Statute for International Criminal Court).

118. Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 Am. J. Int'l L. 2, 3-4 (1999).

activities.[119] This was as true in Maktos's time as it is now.[120] But it is also true that others in this country have taken a different view.[121] The issue was thus already a clear concern in the negotiations during the early days of the Cold War and it remained a concern when, in authorizing U.S. signature of the Rome Statute on the last day that the treaty was open for signature, President Clinton announced that "I will not, and do not recommend that my successor, submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied."[122]

The important point for the purpose of this article is not to re-litigate the merits of the arguments on the two sides, but rather to highlight how these arguments have continued over time. This would suggest that these ICC issues are not likely to vanish depending on whether we are or are not entering a new Cold War. Rather, the persistence of the issue appears to turn on need for the United States to accommodate its commitment to

119. Am. Soc'y of Int'l L., ASIL Task Force on Policy Options for U.S. Engagement with the ICC ix-xi (2021); *see also* Am. Soc'y of Int'l L., U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement iv (2009).

120. *See, e.g.*, Judge John J. Parker, *An International Criminal Court: The Case for its Adoption*, 38 A.B.A. J. 641, 642 (1952) (providing that provisions requiring consent from the state of nationality of the accused "might be amended to advantage, I think, by providing that any state having in its custody persons charged with crimes of an international character may, by unilateral declaration, confer on the court jurisdiction to try such persons, without the consent of the state of which they are nationals."). For opposing views at the time, see George A. Finch, *An International Criminal Court: The Case Against its Adoption*, 38 A.B.A. J. 644, 648 (1952).

121. *See* John Bolton, U.S Nat'l Sec. Advisor, Speech to the Federalist Society in Washington D.C. (Sept. 10, 2018), https://www.aljazeera.com/news/2018/9/10/full-text-of-john-boltons-speech-to-the-federalist-society [perma.cc/AZ3W-KMSE] (Trump Administration will act strongly to ensure "that the ICC does not exercise jurisdiction over Americans and the nationals of our allies that have not ratified the Rome Statute").

122. Statement by President Bill Clinton on Signature of the International Criminal Court Treaty (Dec. 31, 2000), https://1997-2001.state.gov/global/swci/001231_clinton_icc.html [https://perma.cc/Z3MG-3BSZ]; *see also* David Scheffer, All the Missing Souls: A Personal History of the War Crimes Tribunals 234-237 (2012).

accountability for atrocities, on the one hand, and its concerns about the exercise of international or foreign jurisdiction over its servicemembers and officials, on the other hand.[123] Thus, in the wake of Russia's invasion of Ukraine and the atrocities being widely reported,[124] the interests of the United States in effective accountability has gained a strengthened hand. Even with that strengthened hand, however, while one can find numerous general statements of U.S. support for accountability of atrocities in Ukraine, it is difficult to find un-hedged statements of U.S. support for the ICC as an institution.[125]

Looking ahead, one likely scenario would have the two sides of the argument waxing and waning in strength, depending on where the broader politics of the situation point at any particular time. Thus, in periods in which the United States is particularly concerned about a set of unfolding atrocities, as we see today in Ukraine, the United States posture towards the Court will be relatively favorable. In periods in which the United States is particularly concerned about the risk of ICC investigations or prosecutions of U.S. persons, however, the United States posture will be less favorable. We can see this for example in the posture toward the Court in the period before the ICC Prosecutor's statement that his office's investigation of the situation in

123. All Things Considered, *The U.S. Does Not Recognize the Jurisdiction of the International Criminal Court*, NPR, (Apr. 16, 2022, 4:54 PM) https://www.npr.org/2022/04/16/1093212495/the-u-s-does-not-recognize-the-jurisdiction-of-the-international-criminal-court (interview with John Bellinger III) [https://perma.cc/8MTK-5SGN].

124. *See, e.g.*, *War Crimes Have Been Committed in Ukraine Conflict, Top UN Human Rights Inquiry Reveals*, UN News (Sept. 23, 2022), https://news.un.org/en/story/2022/09/1127691 [https://perma.cc/5DRF-RPFV].

125. *See, e.g.*, President Joe Biden, Remarks at the White House Roosevelt Room on the Request to Congress for Additional Funding to Support Ukraine (Apr. 28, 2022, 11:13 AM), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/04/28/remarks-by-president-biden-on-the-request-to-congress-for-additional-funding-to-support-ukraine/ [https://perma.cc/KSF6-VPL2]; *see also* Mark Kersten, *Biden and the ICC: Partial Cooperation, Selective Justice*, Al Jazeera (Mar. 5, 2021), https://www.aljazeera.com/opinions/2021/3/5/biden-and-the-icc-partial-cooperation-selective-justice [https://perma.cc/9SFV-3VY9].

Afghanistan would "prioritise crimes by IS-K, as well as the Taliban," as opposed to allegations of torture by U.S. personnel during the Bush Administration.[126]

(3) Creation of the International Law Commission

The next issue listed in Maktos's memorandum concerned the creation of the International Law Commission.[127]

The U.N. Charter empowers the General Assembly 'to initiate studies and make recommendations" for "encouraging the progressive development of international law and its development."[128] It may surprise the reader that much of the impetus for including this language came from China—then represented by the Nationalists—during the second phase of the Dumbarton Oaks conference in which China, but not the USSR, joined the United States and the United Kingdom.[129]

In practice, the most important vehicle for implementing this responsibility was the creation of the International Law Commission and the adoption of its Statute by the General Assembly in 1947.[130] Maktos reports that the *proximate* genesis of the International Law Commission was a memorandum that he wrote in 1946 about how best to take forward the authority of the General Assembly under Article 13, and that it was he who prepared the draft that the General Assembly approved as the Statute.[131]

For the purposes of today's discussion, this project is something of a horse of a different color than the others that

126. Statement by Karim A. Khan, Prosecutor, Int'l Crim. Ct., Following the Application for an Expedited Order Under 18(2) Seeking Authorisation to Resume Investigations in the Situation in Afghanistan (Sept. 27, 2021), https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application [https://perma.cc/W4AZ-BD5H].

127. Interview with John Maktos, *supra* note 1, at 7-9.

128. U.N. Charter art. 13.

129. Russell, *supra* note 32, at 431. Dumbarton Oaks took place in two phases, the first (Soviet) phase among the United States, the United Kingdom and the USSR, and the second among the first two of those powers and China. *Id.* at 392, 411.

130. G.A. Res. 174 (III), Establishment of an International Law Commission (Nov. 21, 1947).

131. Interview with John Maktos, *supra* note 1, at 8-10.

Maktos included on his list in the sense that the *creation* of the Commission was a project that was begun and completed. No longer do State Department lawyers work on the creation of an international law commission, though they do of course expend considerable time and energy working on establishment of bodies needed by the international community to carry forward important legal tasks.[132]

Beyond that, State Department lawyers do considerable work on the projects that the Commission pursues.[133] The Commission has, over the years, been central in developing many of the most notable multilateral treaties of the post-World War II era,[134] including as well-known examples the texts that became the Vienna Convention on the Law of Treaties[135] and the Vienna Convention on Diplomatic Relations.[136] Will the content of that work be affected if we are entering into a new period of Cold War dynamics? Doubtless there will be *some* effect and the possibility for polarization among Commission members should not be discounted. But much of the Commission's work is of a technical legal nature.[137] Even the work that may have relatively large amounts of political content can fall across political divides that do not match the main fissure points of any Cold War

132. *See Our Mission*, U.S. Dep't of State, https://www.state.gov/bureaus-offices/secretary-of-state/office-of-the-legal-adviser/ [https://perma.cc/8AC2-NG4U].

133. *See generally About Us*, U.S. Dep't of State, https://www.state.gov/about-us-legal-adviser/ [https://perma.cc/PUE3-P2BN].

134. Ineta Ziemele, *The Functions of the International Law Commission: Identifying Existing Law or Proposing New Law?*, *in* Seventy Years of the International Law Commission 265, 268 (U.N. ed., 2021).

135. *United Nations Conference on the Law of Treaties*, Codifications Div. Publ'n, https://legal.un.org/diplomaticconferences/1968_lot/ [https://perma.cc/DZC5-XFKP]; *Law of Treaties*, Int'l L. Comm'n, https://legal.un.org/ilc/summaries/1_1.shtml (Dec. 4, 2017) [https://perma.cc/3BKQ-2CA7].

136. *United Nations Conference on Diplomatic Intercourse and Immunities*, Codifications Div. Publ'n, https://legal.un.org/diplomaticconferences/1961_dipl_intercourse/ [https://perma.cc/HS2G-S3XK].

137. *See Methods of Work*, Int'l L. Comm'n, https://legal.un.org/ilc/methods.shtml (Jan. 11, 2019) [https://perma.cc/H6TF-27DD].

dynamics.[138] At the same time, there are some issues on which the "major powers" seem to have shared legal interests (*e.g.*, on the right to possess nuclear weapons or on issues related to the right of veto in the Security Council). In addition, the fact that the Commission's members serve in their individual capacities,[139] and that they are elected by the General Assembly as a whole,[140] may add a layer of insulation from the political influences of the Cold War, especially since the broad membership of the General Assembly may be more likely than the permanent members to focus on issues that transcend Cold War dynamics.

In any event, the Commission's work is likely to remain an important part of the work of foreign ministry legal offices in the years ahead. It remains another embodiment of the striking continuity of the legal content of the work of practicing international lawyers from the outset of the Cold War until today and another indication that any effect of Cold War dynamics will be modest.

(4) Definition of "Aggression"

The final issue in John Maktos's memorandum concerns the definition of "aggression."[141] The General Assembly referred the question of defining aggression to the Sixth Committee in 1951, and responsibility for dealing with and coordinating the issue thus fell to Maktos in his role as Assistant Legal Adviser[142] -- just as it would later fall to me when I occupied that the same position in the run-up to the ICC Review Conference held in Kampala, Uganda, in the spring of 2010.

The immediate task in the early 1950's was a definition of aggression that the United Nations, and in particular the Security Council, could use as a guide in fulfilling its responsibilities. This included in particular the responsibility of the Security Council

138. *See generally Programme of Work*, Int'l L. Comm'n, https://legal.un.org/ilc/programme.shtml (Oct. 8, 2021) [https://perma.cc/XA45-DRSJ].

139. *Membership*, Int'l L. Comm'n, https://legal.un.org/ilc/ilcmembe.shtml (Sept. 22, 2022) [https://perma.cc/27YQ-LF56].

140. G.A. Res. 174 (III), *supra* note 130, art. 3.

141. Interview with John Maktos, *supra* note 1, at 10-11.

142. *Id.*

to "determine the existence of any threat to the peace, breach of the peace, or act of *aggression*" that, under the Charter, operates as the necessary predicate for the Security Council to decide on enforcement measures under Chapter VII.[143]

Maktos reports his view, which was also the view of the U.S. Government, that "such a definition would be neither desirable nor useful."[144] Among other things, he told the Sixth Committee that the definition could not be comprehensive and would not serve as a useful guide,[145] would fuel bad-faith allegations,[146] and failed to account for the possibility of use of pre-emptive force in the case of an imminent attack.[147] All of these are positions that resonate with the kinds of positions that U.S. Government continued to take outside the Cold War context, including in connection with the Kampala Review Conference.[148]

Of course, the situation was different in the run-up to Kampala, both because the exercise at Kampala was to establish a definition of the individual *crime* of aggression for use by a criminal tribunal, as opposed to a definition of the state act of

143. U.N. Charter art. 39 (emphasis added).

144. Interview with John Maktos, *supra* note 1, at 11.

145. *Id.*

146. Maktos said: "Je crois que cette définition est en réalité un piège destiné à servir des desseins autres que les desseins de ceux qui l'accepteraient de bonne foi. Il pourrait s'agir d'un instrument de propagande destiné à porter de fausses accusations qui causeraient d'irréparables dommages." (translation: "I believe that this definition is in reality a trap designed to serve purposes other than the intentions of those who would accept it in good faith. It could be a propaganda tool intended to make false accusations that would cause irreparable damage."). Julius Stone, Aggression and World Order: A Critique of the United Nations Theories of Aggression 113 n.25 (2nd ed. 2007)

147. *See* U.N. Secretary-General, *Question of Defining Aggression*, ¶ 392, U.N. Doc. A/22/11 (Oct. 3, 1952) (including remarks of Mr. Maktos arguing that language labeling the side that first used force as the aggression would improperly "require a State to let itself be attacked before it could defend itself.").

148. Harold Koh, Legal Adviser, U.S. Dep't of State, Statement at the Review Conference of the International Criminal Court (June 4, 2 010), https://2009-2017.state.gov/s/l/releases/remarks/142665.ht m [https://perma.cc/N9VT-9267].

aggression for use for political purposes by the Security Council,[149] and because the General Assembly had in the interim adopted resolution 3314 in 1974.[150] At least on its face, that resolution contained a definition of the state act of aggression, and there was widespread support among the delegates at Kampala to use the language in the General Assembly's resolution as a touchstone for their package of amendments to the Rome Statute.[151]

For its part, the United States viewed reliance on the language of resolution 3314 as problematic. Among other things, the United States view was that resolution 3314 was designed only to provide *guidance* to the Security Council on elements it should take into account but was not in fact a true "definition" at all, and that resolution 3314 considered the final decision on whether aggression had occurred would be a political decision.[152] Thus, language had been specifically included in resolution 3314 to make clear that the Security Council could and should take into account any "other relevant circumstances" in deciding whether particular conduct did or did not constitute aggression, regardless of the conclusion to which the "definition" would otherwise lead.[153]

It was obviously impractical to include such open-ended language calling for a political judgment in a document that was designed to provide a definition for use in criminal proceedings. However, the U.S. view was that the omission of this language by the delegates in Kampala, as well as the omission of similar key elements that had been included to make resolution 3314 capable of mustering consensus, transposed the essential meaning of the "definition" by removing the remaining language from the context that made it acceptable in the first place. At the end of the day, the view of the United States was that "[r]esolution 3314 was a

149. *See generally* The Princeton Process on the Crime of Aggression (Stefan Barriga, Wolfgang Danspeckgruber & Chrisian Wenaweser, eds., 2009).

150. G.A. Res. 3314 (XXIX), ¶¶ 1-4 (Dec. 14, 1974).

151. The Princeton Process on the Crime of Aggression, *supra* note 149, at 9-11.

152. *See* Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 Am. J. Int'l L. 257, 269 (2015).

153. *Id.* at 265.

political declaration that did not contain an actual definition at all, at least in a legal sense."[154]

Once again, the important point for purposes of this discussion is not to re-litigate the merits of the issue, but rather to highlight its remarkable continuity and to underscore the fact that essentially the same issue stayed on the agenda of practicing international lawyers for such a protracted period of time. It is undeniable that the U.S. concerns in the negotiations leading to resolution 3314 were affected by the dynamics of the Cold War, but the underlying United States allergy to the definition of aggression remained fundamentally constant from John Maktos's time at the beginning of the Cold War, to the détente years of the 1970's when the General Assembly adopted resolution 3314, and to the post-Cold War years in connection with the Kampala Review Conference. Indeed, the issue of aggression remains very much on the current international legal agenda, including most recently in the context of numerous calls to establish an international or hybrid mechanism that could pursue investigations and prosecutions of the crime of aggression in the context of the Russian invasion of Ukraine.[155]

Concluding Observations

There is an undeniable element of happenstance in the fact that the five issues that John Maktos selected as the most noteworthy of his tenure continue to resonate to this day. Surely his day-to-day work involved any number of other legal issues with which present-day international lawyers would find it difficult to connect.

But happenstance cannot be the whole story. The issues he described each stand as testaments to deeper yearnings within the international community. The involvement of John Maktos in the Genocide Convention epitomizes the desire to promote human rights, a durable yearning to promote and protect the

154. *Id.* at 264-269.

155. *See, e.g.*, Ukr. Task Force of the Global Accountability Network, Proposal for a Resolution by the United Nations General Assembl y & Accompanying Proposal for a Statute of a Special Tribunal for Ukraine on the Crime of Aggression 1-2 (2022) [https://perma.cc/D5BW-T8TF].

essential dignity of human beings. His involvement in the establishment of an International Criminal Court embodies a commitment to justice and the deterring of the kind of atrocities that were then fresh in our minds in the aftermath of World War II, and the perpetration of which continues to shock our consciences today. His work in the search for a definition of "aggression" is a reflection of mankind's elusive quest for a world free from the scourges of war. And his efforts in the creation of an International Law Commission, and even the questions about statehood and recognition, reflect a deep-seated desire for a more orderly world with fair rules of the road to govern the conduct of states in predictable ways.

These are yearnings that are durable over time, propelling international lawyers who have practiced during the Cold War, after the Cold War, and to this day. They are yearnings that existed despite, not because of, the Cold War, and they were not extinguished just because the Cold War ended. Because international law must inevitably be responsive to these yearnings, their relevance will continue in the months and years that lie ahead.

At the end of the day, no one can know for sure the extent to which the dynamics of the era ahead of us will echo the dynamics of the Cold War. Whether they echo those dynamics a lot or a little, my conclusion is that a broad swath of international legal issues have been the products of dynamics that are dependent on Cold War dynamics only in an attenuated way, or not at all. And my prediction is that there will continue to be large swaths of issues, central to the work in which practicing international lawyers engage, that will remain center stage regardless of whether we are or are not headed for a new Cold War.