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The United States has been and will continue to be an important player in International Law. That role presupposes that the U.S. stays engaged with International Law. However, in recent years the United States has trended toward withdrawal from several international treaties and organizations. This Article argues that it is in the national interest of the United States to adopt a radically different approach: stay engaged and try to improve International Law from within. This proposition is predicated on the idea that U.S. withdrawal has often had the retrogressive effect of loss of leverage for the U.S. and diminishment of international rule of law. This Article discusses various ways in which the U.S. government and courts have withdrawn from international law with a view to recommending ways in which the U.S. can re-engage to better serve the national interest of the United States, specifically, and international rule of law, generally. This Article recognizes that to achieve that objective, it may not be sufficient for the U.S. to simply re-engage with what it views as being a flawed system. Thus, this Article discusses ways in which international law can be improved to better support the national interests of the United States.

INTRODUCTION

The framers of the U.S. Constitution had such serious regard for the treaties of the U.S. that they put them at the same level as Federal Law, as supreme law of the land.[1] The national interests of the United States, as they relate to treaties, are so great that the power to make treaties was

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1. U.S. CONST. art. VI, § 2; *See also* THE FEDERALIST NO. 22 (Alexander Hamilton) (maintaining that "[t]he treaties of the United States, to have any force at all, must be considered as part of the law of the land.").

not to be reposited solely in the executive branch. Alexander Hamilton wrote:

> However proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to intrust that power to an elective magistrate of four years' duration. . . . But a man raised from the station of a private citizen to the rank of chief magistrate . . . might sometimes be under temptations to sacrifice his duty to his interest . . . An avaricious man might be tempted to betray the interests of the state to the acquisition of wealth. An ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents. The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.[2]

If the executive branch could not act unilaterally in the making of treaties due to the national interests of the United States that might be at stake, it seems appropriate that the same logic should apply to withdrawal from those treaties. Moreover, when the U.S. withdraws from an international treaty, it is not just its national interest that is at stake. It can come with "deep costs to the stability of our world order,"[3] which international rule of law helps to maintain. While it is permissible under international law to withdraw from treaties,[4] the Vienna Convention on the Law of Treaties provides that a fundamental tenet of international law is that treaties must be fulfilled in good faith.[5] The stability of

2. THE FEDERALIST NO. 75 (Alexander Hamilton).

3. Jean Galbraith, *The President's Power to Withdraw the United States from International Agreements at Present and in the Future*, 111 AM. J. INT'L L. UNBOUND 445, 445 (2017).

4. *See* Vienna Convention on the Law of Treaties art. 42(2), May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT] (providing that "[t]he termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention.").

5. *Id.* art. 26 (providing that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."). The Vienna Convention on the Law of Treaties is regarded by the U.S. Department of State as largely an embodiment of customary international law. *See Vienna Convention on the Law of Treaties*, U.S. DEP'T OF STATE, https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm [https://perma.cc/A8HG-FKGT] (last visited Aug. 26, 2019) (stating that "[t]he United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties," without specific mention of which provisions constitute customary international law.).

international order is predicated on the maintenance of international rule of law. That is because among the core elements of international rule of law are predictability and stability.[6]

This Article argues that the pace at which the United States has exited international treaties, even while promising to rejoin those treaties—which has not yet happened—threatens both the critical interests of the United States as well as threatening international rule of law. It proposes that the legislative branch of United States government needs to play a more proactive role in making treaties by specifically providing and implementing legislations that the United States shall not exit certain treaties without the consent of Congress. More generally, it proposes that the judicial branch would also need to adopt a posture that supports international obligations of the United States. This Article also proposes that multilateral institutions need to pay more attention to interests of the United States if there are legitimate reasons for concern.[7]

While the exercise of democracy in all countries can have inevitable political consequences[8] domestically and internationally as well, as it relates to international relations there needs to be, at a minimum, a core of stable and continuing international norms, regardless of such internal changes, to assure predictability and stability of international norms in a multi-polar world. When that does not happen, the rest of the world is at the mercy of the vicissitudes of political change, with the possibility of irreversible and permanent damage to international rule of law.[9]

More recently, the dialectic between a more globalist approach versus an emphasis on a nationalist agenda, has seemed diametrically and irredeemably irreconcilable and it has had repercussions for whether or not the United States can or should remain party to some treaties. This

6. Arthur Watts, *The International Rule of Law*, 36 GERMAN Y.B. INT'L L. 15, 28 (1993) (observing that "An important consequence of certainty of the law is that the outcome of reliance upon the law is to a large degree predictable, which it cannot be if the law is uncertain (or if arbitrary power is not excluded). This in turn is an important factor in establishing confidence in the law, and also in encouraging that stability in the affairs of the community which it is part of the function of the rule of law to create.").

7. This Article will focus on institutions like the International Criminal Court.

8. *See* Jack Goldsmith, *The Trump Administration and International Law, Recent Books on International Law: Book Reviews*, 113 AM. J. INT'L L. 408, 414 (2019) (observing that Obama and Bush administrations charted different courses for international law and that these "presidencies were ultimately quite consequential, and both shaped and violated international law").

9. Harold Hongju Koh, *The Trump Administration and International Law*, 56 WASHBURN L. J. 413, 414 (2017), https://contentdm.washburnlaw.edu/digital/api/collection/wlj/id/6754/page/0/inline/wlj_6754_0 [https://perma.cc/28CN-Y778] (wondering "whether the Trump Administration's many initiatives will permanently change the nature of America's relationship with international law and its institutions," notwithstanding the fact that "laws be faithfully executed, including certain rules of international law, which as ratified treaty or customary international law comprise part of the law of the United States").

Article is premised on the proposition that interests of the United States can be reconciled with robust international engagement. The United States did not achieve its success in the past by stepping outside the currents of international cooperation.[10] This subject is important because it can have real impact on whether the United States can act in concert with other nations on a number of issues that cut across borders—from pandemics to global recession or climate issues.

Professor Jack Goldsmith aptly noted, "U.S. stance toward the Paris Agreement on climate change, international trade laws, and the Iran nuclear deal...implicate international law" and concluded that "[m]ost observers think [that the U.S.] . . . is wreaking havoc in these areas."[11] To support his conclusion, Professor Goldsmith points to the fact that the U.S. announced that it would withdraw from

> [A]t least six international agreements, including a major arms control agreement . . . two signature agreements (Paris and Iran) . . . [and] has refused to conclude, or stopped negotiating over, two important international trade agreements . . . [and] has upended the international trade system and publicly trashed the North Atlantic Treaty Organization, the G7, the G20, the United Nations, and most of the United States' traditional allies... [and] has withdrawn from two important human rights bodies, reversed the United States' historic position on human rights leadership, taken an aggressive initiative against the International Criminal Court, stopped cooperating with human rights rapporteurs, and possibly violated international law.[12]

Additionally, United States announced its withdrawal from major treaties,[13] international trade and environmental law platforms,[14] among

10. *See The Obama Administration National Security Strategy* 9, 12 (May 2010), https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/national_security_strategy.pdf [https://perma.cc/2FFN-8UJD].

11. Goldsmith, *supra* note 8, at 410.

12. *Id.* at 415.

13. The U.S. President announced that the U.S. government would withdraw from the 2015 Paris Agreement on Climate Change as well as Joint Comprehensive Plan of Action (JCPOA) related to Iran's nuclear program. *See* STEVEN P. MULLIGAN, CONG. RSCH. SERV., R44761, WITHDRAWAL FROM INTERNATIONAL AGREEMENTS: LEGAL FRAMEWORK, THE PARIS AGREEMENT, AND THE IRAN NUCLEAR AGREEMENT (2018), https://fas.org/sgp/crs/row/R44761.pdf [https://perma.cc/66B2-MK26].

14. Valerie Volcovici, *U.S. Submits Formal Notice of Withdrawal from Paris Climate Pact,* REUTERS (Aug. 4, 2017), https://www.reuters.com/article/us-un-climate-usa-paris/u-s-submits-formal-notice-of-withdrawal-from-paris-climate-pact-idUSKBN1AK2FM [https://perma.cc/UZT9-Y44G].

others.[15]

While there may be legitimate concerns as to whether those treaties are in the interest of the United States, whether and when more perfect agreements can be negotiated after the less perfect ones are exited is not always assured. In the meantime, the United States may be left isolated and in a position of inability—short of use of unilateral force—to determine the course of international issues, as the case of the U.S. ceasing to a participant in the Iran Nuclear Deal exemplifies.[16] If the United States cannot participate in international discussions regarding whether to reimpose economic sanctions on Iran, the national security interests are at stake, and yet the U.S. does not have a seat at the table because it withdrew from the deal.[17]

More generally, international rule of law is at a crossroads because when the only superpower exits international law, there is "enormous change to international law."[18] This is because international law mostly

15. The counterargument that can be made is that competitors of the United States, such as China and Russia, have refrained from joining certain international treaties and there is no reason to hold the U.S. to a higher standard when embracing such a standard would run counter to the national interest of the United States. That may very well be the case, at least in the short term. However, two wrongs do not make a right and it is unlikely that regimes that have little regard for international law will be able to avoid having to abide by international rules in the long term. There are several reasons for that. First, in a world order defined by nation states, the only way for nations to interact meaningfully is through international norms. It is for this reason that "[p]articularly since the latter part of the nineteenth century, the efforts of diplomats and states to establish clear norms for the conduct of international relations . . . have been remarkably successful." Paul H. Kreisberg, *Does the U.S. Government Think That International Law Is Important*, 11 YALE J. INT'L L. 479, 479 (1986). Secondly, there are other dimensions for which international law remains important such as "[c]risis management, high-stakes political and economic conflict, and national security policy" because these areas "attract[] constant and visible attention from senior decisionmakers." *Id.* at 479. Third, the enduring importance that the United States still attaches to international law is visible in the fact that its ambassador to the United Nations is a member of the Cabinet. Fourth, "[w]hether or not international law plays a direct and immediate role in decision-making by any particular U.S. administration, it is often of such importance to other governments that U.S. officials are compelled to take it into account in explaining and justifying their actions." *Id.* at 483. Finally, the fact that technological, social, economic advances have remarkably and irreversibly brought the world closer than could ever be imagined only means that nations have greater reasons to collaborate in establishing norms that ensure meaningful interaction of nations in those areas.

16. Iran argued that the United States lacked standing to participate in deliberations concerning the Iran Nuclear Deal. *See* Lara Jakes & David E. Sanger, *Instead of Isolating Iran, U.S. Finds Itself on the Outside Over Nuclear Deal*, N.Y. TIMES (Aug. 20, 2020), https://www.nytimes.com/2020/08/20/us/politics/trump-iran-nuclear-deal.html?auth=login-google [https://perma.cc/TN9Z-GRCW].

17. *Id.*

18. Goldsmith, *supra* note 8, at 415.

works by reciprocity[19] and so it is possible that other nations' respect for or willingness to abide by international norms in good faith falters, following the lead of the United States. Historically, the United States has been a trailblazer, champion of, and powerful actor in international law,[20] setting the example for many other nations. To underscore its importance to the United States, U.S. Supreme Court Justice Gray stated in *Paquet Habana*, "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."[21]

The significance of international law is also evidenced by the fact that over the years, the U.S. has signed and ratified more than 10,000 international multilateral and bilateral treaties,[22] and the fact that it was a founding member and promoter of the United Nations in San Francisco in 1945 and continues to be an important member of the United Nations.[23] The U.S. Department of State acknowledges those historical facts:

> Once World War II began, President Franklin D. Roosevelt determined that U.S. leadership was essential for

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19. *See, e.g.*, David J. Lynch, Taylor Telford, Damian Paletta & Gerry Shih, *U.S. Prepares To Slap Tariffs On Remaining Chinese Imports, Which Could Add Levies On Roughly $300 Billion In Additional Goods*, WASH. POST (May 13, 2019, 6:34 PM) https://www.washingtonpost.com/business/2019/05/13/trump-warns-china-not-retaliate-tariffs-insists-they-wont-hurt-us-consumers/ [https://perma.cc/UX7B-8AV8]. A short economic analysis of international trade, tariffs, and wealth/waste generation is provided below:

> > Despite the simplicity of the comparative advantage argument, we often see laws and regulations that ignore this principle. Consider, for example, the many tariffs and quotas placed on goods traded internationally. The law of comparative advantage is often used to explain the benefits of international trade. Resources are used most effectively when they are moved to their most highly valued use. By definition, this means putting resources in their lowest marginal opportunity cost use relative to other resources available for pro-duction. Countries that ignore this logic by enacting tariffs and quotas will become overly self-sufficient and therefore waste resources. The more mutually beneficial transactions that a society undertakes, the more wealth it creates. International trade is based on mutually beneficial exchange. Tariffs and quotas increase the costs of international trade and, thus, decrease the quantity of mutually beneficial transactions and deter wealth creating transactions.
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> HENRY N. BUTLER ET AL, ECONOMIC ANALYSIS FOR LAWYERS 75 (3d ed. 2014).

20. Koh, *supra* note 9, at 415 (observing that "[t]he United States of America--and its President in particular--are powerful players in the making and unmaking of international law.").

21. The Paquete Habana, 175 U.S. 677, 700 (1900).

22. *See* MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY 219 (5th ed. 2014).

23. *The United States and the Founding of the United Nations, August 1941 - October 1945*, U.S. DEP'T OF STATE, BUREAU OF PUB. AFFS., https://2001-2009.state.gov/r/pa/ho/pubs/fs/55407.htm [https://perma.cc/RZ6R-EPC5] (last visited on Aug. 9, 2018).

> the creation of another international organization aimed at preserving peace, and his administration engaged in international diplomacy in pursuit of that goal. He also worked to build domestic support for the concept of the United Nations. After Roosevelt's death, President Harry S Truman also assumed the important task of maintaining support for the United Nations and worked through complicated international problems, particularly with the Soviet Union, to make the founding of the new organization possible. After nearly four years of planning, the international community finally established the United Nations in the spring of 1945.[24]

Yet, in recent years, the United States appears to have backtracked from the position it had historically once held. The U.S. withdrew from important agencies of the United Nations such as the United Nations Human Rights Council,[25] UNESCO,[26] and the World Health Organization.[27] The United States might counterargue that it is not disengaging from international law to the detriment of its national interest. Instead, the United States may maintain that it is only tactfully withdrawing in order to re-engage once the international community makes changes that are in the interest of the United States.

In the meantime, the United States may insist that it is not worse off because it can pursue bilateral accords, one country at a time and, if necessary, act unilaterally in pursuit of its national interest. While there is something to be said for bilateral accords and the ability to act unilaterally, there are important limits to those approaches. While global institutions and the multilateral treaties are not without reproach,[28]

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24. *Id.*

25. *US Quits 'biased' UN Human Rights Council*, BBC NEWS (June 20, 2018), https://www.bbc.com/news/44537372 [https://perma.cc/7YNZ-BJ3M].

26. Eli Rosenberg & Carol Morello, *U.S. Withdraws from UNESCO, the U.N.'s Cultural Organization, Citing Anti-Israel Bias*, WASH. POST (Oct. 12, 2017, 5:10 PM), https://www.washingtonpost.com/news/post-nation/wp/2017/10/12/u-s-withdraws-from-unesco-the-u-n-s-cultural-organization-citing-anti-israel-bias/ [https://perma.cc/6SBE-6BQW].

27. Jason Hoffman & Maegan Vazquez, *Trump Announces End of US Relationship With World Health Organization*, CNN POLITICS (May 29, 2020, 7:17 PM), https://www.cnn.com/2020/05/29/politics/donald-trump-world-health-organization/index.html [https://perma.cc/LV5K-DCD3].

28. *E.g.*, José E. Alvarez, *Multilateralism and Its Discontents*, 11 EUR. J. INT'L L. 393, 395 (2000) (Alvarez observes that "[t]he UN collective security system, designed in the wake of the Holocaust, has prevented neither intrastate disputes nor repeated mass atrocities" and "[i]n the economic realm, free trade/free market forces (including their institutionalized components such as the WTO, NAFTA, and the international financial institutions) have reinforced ethnic self-identification while failing to ameliorate either the gap between rich and poor nations or the gap between rich and poor within nations."). It is therefore unsurprising that there have been efforts

unilateralism and bilateralism appear to have more costs than benefits,[29] which can exacerbate withdrawal from several international compacts and platforms.[30] Moreover, not many countries have accepted offers for bilateral treaties with the United States.[31]

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to find alternatives to globalist approaches. Such alternatives include "transnational networks of domestic actors, both governmental and private (such as central bankers, parliamentarians, insurance brokers or shippers) . . . ." *Id.* at 397. Yet, there are some issues that only a more global and multilateral approach can resolve. *See, e.g.*, Jon Stone, *EU Puts Ireland's Commissioner Who Called Boris Johnson 'Unelected' In Charge Of Negotiating Trade Deal With UK*, INDEPENDENT (Sept. 11, 2019), https://www.independent.co.uk/news/uk/politics/brexit-latest-boris-johnson-ireland-eu-commissioner-trade-deal-uk-a9098821.html [https://perma.cc/FZ 5K-HGK6] (European Union trade commissioner Phil Hogan observing that after Britain exiting the European Union (EU), it would become a "'medium-sized' nation with reduced bargaining power," and that after it exits the EU Britain would "regain the sovereignty to seek and strike agreements where it wants but with reduced bargaining power, reduced security of its markets and supply chains, and a friction and cost added to each trade shipment to the EU, its biggest trade partner."). Some cross-border problems require an international or multilateral approach, which is why such institutions need to be strengthened and not further weakened by fierce criticism focused on their perceived inefficiencies. For example, "it is undeniable that giving effect to human rights requires at least some international scrutiny since governments guilty of human rights violations are not likely to police themselves," the maintenance of international peace and security and the fight against pandemics in many instances require a global approach. *See id.* at 399. Moreover, because of the threat of tit-for-tat responses from other nations, unilateral approaches are likely to have limited success. It has been noted that "when the U.S. acts unilaterally or in ways that other states see as violating critical standards of international behavior, American policies often fail or succeed only partially." Kreisberg, *supra* note 15, at 484.

29. *See* JANIS & NOYES, *supra* note 22, at 774. The controversial 2003 U.S. military intervention in Iraq without unambiguous U.N. Security Council authorization—even though the U.S. was joined by some allies—is widely viewed as an example of the danger and limits of unilateralism, a repeat of which the United States has tried to avoid. In that case, the United States justified the decision to use force in Iraq on U.N. Security Council Resolution 1441, read in conjunction with U.N. Security Council Resolutions 678 and 687. *See* JANIS & NOYES, *supra* note 22, at 774. But the legitimacy of that intervention was marred by the controversy over whether the U.S. should have sought express U.N. Security Council authorization for the use of force because Resolution 1441 merely recalled Resolutions 678 and 687—which explicitly granted authority to use force against Iraq following its invasion and annexation Kuwait—but it did not expressly authorize the use of force per se in Iraq.

30. *See, e.g.*, Katie Rogers, *Trump Pulls Out of Arms Treaty During Speech at N.R.A. Convention*, N.Y. TIMES (Apr. 26, 2019), https://www.nytimes.com/2019/04/26/us/politics/trump-national-rifle-association.html [https://perma.cc/GPA6-PZEW] (On April 26, 2019, the U.S. President declared that the U.S. was withdrawing from an international arms treaty.). *See also*, Nicole Gauette, Ryan Browne, & Vivian Salama, *Trump Confirms US is Withdrawing From Another Major Arms Treaty*, CNN POLITICS (May 21, 2020, 6:15 PM), https://www.cnn.com/2020/05/21/politics/us-open-skies-arms-control-treaty/index.html [https://perma.cc/45TW-GDYK] (Reporting that "President Donald Trump confirmed the U.S. will be exiting the Open Skies Treaty, a pact designed to reduce the risk of military miscalculations that could lead to war.").

31. John Wagner & David J. Lynch, *Trump Said He Would Strike One-on-One Trade Deals. That's Not Happening.*, WASH. POST (Nov. 14, 2017), https://www.washingtonpost.com/politics/trump-said-he-would-strike-one-on-one-trade-deals-thats-not-happening/2017/11/14/eced8a4e-

It could be argued that the United States can act unilaterally, if other countries don't yield to its national interest, even though reality doesn't support such a belief.[32] This position assumes that other countries, particularly America's allies, will be more indulgent of its actions, but, as Ambassador Taft explained, the United States has not acted in this way, and it is a well-accepted thought "that one of the reasons that the United States is where it is today is because over the past century the United States has been in the forefront of making international agreements,"[33] not acting unilaterally.

With regard to bilateralism, addressing certain issues that pertain to two countries such as trade investment, bilateral agreements are the best devices to use. For a bilateral treaty, the negotiation time is fairly short, as it is only necessary for two states to meet and agree on the details of the treaty. Unlike multilateral agreements, parties can agree on every provision in the agreement and there is no need to make reservations. Some countries may refuse to join the agreement because of objectionable provisions. Even then, nations enter into multilateral agreements because they appear to have more advantages relative to bilateral agreements. In this regard, it has been noted that:

> One obvious advantage with multilateral arrangements is reduced negotiation costs. Once a multilateral negotiation has been concluded, the results apply to all and there is no need to duplicate the cost of bargaining with many individual countries. Monitoring and enforcement costs are also reduced, since the same standards apply to all, instead of a myriad of different standards applying between each bilateral partner. Further, if all are subject to the same minimum standards, there is no potential for 'free- riding' giving rise to the classical problem of the 'prisoner's dilemma.'[34]

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c949-11e7-b0cf-7689a9f2d84e_story.html [https://perma.cc/9JA7-4L6S] (reporting, "[a]s he traveled across Asia, President Trump touted a flurry of multibillion-dollar military sales and one-off business deals with nations he visited. Upon his return to the White House this week, he is pledging to unveil more, boasting that his handiwork is "far bigger than anything you know." But the 12-day trip also underscored how little progress Trump has made on a far more sweeping pledge central to his "America first" vision: replacing multilateral trade agreements—which he has long railed against but every U.S. president since Harry S. Truman has embraced—with one-on-one deals more "fair" to the United States.").

32. *See* Koh, *supra* note 9, at 420 (observing that "the basic message ... is that no single player in the transnational legal process—not even the most powerful one—can easily discard the rules that we have been following for some time.").

33. Christopher J. Borgen, *Presidential Panel: The Impact of The United States on International Law*, 96 AM. SOC'Y INT'L L. PROC. 162, 164 (2002).

34. Vicki Waye, *Assessing Multilateral vs. Bilateral Agreements and Geographic Indications through International Food and Wine*, 14 CURRENTS: INT'L TRADE L. J. 56, 63 (2005).

There is no doubt that international treaties would need to be changed in some respects in order to protect the national interest of the United States. For example, there is something to be said for the United States argument that the trade deficits with China have an impact on its national interest and those deficits may be due, in part, to exemptions that China has benefited from pursuant to its designation as a developing nation under the World Trade Organization (WTO) regime.[35] Because the WTO treaties are not going to be renegotiated quickly, China can continue to exploit its deficiency for a very long time, unless the United States takes decisive and immediate action.[36]

With that said, it seems that while the United States has legitimate concerns, there would be no international law without tradeoffs because every country has its national interest. In light of that reality, the U.S. may never achieve the desired changes through retreat from international law and commitments, especially when replacement treaties are not likely to be adopted at the behest of unilateral withdrawals. Withdrawal is allowed under international law, but large-scale withdrawals appear to strike at the core of international rule of law because there is the expectation that treaties will be performed in good faith, otherwise there is no security to any international compact if large scale withdrawals is the norm.[37]

It is not just withdrawal from treaties that has the potential to negatively impact U.S. national interest and international rule of law, there is also the consistent trend of not joining many treaties as observed

35. *See, e.g.*, *Understanding the WTO: Developing Countries*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm [https://perma.cc/T5LM-EUPD] (last visited May 12, 2021) (explaining that after a country has designated itself a "developing country," it is not immediately subject to several commitments under WTO agreements; "developing countries" have greater market access and are not subject to anti-dumping regulations, animal, plant and technical standards.).

36. *See, e.g.*, Jim Zarroli, *Trump Pledges To Withdraw From U.S.-South Korea Trade Agreement*, NAT'L PUB. RADIO (NPR) (Sept. 6, 2017, 4:30 PM), https://www.npr.org/2017/09/06/548985192/trump-pledges-to-withdraw-from-u-s-south-korea-trade-agreement [https://perma.cc/S4HK-HECS] (reporting that the U.S. President said, "The fact is that the United States has trade deficits with many, many countries, and we cannot allow that to continue. And we'll start with South Korea right now.").

37. VCLT, *supra* note 4, art. 26. The Vienna Convention on the Law of Treaties reiterates that "every treaty in force is binding upon the parties to it and must be performed by them in good faith." *Id.* The European Union expressed concern that the U.S. strategy would "undercut European solidarity in NATO and the European Union so the United States can exercise its economic and military power to shape relations with individual countries, just as China and Russia seek to do" and according to François Heisbourg, a French political analyst, "Europeans realize that...he [the U.S. President] wants to dismantle the multilateral order created 70 years ago that he believes limits American power." Steven Erlanger, *Amid the Trumpian Chaos, Europe Sees a Strategy: Divide and Conquer*, N.Y. TIMES (July 13, 2018), https://www.nytimes.com/2018/07/13/world/europe/trump-europe.html [https://perma.cc/G9D7-CGNU].

by Curtis Bradley and Jack Goldsmith.[38] The United States is not a state party to several important treaties such as the Convention on the Rights of the Child,[39] Convention on the Law of the Sea,[40] Land Mines Convention,[41] Kyoto Protocol,[42] and the Rome Statute of the International Criminal Court.[43]

Moreover, United States courts have not consistently supported international law which, again, detracts from the obligation to perform international treaties in good faith. International law is, for the most part, enforced within domestic courts and thus domestic courts play a crucial role in the promotion of international rule of law.[44]

In light of the above, Part II of this Article discusses the impact of the executive branch's approach to international law. Part III discusses recent jurisprudence of U.S. courts that has overall trended towards a more restrictive approach to international law. Because there can be legitimate concerns as to whether international law or international courts always act in the interest of the United States, Part IV revisits the basics of international law in order to assess whether international law needs to do more to support the national interests of the United States. Part V makes recommendations and provides the conclusion.

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38. Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1211 (2018) (noting the "reduction internationally in the number of multilateral treaties").

39. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11 &chapter=4&clang=_en [https://perma.cc/DX82-GKL6].

40. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en [https://perma.cc/Z6JU-HGU3].

41. United Nations Convention on Land Mines, available at https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.44_convention%20antipersonnel%20mines.pdf [https://perma.cc/JUX6-E26C] (last visited May 12, 2021).

42. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-a&chapter=27&clang=_en [https://perma.cc/7K97-32FA].

43. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf [https://perma.cc/A7R9-MWR8].

44. For the most part, International Law relies upon domestic courts for enforcement. For example, between 1946 and 2000 International Court of Justice handled about 70 cases. *See* Karen Mingst, *International Court of Justice*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/International-Court-of-Justice [https://perma.cc/FT5V-NE57] (last visited on Jan. 3, 2020); *see also* American International Law Cases, Fourth Series: 2006 – Present, OXFORD UNIV. PRESS (Apr. 5, 2018), https://global.oup.com/academic/product/american-international-law-cases-fourth-series-9780190875015?lang=en&cc=us# [https://perma.cc/JL5J-DKS3] (last visited on Jan. 3, 2020) (Oxford University Press has an annual reporter series that compiles approximately 300 cases decided by U.S. courts issuing opinions involving international law related issues over twelve volumes.).

I. RECENT EXECUTIVE AND LEGISLATIVE APPROACH TO INTERNATIONAL LAW

The United States has had a long-running love-hate relationship with international law in general and international organizations and their agencies, as well.[45] Historically, the United States has been the harbinger of norms that were developed for the first time in its domestic crucible and were subsequently internationalized for all, human rights[46] being just

45. Alvarez, *supra* note 28, at 405–06. One way the United States can have a dramatic impact on international rule of law is to withhold its financial contributions to multilateral institutions, such as the United Nations, or attach conditions to such contributions, unless they change the way they conduct business in relation to the United States. *Id.* This is an effective bargaining tool because withholding the funds denies such organizations vital funding that they need to survive. *Id.* The United States is the largest single contributor to the U.N. financial system. *See, e.g.*, Amanda Shendruk, Laura Hillard & Diana Roy, *Funding the United Nations: What Impact Do U.S. Contributions Have on UN Agencies and Programs?*, COUNCIL ON FOREIGN RELS. (June 8, 2020, 8:00 AM), https://www.cfr.org/article/funding-united-nations-what-impact-do-us-contributions-have-un-agencies-and-programs [https://perma.cc/44AL-NJXV] (the United States contributed more than $10 billion in 2018, roughly one fifth of the United Nations' collective budget). Furthermore, recently the United States has on many occasions implemented this policy of refusing or withholding its contributions. *See id.* (noting that the U.S. has raised complaints about the amount that it contributes in the past and that if the United States followed through on proposed cuts, then the United Nations would be significantly impacted along with it its ability to carry out its objectives); John Fritze & Deirdre Shesgreen, *Pay freeze at the UN? Trump administration owes the United Nations $1 Billion*, USA TODAY (Oct. 9, 2019, 3:15 PM), https://www.usatoday.com/story/news/politics/2019/10/09/donald-trump-dismisses-united-nations-deficits-says-others-should-pay/3917554002/ [https://perma.cc/8UT8-EEYQ] (reporting that the U.S. President questioned the value of the United Nations and told the multinational organization that "[t]he future does not belong to globalists. The future belongs to patriots," and that "[t]he future belongs to sovereign and independent nations."). José E. Alvarez has argued that this practice of withholding or conditioning contributions is "unilateralism that attempts, with some success, to turn a multilateral forum intended to voice the views and needs of all into a branch office of the U.S. Department of State." Alvarez, *supra* note 28, at 407. Indeed, it has not always been this way. In 1962, the United States indicated in its brief to the International Court of Justice in the *Certain Expenses* case that each nation has a legal duty to pay its assessed contribution to the United Nations. Certain Expenses of the United Nations, 1962 I.C.J. Pleadings 180 (Jan. 22, 1962), https://www.icj-cij.org/public/files/case-related/49/11781.pdf [https://perma .cc/HNG7-EV4N]; *see also* Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151 (July 20, 1962), https://www.icj-cij.org/public/files/case-related/49/049-19620720-ADV-01-00-EN.pdf [https://perma.cc/9STY-BD5Z].

46. However, the human rights record of the United States remains a mixed one. *See* Doug Cassel, *The United States and Human Rights Treaties: Can We Meet Our Commitments*, 41 HUM. RTS. 5, 5 (2015) (noting that while "[t]he United States has a strong human rights record in many respects. . . . [c]ompared to other countries . . . there is another side to the story. . . . [T]he CIA and military [have] tortured prisoners, but few prosecutions or civil damages judgments resulted. The United States continues to detain prisoners indefinitely without trial, and few are released on habeas corpus. . . . [and] engage in questionable killings by unmanned drones and intrusive and expansive NSA surveillance. Racial minorities suffer police violence and disproportionate rates of incarceration in substandard facilities. Many Native Americans live in abominable

one instance of that. The United States—arguably the most successful federalized polity in the world which makes it a "world" in microcosm—was uniquely positioned for experimentation on various norms that would later be internationalized.

At the same time, the United States remained a discrete nation-state on the global stage that had national interests to assert against other countries. Whenever those interests clashed with those of other countries, the tendency was to assert a more nationalistic stance versus other nations. The epidemy of that tendency is American exceptionalism. In more recent parlance, that position amounts to "America First."[47] It is a worldview that holds that "the United States should act based on its perceived national interests, not international rules."[48] But it is not as if that objective can only be achieved through that paradigm. Put differently, the national interests of the United States are not diametrically irreconcilable with the pursuit of a more collaborative paradigm. It is possible to imagine a world in which U.S. national interests can be protected while the United States is working in collaboration with other countries, because the United States is at its best when it leads rather than when it retreats from the international stage.[49]

The "making friends" strategy is perceived to be the best way to garner international support for the United States' interests both domestically and abroad.[50] International law recognizes and supports the notion of nation-states and it is not premised on the suppression of national interest. The founding principle of the Charter of the United Nations is national sovereignty.[51] Thus, the idea that international law, or international organizations for that matter, are irreconcilable with the pursuit of national interest is a misrepresentation. It is urgent to emphasize the significance of international law and institutions at this time because, while opposition to international law and institutions is

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conditions . . . . [American] laws do not treat economic, social, and cultural rights as human rights.").

47. Catherine Amirfar & Ashika Singh, *The Trump Administration and the Unmaking of International Agreements*, 59 HARV. INT'L L. J. 443, 443 (2018).

48. Koh, *supra* note 9, at 420.

49. *See* Amirfar & Singh, *supra* note 47, at 443 (arguing that, far from being harmful, international "commitments long have served U.S. national interests").

50. In general, the U.S. Administration's approach during the Obama era can be summed up by the following four principles: (1) principled engagement; (2) diplomacy as a critical element of smart power; (3) strategic multilateralism; and (4) the notion that following universal standards, not double standards, and following rules of domestic and international law, as well as living by our values makes us stronger and safer. *See* Harold Hongju Koh, U.S. Dep't of State Legal Adviser, Address Before the Annual Meeting of the American Society of International Law (Mar. 25, 2010), https://2009-2017.state.gov/s/l/releases/remarks/139119.htm [https://perma.cc /K77Z-SXMQ].

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

nothing new, what used to be at the periphery appears to be going mainstream and threatening the very core of international rule of law.[52] There is overwhelming evidence that the animus towards international law is real and needs to be taken seriously.[53]

Assuming, arguendo, that what is said about international law and institutions is true, what are the chances that national interest can be realistically achieved at the expense of other nations? International law is enforced on the basis of the principle of reciprocity[54] and so the United States might not be successful in asserting its interest while the rest of the world sits by and does not push back. It has been noted that,

> [T]here is a practical reason for the United States to abide by its international legal obligations: reciprocity. It is in our own national interest to treat international legal obligations

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52. *See* Amirfar & Singh, *supra* note 47, at 443 (observing that the "America First" "platform has since manifested in part as skepticism of, if not outright hostility to, the rules-based, interconnected international order that the United States had played a central role in painstakingly constructing since World War II").

53. *See, e.g.*, Donald Trump, U.S. President, Statement by President Trump on the Paris Climate Accord (June 1, 2017), https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-trump-paris-climate-accord/ [https://perma.cc/Q5K7-W8X6] (the U.S. President proclaiming that "[a]s President, I can put no other consideration before the wellbeing of American citizens. The Paris Climate Accord is simply the latest example of Washington entering into an agreement that disadvantages the United States to the exclusive benefit of other countries."). It is unlikely that the Paris Accord was made to the exclusive benefit of the other countries. But what this statement reflects is that there is nothing good in this particular treaty for the United States and thus there is no reason to participate in it. It is instructive that other developed countries have remained in the accord despite the U.S. position. While withdrawing the U.S. from the Iran nuclear deal (the Joint Comprehensive Plan of Action, or "JCPOA"), the U.S. President described the deal in the following terms: the "so-called "Iran deal" was supposed to protect the United States and our allies from the lunacy of an Iranian nuclear bomb," but instead, it was a "disastrous deal [that] gave [the Iranian] regime—and it's a regime of great terror—many billions of dollars, some of it in actual cash . . . this was a horrible, one-sided deal that should have never, ever been made." Donald Trump, U.S. President, Remarks by President Trump on the Joint Comprehensive Plan of Action (May 8, 2018), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-joint-comprehensive-plan-action/ [https://perma.cc/F5S5-6B6D]. The U.S. President ended by announcing that "[i]n light of these glaring flaws, I announced last October that the Iran deal must either be renegotiated or terminated." *Id.* It is instructive that none of the other developed countries have so far joined the United States in exiting the Iran Deal. Meanwhile, none of the promised renegotiation of the treaty has taken place and U.S.-Iran relations tensions only exacerbated when the U.S. ordered the unilateral use of force on Iran's top military commander Qasem Soleimani. *See* Donald Trump, U.S. President, Remarks by President Trump on the Killing of Qasem Soleimani (Jan. 3, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-killing-qasem-soleimani/ [https://perma.cc/2ZXU-JERK] (the U.S. President announcing that "[l]ast night, at my direction, the United States military successfully executed a flawless precision strike that killed the number-one terrorist anywhere in the world, Qasem Soleimani.").

54. *See generally* John W. Head, *The United States and International Law After September 11*, 11 KAN. J. L. & PUB. POL'Y 1 (2001–2002).

> as binding on us so that we can continue to expect other states to take their own international legal obligations seriously. . . . If we disregard . . . our treaty commitments . . . then we cannot easily press other states to honor their own treaty commitments.[55]

Examples of reciprocity in action and the futility of withdrawal are plentiful. When the United States gave notice that it was withdrawing from the Intermediate Range Nuclear Forces Treaty (Nuclear Forces Treaty), Russia reciprocated by withdrawing as well.[56] One of the main reasons for the proliferation of international treaties, including the Nuclear Forces Treaty entered after the end of the Second World War, was the promotion and maintenance of international peace and security.[57] It may very well be true that Russia had not been compliant and that China, which was not a party to the treaty, was making significant progress in weapons development without any constraints. However, there doesn't seem to have been sufficient effort put into saving the treaty by persuading Russia to come back into compliance, while allowing the United States to make up for any effects arising from Russian non-compliance and persuading China to accede the treaty regime or face certain consequences such as economic sanctions. The alternative—having no arms reduction treaty to restrain the three nations from entering into an unprecedented new arms race, with the accompanying dangers of a nuclear conflagration—is unfathomable.

Another example of the futility of the "withdraw and rejoin" approach relates to the Trans-Pacific Partnership. Not only did the partnership not collapse because of the withdrawal of the United States, it diminished the influence of the United States in the region, particularly against an increasingly strong economic nemesis—China. When the United States withdraws, China is usually only too eager to fill the vacuum. As one observer noted, staying in the Trans-Pacific Partnership would have "set the U.S. up with 11 countries to take on China."[58] The United States unilaterally taking on China through the use of tariffs in response to

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55. *Id.*

56. Veronica Stracqualursi, Nicole Gaouette, Barbara Starr & Kylie Atwood, *US Formally Withdraws From Nuclear Treaty with Russia and Prepares to Test New Missile*, CNN POLITICS (Aug. 2, 2019, 1:10 PM), https://www.cnn.com/2019/08/02/politics/nuclear-treaty-inf-us-withdraws-russia/index.html [https://perma.cc/9MX6-3M9U].

57. U.N. Charter pmbl. (The Charter of the United Nations opens with a solemn proclamation and reminder that the primary purpose of the United Nations is "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.").

58. Brendan Cole, *Ohio Farmer Who Backed Trump Says He Won't Be Voting For Him in 2020: 'I Have To Protect My Business,'* NEWSWEEK (Aug. 9, 2019, 9:08 AM), https://www.newsweek.com/cnbc-trade-war-soy-beans-gribbs-ohio-1453461 [https://perma.cc/GVM3-9DT8].

China's unfair trade practices does not appear to have been an effective strategy.[59]

The United States withdrew from the Iran Nuclear Deal,[60] but it was unsuccessful in its push to have the allies do likewise.[61] None of the U.S. allies have left the Iran Nuclear Deal. Meanwhile Iran was welcomed into what can be called the Eastern Axis (China, India, Russia and Japan) and only two nations seemed enthusiastic about the administration's chaotic approach to Iran—Israel and Saudi Arabia.[62]

Instead of the traditional leadership role promoting international rule of law and respect for human rights and democracy, the U.S. administration appeared to endorse or remained silent on those issues as

59. Some observers have noted that while it is good to take on China, it is important to do so using an appropriate approach. For example, one observer noted that "[t]o take on China there has to be a multilateral approach. One country can't take on China." Mary Papenfuss, *AFL-CIO Chief Lashes Trump Administration For Hurting American Workers*, HUFFPOST (Sept. 2, 2019, 2:27 AM), https://www.huffpost.com/entry/richard-trumka-afl-cio-trump-hurting-american-workers_n_5d6c66f9e4b0cdfe057214bf [https://perma.cc/U2WG-CTVT].

60. Mark Landler, *Trump Abandons Iran Nuclear Deal He Long Scorned*, N.Y. TIMES, (May 8, 2018), https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html [https://perma.cc/BD6S-EKFQ]. The Arms Control Association describes the Joint Comprehensive Plan of Action (JCPOA) or Iran Nuclear Deal as "a detailed, 159-page agreement with five annexes reached by Iran and the P5+1 (China France, Germany, Russia, the United Kingdom, and the United States) on July 14, 2015," which was subsequently "endorsed by UN Security Council Resolution 2231, adopted on July 20, 2015." *The Joint Comprehensive Plan of Action (JCPOA) at a Glance*, ARMS CONTROL ASS'N, https://www.armscontrol.org/factsheets/JCPOA-at-a-glance [https://perma.cc/26HE-U4W2] (last visited on Aug. 1, 2019).

61. Kali Robinson, *What Is the Status of the Iran Nuclear Agreement?*, COUNCIL FOREIGN REL. (Feb. 25, 2021, 7:00 AM), https://www.cfr.org/backgrounder/what-iran-nuclear-deal (reporting that "[f]ollowing the U.S. withdrawal, several countries, U.S. allies among them, continued to import Iranian oil under waivers granted by the Trump administration, and Iran continued to abide by its commitments").

62. David Wainer, *Trump Isolated on Iran as World Sees Confusion in U.S. Strategy*, BLOOMBERG (May 18, 2019, 4:00 AM), https://www.bloomberg.com/news/articles/2019-05-18/trump-isolated-on-iran-as-world-sees-confusion-in-u-s-strategy [https://perma.cc/AR4X-LE7P].

exemplified by the cases of North Korea,[63] Russia,[64] Venezuela[65] and

63. The U.S. Administration began a series of negotiations with North Korea aimed at convincing the North Korean regime to dismantle its Nuclear Weapons program in exchange for the lifting of economic sanctions. To date, those talks have been fruitless. Instead, the talks may have legitimized the North Korea regime to a degree and given it time to test and expand its nuclear arsenal. *See* Andrew Blake, *Defector says Trump is 'legitimizing' Kim Jong-un Regime*, WASH. TIMES (July 6, 2019), https://www.washingtontimes.com/news/2019/jul/6/donald-trump-legitimizing-kim-regime-north-korea-v/ [https://perma.cc/W8ZJ-6NST]; Sharon Shi and Clément Bürge, *While Trump and Kim Talk, North Korea Appears to Expand Its Nuclear Arsenal*, The WALL ST. J. (July 27, 2019, 11:23 AM), https://www.wsj.com/articles/while-trump-and-kim-talk-north-korea-appears-to-expand-its-nuclear-arsenal-11564059627 [https://perma.cc/ZF7U-75CS]. Even if engaging North Korea is worth trying, the strategy is likely to have only limited success without the support of China—North Korea's greatest supporter—with which the United States is engaged in a protracted trade war. *See* Koh, *supra* note 9, at 448 (noting that after causing diplomatic waves with the declaration that recognition of Taiwan was being considered, "Trump has now been schooled by Beijing [China] that he needs Chinese cooperation to put diplomatic pressure on Pyongyang [North Korea]."). It is unlikely that North Korea will give up its nuclear weapons just because of the mere promise of economic prosperity until it is "confronted by concerted, unified multilateral diplomacy and relief from sanctions." *Id.* at 448. A multilateral approach resembling the Six Party Talks (the two Koreas, Russia, China, Japan, Taiwan, and the United States) would probably be a better approach. *Id.* at 449.

64. From crackdown on political opposition and torture to restrictions on freedoms of assembly and speech, disability, sexual and gender discrimination, Russia has reportedly violated human rights, and yet the U.S. government has not been able to speak up clearly and equivocally in denunciation of those acts. *See Russia Events of 2018*, HUM. RS. WATCH, https://www.hrw.org/world-report/2019/country-chapters/russia [https://perma.cc/6YC6-JX4G] (last visited on Aug. 17, 2019). Russia's continued support of rebels and atrocities committed in Eastern Ukraine have gone largely unaddressed by the United States in recent years. *See* Koh, *supra* note 9, at 452–53.

65. A report of the United Nations Human Rights Council indicates that over the last decade, Venezuelan authorities deployed a strategy "aimed at neutralizing, repressing and criminalizing political opponents and people critical of the Government." *See* Human Rights Council, Rep. of the U.N. High Comm'r for Hum. Rts. on the Situation of Human Rights in the Bolivarian Republic of Venezuela, U.N. Doc. A/HRC/41/18, at 7 (Oct. 9, 2019), https://undocs.org/en/A/HRC/41/18 [https://perma.cc/JV8T-97TM]. Additionally, rampant corruption in Venezuela has led to a political and humanitarian crisis of gigantic proportions. Research by Human Rights Watch and Center for Humanitarian Health and the Center for Public Health and Human Rights at the Johns Hopkins Bloomberg School of Public Health found,

> [A] health system in utter collapse with increased levels of maternal and infant mortality; the spread of vaccine-preventable diseases, such as measles and diphtheria; and increases in numbers of infectious diseases such as malaria and tuberculosis (TB). Although the government stopped publishing official data on nutrition in 2007, research by Venezuelan organizations and universities documents high levels of food insecurity and child malnutrition, and available data shows high hospital admissions of malnourished children. A massive exodus of Venezuelans—more than 3.4 million in recent years, according to the UN—is straining health systems in receiving countries.

Saudi Arabia.[66] The U.S. government declined taking decisive action such as imposing sanctions to ensure that regimes in those countries understand that human rights atrocities have consequences. The United States has a unique leadership role that can be exercised by speaking out against violations of international norms.

The muted response of the U.S. government to Russian interference in the 2016 electoral process[67] in the U.S. can be tantamount to condoning of those actions. The Charter of the United Nations provides that one of the purposes of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."[68] With respect to this purpose, the Charter further provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or *in any other manner inconsistent with the Purposes of the United Nations*."[69] Interference in the electoral process is inconsistent with these Charter provisions. The United States should have considered using appropriate lawful countermeasures that would target Russian cyber-assets that were used to attack the electoral systems in the United States.[70] Yet, the U.S. Senate repeatedly rejected

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Venezuela's Humanitarian Emergency—Large-Scale UN Response Needed to Address Health and Food Crises, HUM. RTS. WATCH (Apr. 4, 2019), https://www.hrw.org/report/2019/04/04/venezuelas-humanitarian-emergency/large-scale-un-response-needed-address-health [https://perma.cc/SW2X-8ZNY].

66. Margaret McGuinness, *Paying Lip Service to Human Rights: The Value of Presidential Human Rights Talk*, 56 WASHBURN L. J. 471, 486 (2017). *See also* Rex Tillerson, Sec'y of State, Remarks to U.S. Department of State Employees (May 3, 2017), https://2017-2021.state.gov/remarks-to-u-s-department-of-state-employees/index.html [https://perma.cc/KN9P-MWFN] (stating that "we really have to understand, in each country or each region of the world that we're dealing with, what are our national security interests, what are our economic prosperity interests, and then as we can advocate and advance our values . . ."). After the blatant and openly brutal murder of Khashoggi in the Saudi Arabian embassy in Istanbul, Turkey, the U.S. went ahead with the sale of American weapons to the regime and the U.S. Senate "failed to override President Donald Trump's veto of three resolutions that would have stopped the sale of Raytheon Co precision-guided munitions (PGMs) to Saudi Arabia." Patricia Zengerle, *U.S. Lawmakers Still Plot to Push Saudi Arabia on Rights, Despite Trump*, REUTERS (Aug. 1, 2019, 5:44 PM), https://www.reuters.com/article/us-usa-saudi-arms/u-s-lawmakers-still-plot-to-push-saudi-arabia-on-rights-despite-trump-idUSKCN1UR5T1 [https://perma.cc/F7RH-TWEN].

67. *See Report on the Investigation into Russian Interference in the 2016 Presidential Election*, U.S. DEP'T OF JUST. 57 (2019), https://www.justice.gov/storage/report.pdf.

68. U.N. Charter art. 1, ¶ 2.

69. *Id.* art. 2, ¶ 4 (Italicization supplied).

70. *See, e.g.*, Case Concerning the Air Services Agreement of 27 March 1946 between the United States of America and France, Arbitral Award, 18 Rep. Int'l Arb. Awards 417, 54 I.L.R. 304 (Dec. 9, 1978), https://legal.un.org/riaa/cases/vol_XVIII/417-493.pdf [https://perma.cc/6CVM-34YX] (an international arbitral tribunal, concluding in that case that the U.S.

efforts to enact legislation that would deter further interference in the U.S. elections. Those efforts would probably provide for federal funding to ensure that the electoral process is secure and deters foreign influence. Not enacting such legislation[71] is tantamount to sending the wrong message to foreign actors, including Russia, because it is akin to leaving the door open and the building less secure with the awareness that the enemy is still planning to attack.[72]

Ignoring international norms is equivalent in some respects to what China and Russia have done in recent times to erode international rule of law. For example, when the Philippines brought before the Permanent Court of Arbitration (PCA) a dispute against China arising over the South China Sea,[73] China refused to attend the proceedings or to abide by the decision of PCA.[74] Russia also acted in a similar manner with respect to a case brought by Ukraine before the International Tribunal for the Law of the Sea (ITLOS), in response to Russia's seizure of three Ukrainian naval vessels and the arrest and detainment of the 24 servicemen aboard

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countermeasure in response to an unlawful act by France was justified and proportionate to the prior illegal act by France).

71. U.S. Congress passed the Countering America's Adversaries Through Sanctions Act which was veto proof, but the U.S. government has not been pushing for more legislation that would specifically target electoral security. See Countering America's Adversaries Through Sanctions Act (CAATSA), Pub. L. No. 115–44, 131 Stat. 886 (2017), https://www.congress.gov/bill/115th-congress/house-bill/3364/text [https://perma.cc/C5B2-9KEM]. In fact, the U.S. government has been reluctant to impose any further sanctions against Russia or adopt stiffer legislation to the same end. *See* Patricia Zengerle, *U.S. Senators to Try Again to Pass Russia Sanctions Bill*, REUTERS (Feb. 13, 2019), https://www.reuters.com/article/us-usa-russia-sanctions-exclusive/u-s-senators-to-try-again-to-pass-russia-sanctions-bill-idUSKCN1Q22J9 [https://perma.cc/YD84-6BWB] (reporting that "Trump . . . [had] gone along with some previous congressional efforts to increase sanctions on Russia, though sometimes reluctantly.").

72. Zachary B. Wolf, *Russians are still meddling in US elections, Mueller said. Is anybody Listening?*, CNN (July 25, 2019, 2:04 PM), https://www.cnn.com/2019/07/24/politics/russia-trump-election-interference/index.html [https://perma.cc/6KT4-6GB2] (reporting that Special Counsel Mueller said that "[t]hey're doing it [interfering in U.S. electoral process] as we sit here."). In response to criticisms that the U.S. Senate was not doing anything about securing the U.S. electoral process and safeguarding the sovereignty of the United States, Senate Leader Mitch McConnell, stated that "I'm open to considering legislation but it has to be directed in a way that doesn't undermine state and local elections. The Democrats would like to nationalize everything. They want the federal government to take over the election process because they think that would somehow benefit them." Ted Barrett, Manu Raju & Clare Foran, *Why Mitch McConnell is Rejecting Hill Calls on Election Security, As House Dems Plan New Push*, CNN (June 14, 2019, 4:46 PM), https://www.cnn.com/2019/06/14/politics/mcconnell-election-security/index.html [https://perma.cc/2LD8-CDKP].

73. South China Sea Arbitration (Philippines v. China), Case No. 2013-19, Award, ¶¶ 1–2, 4, 7–10 (Perm. Ct. Arb. 2016), https://pcacases.com/web/sendAttach/2086 [https://perma.cc/ZAC8-5NCN].

74. *Id.* ¶ 15.

the vessels on November 25, 2018, by subsequently refusing to attend any of the proceedings brought by Ukraine before the ITLOS.[75]

Meanwhile, the U.S. government has not been forceful enough to condemn Russia's violation of the United Nations Charter vis-à-vis its aggression against Ukraine's sovereignty and territorial integrity.[76] Far from condemning those actions, the U.S. government has instead supported the idea of readmitting Russia to the group of the seven most industrialized nations (G8) without Russia first giving up Crimea.[77] These actions and inaction tend to embolden those regimes and legitimizes their actions. That is what happened in regard to the Paris Agreement on Climate Change. Professor Jack Smith observed that the U.S. government's assaults on the "Paris Agreement framework have given some nations cover to take it less seriously and have created disincentives for other nations to meet their Paris pledges while the heavy-polluting United States violates its own pledge."[78]

In regard to the 2015 Paris Agreement on Climate Change, it should be noted that the withdrawal of the United States—with no allies following suit—only resulted in further United States isolation from a platform that is crafting hi-tech solutions to the overwhelming scientific evidence of global climate change that is impacting the entire planet.[79]

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75. *See* Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Case No. 26, Order of May 25, 2019, ¶¶ 25, 118, https://www.itlos.org/en/main/cases/list-of-cases/case-concerning-the-detention-of-three-ukrainian-naval-vessels-ukraine-v-russian-federation-provisional-measures/ [https://perma.cc/2LBW-SAZD] (ordering that the Russian Federation immediately release the 24 detained Ukrainian servicemen and allow them to return to Ukraine and release the Ukrainian naval vessels and return them to the custody of Ukraine). Russia refused to abide by the order. *See* Halya Coynash, *Russia Refuses to Free 24 Ukrainian POWS Despite an International Tribunal Order it Must Obey*, HUM. RTS. IN UKR. (June 26, 2019), http://khpg.org/en/index.php?id=1561498611 [https://perma.cc/7ANM-XPKZ].

76. *See* U.N. Charter art. 2, ¶ 4 (The U.N. Charter provides that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.")

77. Kylie Atwood & Betsy Klein, *Trump and Macron Agree That Russia Should Be Invited To Next Year's G7 Conference, Senior Admin Official Says*, CNN (Aug. 7, 2019, 11:25 AM), https://www.cnn.com/2019/08/20/politics/donald-trump-russia-g8-g7/index.html [https://perma.cc/5MYL-2MJJ] (observing that this is yet "another example of Trump's failure to condemn Russia for its aggressive behavior and his ongoing push to restore more normal relations.").

78. Goldsmith, *supra* note 8, at 412.

79. Because the Paris Agreement on Climate Change entered into force in 2016, it was unclear what short-term legal effect such an announcement would have beyond the refusal to comply with the agreement. The Paris agreement provides that notice to withdraw from the treaty cannot be submitted until after "three years from the date on which this Agreement has entered into force." The earliest that the U.S. could give an effective notice to withdraw was November 2019. Paris Agreement of the United Nations Framework Convention on Climate Change art. 28, ¶ 1, Apr. 22, 2016, T.I.A.S. No. 16-1104, https://www.state.gov/wp-content/uploads/2019/02/16-

Perhaps it is not surprising that allies would sometimes not walk the same line as the United States, because even allies do not like to be pushed around. As one U.S. leader acknowledged during a visit to Europe, "there have been times where America has shown arrogance and been dismissive, even derisive."[80]

It is not just withdrawal from international treaties that can be problematic. Equally problematic is the slow ratification of international treaties, a process that may result in the languishing of those treaties. The United States Senate has been slow in its ratification of international treaties even after they have been signed by the United States. In other cases, the United States ratifies international agreements but neglects to meet its obligations under the treaty.

For example, U.S. Senate ratified International Covenant on Civil and Political Rights in 1994, and it obligated the U.S. to produce reports on racial discrimination in the United States every two years. "The reports were to include anywhere in the world where the U.S. military is in charge. In other words, the United States military no matter where it was on the globe, agreed to report discrimination."[81] However, the U.S. failed to live up to those promises. On December 30, 2011, the U.S. filed its fourth report on compliance with the Covenant, over a year late and lacking in the agreed upon substance.[82] In particular, the report failed to mention anything about police reactions to Occupy Protests and offered next to nothing on compliance at the state and local level.[83] Furthermore, the report failed to address Abu Ghraib, or Guantanamo and other areas of interest to the U.N. Human Rights Committee in the report.[84] By

1104-Multilateral-Environment-and-Conservation-Climate-Change.pdf [https://perma.cc/D9YV-BB2P] (entered into force Nov. 4, 2016) [hereinafter Paris Agreement].

80. Barack Obama, U.S. President, Remarks by President Obama at Strasbourg Town Hall (Apr. 3, 2009), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-obama-strasbourg-town-hall [https://perma.cc/57UE-YFD3].

81. Leslie Griffith, *U.S. Quietly Breaks U.N. Treaty*, HUFFPOST (Feb. 25, 2008, 2:42 PM), http://www.huffingtonpost.com/leslie-griffith/us-quietly-breaks-un-trea_b_88347.html [https://perma.cc/3U49-VS4E].

82. *Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights*, U.S. DEP'T OF STATE (Dec. 30, 2011), https://2009-2017.state.gov/j/drl/rls/179781.htm [https://perma.cc/F3EV-HVH5].

83. *Id.*

84. *See* U.N. Hum. Rts. Comm., *Concluding observations on the fourth periodic report of the United States of America*, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014), https://undocs.org/CCPR/C/USA/CO/4 [https://perma.cc/DM9D-CNLD] (observing that the U.N. Human Rights Committee was "concerned at the limited number of investigations, prosecutions and convictions of members of the Armed Forces and other agents of the United States Government, including private contractors, for unlawful killings during its international operations, and the use of torture or other cruel, inhuman or degrading treatment or punishment of detainees in United States custody, including outside its territory, as part of the so-called "enhanced interrogation techniques."").

failing to provide these reports in a timely fashion, or to live up to the expectations agreed upon in the Covenant, it made the U.S. appear to not take this agreement seriously. This shows a serious lack of compliance with international agreements and raises the question of whether this was ratified just for show. It takes more than entering into an agreement to change the way the world views the United States. The U.S. must not only enter into these agreements but show that it takes these agreements seriously and that it is willing to fulfill its obligations under them.

It must be acknowledged, however, that the withdrawal or "repeal first, replace later" approach has had success in some cases. The United States announced that it would withdraw from NAFTA—the North America Free Trade Agreement and then replace it with a version that better comports with the national interest of the United States. The fortunes of Mexico and Canada are so inextricably intertwined with those of the United States that the three countries did all they could to agree on a replacement for the tripartite NAFTA—United States–Mexico–Canada Agreement (USMCA). For the United States in particular, replacing NAFTA was imperative in light of the "waning support in the rural sector due to [the U.S. administration's] trade wars."[85] If USMCA is what the United States says it is—that is, that it is the "largest, fairest, most balanced, and modern trade agreement ever achieved,"[86] "a colossal victory for our farmers, ranchers, energy workers, factory workers, and American workers,"[87] that replaces "outsourcing with a truly fair and reciprocal trade deal that will keep jobs, wealth, and growth right here in America,"[88] then it is a noteworthy achievement.

However, critics of UMSCA insist that "[t]he deal replacing the North America Free Trade Agreement (NAFTA) offers little for smaller farmers and will negatively impact consumers,"[89] because the deal did not "address low prices for products by independent family farmers,"[90] "[did] not reinstate "country of origin" labeling for beef, pork, and dairy products, thus making it harder for U.S. farmers to compete against cheaper imports,"[91] or address climate change, which ". . . does nothing

85. Brendan Cole, *Trump's New Trade Deal USMCA Was 'Oversold' and Will Hurt Smaller Farmers, Says Rural Coalition*, NEWSWEEK (Dec. 16, 2019, 12:22 PM), https://www.newsweek.com/usmca-trump-farms-rural-national-family-farm-coalition-1477459 [https://perma.cc/W9T4-XLS6].

86. Donald Trump, U.S. President Trump's Remarks by President Trump at a Signing Ceremony for the United States-Mexico-Canada Trade Agreement, MIRAGE, (Jan. 30, 2020), https://www.miragenews.com/us-president-trump-s-remarks-at-a-signing-ceremony-for-united-states-mexico-canada-trade-agreement/ [https://perma.cc/6KXV-T9YY].

87. *Id.*

88. *Id.*

89. Cole, *supra* note 85.

90. *Id.*

91. *Id.*

to curb the environmental damage that was part of the original NAFTA."[92] It may also be easier to withdraw from and replace a tripartite agreement than a more multilateral treaty like the Transpacific Partnership Agreement.

In a post-9/11 world, the challenge has also been whether the United States would disregard the international rule of law in its pursuit of the "war" against terrorists.[93] The challenge was whether the United States would pursue a multilateral rather than unilateral approach. In this respect, the U.S. has largely been successful. The multilateral approach would serve to "broaden the base of support among other countries, thus increasing the possibility of success in the overall anti-terrorist campaign."[94] The United States actively worked to block attempts to characterize U.S. objectives as a "clash of civilizations" or a religious war.[95] To avoid that result, the United States endeavored to show that it did not regard international terrorism as being synonymous with Islam. One U.S. President characterized the relationship between the Islamic world and America as one that was "based on mutual interest and mutual respect, and one based upon the truth that America and Islam are not exclusive and need not be in competition. Instead, they overlap, and share common principles - principles of justice and progress; tolerance and the dignity of all human beings."[96]

In sum, it cannot generally be concluded that the recent approach to international law has been effective in promoting the national interest of the United States. The withdrawal of the United States from international treaties and platforms may have delayed or prevented the achievement of important international objectives for the U.S. and international rule of law in general.

II. RECENT U.S. JUDICIAL APPROACH TO INTERNATIONAL LAW

The interpretation and application of international law presents another issue for the United States, as it is important to uphold domestic policies as well as be a supportive member in the international community. Overall, the record of the judicial branch has been to restrict the applicability of international law in the United States, while emphasizing U.S. law.

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92. *Id.*

93. *See generally* Head, *supra* note 54.

94. *Id.* at 8.

95. *Id.*; *see also*, Samuel P. Huntington, *The Clash of Civilizations*, 72 FOREIGN AFF. 22, 29 (1992–1993).

96. Barack Obama, U.S. President, Remarks by the President on a New Beginning at Cairo University, Cairo, Egypt (June 4, 2009), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-cairo-university-6-04-09 [https://perma.cc/4SHB-YEEU].

One example of the Supreme Court's restriction of international law was epitomized by United States decision in the *Medellin v. Texas*[97] (*Medellin*) which, in essence, determined that the U.S. did not have to comply with a decision of the International Court of Justice (ICJ) if U.S. law conflicted with international law. The United States Supreme Court decision in *Medellin* was in response to the ruling of the ICJ in the *Case Concerning Avena and Other Mexican Nationals* (*Avena*),[98] in which the ICJ required of the United States and, specifically, Texas, to conduct a retrial of several Mexican nationals who had been sentenced to death following criminal proceedings in Texas.[99]

In the *Avena* decision, the ICJ found that the U.S. violated the Vienna Convention on Consular Relations (VCCR), which required consular notification in cases of an alien undergoing criminal prosecution in a State party to that treaty.[100] In this case, the Mexican consulate had not been notified of the prosecution of the Mexican nationals.[101] In light of that, the ICJ determined that the Mexican nationals should not be executed without review and a determination that their rights under VCCR had not been compromised.[102] The U.S. Congress did not pass legislation that would obligate Texas to abide by the ICJ decision.[103]

The executive branch, however, issued a non-binding memorandum to urge Texas to comply.[104] Texas refused to review the Mexican national's case. On a petition for stay of execution, the U.S. Supreme Court rejected the petition on the grounds that the ICJ *Avena* decision was not self-executing and therefore had no binding effect in the U.S. absent an implementing legislation.[105] Medellin—one of the seven Mexican

97. 552 U.S. 491 (2008).

98. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12 (Mar. 31, 2004), https://www.icj-cij.org/public/files/case-related/128/128-20040331-JUD-01-00-EN.pdf [https://perma.cc/LY8E-LDGR] [hereinafter Avena].

99. *Id.* ¶ 153(11)

100. *Id.* ¶ 153(4)

101. *Id.*

102. *Id.* ¶ 153(9).

103. It is noteworthy that while the President George W. Bush Administration tried to steer away from international law at the beginning of that administration, towards the end it tried to re-engage international law. *See* Koh, *supra* note 9, at 420 (observing that "[a]fter September 11, George W. Bush, like Donald Trump, headed sharply toward a strategy of "disengage -black hole-hard power," but he visibly reverted toward the use of smart power by the time he left office.").

104. *See The Medellin "Memorandum" from the President*, OPINIOJURIS, http://opiniojuris.org/2005/03/02/the-medellin-memorandum-from-the-president/ [https://perma.cc/S7ZT-RBLZ].

105. *Medellin v. Texas*, 552 U.S. 491 (2008) (holding that "The *Avena* judgment creates an international law obligation on the part of the United States, but it is not automatically binding domestic law because none of the relevant treaty sources—the Optional Protocol, the U.N. Charter, or the ICJ Statute—creates binding federal law in the absence of implementing legislation, and no such legislation has been enacted.").

nationals—was then subsequently and promptly executed.[106] The United States then quickly withdrew from the Optional Protocol to the Vienna Convention on Consular Relations, whose provisions had been found by the ICJ to be binding on the United States as the basis for the compulsory jurisdiction of ICJ over disputes arising under the VCCR.[107]

The ICJ subsequently ruled that the U.S. was also in violation of its international obligations in not using whatever means necessary, such enacting legislation to implement the earlier *Avena* decision, in order to preserve the rights of the Mexican nationals.[108] This case exemplifies that the United States was not willing to enact legislation to fulfill its international obligations. In sum, the case illustrates the judiciary's prioritization of national law and procedures over international law, effectively endorsing the executive branch's failure to uphold its international law.[109] It is not as if the court was not aware that the refusal to uphold international obligations could have an impact on how other countries apply international law in cases affecting U.S. nationals. Justice Stevens warned in *Medellin v. Texas*[110] that the "costs of refusing to

106. Avena, *supra* note 98, ¶ 52.

107. *See* United Nations Treaty Collection, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-8&chapter=3 [https://perma.cc/9LNY-LT73], at endnote 1.

108. Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2009 I.C.J. Rep. 3, ¶ 61(2) (Jan. 19, 2009), https://www.icj-cij.org/public/files/case-related/139/139-20090119-JUD-01-00-EN.pdf [https://perma.cc/WM4E-RHEJ] [hereinafter Interpretation in Avena].

109. It is noteworthy that the U.S. Constitution puts international law at the same level with U.S. Federal Law, and thus subordinates state law to international law. *See* U.S. CONST. art. VI, cl. 2 (providing that "[t]his Constitution, and the Law of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby." Also, the Vienna Convention on the Law of Treaties—whose provisions the U.S. regards as consistent with customary international law—provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46." VCLT, *supra* note 4, art. 17. In spite of this, the U.S. sought to argue that the controversy between Texas and the U.S. government regarding whether Texas was obligated to give effect to the ICJ decision was "strictly a matter of United States domestic law," which appears to indicate that the U.S. neglected or simply refused to comply with an international obligation by its failure to ensure that U.S. domestic law was not at odds with international law. Interpretation in Avena, *supra* note 98. The U.S. cannot excuse this failure by pointing to the failure of the U.S. Congress to enact appropriate legislation because the executive branch could have implemented the ICJ decision through an executive agreement, which would be self-executing, as long as there is no conflicting Federal statute. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 115 (AM. L. INST. 1987).

110. Medellin v. Texas, 552 U.S. 491 (2008). The International Court of Justice (ICJ) held that the United States had violated Article 36(1)(b) of the Vienna Convention on Consular Relations by failing to inform 51 named Mexican nationals, including petitioner Medellín, of their Vienna Convention rights. Avena, *supra* note 98, ¶ 153(4). The ICJ found that those named individuals were entitled to review and reconsideration of their convictions and sentences

respect the ICJ's judgment are significant. The entire Court and the President agree that breach will jeopardize the United States' 'plainly compelling' interests in 'ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law.'"[111] Justice Stevens' warning is consistent with the perspective of the ICJ. In a follow-up decision, the ICJ emphasized that it is in the interest of states to take international obligations seriously.[112] The ICJ observed

> [C]onsiderations of domestic law which have so far hindered the implementation of the obligation incumbent upon the United States, cannot relieve it of its obligation. A choice of means was allowed to the United States in the implementation of its obligation and, failing success within a reasonable period of time through the means chosen, it must rapidly turn to alternative and effective means of attaining that result.[113]

ICJ even obliquely critiqued the U.S. Supreme Court's view of International Law:

> The Court notes – without necessarily agreeing with certain points made by the [U.S.] Supreme Court in its reasoning regarding international law – that the Supreme Court has stated that the *Avena* Judgment creates an obligation that is binding on the United States. This is so notwithstanding that it has said that the obligation has no direct effect in domestic

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regardless of their failure to comply with generally applicable state rules governing challenges to criminal convictions. *Id.* ¶ 153(9). President George W. Bush then issued a memorandum stating that the United States would "discharge its international obligations" under *Avena* "by having State courts give effect to the decision." Relying on *Avena* and the President's Memorandum, Medellín filed a second Texas state-court habeas application challenging his state capital murder conviction and death sentence on the ground that he had not been informed of his Vienna Convention rights. The Texas Court of Criminal Appeals dismissed Medellín's application as an abuse of the writ, concluding that neither *Avena* nor the President's Memorandum was binding Federal law that could displace the State's limitations on filing successive habeas applications. On appeal, the U.S. Supreme Court held that neither *Avena* nor the President's Memorandum constituted directly enforceable Federal law that pre-empts state limitations on the filing of successive habeas petitions.

111. *Medellin*, 552 U.S. at 491.

112. Interpretation in Avena, *supra* note 98, ¶ 4 (Mexico requested the ICJ to order that the United States must take any and all steps necessary to ensure that no Mexican national entitled to review and reconsideration under the *Avena* Judgment is executed unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation.).

113. *Id.* ¶ 47.

> law, and that it cannot be given effect by a Presidential Memorandum.[114]

The United States could have done exactly that in *Medellin v. Texas*. In a similar case, the United States tried to do what it should have done in *Medellin v. Texas*. In *Garcia v. Texas*,[115] the Supreme Court denied certiorari for Garcia after a denial for his application for post-conviction writ of habeas corpus and motion for stay of execution. Garcia, a Mexican national, was not granted consular access as guaranteed under Article 36 of the Vienna Convention on Consular Relations (VCCR).[116] This Article of the VCCR was established with the "view to facilitating the exercise of consular functions relation to nationals of the sending State," and provides for consular access to a nation of that State who is "arrested or committed to prison or to custody pending trial or is detained in any other manner."[117]

After being sentenced to death for the kidnapping, raping and murdering of a 16-year-old girl, the U.S. administration appealed to the U.S. Supreme Court to delay the impending execution of the Mexican national[118] in order to give Congress time to act on the Consular Notification Compliance Act, to provide the opportunity for the judicial review required by international law.[119] The State Department raised the concern of reciprocity, stating, "[i]f we don't protect the rights of non-Americans in the United States, we seriously risk reciprocal lack of access to our own citizens overseas."[120] The U.S. administration clearly did not want a repeat of the *Avena* case.

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114. *Id.* ¶ 36 (Emphasis added).

115. *Garcia v. Texas*, 565 U.S. 806 (2011) (stating "Petition for writ of certiorari to the Court of Criminal Appeals of Texas dismissed as moot."). *See also Ex parte Leal*, No. WR-41, 743-03, 2011 Tex. Crim. App. Unpub. LEXIS 484, at *2-3, 2011 WL 2581917 (Tex. Crim. App. June 27, 2011) (denying Garcia's second application for writ of habeas corpus as well as his motion for stay of execution).

116. *Garcia*, 564 U.S. at 940.

117. Vienna Convention on Consular Relations, art. 36, ¶ 1(b), Apr. 24, 1963, 596 U.N.T.S. 261 (entered into force Mar. 19, 1967), https://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf [https://perma.cc/2RMG-8HSH].

118. *Garcia*, 564 U.S. at 940.

119. Adam Liptak, *Mexican Citizen Is Executed as Justices Refuse to Step In*, N.Y. TIMES (July 7, 2011), https://www.nytimes.com/2011/07/08/us/08execute.html#:~:text=Mexican%20Citizen%20Is%20Executed%20as%20Justices%20Refuse%20to%20Step%20In,-By%20Adam%20Liptak&text=WASHINGTON%20%E2%80%94%20In%20a%205%2Dto,on%20death%20row%20in%20Texas [https://perma.cc/7FB5-TLLJ] (reporting that "split along ideological lines, the Supreme Court on Thursday evening rebuffed a request from the Obama administration that it stay the execution of a Mexican citizen on death row in Texas").

120. Reuters Staff, *U.S. seeks to limit damage of Texas execution case*, REUTERS (July 8, 2011, 5:35 PM), https://www.reuters.com/article/us-usa-mexico-execution/u-s-seeks-to-limit-damage-of-texas-execution-case-idUSTRE7676YT20110708?feedType=RSS&feedName=topNews [https://perma.cc/C3R8-TZ6R].

Solicitor General Donald B. Verrilli Jr. noted that "[t]he execution of Humberto Leal Garcia, who was sentenced to death for the 1994 crimes, 'would place the United States in irreparable breach of its international-law obligation . . .'."[121] The U.S. government added, "complying with its obligations to 'notify consuls in such cases would serve U.S. interests as well as those of the condemned man,'"[122] and would contribute to the "protection Americans abroad, fostering cooperation with foreign nations, and demonstrating respect for the international rule of law."[123] Unfortunately, the U.S. Supreme Court did not heed those concerns, and Garcia was executed.[124] This case did not go unnoticed. In response to this disregard for international agreements, Mexico openly condemned the execution, saying it violated an International Court of Justice's ruling ordering the United States to review capital convictions of Mexican nationals.[125]

There is still a major question of whether an ICJ judgment does or does not automatically become a part of U.S. domestic law.[126] What is sure is that the Vienna Convention on the Law of Treaties provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[127] The United States could, in appropriate circumstances, advocate for clauses in treaties that provide for dispute resolution by an international tribunal and indicate in those clauses that domestic courts of State parties treat decisions of such a tribunal as binding on their domestic courts.[128] The second approach could be for the executive branch, when submitting treaties to the Senate for advice and consent to ratification, to express its view as to the self-executing nature of these treaties.[129] If the Senate were to agree with the

121. CNN Wire Staff, *Obama and U.N. Seek Delay in Execution of Mexican National*, CNN (July 2, 2011), http://edition.cnn.com/2011/CRIME/07/01/texas.death.row.inmate/ [https://perma.cc/GD69-KE4J].

122. *FOREIGN NATIONALS: Obama Administration and U.N. High Commissioner Seek Relief for Texas Death Row Inmate*, DEATH PENALTY INFO. CTR. (July 5, 2011), https://deathpenaltyinfo.org/news/foreign-nationals-obama-administration-and-u-n-high-commissioner-seek-relief-for-texas-death-row-inmate [https://perma.cc/G76B-KH64].

123. CNN Wire Staff, *supra* note 121.

124. Liptak, *supra* note 119.

125. Jon Herskovitz, *Texas Executes Mexican National Despite Diplomatic Uproar*, Reuters (Jan. 22, 2014, 7:01 AM), https://www.reuters.com/article/usa-execution-texas-mexico/texas-to-execute-mexican-national-in-face-of-diplomatic-protest-idUSL2N0KW02K20140122 [https://perma.cc/FRW9-TM5Y].

126. *See* Joseph Keller, *Sovereignty vs. Internationalism and Where United States Courts Should Find International Law*, 24 PENN ST. INT'L. L. REV. 353, 372 (2005), https://elibrary.law.psu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1753&context=psilr [https://perma.cc/G2GR-VL2Z].

127. VCLT, *supra* note 4, art. 27.

128. *See* Keller, *supra* note 126, at 372.

129. *Id.*

executive branch's view, it is likely that the courts would accept the combined view of the political branches, although the judiciary would still have the authority to make the final determination.[130]

Medellin v. Texas and *Garcia v. Texas* are not isolated cases. There is a consistent pattern of judicial restriction of international norms that emerges out of many other cases going back several years. A result similar to *Medellin v. Texas* occurred in *Sanchez-Llamas v. Oregon.*[131] This decision was issued after the ICJ had made its decision in the *Avena* case. Once again, this case concerned the obligations of the United States under the VCCR. The case consolidated the appeals of Moises Sanchez-Llamas, a Mexican national charged for his involvement in an exchange of gunfire with police in Oregon, and Mario Bustillo, a Honduran national convicted of first-degree murder in Virginia.[132] On appeal, both defendants raised VCCR questions asking:

> (1) whether Article 36 of the Vienna Convention grants rights that may be invoked by individuals in a judicial proceeding; (2) whether suppression of evidence is a proper remedy for a violation of Article 36; and (3) whether an Article 36 claim may be deemed forfeited under state procedural rules because a defendant failed to raise the claim at trial.[133]

The court held that although "there are some times when a Convention violation, standing alone, might warrant suppression, or the displacement of a State's ordinarily applicable procedural default rules, neither Sanchez-Llamas' case nor Bustillo's belongs in that category."[134] The Court held that "[a]lthough the ICJ's interpretation deserves 'respectful consideration' . . . it does not compel [the Supreme Court] to reconsider [its] understanding of the [Vienna] Convention."[135] This case once again showed that the judicial branch was unwilling to recognize VCCR obligations.

There are some cases, however, in which the United States Supreme Court upheld norms of international law. For instance, in *Massachusetts v. EPA*,[136] the U.S. Supreme Court acknowledged a causal link between greenhouse gas emissions, global warming, hurricane strength and resulting damages, and as a result held that the Commonwealth of Massachusetts had standing to petition for review of an Environmental

130. *Id.*

131. Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006).

132. *Id.* at 339–42.

133. *Id.* at 342.

134. *Id.* at 364–365 (Ginsburg, J., concurring).

135. *Id.* at 353 (citing *Breard v. Greene*, 523 U.S. 371 (1998) which held that the Vienna Convention did not trump the procedural-default doctrine).

136. Massachusetts v. EPA, 549 U.S. 497 (2007).

Protection Agency (EPA) decision not to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act.[137] The Court's decision remanded back to EPA the issue of whether carbon emissions constitute human endangerment. In April 2009, the agency concluded the scientific review ordered by the Court and announced its "endangerment finding," officially declaring that greenhouse gases are pollutants that threaten public health and welfare.[138]

To the extent that the U.S. Supreme Court rejected international norms, however, several lower courts have followed its lead. For example, in *Igartúa v. U.S.*[139] the court reluctantly rejected the argument that international customary law and treaty law bound the United States to grant the right to vote to Puerto Ricans, on the grounds that the U.S. Constitution does not grant statehood to Puerto Rico.[140] In denying effect to what is almost a universal right to vote—arguably a norm of a customary international law[141]—the court argued that if an international norm of democratic governance exists, "it is at a level of generality so high as to be unsuitable for importation into domestic law."[142]

That refusal to uphold customary international law is in contrast to another lower court's approach in *Filartiga v. Pena-Irala*,[143] where the court allowed an Alien Tort Statute (ATS) claim to proceed, holding that "torture perpetrated under the color of official authority violated universally accepted norms of international human rights" and had to be deterred.[144]

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137. *Id.* at 534–35.

138. John M. Broder, *E.P.A. Clears Way for Greenhouse Gas Rules*, N.Y. TIMES (Apr. 17, 2009), https://www.nytimes.com/2009/04/18/science/earth/18endanger.html [https://perma.cc/MF6B-X7VG].

139. Igartúa v. U.S., 626 F.3d 592 (1st Cir. 2010).

140. *Id.* at 611–12.

141. The Universal Declaration of Human Rights (UDHR) proclaims that "[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives." G.A. Res. 217 (III) A, art. 21, ¶ 1, Universal Declaration of Human Rights, U.N. Doc A/810, at 75 (Dec. 10. 1948), https://undocs.org/en/A/RES/217(III) [https://perma.cc/Z2CW-7CHZ]. While the UDHR is not a treaty, its norms are arguably part of customary international law. *See International Human Rights Law: Non-Treaty Standards*, LAWS.' RTS. WATCH CAN., https://www.lrwc.org/library/know-your-rights-index/international-law/non-treaty-standards/ [https://perma.cc/LU48-MSHR] (last visited on July 18, 2019) (observing that "[s]ome international law scholars are of the view that the UDHR has the status of customary international law.").

142. *Igartua*, 626 F.3d at 602.

143. Filartiga v. Pena-Irala, 577 F. Supp. 860 (E.D.N.Y. 1984).

144. *Id.* at 861, 867. In fact, "[i]n the early 1980s, U.S. courts began to recognize alien plaintiffs' claims against dictators, war criminals, and terrorists for torture, slavery, genocide, and other egregious acts under the ATS. Courts recognized these claims as valid under the body of law known as "customary international law." *See* Vanessa R. Waldref, *The Alien Tort Statute After Sosa: A Viable Tool In The Campaign To End Child Labor?*, 31 BERKELEY J. EMP. & LAB. L. 160, 163 (2010).

It is noteworthy, however, that since the *Filartiga v. Pena-Irala* decision in the 80's, the U.S. Supreme Court has been walking back from the decision, in further restriction of international norms. In *Sosa v. Alvarez-Machain*,[145] for example, the court determined that the Alien Tort Statute (ATS) is solely a jurisdictional statute[146] and that it does not itself provide a cause of action.[147] In *Sosa*, the U.S. Supreme Court held that the plaintiff was not entitled to a remedy under the ATS alone, when the Law of Nations (customary international law) did not specifically provide for arbitrary arrest.[148] The Court argued that in 1789 when the ATS was enacted, the Law of Nations and Common Law recognized only a limited number of violations which were specific or definite enough: offences against ambassadors, violations of safe conduct, and piracy.[149] In other words, arbitrary arrest was not recognized or specifically defined under the Law of Nations as to bring it within the purview of the ATS. The Court went a step further in its restrictive approach by ruling that it would not allow claims based on violations of human rights if those abuses took place outside the territory of the United States because, in the view of the court, the ATS did not apply extra-territorially.[150]

The restrictive reading of the content of "Law of Nations" in *Sosa*, as well as the determination that only cases that touched upon the territory of the United States could be pursued in U.S. domestic courts, dealt a severe blow to the number of claims that could be brought in U.S. courts in order to enforce violations of international law. But it is not as if the results of the courts in all of these cases are inevitable. The requirement of specificity of crimes in Law of Nations was rejected by the Nuremburg Tribunal after World War II in order to hold the defendants accountable for horrendous human rights violations. In the Nuremburg Judgment handed down by the International Military Tribunal, the Tribunal noted that the defendants had argued that statutory law crimes against humanity were not specifically provided for in prior positive law and thus could not be punished.[151]

145. Sosa v. Alvarez-Machain, 542 U.S. 692, 697 (2004).

146. The ATS provides Federal district courts with jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Alien's Action for Tort (Alien Tort Statute), 28 U.S.C. § 1350 (1948).

147. *Sosa*, 542 U.S. at 713, 763.

148. *Id.* at 725.

149. *Id.* at 720.

150. *Id.* at 750; *Adhikari v. Daoud & Partners*, 95 F. Supp. 3d 1013 (S.D. Tex. 2015) (holding that the Alien Tort Statute did not apply extraterritorially to confer subject matter jurisdiction over human trafficking claims).

151. INTERNATIONAL MILITARY TRIBUNAL (NUREMBERG), TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 219 (1947), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf [https://perma.cc/LZE8-FLGY].

However, the Tribunal—of which U.S. judges were a part—held that "the attacker *must know that he is doing wrong*, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished."[152] *United States v. Smith*[153]—an early U.S. Supreme Court decision—establishes a similar precedent. In *Smith*, one of the issues was whether the crime of piracy was defined by the law of nations with reasonable certainty in a U.S. statute.[154] The Court held that it sufficed that piracy was defined in the Law of Nations.[155]

Yet, the U.S. Supreme Court has persisted in its restrictive approach to international norms. In *Kiobel v. Royal Dutch Petroleum Co.*,[156] for example, the majority of the Court held that the principles underlying presumption against extraterritoriality constrain courts exercising their power under ATS, and that the ATS did not apply to violations of the Law of Nations occurring within territory of a sovereign other than the United States.[157] In *Kiobel*, the Court concluded that it lacked ATS jurisdiction over plaintiffs' claims because the acts giving rise to their tort claims occurred exclusively in Nigeria, a foreign sovereign. The concurring Justices, Breyer, Ginsburg, Sotomayor and Kagan reasoned that the presumption against extraterritoriality should not be used to exclude jurisdiction under the ATS, but rather the dispositive consideration should be whether the defendant's conduct adversely affects an important American national interest, which includes a distinct interest in preventing the U.S. from becoming a safe harbor for a torturer

152. *Id.* (Italicization supplied).

153. United States v. Smith, 18 U.S. (5 Wheat.) 153, 162 (1820).

154. *Id.*

155. *Id.*

156. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (holding that nothing in the statutory language provided a clear indication that the statute was intended to have extraterritorial reach). That holding was premised on the presumption against extraterritorial application of U.S. legislation, which reflects the "longstanding principle of American law that 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' . . ." because "Congress ordinarily legislates with respect to domestic, not foreign matters." Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 248, 255 (2010). In *Kiobel*, the Supreme Court considered whether a claim brought under the ATS may reach conduct occurring in the territory of a foreign sovereign. *Kiobel*, 569 U.S. at 115. In that case, Nigerian nationals (the petitioners)—who became legal residents of the United States after being granted political asylum—brought tort claims under the ATS against certain British, Dutch, and Nigerian corporations. *Id.* at 111–12. In their complaint, the petitioners contended that the corporate defendants violated the Law of Nations by aiding and abetting atrocities committed by Nigerian military and police forces, in providing those forces with food, transportation, compensation, and access to property. *Id.* at 112. All the atrocities were alleged to have been committed in Nigeria, and it was undisputed that none of the conduct alleged in the complaint occurred within the territory of the United States. *Id.* at 111–13.

157. *Id.*

and other common enemies of humankind.[158] That approach seems to be more in accord with the reasoning in the *Judgment at Nuremberg*.

Further, in 2014 the U.S. Supreme Court issued its decision in *Bond v. United States*,[159] once again indicating that it was persisting in its restrictive approach to international law. The petitioner, Bond, used a chemical to harm her husband's mistress.[160] She was indicted for violating 18 U.S.C. § 229, which forbids knowing possession or use, for nonpeaceful purposes, of a chemical that "can cause death, temporary incapacitation or permanent harm to humans."[161] 18 U.S.C. § 229 is federal legislation implementing the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, a treaty that the United States ratified in 1997.[162] Bond then brought a Tenth Amendment claim, challenging the statute on the ground that the U.S. Congress had exceeded its constitutional authority in enacting the implementing legislation.[163] The issue was whether the Chemical Weapons Convention Implementation Act could be properly interpreted so that it does not apply to ordinary poisoning cases, which have been traditionally handled by state and local authorities.[164] Adopting a narrow interpretation in order to deny effect to an international treaty, the Court held that federal law, including treaties of the U.S., typically does not intrude on the ability of states to regulate local matters, and that Chemical Weapons Convention Implementation Act was not an exception to that general rule.[165]

Maintaining the same posture, the U.S. Supreme Court recently sided with the executive branch to uphold a Presidential Proclamation banning Muslims from specified countries, reasoning that "[t]he Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion."[166] This case, while decided primarily on constitutional grounds, had international implications and was consistent with the U.S. government's avowed patriotic focus, as opposed to a globalist view.[167] As Justice Sotomayor pointed out, the majority in *Trump v. Hawaii* focused on national security

158. *Kiobel*, 569 U.S. at 127–40.
159. Bond v. United States, 572 U.S. 844 (2014).
160. *Id.* at 852.
161. *Id.*
162. *Id.* at 848, 851.
163. *Id.* at 853.
164. *Id.* at 857.
165. *Bond*, 572 U.S. at 866.
166. Trump v. Hawaii, 138 S. Ct. 2392, 2421 (2018).
167. *See* Clare Frances Moran, *Crystallising the International Rule of Law: Trump's Accidental Contribution to International Law*, 56 WASHBURN L. J. 491, 492 (2017), https://core.ac.uk/download/pdf/151169689.pdf.

even though "a cursory review of the Government's asserted national-security rationale reveals that the Proclamation is nothing more than a 'religious gerrymander.'"[168]

Additionally, the U.S. Supreme Court has addressed international norms in the context of immigration. Recently, the U.S. Administration has promoted a policy aimed at a drastic reduction of refugees,[169] even when those efforts appeared to run afoul of relevant international law norms.[170] For example, although the U.S. is bound by the rule of refoulment—the norm that refugees should not be returned to their countries of origin—and, even though the U.S. is not a party to third-party-transition treaties, the U.S. advocated for immigrants and refugees to wait in a third country that they were transiting through.[171] The government maintained that, "when somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came[sic]"[172] This would be concerning because of "the vulnerability of the immigrant population within the relevant legal and social structure."[173] Yet, a sharply divided U.S. Supreme Court decided that the U.S. government was within its rights to issue the travel ban on people from certain states and to act the way it did.[174]

Relatedly, a divided U.S. Supreme Court signed off on the U.S. government's policy regarding appropriation of funds for the building of a border wall on the Mexico border.[175] Against the backdrop of efforts to reduce the number of legal immigrants entering the United States,[176] the government decided to build the wall at the U.S. southern border, which was emblematic of withdrawal and refusal to engage internationally.

The trade war with several countries and their rejection of tariffs imposed on China by the World Trade Organization is another indication of protectionism that is also characteristic of a lack of willingness to be

168. *Trump*, 138 S. Ct. at 2442.

169. *See* Koh, *supra* note 9, at 422.

170. *See generally* Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, https://www.refworld.org/docid/3be01b964.html [https://perma.cc/GC8B-93UQ].

171. *See* Protocol Relating to the Status of Refugees art. II, ¶ 3, Jan. 1, 1967, 606 U.N.T.S. 270, https://treaties.un.org/doc/Publication/UNTS/Volume%20606/v606.pdf [https://perma.cc/HX8V-L929] (providing that "the present Protocol shall be applied by the States Parties hereto without any geographic limitation.").

172. Katie Rogers & Sheryl Gay Stolberg, *Trump Calls for Depriving Immigrants Who Illegally Cross Border of Due Process Rights*, N.Y. TIMES (June 24, 2018), https://www.nytimes.com/2018/06/24/us/politics/trump-immigration-judges-due-process.html [https://perma.cc/Y278-ZPY3].

173. S. I. Strong, *Can International Law Trump Trump's Immigration Agenda: Protecting Individual Rights through Procedural Jus Cogens*, U. ILL. L. REV. 272, 282 (2018).

174. *Trump*, 138 S. Ct. at 2392.

175. Trump v. Sierra Club, 140 S. Ct. 1 (2019).

176. *See* Reforming American Immigration for Strong Employment Act, S. 354, 115th Cong. (2017).

more open to the rest of the world.[177] The irony of trade wars is that there is no real winner of such wars,[178] which speaks to the inevitability of the necessity of international rule of law. The U.S. federal government essentially acknowledged as much when they reported that the Chinese government was going to wait until after the next U.S. presidential election in November 2021 before China would return to a more complete trade deal including items such as smartphones and toys with the United States.[179] Yet, the U.S. Supreme Court rejected efforts aimed at challenging the government's steel tariffs in a case brought by the American Institute for International Steel.

In a rare case, however, the U.S. government's attempt to add a citizenship question to the national census questionnaire was ultimately rejected by the U.S. Supreme Court.[180] The effort was aimed at identifying the number of non-U.S. citizens in the United States. The U.S. government's efforts to deport even DREAMers and to separate children from their parents at the border showed that the government had become emboldened to take extreme measures to promote a decidedly U.S.-oriented policy. The U.S. Supreme Court signaled that it was not willing to go that far.

The conclusions of the U.S. Supreme Court should not be considered predictable because looking at the similar facts and international law to which the United States has subscribed, the International Court of Justice (ICJ) has tended to come out differently. For instance, in response to the U.S. Supreme Court decision in *Bank Markazi v. Peterson*,[181] in which

177. Appellate Body Report, *United States – Countervailing Duty Measures On Certain Products From China*, WTO Doc. WT/DS437/AB/RW (adopted July 16, 2019), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=255675,255676&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [https://perma.cc/3LTK-9KAV] (holding that while the U.S. was correct that China subsidized the cost of the production of Chinese products, thereby taking advantage of being a developing state as classified by the UN, the U.S. must accept Chinese pricing when calculating the tariffs—not calculations on pricing the U.S. came up with—and that China had the option to respond with retaliatory measures against the U.S. if Chinese pricing was not accepted.). *See also* Don Weinland, *WTO Rules Against US in Tariff Dispute With China*, FIN. TIMES (July 17, 2019), https://www.ft.com/content/131a55ea-a84a-11e9-984c-fac8325aaa04 [https://perma.cc/T4DZ-EL9V].

178. For example, while the trade war between the U.S. and China has hit China's exports hard, the U.S. manufacturing sector has also been decimated by the trade war. Ana Swanson & Jeanna Smialek, *U.S. Manufacturing Slumps as Trade War Damage Lingers*, N.Y. TIMES (Jan. 3, 2020), https://www.nytimes.com/2020/01/03/business/manufacturing-trump-trade-war.html [https://perma.cc/K9P8-XW89].

179. Zeke Miller, *Trump Says China Deal Could Wait Until After 2020 Election*, ASSOCIATED PRESS (Dec. 3, 2019), https://apnews.com/fbfc4c93ff424225b36c20527166fb08 [https://perma.cc/7CRY-BVJL] (noting that "president has previously suggested that China wanted to wait until after the election to negotiate a deal").

180. Department of Commerce et al. v. New York et al., 139 S. Ct. 2551, 2576 (2019).

181. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1329 (2016).

the U.S. Supreme Court upheld the circuit court's judgment for the turnover of approximately $1.75 billion in assets of the Iranian national bank in order to compensate victims of a 1983 bombing in Beirut, Lebanon, Iran initiated an action against the U.S. before the ICJ.[182] In reaching that decision, the U.S. Supreme Court had rejected Iran's arguments that it was entitled to foreign sovereign immunity, maintaining that the terrorism exception applied, even though Iran explicitly rejects the allegations of terrorism in the ICJ case.[183]

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182. *Id.* at 1319–20; Certain Iranian Assets (Iran v. U.S.), Judgment, 2019 I.C.J. 10, ¶ 1 (Feb. 13, 2019), https://www.icj-cij.org/public/files/case-related/164/164-20190213-JUD-01-00-EN.pdf [https://perma.cc/WJD4-VACF] [hereinafter Certain Iranian Assets]. The ICJ notes the history of the tense relationship between the United States and Iran as follows:

> 20. In October 1983, United States Marine Corps barracks in Beirut, Lebanon, were bombed, killing 241 United States servicemen who were part of a multinational peacekeeping force. The United States claims that Iran is responsible for this bombing and for subsequent acts of terrorism and violations of international law; Iran rejects these allegations.
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> 21. In 1984, the United States designated Iran as a "State sponsor of terrorism", a designation which has been maintained ever since.
>
> 22. In 1996, the United States amended its Foreign Sovereign Immunities Act (hereinafter the "FSIA") so as to remove the immunity from suit before its courts of States designated as "State sponsors of terrorism" in certain cases involving allegations of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support for such acts (Section 1605 (a) (7) of the FSIA); it also provided exceptions to immunity from execution applicable in such cases (Sections 1610 (a) (7) and 1610 (b) (2) of the FSIA). Plaintiffs then began to bring actions against Iran before United States courts for damages arising from deaths and injuries caused by acts allegedly supported, including financially, by Iran....
>
> 23. In 2002, the United States adopted the Terrorism Risk Insurance Act (hereinafter the "TRIA"), which established enforcement measures for judgments entered following the 1996 amendment to the FSIA. In particular, Section 201 of the TRIA provides as a general rule that, in every case in which a person has obtained a judgment in respect of an act of terrorism or falling within the scope of Section 1605 (a) (7) of the FSIA, the assets of a "terrorist party" (defined to include, among others, designated "State sponsors of terrorism") previously blocked by the United States Government—"including the blocked assets of any agency or instrumentality of that terrorist party"—shall be subject to execution or attachment in aid of execution.

Id. ¶¶ 20–23. It further notes that "the assets of Iran and Iranian State-owned entities, including Bank Markazi, are now subject to enforcement proceedings in various cases in the United States or abroad, or have already been distributed to judgment creditors." *Id.* ¶ 27.

183. Certain Iranian Assets, *supra* note 182, ¶ 20 (stating "The United States claims that Iran is responsible for this bombing and for subsequent acts of terrorism and violations of international law; Iran rejects these allegations.").

Before the ICJ, the U.S. orally argued that the ICJ lacked jurisdiction on different three grounds while Iran simply claimed the ICJ had jurisdiction pursuant to the Treaty of Amity signed by the U.S. and Iran in 1955.[184] One of the grounds the U.S. argued lack of jurisdiction on was that Iran's claims arose from Executive Order 13599,[185] which Iran viewed to be inconsistent with the obligations of the U.S. to Iran under the Treaty of Amity.[186] Specifically, Iran claimed "that, by failing to

184. *Id.* ¶¶ 17, 29. It is instructive to note that Article XXI, paragraph 2, of the Treaty of Amity provides the following: "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means." *Id.* ¶ 29; *see also* Treaty of Amity, Economic Relations, and Consular Rights Between Iran and the United States of America, Iran-U.S., art. XXI, ¶ 2, Aug. 15, 1955, 8 U.S.T. 899, https://www.state.gov/wp-content/uploads/2019/05/Treaty-of-Amity-Economic-Relations-and-Consular-Rights-between-the-United-States-of-America-and-Iran-Aug.-15-1955.pdf [https://perma.cc/HVN7-GW5Z] [hereinafter Treaty of Amity]. In holding that it had jurisdiction, the ICJ notes that "Treaty of Amity was in force between the Parties on the date of the filing of Iran's Application, namely 14 June 2016, and that the denunciation of the Treaty announced by the United States on 3 October 2018 has no effect on the jurisdiction of the Court in the present case." Certain Iranian Assets, *supra* note 182, ¶ 30. The United States had argued that the Treaty of Amity would not apply to this case because "all claims that U.S. measures that block the property and interests in property of the Government of Iran or Iranian financial institutions (as defined in Executive Order 13599 and regulatory provisions implementing Executive Order 13599) violate any provision of the Treaty." *Id.* ¶ 15. In its view, these claims fell outside the scope of the Treaty by virtue of Article XX, paragraph 1, subparagraphs (c) and (d), thereof, which, in part, provides that "[t]he present Treaty shall not preclude the application of measures... necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests." *Id.* ¶ 39. But the ICJ held that it had jurisdiction because Treaty of Amity contains no provision expressly excluding certain matters from its jurisdiction." *Id.* ¶ 45.

185. Certain Iranian Assets, *supra* note 182, at 5 (noting that the U.S.'s first objection to the ICJ's jurisdiction was based on "Iran's claims arising from measures taken by United States to block Iranian assets pursuant to Executive Order 13599."); *see also id.* ¶ 25. In 2012, the Obama administration, with the authority vested in the president under the International Emergency Economic Powers Act, the National Emergencies Act, and the National Defense Authorization Act, among other laws, implemented Executive Order 13599, with the design to block the assets of the Iranian government and other Iranian controlled or owned financial institutions, "in light of the deceptive practices of the Central Bank of Iran and other Iranian banks to conceal transactions of sanctioned parties, the deficiencies in Iran's antimoney laundering regime and the weaknesses in its implementation, and the continuing and unacceptable risk posed to the international financial system by Iran's activities . . . ." Exec. Order No. 13599 of February 5, 2012, 77 Fed. Reg. 26, 6659 (Feb. 8, 2012), https://www.federalregister.gov/documents/2012/02/08/2012-3097/blocking-property-of-the-government-of-iran-and-iranian-financial-institutions [https://perma.cc/GS2W-PG4Z].

186. Certain Iranian Assets, *supra* note 182, ¶ 13(b) (detailing a long list of acts Iran claimed the United States committed, many of which are similar to the sanctions outlined in Executive Order 13599, that Iran claimed were breaches of the obligations owed to it by the U.S.).

In rejecting the United States' first objection, the ICJ noted that the "Treaty of Amity was in force between the Parties on the date of the filing of Iran's Application, namely 14 June 2016, and

recognize the separate juridical status of Bank Markazi and other Iranian companies, the United States has breached Article III, paragraph 1, of the Treaty [of Amity]; that, by denying these various companies the immunities that they would otherwise enjoy, it has breached Article III, paragraph 2, and Article XI, paragraph 4, of the Treaty."[187]

The United States also argued that the case was not admissible because,

> 116. . . . Iran has come before it with "unclean hands". . . . "Iran has sponsored and supported international terrorism, as well as taken destabilizing actions in contravention of nuclear non-proliferation, ballistic missile, arms trafficking, and counter-terrorism obligations." It contends that Iran is seeking relief because of the outcome of the *Peterson* case, which, in its view, arose from Iran's support for terrorism.
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> 117. The United States recognizes that in the past the Court has not upheld an objection based on the "clean hands" doctrine, but argues that it has not rejected the doctrine either, and that, in any event, the time is ripe for the Court to acknowledge it and apply it. According to the United States, the Court need not address the merits of this case to assess the legal consequences of Iran's conduct.[188]

However, the ICJ responded by stating that "the United States has not argued that Iran, through its alleged conduct, has violated the Treaty of Amity, upon which its Application is based"[189] and that "[s]uch a conclusion is however without prejudice to the question whether the allegations made by the United States, concerning notably Iran's alleged sponsoring and support of international terrorism and its presumed

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that the denunciation of the Treaty announced by the United States on 3 October 2018 has no effect on the jurisdiction of the Court in the present case." *Id.* ¶ 30. The United States had previously argued that the Treaty of Amity would not apply to this case because "all claims that U.S. measures that block the property and interests in property of the Government of Iran or Iranian financial institutions (as defined in Executive Order 13599 and regulatory provisions implementing Executive Order 13599) violate any provision of the Treaty". *Id.* ¶ 15. In the view of the U.S., Iran's claims in this regard fell outside the scope of the Treaty of Amity by virtue of Article XX, paragraph 1, subparagraphs (c) and (d), which, in part, provide that "[t]he present Treaty shall not preclude the application of measures... (d) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests." *Id.* ¶¶ 38, 39; *see also* Treaty of Amity, *supra* note 184, art. XX, ¶ 1. However, the ICJ held that it had jurisdiction because the Treaty of Amity contains no provision expressly excluding certain matters from its jurisdiction." *Id.* ¶¶ 45, 47.

187. Certain Iranian Assets, *supra* note 182, ¶ 33.

188. *Id.* ¶¶ 116–17.

189. *Id.* ¶ 122.

actions in respect of nuclear non-proliferation and arms trafficking, could, eventually, provide a defense on the merits."[190] In spite of the ICJ ruling, on January 13, 2020 the U.S. Supreme Court directed the Second U.S. Circuit Court of Appeals to consider a new law enacted by the government—the defense spending bill signed by the President in 2019—that could give the families access to the funds.[191]

Following the lead of the U.S. Supreme court in recent decisions, lower courts have summarily rejected Alien Tort Statute (ATS) claims on the ground that the petitioners could not overcome the presumption against extraterritorial application. Apart from the case of *Al Shimari v. CACI Premier Technology, Inc.*,[192] in which the court held that the Supreme Court's decision in *Kiobel* did not foreclose the plaintiffs' claims under the ATS because plaintiffs' claims did "touch and concern" the territory of the United States with sufficient force to displace the presumption against extraterritorial application of the ATS,[193] the

190. *Id.* ¶ 123.

191. Andrew Chung, *U.S. Supreme Court Tosses Ruling That Revived Suit Against Iran Central Bank*, REUTERS (Jan. 13, 2020, 9:55 AM), https://www.reuters.com/article/us-usa-court-iran/u-s-supreme-court-tosses-ruling-that-revived-suit-against-iran-central-bank-idUSKBN1ZC1II [https://perma.cc/S66B-YQ6L].

192. 758 F.3d 516 (4th Cir. 2014). In this case, four Iraqi citizens brought action in the Southern District of Ohio under the Alien Tort Statute (ATS) against, *inter alia*, the military contractor, CACI, alleging that the plaintiffs were abused and tortured during their detention at Abu Ghraib prison in Iraq as suspected enemy combatants. *Id.* at 520–21. The abuse and torture were described in the opinion as follows:

> Among many other examples of mistreatment, the plaintiffs described having been "repeatedly beaten," "shot in the leg," "repeatedly shot in the head with a taser gun," "subjected to mock execution," "threatened with unleashed dogs," "stripped naked," "kept in a cage," "beaten on [the] genitals with a stick," "forcibly subjected to sexual acts," and "forced to watch" the "rape[] [of] a female detainee."

Id. at 521.

193. Al Shimari v. CACI Premier Tech. Inc., 758 F.3d at 520. In this case, the court found that the claims of the plaintiffs' reflected "extensive relevant conduct" on United States territory. *Id.* at 528. The plaintiffs' allegations of torture were "committed by United States citizens who were employed by an American corporation, CACI, which has corporate headquarters located in Fairfax County, Virginia." *Id.* The court further found that the alleged torture "occurred at a military facility operated by United States government personnel." *Id.*; *compare* Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 323 (D. Mass. 2013) (evaluating a claim for aiding and abetting international law violations committed abroad and holding that the claims sufficiently touched and concerned the United States because the "[a]mended Complaint adequately sets out actionable conduct undertaken by Defendant in the United States to provide assistance" to the primary tortfeasors), *with* Doe v. Exxon Mobil Corporation, 69 F. Supp. 3d 75, 96–97 (D.D.C. 2014) (holding that plaintiffs should be allowed to amend their complaint to allege further facts to display that their claims "sufficiently touch and concern" the U.S. in order to displace the presumption against extraterritoriality, and implying that general evidence in the record of

majority of cases brought under the ATS have not been successful.[194]

Courts have even rejected cases of torture allegedly committed by U.S. agents invoking the presumption against extraterritoriality.[195] Sometimes the U.S. courts have granted relief under the Torture Victim Protection Act (TVPA) but, unfortunately, the TVPA does not grant jurisdiction for an ATS claim.[196] In all of these cases, the courts were reluctant to accept the concept of universal jurisdiction, which is an exception to extraterritoriality principle. That is the case, even though many courts across the world[197] embrace the view that "a foreign court

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management decisions being made in the United States was not enough to overcome this presumption.).

194. *See, e.g.*, Balintulo v. Ford Motor Co., 796 F.3d 160, 171 (2d Cir. 2015) (holding that allegations against the automobile manufacturer were insufficient to rebut presumption against extraterritoriality); Doe v. Cisco Systems, Inc., 66 F. Supp. 3d 1239, 1246 (N.D. Cal. 2014) (holding that the alleged torture in China lacked sufficient nexus with United States to overcome presumption against extraterritorial application of ATS); Doe v. Drummond Co., 782 F.3d 576, 593 (11th Cir. 2015) (holding that "[s]ince Plaintiffs' claims as alleged involve both domestic and extraterritorial conduct, the presumption against extraterritoriality applies and will prevent jurisdiction unless it is displaced."); Doe v. Exxon Mobil Corporation, 69 F. Supp. 3d at 95 (noting prior cases that have held that "the presumption against extraterritoriality is not displaced by a defendant's U.S. citizenship alone").

195. *See, e.g.*, Meshal v. Higgenbotham, 804 F.3d 417, 431 (D.C. Cir. 2015) (Kavanaugh, J., concurring) (stating that the court would dismiss the torture allegations arising the context of the U.S. fight against terrorism, even if there was no alternative remedy, because "[t]he confluence of . . . two factors—extraterritoriality and national security—renders this an especially inappropriate case for a court to supplant Congress and the President by erecting new limits on the U.S. war effort.").

196. *See, e.g.*, *Drummond Co.*, 782 F.3d at 583 ("In contrast to the ATS, which can confer jurisdiction but does not include an independent cause of action, the TVPA provides a cause of action but contains no jurisdictional grant."); Jara v. Núñez, 878 F.3d 1268, 1274 (11th Cir. 2018) (citing *Doe v. Drummond Co.*, 782 F.3d 576, 593 (11th Cir. 2015) and noting that the district court dismissed the plaintiff's Alien Tort Statute claims for lack of subject matter jurisdiction, however, plaintiffs ultimately won the jury trial on their claims under the Torture Victim Protection Act [TVPA] and were awarded $28 million in damages. Plaintiffs appealed from the dismissal order of their ATS claims, but the court affirmed the dismissal order as the TVPA grants cause of action but not jurisdiction and the plaintiffs could only alleged extraterritorial conduct.).

197. Garth Meintjes & Juan E. Mendez, *Reconciling Amnesties With Universal Jurisdiction*, 2 INT'L L. F. DU DROIT INT'L 76, 78 (2000) (observing that the principle of universal jurisdiction "has been reinforced by the creation of *ad hoc* war crimes tribunals for the Former Yugoslavia and Rwanda, and reconfirmed by the adoption by the Rome Statute for an International Criminal Court . . . In addition, the recent arrest of Pinochet in the United Kingdom . . . has given greater recognition to another form of universal jurisdiction: a state's extraterritorial competence to prosecute international crimes committed in foreign countries."). Although the U.S. has increasingly declined to extend the instances in which universal jurisdiction applies, there is historical precedent for such application. *See* United States v. Smith, 18 U.S. (5 Wheat.) 153, 162 (1820) (noting "the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offense against any persons whatsoever."); *Inst. of Cetacean Rsch v. Sea Shepherd Conservation Soc'y*, 153 F. Supp. 3d 1291, 1317 (W.D. Wash. 2015)

may legitimately invoke universal jurisdiction to prosecute certain crimes that were inadequately prosecuted at the domestic level."[198] In doing so, the international community is not completely oblivious to the principle of extraterritoriality. Rather, the extraterritoriality principle is qualified in order to enforce more transcendent international obligations. It is on that basis that, historically, courts have ruled that "[u]niversal jurisdiction over pirates applied to both civil and criminal proceedings."[199]

Following the U.S. withdrawing from the Iran Deal, as part of what appeared to be the Trump administration's general retreat from international deals,[200] the U.S. reimposed sanctions on Iran pursuant to Executive Order 13846 dated August 6, 2018.[201] Iran responded to the reimposition of sanctions by suing the U.S. before the ICJ and submitting a request for the indication of provisional measures.[202] Iran advanced the argument that the "sanctions" imposed by the U.S. pursuant to Executive Order 13846 of August 6, 2018,

> which are to be applied in the event that any person provides material assistance, sponsors, or provides financial, material or technological support for, or goods or services in support of, among others the National Iranian Oil Company and the Central Bank of Iran after 5 November 2018, are incompatible with the rights of Iran under Article IV, paragraph 1[of Treaty of Amity, Economic Relations, and Consular Rights Between Iran and the United States of America (1955).][203]

(holding that court lacked subject matter jurisdiction to hear ATS claim by environmental group for illegal whaling).

198. Meintjes & Mendez, *supra* note 197, at 82.

199. Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L. J. 183, 192 (2004).

200. In exchange for sanctions on Iran, in 2015, "the P5+1 (China, France, Germany, Russia, the United Kingdom, and the United States), the European Union (EU), and Iran reached a Joint Comprehensive Plan of Action (JCPOA) to ensure that Iran's nuclear program will be exclusively peaceful." U.S. Dep't of State, Joint Comprehensive Plan of Action, https://2009-2017.state.gov/e/eb/tfs/spi/iran/jcpoa/index.html [https://perma.cc/S2EU-2E2C].

201. Exec. Order No. 13846 of August 6, 2018, Fed. Reg. 152,38939 (Aug. 7, 2018), https://www.federalregister.gov/documents/2018/08/07/2018-17068/reimposing-certain-sanctions-with-respect-to-iran [https://perma.cc/46BR-J9Y8].

202. Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights, Iran v. U.S., Provisional Measures Order, 2018 I.C.J. Rep. 623, ¶¶ 1, 4 (Oct. 3, 2018), https://www.icj-cij.org/public/files/case-related/175/175-20181003-ORD-01-00-EN.pdf [https://perma.cc/GC9V-P72H]. The ICJ defines "provisional measures" as "interim measures which can be requested by the applicant State if it considers that the rights that form the subject of its application are in immediate danger." *How the Court Works*, INT'L CT. JUST., https://www.icj-cij.org/en/how-the-court-works [https://perma.cc/7DHW-V7V7].

203. *Id.* ¶ 56.

On October 4, 2018, the ICJ issued provisional measures under which it ordered the United States to remove the sanctions that suppressed humanitarian aid to Iran, including medical supplies, food, and civil aviation safety,[204] observing that "there remains a risk that the measures adopted by the United States . . . may entail irreparable consequence."[205]

The ICJ pretty much told the U.S. government that it would not unilaterally and blatantly flout international obligations under the Treaty of Amity. Because the Treaty of Amity was standing in the way of its interests, the U.S. government subsequently withdrew from that treaty in 2018.[206] Then on January 3, 2020, a drone strike ordered by the U.S. government killed General Qasem Soleimani—the top commander of

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204. *Id.* ¶ 70. The ICJ notes some of the history of this case as follows:

> 16. Starting in 2006, the Security Council of the United Nations adopted a number of resolutions (1696 (2006), 1737 (2007), 1747 (2007), 1803 (2008), 1835 (2008) and 1929 (2010)), following reports by the International Atomic Energy Agency (hereinafter "IAEA") which were critical of Iran's compliance with its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons (ratified by Iran in 1970), calling upon Iran to cease some of its nuclear activities. The Security Council also imposed sanctions in order to ensure compliance. Various States imposed additional "sanctions" on Iran.
>
> 17. On 14 July 2015, China, France, Germany, the Russian Federation, the United Kingdom and the United States, with the High Representative of the European Union for Foreign Affairs and Security Policy and the Islamic Republic of Iran, adopted a long-term Joint Comprehensive Plan of Action (hereinafter the "JCPOA" or the "Plan") concerning the nuclear programme of Iran. . . .
>
> 20. On 8 May 2018, the President of the United States issued a National Security Presidential Memorandum announcing the end of the participation of the United States in the JCPOA and directing the reimposition of "sanctions lifted or waived in connection with the JCPOA". In the Memorandum, the President of the United States indicated that "Iranian or Iran-backed forces have gone on the march in Syria, Iraq, and Yemen, and continue to control parts of Lebanon and Gaza". He further stated that Iran had publicly declared that it would deny the IAEA access to military sites and that, in 2016, Iran had twice violated the JCPOA's heavy-water stockpile limits. The Presidential Memorandum determined that it was in the national interest of the United States to reimpose sanctions "as expeditiously as possible", and "in no case later than 180 days" from the date of the Memorandum.

¶¶ 16–17, 20.

205. *Id.* ¶ 92.

206. Edward Wong & David E. Sanger, *U.S. Withdraws From 1955 Treaty Normalizing Relations With Iran*, N.Y TIMES (Oct. 3, 2018), https://www.nytimes.com/2018/10/03/world/middleeast/us-withdraws-treaty-iran.html [https://perma.cc/HPS9-Y4QT] (observing that the "move came hours after the International Court of Justice ordered the United States to ensure that a new round of American sanctions imposed against Tehran this year did not prevent food, medicine and aircraft parts from reaching Iran").

Iranian Revolutionary guards—as the U.S. claimed that Soleimani was plotting an imminent, significant campaign of violence against the United States.[207]

When the ICJ looks at the same facts and norms and tends to rule in ways that depart from positions adopted by the courts in the United States, it may be worth asking whether the U.S. Supreme Court needs to do more of what Justice Scalia urged it to do when considering positions held in foreign and international courts.

> We can, and should, look decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties. . . . even if we disagree, we surely owe the conclusions reached by appellate courts of other signatories the *courtesy of respectful consideration.*[208]

III. LOOKING TOWARD INTERNATIONAL LAW THAT SUPPORTS UNITED STATES INTERESTS

It is not enough to say that the U.S. is an important international actor that needs to do more to engage international law when the United States keeps insisting that its interests are not sufficiently protected. It is not just the United States that needs international law, the rest of the international community benefits from the full participation of the U.S. As a former Secretary of State noted with regard to the U.S. national security strategy, "American leadership isn't needed less, it's actually needed more. And the simple fact is that no significant global change can be met without [the United States]."[209] American leadership in the international arena is needed and this should have nothing to do with which political party is in charge in the United States, yet it does.[210]

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207. Jesse Yeung, Fernando Alfonso III, Tara John, Julia Hollingsworth, Rob Picheta & Mike Hayes, *Iran's Top General Soleimani Killed in US Strike*, CNN (Jan. 4, 2020, 4:26 AM), https://www.cnn.com/middleeast/live-news/baghdad-airport-strike-live-intl-hnk/h_3615c6d58cbd56d14338a9358d1d8900 [https://perma.cc/TZ2K-3QU3].

208. Olympic Airways v. Husain, 540 U.S. 644, 660–61 (2004) (emphasis added).

209. Hillary Rodham Clinton, U.S. Sec'y of State, Remarks on the Obama Administration's National Security Strategy at the Brookings Institute in Washington, D.C. (May 27, 2010), https://2009-2017.state.gov/secretary/20092013clinton/rm/2010/05/142312.htm [https://perma.cc/4ELR-QU2X].

210. The world views of the United States under President Trump's republican administration dipped drastically compared to that of his predecessor, President Obama's democratic administration. *Compare World Warming to US under Obama, BBC Poll Suggests*, BBC NEWS (Apr. 19, 2010, 1:16 GMT), http://news.bbc.co.uk/2/hi/8626041.stm [https://perma.cc/G44M-TE76] (noting that "[f]or the first time since the annual poll began in 2005, America's influence in the world is now seen as more positive than negative," "[t]he improved scores for the US coincided with Barack Obama becoming president." and "positive

As U.S. President Obama acknowledged to the United Nations General Assembly nine months after taking office:

> I took office at a time when many around the world had come to view America with skepticism and distrust. . . . Part of this was due to opposition to specific policies, and a belief that on certain critical issues, America has acted *unilaterally*, without regard for the interests of others. And this has fed an almost reflexive anti-Americanism, which too often has served as an excuse for collective inaction. Now, like all of you, my responsibility is to *act in the interest of my nation and my people*, and I will *never apologize for defending those interests*. But it is my deeply held belief that in the year 2009 -- more than at any point in human history -- *the interests of nations and peoples are shared.*[211]

The President also said "[t]he world must stand together to demonstrate that international law is not an empty promise, and that treaties will be enforced."[212] Indeed, despite the whipsaw created by the revolving U.S. administrations every 4 to 8 years controlled by different political parties with vastly different views, the global poll seems to indicate that "people haven't necessarily given up on the U.S. . . . that they still want the U.S. to play a leadership role on the international stage."[213]

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views of the US fell to a low of 28% on average in 2007, from 38% in 2005, but recovered to 35% in 2009 and 40% in [the 2010] poll.") *with Sharp drop in world views of US, UK: Global poll for BBC World Service, BBC*, BBC MEDIA CENTRE (July 3, 2017), https://www.bbc.co.uk/mediacentre/latestnews/2017/globescan-poll-world-views-world-service [https://perma.cc/8AKF-XQHR] (noting "[n]egative views of US influence in the world have increased in the majority of countries surveyed," "double-digit increases in negative views of the US, rising to majorities, are now found in several of its NATO allies," and "positive views have dropped by five points to about a third (34%). The US showed the most substantial decline in ratings out of all the countries polled this year.") *and Global perception of US falls to two-decade low*, BBC NEWS (Sept. 15, 2020), https://www.bbc.com/news/world-us-canada-54169732 [https://perma.cc/G8T8-3RJ5] [hereinafter *Global Perception*] (noting that "[t]hough favourable views of the US has been falling in recent years, in 2020, the perceptions in several countries were the lowest Pew had seen since it began polling," "[t]he majority of the public in every country surveyed did not have confidence in Mr. Trump," and that "[t]he results of the survey come as long-term questions swirl over America's leadership on the global stage, and as the country continues to battle coronavirus. The US has recorded over 6m cases and nearly 200,000 deaths due to Covid-19. Dr Richard Wike, a director of the Pew survey, said: 'What we've seen in our polling over the past few years is that many people around the world see the US stepping away from a leadership position in world affairs, and that's had a negative impact on what they think of the country.'").

211. Barack Obama, U.S. President, Remarks By The President To The United Nations General Assembly at the United Nations Headquarters, New York, New York (Sept. 23, 2009), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-united-nations-general-assembly [https://perma.cc/XV3F-NZV8] (Emphasis added).

212. *Id.*

213. Global Perception, *supra* note 210.

With that said, there is still a legitimate question as to what can be done, if anything, to ensure that international law is more supportive of interests of the United States. International Law already provides for accommodations especially with regard to the reservations and understandings clauses of the Vienna Convention on the Law of Treaties.[214] International law also defers to the domestic legal system with respect to each country's involvement in international law. Some countries adopt a monistic system, while others adopt a dualist system. Indeed, some other countries adopt a hybrid system, which allows for the so-called self-executing treaties.[215]

The Constitution of the United States of America provides that the President shall have the power, "by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[216] Under United States law, however, there is a distinction made between the terms "treaty" and "executive agreement." In the United States, the word treaty is reserved for an agreement that is made "by and with the Advice and Consent of the Senate."[217] International agreements that are not submitted to the Senate for ratification are known as executive agreements.[218] "Generally, a treaty is a binding international agreement and an executive agreement applies in domestic law only."[219] States have the right to join treaties, withdraw from treaties, or terminate their treaty obligations as long as they do it according to the provisions of the pertinent law.[220] Consistent with those rights, "the United States has

214. VCLT, *supra* note 4, arts. 2(1)(d), 19–23. Most of these provisions are regarded as part of customary international law. *See* Case Concerning the Gabčikovo-Nagymaros Project (Hungary v. Slovakia), Judgment, 1997 I.C.J. 3, ¶¶ 42–46 (Sept. 25, 1997).

215. See MARK W. JANIS & JOHN E. NOYES,, INTERNATIONAL LAW: CASES AND COMMENTARY 226–28 (6th ed. 2020)(explaining that under dualism, "international law and municipal law" are seen as separate and discrete legal systems.") Under dualism, international treaties must be ratified in accordance with municipal procedures to become binding. In countries with monistic procedures, international law and municipal law are seen as parts of an integrated legal system with the result that there is no need for ratification for international treaties to become legally binding. In some countries, such as the United States, courts give effect to some international treaties without any need for ratification—even though a dualistic system is generally followed—if those treaties were intended to have that effect under domestic law.

216. U.S. CONST. art. II, § 2, cl. 2.

217. *Treaty vs. Executive Agreement*, U.S. DEP'T OF STATE: TREATY AFFAIRS FAQ, https://2009-2017.state.gov/s/l/treaty/faqs/70133.htm [https://perma.cc/E2YB-23BS] (last visited May 12, 2021).

218. *Id.*

219. Marci Hoffman, *Researching U.S. Treaties and Agreements*, LLRX: LAW AND TECH. RES. FOR LEGAL PROS. (2001), https://www.llrx.com/2001/05/features-researching-u-s-treaties-and-agreements/ [https://perma.cc/UG5N-NUHE].

220. VCLT, *supra* note 4, art. 54 ("The termination of a treaty or the withdrawal of a party may take place: in conformity with the provisions of the treaty; or at any time by consent of all the parties after consultation with the other contracting States."); *see also id.* art. 56(2) ("[A] party

refused to join . . . the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (2000),"[221] and renounced the Kyoto Protocol and the Paris Agreement on Climate Change.

Sometimes the U.S. not becoming a party to a treaty has to do with the fact that the Senate's consent cannot be secured. For example, when the U.S. signed an international treaty with Russia regarding Nuclear Weapons,[222] the government had to face a Congress which was not filibuster-proof, where these actions were viewed as weakening the security of the United States.[223] Yet this was an issue on which both political parties could have found common ground. For example, the idea of limiting the proliferation of nuclear weapons, especially if they got into the hands of terrorists, would be appealing to those who have high security concerns.[224] Also, it would mean that a treaty such as the New START would have to guarantee that the security of the United States

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shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1."); *see also* Paris Agreement, *supra* note 79, art. 28 (providing for the process for withdrawing from the treaty); *see also* U.S. CONST. art. II, § 2 (arguing that whereas the U.S. Constitution provides that the President has the power to make treaties with the "advice and consent" of Congress, it is important to note that from a domestic standpoint, the Constitution is silent with regard to the issue of whether the President "must" seek the consent of Congress); *see also Goldwater v. Carter*, 617 F.2d 697, 698 (D.C. Cir. 1979) (holding that the president had the authority to terminate a treaty with Taiwan without first obtaining the advice and consent of the Senate). However, the circuit court opinion in *Goldwater v. Carter* was later vacated by the U.S. Supreme Court and remanded to the lower court for dismissal without an official opinion being issued addressing the question, two justices stating in separate concurring opinions that the issue was either not ripe for judicial review or was a nonjusticiable political question that could not be addressed by the Court. Goldwater v. Carter, 444 U.S. 996, 996, 998 (1979).

221. Rudiger Wolfrum, *Reflections on the Development of International Treaty Law under the Auspices of the United States Hegemony and Globalization*, 8 AUSTRIAN REV. INT'L & EUR. L. 229, 229 (2003).

222. Peter Baker & Dan Bilefsky, *Russia and U.S. Sign Nuclear Arms Reduction Pact*, N.Y. TIMES (Apr. 9, 2010), https://www.nytimes.com/2010/04/09/world/europe/09prexy.html [https://perma.cc/5R5E-4K5M] (reporting that under the NEW START treaty, if ratified, each side within seven years would be barred from deploying more than 1,550 strategic warheads or 700 launchers).

223. *See* Ed Hornick, *U.S.-Russia Arms Treaty To Face GOP Scrutiny in Senate*, CNN POLITICS (Apr. 9, 2010, 10:31 AM), http://www.cnn.com/2010/POLITICS/04/08/start.treaty.senate/index.html?iref=allsearch [https://perma.cc/75ME-3ZZ8] (providing that U.S. Senator Mitch McConnell responded to the new Strategic Arms Reduction Treaty by announcing that "[t]he Senate will assess whether or not the agreement is verifiable, whether it reduces our Nation's ability to defend itself and our allies from the threat of nuclear armed missiles, and whether or not this administration is committed to preserving our own nuclear triad.").

224. *See* David E. Sanger, *Obama Vows Fresh Proliferation Push as Summit Ends*, N.Y. TIMES (Apr. 13, 2010), https://www.nytimes.com/2010/04/14/world/14summit.html [https://perma.cc/6ZL5-G3WH].

could be maintained. This is the way to proceed with treaties and to get the consent of the Senate.[225]

If the U.S. Senate is suspicious of international treaties, this suspicion may extend to how international courts are viewed in the U.S. There could be legitimate reasons for the United States being suspicious of international courts on the assumption that international judges could "gang up" against the United States using international law as a pretext. It is for this reason that the International Court of Justice established the chambers procedure so that states can choose judges that it believes would render impartial justice.[226] But that is only one instance in which the interests of the United States can be assured. There is more that needs to be done to give confidence to the United States that its interests are not necessarily frustrated under the guise of "neutral" application of international law.

Treaties should provide to states that are parties to the treaty the opportunity to have bilateral treaties that provide protection to non-participating (third) states. For example, the Rome Statute of the International Criminal Court provides that a third state's consent must be requested before the sending state surrenders a person belonging to the third state to the International Criminal Court (ICC).[227] To take advantage of this provision, the United States has taken every step necessary to ensure that ICC jurisdiction does not extend to United States citizens by entering into bilateral immunity agreements with state parties to the Rome Statute. The U.S. government at one time even blacklisted states that were involved in the ICC, including those who shared the democratic ideals of the United States.[228]

For example, the United States government went so far as to veto a peacekeeping operation in Bosnia in 2002 because it was unable to secure similar immunity provisions in the authorizing Security Council

225. *See* Hornick, *supra* note 223 ("Senate GOP leadership reportedly said that 'as long as the administration can satisfactorily answer questions about verification, missile defense and the modernization of the existing U.S. stockpile, Republicans will likely support the new treaty.'").

226. Statute of the International Court of Justice art. 26(2), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 ("The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties.").

227. Rome Statute of the International Criminal Court art. 98, July 17, 1998, 2187 U.N.T.S. 90, 148, https://treaties.un.org/doc/Treaties/1998/07/19980717%2006-33%20PM/volume-2187-I-38544-English.pdf [https://perma.cc/C4ZU-SXMW].

228. Elise Keppler, *The United States and the International Criminal Court: The Bush Administration's Approach and A Way Forward Under the Obama Administration*, HUM. RTS. WATCH (Aug. 2, 2009, 8:45 AM), https://www.hrw.org/news/2009/08/02/united-states-and-international-criminal-court-bush-administrations-approach-and-way [https://perma.cc/8EJY-BJSG].

Resolution.[229] In spite of that, the Rome Statute could go further by endorsing the validity of those bilateral immunity agreements. This has the potential of changing U.S. attitude towards the ICC.

The United States has already shown signs that it can change its attitude towards the ICC because it did not reject a major decision of the U.N. Security Council concerning referral of the situation in Darfur, Sudan, to the ICC.[230] By allowing this to happen, the United States recognized the ICC as a legitimate organization capable of ensuring security and justice for serious offenses against humanity within the international community.[231] But that does not mean that the U.S. fully embraces the ICC.

Another area of concern is the role of international organizations, particularly the United Nations and its agencies. The United States sometimes maintains that these organizations receive a lot of financial support from the United States and other countries do not contribute their fair share of the financial burden. It is also no accident that globalizing forces are at the center of the renewed debate about international law. Whether in terms of liberalized trade, strengthened human rights rules, or enhanced environmental protections, or the clout of international organizations, so much of the debate about the proper role of international regimes is really an exercise at shadow boxing between the proponents and critics of certain, distinct forms of globalization.

The most credible of the critiques of the globalization is the combined concerns of the transparency, accountability, and overall legitimacy of international lawmaking processes. It has been observed that "[g]lobalization and its attendant effects . . . place new stresses on our domestic constitutional and political system. Novel forms of international cooperation increasingly call for the transfer of rulemaking authority to international organizations that lack American openness and accountability."[232] According to this view of globalization, the inevitable concentration of power in international institutions, far removed from mechanisms of popular democracy, makes much international law illegitimate.

While there are no easy answers to these issues, it is important that the United Nations tries to engage the legitimate concerns about lack of accountability and globalization at the national level. As more countries

229. Colum Lynch, *Dispute Threatens U.N. Role in Bosnia*, WASH. POST (July 1, 2002), https://www.washingtonpost.com/archive/politics/2002/07/01/dispute-threatens-un-role-in-bosnia/126b405f-6f58-4d7a-9dcc-6bd1715155d1/ [https://perma.cc/8PTS-7LVG]; *see also U.S. Veto Betrays the Bosnian People*, HUM. RTS. WATCH (July 1, 2002, 8:00 PM), https://www.hrw.org/news/2002/07/01/us-veto-betrays-bosnian-people [https://perma.cc/8DNR-89E5].

230. *See* S.C. Res. 1593, ¶ 1 (Mar. 31, 2005).

231. Keppler, *supra* note 228.

232. John C. Yoo, *UN Wars, U.S. Powers*, 1 CHI. J. INT'L L. 355, 361 (2000).

such as China, Germany, and Japan, grow in economic prowess, they should begin to contribute in proportion to their gross domestic product. Just like with the European Union, the United Nations may have, at some point, to consider having elected representatives to increase accountability. These changes are not likely to happen, however, until reforms have been made to the Charter of the United Nations.

RECOMMENDATIONS AND CONCLUSION

It has been proposed that the "United States—and other like-minded states—should choose engagement over unilateralism. When faced with a foreign policy problem, the United States should not proceed alone but rather seek to engage with other countries and adversaries around common values, in search of diplomatic solutions that can be embedded within durable international law principles."[233] But the withdrawal from international treaties signals that the United States is ready and willing to go it alone, if necessary. This withdrawal is not without its costs.

Withdrawal from a treaty should be a tool of last resort. Just like it is difficult to ratify a treaty, it should be equally hard to exit an international treaty. It is permissible to withdraw from a treaty;[234] it is just so much harder to rejoin the treaty. In the meantime, the United States would have to sit out, isolated, and incapable of directly influencing important decisions. The Vienna Convention on the Law of Treaties provides for accession to a treaty, but it does not provide a mechanism for rejoining and the only opportunity to change course is to revoke a withdrawal instrument before it takes effect.[235]

The issue is whether the interests of the country that is withdrawing are best served by staying and trying to improve the treaty, rather than wholesale withdrawal, even with a promise of rejoining at a later stage after changes that the U.S. agrees with have been made.[236] It appears that

233. Koh, *supra* note 9, at 417.

234. VCLT, *supra* note 4, art. 54(a) ("The termination of a treaty or the withdrawal of a party may take place in conformity with the provisions of the treaty . . . .").

235. *Id.* art. 68 ("A notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect.").

236. *See* Chris Riotta, *Trump Asks Lindsey Graham to Help Make New Iran Nuclear Deal, Reports Say*, THE INDEP. (Aug. 1, 2019, 3:25 PM), https://www.independent.co.uk/news/world/americas/us-politics/trump-iran-nuclear-deal-lindsey-graham-middle-east-latest-a9033291.html [https://perma.cc/2M98-T2BE] (arguing that there are several instances where the approach by the U.S. government has been to push first for the tearing up of a treaty in the hope that it will be rebuilt later; for example, with regard to the Iran Nuclear Deal, the U.S. withdrew and then sought to promote the adoption of new deal, even as the U.S. imposed sanctions on Iran's Foreign Minister, essentially cutting him off from meaningful diplomatic involvement, which followed the re-imposition of sanctions on Iran on November 5, 2018); *see also* Jennifer Hansler & Betsy Klein, *US Sanctions Iranian Foreign Minister Zarif*, CNN (July 31, 2019, 6:12 PM),

it is easier and more constructive to make changes by staying engaged as opposed to trying to effect change from without.[237] Rejoining a treaty after a country has exited that treaty is fraught with uncertainties, including the possibility that the government may need to seek fresh Senate advice and consent, unless it is assumed that the original advice and consent of the Senate applies to the rejoining process as well.[238] Moreover, if the government needs to seek the advice and consent of the Senate in order to rejoin a treaty, there is no guarantee that such consent would be obtained the next round.[239] Even if such consent is given, it may take a very long time to get.[240] In addition, rejoining a treaty presupposes that the rejoining state has to go through the formalities of accession to the treaty as if it had never belonged to the treaty.[241]

The U.S. Congress should adopt legislation to curb the powers of the government from exiting international treaties, particularly those that were ratified by Congress, where the Congress has expressed its will.[242]

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https://www.cnn.com/2019/07/31/politics/zarif-sanctions/index.html [https://perma.cc/N8A7-MEAQ]; *see also Iran Sanctions*, U.S. DEP'T OF TREASURY, https://www.treasury.gov/resource-center/sanctions/programs/pages/iran.aspx [https://perma.cc/W6PS-5XBV] (last visited on Aug. 1, 2019).

237. *See* Koh, *supra* note 9, at 442 (noting that withdrawal leads to loss of leverage).

238. Jean Galbraith, *Rejoining Treaties*, 106 VA. L. REV. 73, 78 (2020) (arguing that it is possible to "treat the Senate's pre-existing resolution of advice and consent as still operative.").

239. *See id.* at 77 ("[G]etting treaties through the Senate has always been challenging and is now even harder than it used to be, due both to increased partisanship and to changed procedural norms.").

240. *See id.* at 83–84 (providing examples of treaties that took a long time for the U.S. Senate to provide the requisite advice and consent).

241. The Vienna Convention on the Law of Treaties provides that "[f]or each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession." VCLT, *supra* note 4, art. 84(2). It also provides that termination of a treaty with respect to a state party to the treaty "[r]eleases the parties from any obligation further to perform the treaty . . . ." *Id.* art. 70.

242. *See* Amirfar & Singh, *supra* note 47, at 445 (observing in connection with Justice Jackson's tripartite analytical framework in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), that the President's power to withdraw unilaterally from international agreements is at its height where the withdrawal relates primarily to the exercise of the Executive branch's exclusive Article II powers, such as the power to recognize foreign nations, but "the power of unilateral withdrawal is at its nadir where the treaty relates to matters within the constitutional authority of Congress, such as the power to regulate foreign commerce, and the withdrawal is not supported by the express or implied will of Congress." The tripartite formula in *Youngstown* provides that: (1) "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate;" (2) "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain;" and (3) "[w]hen the President takes measures incompatible with the

The U.S. Constitution does not provide that termination of international obligations must be with the advice and consent of congress, but nor does it prohibit the U.S. Congress from making such a requirement.[243] It seems logical that if a treaty was entered into with the advice and consent of Congress—an act that signifies that the Congress views the treaty to be in national interest—that exiting such a treaty should also be with the advice and consent of the U.S. Congress. Such legislation should provide that the government can exit sole-executive agreements (after all those are made without the advice and consent of the U.S. Congress) but not treaties and congressional-executive agreements made with the advice and consent of the U.S. Congress.[244]

Regarding the significance of making treaties and delegation of the power to make treaties, one of the framers of the U.S. Constitution, John Jay, wrote: "[t]he power of making treaties is an important one . . . and it should not be delegated but in such a mode, and with such precautions . . . that it will be exercised . . . in the manner most conducive to the public good."[245] If the power of "advice and consent" is aimed at ensuring that the making of treaties is for the public good, so should the unmaking of those treaties. John Jay further wrote that the "President and Senators . . . will always be . . . those who best understand our national interests . . . who are best able to promote those interests . . . . With such men the power of making treaties may be safely lodged."[246] Because treaties take a long time and they are usually made in the national interest, they should not be so quickly terminated. In this connection, John Jay wrote:

> It was wise, therefore, in the convention to provide, not only that the power of making treaties should be committed to able and honest men, but also that they should continue in

expressed or implied will of Congress, his power is at his lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.").

243. The U.S. Constitution provides for congressional power and control over treaty-making. *See* U.S. CONST. art. II, § 2. In *Goldwater v. Carter*, 617 F.2d 697, 698 (D.C. Cir. 1979) the court held that the president had the authority to terminate a treaty with Taiwan without first obtaining the advice and consent of the Senate. However, the circuit court opinion in *Goldwater v. Carter* was later vacated by the U.S. Supreme Court and remanded to the lower court for dismissal without an official opinion being issued addressing the question, two justices stating in separate concurring opinions that the issue was either not ripe for judicial review or was a nonjusticiable political question that could not be addressed by the Court. *Goldwater v. Carter*, 444 U.S. 996, 996, 998 (1979).

244. There are three types of executive agreements: sole-executive, congressional-executive, and treaty-based executive agreements. Sole-executive "agreements with no congressional authorization or approval . . . rest on the President's independent constitutional authority in the realm of foreign affairs." Amirfar & Singh, *supra* note 47, at 448.

245. THE FEDERALIST NO. 64 (John Jay).

246. *Id.*

> place a sufficient time to become perfectly acquainted with our national concerns, and to form and introduce a system for the management of them.[247]

Indeed, it does not seem that at the time the U.S. Constitution was framed, it was envisioned that treaties could be so easily repealed. In this regard, John Jay wrote:

> Others, though content that treaties should be made in the mode proposed, are averse to their being the SUPREME laws of the land. They insist, and profess to believe, that treaties like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, an that it would be impossible to find a nation who would make any bargain with us, which should be binding on them ABSOLUTELY, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them.[248]

The U.S. Constitution does not permit the government the powers to arrogate to itself the ability to unilaterally terminate treaties whose formation had the seal of the U.S. Congress without the co-equal participation of the U.S. Congress. On this matter, one of the United States' founding fathers, Alexander Hamilton, had this to say:

> The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws, and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate. The *power of making treaties is, plainly, neither the one nor the other.* It relates neither to the execution of the subsisting laws, nor to the enaction of new ones; and still less to an exertion of the common strength. Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign.

247. *Id.*
248. *Id.*

> *The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive.* The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.[249]

If the U.S. government were able to act alone in the formation, and by extension the termination of treaties, the security of such treaties would be on precarious grounds. Alexander Hamilton spoke to this point by writing:

> To have intrusted the power of making treaties to the Senate alone, would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations . . . . While the Union would, from this cause, lose a considerable advantage in the management of its external concerns, the people would lose the additional security which would result from the co-operation of the Executive. Though it would be imprudent to confide in him solely so important a trust, yet it cannot be doubted that his participation would materially add to the safety of the society. It must indeed be clear to a demonstration that the joint possession of the power in question, *by the President and Senate, would afford a greater prospect of security, than the separate possession of it by either of them.* And whoever has maturely weighed the circumstances which must concur in the appointment of a President, will be satisfied that the office will always bid fair to be filled by men of such characters as to render their concurrence in the formation of treaties peculiarly desirable, as well on the score of wisdom, as on that of integrity.[250]

Thomas Jefferson opined, "[t]reaties being declared, equally with the laws of the United States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded."[251] Although that statement seems absolute, history indicates that Congress has been willing to allow certain exceptions under which the government could act unilaterally in terminating certain treaties. For example, the U.S. Senate has previously considered, without

249. THE FEDERALIST NO. 75 (Alexander Hamilton).

250. *Id.* (emphasis added).

251. THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE: FOR THE USE OF THE UNITED STATES SENATE 111 (1866).

adopting, resolutions, "providing for unilateral termination without the concurrence of Congress under certain circumstances, such as where the treaty was superseded by statute,"[252] or more generally when the termination would not "endanger the security of the United States."[253]

In addition, even without adopting legislation that requires express concurrence of the U.S. Senate in termination of a treaty of the U.S., when ratifying a treaty, the U.S. Senate could indicate that the treaty cannot be terminated without the concurrence of the Senate. U.S. courts tend to disapprove of executive agreements that were entered into contrary to the will of Congress. For example, in *United States v. Guy W. Capps, Inc.*,[254] the court declared a sole executive void and unenforceable "because it was not authorized by Congress and contravened provisions of a statute dealing with the very matter to which it related."[255] Similarly, a court could declare invalid any attempt to terminate a treaty contrary to the expressed will of the U.S. Senate. Indeed, the Restatement (Third) of Foreign Relations Law provides that:

> If the United States Senate, in giving consent to a treaty, declares that it does so on condition that the President shall not terminate the treaty without the consent of Congress or of the Senate, or that he shall do so only in accordance with some other procedure, that condition presumably would be binding on the President if he proceeded to make the treaty.[256]

The disadvantage of this approach is that the U.S. Senate would have to indicate in each ratified treaty whether it requires the concurrence of Congress for that particular treaty to be terminated.

As far as the courts are concerned in their general approach to international law, the United States Supreme Court needs to take a position that consistently supports international law. As Professor Jack Goldsmith notes, the Supreme Court has a "general (though not inevitable) aversion to the incorporation of international law."[257] That need not be the case. Specifically, in holding governments accountable, the U.S. courts have the power to determine that the government cannot unilaterally terminate international treaties.[258] It might not be a radical

252. Amirfar & Singh, *supra* note 47, at 454.

253. *Id.*

254. 204 F.2d 655 (4th Cir. 1953), *aff'd*, 348 U.S. 296 (1955).

255. *Id.* at 658.

256. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 339 cmt. a (AM. LAW. INST. 1987).

257. Goldsmith, *supra* note 8, at 410.

258. Galbraith, *supra* note 3, at 448 ("U.S. courts hold the keys to new limits on presidential power with respect to constitutional law and to the interpretation of implementing legislation. As

step for the courts to take. After all, the U.S. Supreme Court may have laid the ground in *Clinton v. City of New York*, where the Court held that executive withdrawal from a treaty does not necessarily imply the termination of implementing legislation of a treaty that is rooted in the U.S. Constitution.[259]

Beyond those recommendations, it is necessary also to ask what international law can do to ensure that it responds to the concerns of the United States. International institutions like the United Nations and its agencies need to find creative ways to resolve those concerns. For example, the United Nations may need to ensure that countries contribute more to an organization in proportion to their respective gross domestic product.

International courts need to ensure that justice is not just done but is seen to be done when it relates to the United States. The Statute of the International Court of Justice need not provide that parties can decide the judges will sit in judgment over a matter affecting them, but only with the consent of the ICJ. That consent may not be necessary as long as the parties have agreed as to the judges.

It may be necessary also for the United Nations to establish a mechanism for the continuing review of international agreements to ensure that they are not rendered obsolete and non-responsive to emerging issues, some of which have been raised by the United States.

In conclusion, the withdrawal of the United States may have a point in that there could be legitimate concerns as to whether the interests of the United States are not being met under various international treaties and platforms. Even then, withdrawal itself seems to be too blunt an instrument that may be wreaking havoc by painting international law with a broad brush that may have long-term negative impacts on the very interests that the United States is seeking to protect. This is because there is a real possibility that the United States will simply end up isolating itself. It may be easier to try to stay and bring change from within, rather than try to change international law from the outside looking in because of lack of standing. The United States, as the only superpower, has a lot of leverage that it can rely on to bring about change while working from the inside. U.S. courts need to be more protective of international law just as international law needs to be more protective of U.S. interests.

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example[] in the constitutional domain, the Supreme Court could one day hold that . . . the President lacks the power to terminate treaties . . . .").

259. Clinton v. City of New York, 524 U.S. 417 (1998).