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Indisputable Violations: What Happens When the United States Unambiguously Breaches a Treaty?

DAVID A. KOPLOW

The United States justifiably prides itself on its devotion to “the rule of law.” We take legal instruments seriously; when we assume a binding legal obligation at home, we mean it, and we expect all parties to the agreement to demonstrate comparable fealty.

This commitment to the law also extends to international agreements. Treaties are the coin of the international realm, and the United States leads the world both in making treaties and in publicly and pointedly holding others accountable when they fall short of full compliance.¹ What happens, then, when the United States contravenes a binding international legal obligation in a manner so obvious and unarguable that it can offer no defense to the charge of breach?

It happens more often than one might think and to more important treaties than one would hope, including treaties for which the United States continues to depend upon fastidious performance by other countries. Here, I present three illustrative cases studies of blatant U.S. violations of binding international legal obligations: the 1993 Chemical Weapons Convention, the 1963 Vienna Convention on Consular Relations, and the obligation to pay annual dues under the Charter of the United Nations. I explain the causes of these breaches and examine their adverse consequences for the United States and for the international rule of law.

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TWO STREAMS OF LAW

First, however, a bit of background about the two independent and somewhat-competing streams of legal authority governing treaties. On the one hand, under Article VI of the U.S. Constitution, a treaty, as a matter of domestic law, is the “supreme Law of the Land.” Only the Constitution is superior to a treaty and the latter has the equivalent legal dignity of a statute. Article II of the Constitution further states that the President of the United States has the obligation to “take Care that the Laws be faithfully executed.” Juxtaposing these texts, it is “black letter law” that a treaty must be enforced unless it runs afoul of a provision of the Constitution (noting that a treaty may be invalidated as “unconstitutional” in the same sense as a statute) or if it is superseded by a directly contrary stipulation in a subsequently enacted statute.

On the other hand, international law presents a somewhat different hierarchy of legal rules. From the perspective of international jurisprudence, the foundational prescription is *pacta sunt servanda*; treaties are to be respected and international obligations must be obeyed. Treaties and other forms of international law, therefore, occupy the apex of the legal pyramid and all domestic authorities of any particular country—whether denominated as rules of its national constitution, ordinary legislation, or in any other manner—are subsidiary. A country may not, under this system, interpose domestic law as a justification for its failure to meet treaty requirements. If it could, there would not be much point in concluding such agreements.

The President of the United States may therefore occasionally be handcuffed by this amalgamation of distinct legal authorities. If a valid treaty imposes an obligation, international law will demand adherence to it. However, if the same treaty violates the Constitution or if a subsequent domestic statute were to contain a contradictory obligation, the President’s ability to fulfill international obligations would be constrained. The United States must then adhere to domestic law and violate the treaty, or develop a creative mechanism to reconcile the contradictory requirements of the treaty and the statute. U.S. institutions have demonstrated great zeal in attempting to find or invent such harmonization, but it is not always possible.

A MATTER OF INTERPRETATION

In practice, violations of international law are not usually formally adjudicated. The world’s leading international judicial tribunal, the International Court of Justice (ICJ), typically resolves only two or three

cases per year, and it does not possess automatic jurisdictional power over the United States, Russia, China, and other leading international actors who have not submitted themselves to the Court's mandatory authority. Some other international courts, such as the European Court of Justice, are more active, but even the most successful do not exercise the same primacy in the global arena that U.S. courts enjoy domestically. Aside from judicial institutions, the United Nations Security Council holds the power to resolve disputes in a compulsory fashion. However, the veto power ensures that the five permanent members—and their allies—are protected against any adverse findings or orders. The “court of world public opinion” can be meaningful too, but its judgments are often murky.

Debates about putative treaty violations are also often inconclusive because international law, like domestic U.S. law, is frequently contestable. For example, the rules for demarcating a disputed land or maritime boundary or the interpretation of a World Trade Organization obligation about improper barriers to international trade can be obscure, ambiguous, and debatable. Often, the United States (or any other country) adopts a certain interpretation of the treaty. If the issue becomes a *cause célèbre*, the United States might “win” or “lose” the debate over its interpretation. But if the matter is truly one on which countries could reasonably disagree, there may not be much embarrassment for a country that has in good faith advanced what subsequently turns out to be only a minority position.

We should not overstate this ambivalence—there are plenty of instances in which the United States publicly adopted a legal posture wholly at odds with the mainstream opinion of the world legal community. The recent U.S. arguments that waterboarding was not “torture,” for example, or that “extraordinary rendition” was legally permissible, failed the international laugh test. In the 1999 NATO bombing campaign against Serbia to arrest the ethnic cleansing of Kosovo, the United States did not have a real legal justification to propound, since it was acting without authorization from the Security Council and without a self-defense rationale. But the point is that in most of those instances, the United States at least had *something* to say. It may have only been a half-baked legal theory, a justification that rested on impressionistic “legitimacy” rather than strict “lawfulness,”

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or a nuanced rationale that inspired precious little international resonance. But at least U.S. representatives had a story to offer by way of defense, explanation, or mitigation.

At other times, however, the U.S. position garners absolutely no legal support—and deserves none. On multiple occasions, the United States has joined a valid treaty, helped bring it into legal force, accepted the obligations and the benefits that come with it, and then unarguably and ostentatiously violated the treaty. As detailed in the three cases below, the United States has a history of flatly breaching commitments and, when challenged, having nothing to assert in its defense.

THE CHEMICAL WEAPONS CONVENTION

The 1993 Chemical Weapons Convention (CWC) constitutes a comprehensive and nearly universal bulwark against chemical warfare. Its ambitious scope is reflected in the preamble, in which the parties declare themselves “determined, for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons.” The treaty has attracted 188 parties and the detail and specificity of its terms represent “state of the art” arms control verification methodology. By any measure, it is one of the most significant and successful disarmament agreements in history.

Parties to the CWC commit to never develop, produce, acquire, retain, transfer, or use chemical weapons and to destroy their existing stockpiles. The treaty lays out a timetable for the elimination of existing weapons—called the “order of destruction”—with interim benchmarks until the tenth year. By then, each party must have incinerated, chemically neutralized, or otherwise destroyed 100 percent of its declared chemical weapon inventory. If a party experiences difficulty meeting these deadlines, it can apply for an extension, but the treaty stipulates that “in no case” may the final deadline for completing the entirety of the chemical weapon elimination exceed a total of fifteen years.

Unsurprisingly, the United States and Russia declared the overwhelming majority of the world’s chemical weapon stocks, with approximately 30,000 tons and 40,000 tons respectively. Five other countries (Albania, India, Iraq, Libya, and South Korea) had, or still have, much smaller chemical weapon reserves to wrestle with. The two chemical leviathans devoted time, technology, and treasure to the chore of destroying the chemical reservoirs that each had so assiduously assembled during the Cold War. For the United States, the destruction process has consumed an estimated \$28 billion to date.

The CWC entered into force on April 29, 1997 and made April 29, 2012 the final deadline for completing the chemical weapon destruction operations, even with the single allowable five-year extension. Neither the United States nor Russia met that deadline. The U.S. Army, responsible for leading the American chemical weapon destruction program, accomplished approximately ninety percent of the goal by the specified deadline, but noted that it will take until the fourth quarter of 2023—some eleven and a half years beyond the supposedly “final” date—to eliminate the remainder. Moscow managed to destroy only about sixty percent of its inventory by the target date. Yet, despite its initial inertia, Russia is now moving considerably faster and projects to complete the remainder of its chemical weapon destruction operations by about 2015. Some experts, however, are skeptical of Russia’s ability to meet that target and would add two or three more years to the prediction.

It must be acknowledged that the job of destroying this amount of chemical detritus is a severe challenge. The munitions are old, fragile, and diverse, and they occasionally leak; the chemicals are extremely hazardous and sometimes congealed into rubbery “heels” of hard-to-destroy residue. The inventory was not constructed with the possibility of safe destruction in mind and operators have had to innovate suitable procedures, equipment, and facilities.

The CWC allows each party to determine for itself which destruction technology to use, with the exceptions of forbidding open-pit burning, land burial, and dumping into a body of water. The treaty also appropriately stipulates that in chemical weapon destruction operations, each party “shall assign the highest priority to ensuring the safety of people and to protecting the environment.” Still, the timetable in the “order of destruction” must be met.

Three fateful factors contributed to the U.S. failure to meet the treaty’s deadline. First, mismanagement, poor oversight, and mangled lines of bureaucratic supervision led to much of the delay. Many government programs suffer notorious cost overruns and schedule delays, but the record of the chemical demilitarization campaign is even worse than most. The Government Accountability Office has issued dozens of reports criticizing various aspects of the administrative operations; the Department of Defense has largely concurred in the analyses and pledged, though not always successfully, to do better.²

Second, because the chemical weapon stocks were stored at eight disparate locations around the continental United States, the Army had initially contemplated relocating much of the ordnance into a few

centralized repositories to allow for more efficient, larger-scale operations. However, in response to constituent opposition to such transport, Congress forbade the interstate shipment of these fragile and dangerous paraphernalia, requiring investment in multiple, arguably redundant facilities.³

Third, domestic politics led to the introduction of new technologies for destroying the chemical weapons, causing further delay. A series of technical studies by the National Academies of Sciences validated the safety and effectiveness of incineration as the preferred methodology for eliminating most of the U.S. chemical weapon stocks. Accordingly, the Army adopted plans to construct a series of state-of-the-art furnaces and other facilities at the storage locations, which eventually succeeded in destroying ninety percent of the inventory within the treaty's timetable. However, some local communities resisted, horrified by the prospect that smokestacks might spew even minute quantities of such lethal substances into the environment. Again, Congress responded, mandating the use of "alternative technologies" such as chemical neutralization and additional processing at two sites—Lexington, Kentucky and Pueblo, Colorado—that together held about ten percent of total U.S. chemical weapons.⁴ Unfortunately, the process of designing, developing, constructing, testing, and obtaining federal and state environmental and safety permits for these alternative technology facilities has consumed an inordinate amount of time. Construction is now proceeding apace at both locations, but the

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current timetable has Pueblo beginning its chemical weapon destruction operations in 2015 and finishing in 2019. Lexington, which holds only 1.7 percent of the original stocks, will start destruction operations in 2020 and finish in 2023.

The point is that the United States is currently violating a central provision of a major arms control treaty, and it has no one but itself to

blame. None of the usual legal excuses that are sometimes available to mitigate a delict of an international agreement—doctrines such as "impossibility" or "changed circumstances"—are applicable here. The United States has neither contested its *prima facie* failure to meet the CWC deadline nor advanced any defense against the legal conclusion.

In sharp contrast, the United States regularly monitors other countries' performance regarding their obligations under the CWC. It has vigor-

ously pressed those who have fallen short even on secondary matters, which include the failure by some parties to designate a “National Authority” as a central point of contact for CWC matters or the absence in some states of domestic legislation to ensure that private parties honor treaty provisions. But in this instance—notably a much more important failure to comply with one of the treaty’s central obligations—the United States is unwilling even to concede that the vocabulary of “breach” or “non-compliance” is applicable. American diplomats have restricted the analysis to a neutral comment, noting that the United States has simply been “unable to meet the deadline.”⁵

The United States and Russia are behaving “in good faith” in pursuing chemical weapon destruction—albeit at a dilatory pace—and do not retain any viable military advantage from their prolonged possession of these largely obsolete and dysfunctional munitions. There is no doubt that the two countries will eventually achieve the CWC’s desired end state: complete eradication of the toxic threats. Likewise, neither country has retreated from the demand that all other parties must remain equally resolute in their rejection of chemical weapon use. But, for at least the next eleven years, the United States will stand in stark, unexcused violation of this central international legal obligation.

THE VIENNA CONVENTION ON CONSULAR RELATIONS

The 1963 Vienna Convention on Consular Relations (VCCR) is the leading international instrument on the status, rights, protections, and responsibilities of consular officials inside a receiving state.⁶ One hundred and seventy-three parties have joined the treaty and it is widely regarded as one of the foundation stones of normal international relations.

Article 36 of the VCCR stipulates that when a party arrests, imprisons, or detains a foreign citizen, it must inform him “without delay” of his right to have his consul notified of the adverse action and to communicate with his home authorities. The consul’s office will then be in a position to visit the detainee, monitor the situation, and offer whatever assistance or support it deems appropriate. This protection may or may not be of great practical value to the detainee; there is no guarantee that the consul will provide legal advice, investigatory assistance, or diplomatic pressure for release. But some states, such as Mexico, regularly extend these important services to their nationals in times of need. The fundamental notion is that the sending state should have an opportunity to look after its people and the treaty-required notification of arrest is where this supervision begins.

The United States exercises its VCCR rights on a daily basis inside foreign countries and relies upon the other treaty parties to advise American arrestees of their right to contact U.S. official personnel. In 2010, American consular officers conducted 9,500 prison visits and assisted 3,500 U.S. citizens arrested abroad. The formality sometimes carries little value, but in potentially abusive and hostile environments American intervention can be quite important. For example, the VCCR formed a critical part of the U.S. legal action against Iran after the seizure and detention of American embassy personnel in Tehran during the hostage crisis of 1979-1981.

In 2009, two U.S. citizens, Euna Lee and Laura Ling, were arrested for illegally crossing from China into North Korea. They were held by North Korean officials for months, interrogated, tried, convicted, and sentenced to twelve years of hard labor. They experienced what they described as weeks of isolation where their only contact with the outside world was visits from the Swedish ambassador. Since U.S.-North Korea diplomatic relations are suspended, Sweden agreed to assert U.S. rights under the VCCR. These brief consular visits convinced Lee and Ling that outsiders had not forgotten them and, as Lee put it, “[they] protected me from any physical mistreatment by my captors.”⁷

However, the United States routinely violates the VCCR. When U.S. law enforcement authorities arrest or detain foreign nationals, they fail, dozens of times annually, to advise them of their rights and to notify

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the appropriate consuls.⁸ The individual arrestees, often unaware of the treaty and its provisions, do not affirmatively solicit assistance from their consuls; likewise, the consuls, ignorant of the fate of their citizen, are unable to reach out with any support. Often, the alien is tried, convicted, sentenced, and incarcerated in a routine fashion before anyone notices that the VCCR might be relevant. At that point, a perverse “Catch-22” situation arises: if the non-

citizen fails to raise a complaint about the VCCR violation at the trial level—including if he fails to assert the argument because he was never advised of his rights under the treaty—U.S. law determines that his claim has been permanently waived. This “procedural default” rule precludes the breach from being remedied, or even considered, in subsequent proceedings or appeals.

The fundamental reason for persistent American non-compliance is that most law enforcement activity in the United States is conducted at the state and municipal levels, not at the federal level. Local police may have little training and even less interest in international legal affairs. They may have never heard of the VCCR or may not have a standard routine for implementing its requirements. Conversely, Department of State officials, who are keenly aware of the reciprocity value of adherence to the treaty as a lifeline for Americans arrested abroad, have little power to ensure adherence to the treaty mandate inside the domestic U.S. system. The Department of State has prepared and promulgated voluminous training materials to inform and instruct local law enforcement officials about the VCCR. It has recently released the third edition of its manual *Consular Notification and Access*,⁹ distributed over one million sets of briefing materials, and issued 70,000 pocket cards for law enforcement officials to carry. But the Department of State cannot ensure that the training is undertaken or heeded.

The violation scenario is therefore replayed with distressing frequency year after year, with foreigners from many countries denied the protection that the treaty was intended to ensure. On three separate occasions, the ICJ has heard complaints against the United States on these grounds. These are open-and-shut violations: Department

of State lawyers have explicitly conceded the U.S. deficiency.¹⁰ The only persistent difficulty in these cases concerns the remedy—what, if anything, can the U.S. executive branch do under the Constitution to correct the failures of local law enforcement and preclude their repetition?

The first such case, arising in 1992, involved Angel Breard, a Paraguayan citizen charged with attempted rape and capital murder in Arlington, Virginia. Breard was not afforded the requisite VCCR disclosures; the Paraguayan consul was not engaged in a timely manner; and Breard was tried, convicted, and sentenced to death. While he was on death row, Paraguay sued the United States in the ICJ, alleging the violation of the treaty and demanding some form of fresh judicial process for him. While the case was pending, the ICJ sought to freeze the status quo in anticipation of an upcoming oral argument, and ordered the United

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States in the interim to “take all measures at its disposal to ensure that Angel Francisco Breard [was] not executed pending the final decision in these proceedings.”¹¹

The United States took the extraordinary step in the ICJ of admitting that the failures of Virginia authorities constituted a U.S. breach of the treaty and formally apologized to Paraguay.¹² Secretary of State Madeleine Albright sent a letter to Virginia Governor James S. Gilmore III requesting a stay of execution, since “execution of Mr. Breard in the face of the Court’s April 9 action could be seen as a denial by the United States of the significance of international law and the Court’s processes in its international relations and thereby limit our ability to ensure that Americans are protected when living or traveling abroad.”¹³

Meanwhile, the U.S. Supreme Court determined that although the United States had thwarted its international obligation by failing to provide prompt consular notification, under applicable U.S. procedural rules Breard had forfeited his VCCR claim by failing to assert it at the outset of the criminal prosecution.¹⁴ Shortly after that decision, Governor Gilmore rejected relief, and Breard was executed by lethal injection.¹⁵

A similar drama played out only a few years later, when German brothers Karl and Walter LaGrand were arrested in Arizona. Like Breard, they were not afforded the mandatory VCCR disclosures, even after the police became aware of their foreign nationality. Both brothers were tried, convicted for murder, and sentenced to death. After years of appellate litigation and diplomatic wrangling, Karl LaGrand was executed on February 24, 1999. Walter LaGrand’s execution was scheduled for a few days later and Germany filed an emergency suit against the United States in the ICJ. The ICJ issued a preliminary order against the execution, which the U.S. federal government determined it could not enforce by itself, but which it communicated to Arizona Governor Jane Dee Hull. Governor Hull rejected clemency, and Walter LaGrand was executed.

As in *Breard*, the U.S. government was forced to concede in oral and written ICJ proceedings that it had failed to comply with Article 36 of the VCCR. It apologized to Germany and offered assurances that it would try to avoid repetition. Germany nonetheless asked the ICJ to obtain more definitive assurances of effective implementation of the treaty by the United States, and more meaningful responses to any future breaches. The ICJ ruled that the United States would have to develop a mechanism of its own choosing for “review and reconsideration” of any conviction and sentencing that would be affected by another treaty violation.¹⁶

In 2003, a third case arose over a group of fifty-one Mexican citi-

zens, each of whom had been processed through the U.S. judicial system and sentenced to death without VCCR protections, despite the U.S. assurances about not replicating the violations of *Breard* and *LaGrand*. In a case denominated *Avena*, the ICJ again ruled that the United States had clearly violated the treaty and ordered that the fifty-one Mexicans were entitled to “review and reconsideration.” The Court noted with concern that “there remain a substantial number of cases of failure to carry out the obligation to furnish consular information to Mexican nationals,” but it appreciated the United States’ “good faith efforts to implement the obligations incumbent upon it.”¹⁷

In 2005, President George W. Bush determined that the United States would “discharge its international obligations” by having state courts “give effect to the decision,” and he sent a memorandum to that effect to the relevant state authorities. In Texas, the test case involved Jose Ernesto Medellin, who had been convicted of murder. Texas authorities declined to offer relief, and the U.S. Supreme Court ruled that the President lacked constitutional authority to compel state officials to conform. Medellin was then executed.

These cases are far from simple. They raise some of the most complicated points of international and U.S. constitutional law, and of the relationship between competing authorities at the global, national, and state levels. One point, however, remains crystal clear: Article 36 requires the United States to provide consular notifications, and the United States repeatedly fails to do so. Good faith attempts at remediation and reform, as well as the bromides from both Democratic and Republican executive branch leaders have persistently proven unavailing.

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In 2005, frustrated with the inability to ensure compliance and embarrassed by repeatedly losing “slam dunk” cases in the ICJ, the United States withdrew from the “optional protocol” to the VCCR.¹⁸ This maneuver does not terminate U.S. participation in the whole treaty—the United States still sustains the agreement as a vital vehicle for protecting U.S. citizens who are incarcerated abroad and is still legally obligated to perform reciprocal duties—but it does remove the mechanism that allows other parties to bring suit against the United States in the ICJ. So the U.S. violations continue, but the avenue

for attaining international judicial accountability is foreclosed. By the same measure, the United States can no longer protect U.S. nationals abroad by bringing its own suits in the ICJ.

In 2011, Senator Patrick Leahy introduced the “Consular Notification Compliance Act,” designed to facilitate compliance with the VCCR notification requirements and the fulfillment of the U.S. commitments under-
 taken in the ICJ proceedings. Despite strong endorsement by the Obama Administration, however, prospects for this legislation remain unclear.

The current situation continues to reflect the persistent asymmetry in international practice; the United States remains a party to the VCCR and derives the anticipated benefits when a U.S. national is arrested abroad, yet repeatedly fails to reciprocate.

obligations under the VCCR very seriously,” while somehow expressing a perverse pride in noting that “the Department receives only about [fifty] complaints a year from foreign governments that consular notification has not been provided, and many of these complaints are not meritorious.”¹⁹

UNITED NATIONS DUES

The third case study, the recurrent U.S. failure to pay its assessed dues to the UN, is in some ways the simplest and most obvious. Here, the default is not “accidental” nor is it the unintended byproduct of bureaucratic bungling, misbegotten technologies, or ineffective coordination among executive, legislative, and state authorities. Instead, the whole purpose of the failure to pay has deliberately been to violate U.S. treaty obligations, and to do so in an ostentatious, threatening fashion.

The UN Charter specifies that “the expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.” On most matters, the General Assembly plays only a recommendatory role; but on budgetary questions it is a true legislature authorized to specify, via a two-thirds vote, the legal obligations of members.²⁰

The overall financial structure of the UN defies easy explanation. The total costs are sometimes divided into separate accounts for the “regular” budget (for the primary functions of the institution), the budget for specialized agencies and other members of the UN family, the costs of various international peacekeeping operations (now totaling seventeen missions on four continents) and other categories. The money comes both from assessed dues and from members’ voluntary contributions—which may seem less reliable than mandatory dues, but which account for well over half of the organization’s finances. The grand total of UN spending now tops \$30 billion annually.²¹

The UN Committee on Contributions has the primary responsibility for recommending the “scale of assessments” to the General Assembly, based on each member state’s ability to pay, accounting for factors including per capita income, relative share of the world economy, and debt burden. The minimum allocation, paid by thirty-nine countries, is 0.001 percent of the regular budget, or about \$26,000. The United States’ assessments are currently 22 percent of the regular budget and 27.14 percent of the peacekeeping budget.²² This amounts to a total annual contribution of about \$2.5 billion. As a reflection of its preponderant role in the world economy, the U.S. share of UN dues is by far the largest of any country. It would be an even greater percentage if the members had not agreed to artificially cap a state’s maximum possible dues.

The problem is that the United States routinely does not cough up its assessed dues. Over the years, the United States has repeatedly withheld, reduced, or delayed its required annual contribution in protest over a wide variety of UN actions. On occasion, the United States has interrupted its assigned payments or threatened a “financial veto” with respect to specific, unwelcome UN programs or actions.²³ In addition to these “targeted” cuts, the United States has sometimes unilaterally inflicted an across-the-board withholding of a percentage of its assessed dues as a way of reducing the overall U.S. government budget.²⁴

Sometimes, Congress has been the locus of the resistance to meeting the U.S. dues commitment. Even if the President wanted to satisfy an international legal obligation, under the U.S. system, the Treasury can ordinarily make no disbursements without legislative authorization and appropriation. If Congress were to decline the funds, the President would be unable to sign the checks. Other times, the legislative branch supports the UN, but the executive branch withholds payment to make a point or exert political pressure.²⁵ Either way, the United States tries, in effect, to single-handedly convert the overall dues obligation into an à la carte whim, funding selected activities but shunning others.

Missed payments are not forgiven or forgotten; they accumulate into an “arrearage.” Many countries occasionally or routinely pile up such backlogs; yet, the United States has consistently stacked up the largest and most persistent debt to the UN. In 1998, for example, the U.S. arrearage rose to a then-record \$1.58 billion. It took prolonged negotiation, brokered by U.S. Senators Jesse Helms and Joe Biden, to create a watershed compromise, under which the UN agreed to reduce future U.S. annual assessments, and the United States agreed to pay down the past-due accounts.²⁶ Still, the protagonists had to rely upon private charity, in the form of a \$34 million gift offer from businessman and philanthropist Ted Turner, to patch the finances together and close the deal.²⁷

For most of the past decade, the U.S. arrearage has fluctuated between one and two billion dollars, creeping higher in recent years. By the end of 2011, the deficit stood at \$855 million (roughly twenty-seven percent of the world’s total arrearages), and by May 2012, it had swollen to about \$1.25 billion.²⁸ Controversy has occasionally arisen regarding the actual size of the deficit as the United States and the UN disagree over important bookkeeping details, such as the proper reimbursement for logistical support the United States provides to peacekeeping operations. “Contested arrearages” aside, it is clear that the United States consistently fails to pay its assigned dues on time and in full.

The primary enforcement mechanism for the dues obligation, pursuant to Article 19 of the Charter, is that a state that falls in arrears by two years “shall have no vote in the General Assembly.” The General Assembly may waive that sanction if it finds that the failure to pay “is due to conditions beyond the control of the Member,” as is currently the case for six impoverished states.²⁹

The irregularity of financial contributions from the United States and other members has caused severe difficulties for efficient planning and consistent operations of the UN.

The irregularity of financial contributions from the United States and other members has caused severe difficulties for efficient planning and consistent operations of the UN. Financial stringency, especially in hard times, is one thing; unpredictability of funding, especially on such a large scale, can be disabling. Meanwhile, the

demands placed upon the UN—including U.S. requirements for programs ranging from civil aviation, to food safety, to patent protection—have not abated, nor are they compatible with irregular funding.

This article is not the place to rehearse the legitimacy of various U.S. complaints about UN operations, or to assess the sometimes-salutary effect of selective withholding of dues as a tactic for inducing needed reforms in organizational behavior. Rather, the point is simply to observe that a very important treaty, namely the UN Charter, requires dues, and the United States has conspicuously breached that obligation by deliberately failing to pay.

This posture is ironic given the United States' history of pressing other states, notably the Soviet Union, over their failure to share equitably the institution's financial burdens. During the 1950s and 1960s, the General Assembly initiated UN peacekeeping operations in the Congo and in the Middle East, which roiled Cold War tensions and global politics. In protest, the USSR and France, along with scores of other states, began withholding their dues payments and ran up significant arrearages. Crisis loomed in 1964, when the Soviet backlog approached the two-year point. The United States asserted that when the arrearage reached that level, the suspension of the Soviet vote in the General Assembly would be "mandatory and automatic," and that the Soviet Union would not be eligible for a waiver, since non-payment was not "beyond the control" of Moscow.³⁰ The United States prepared and distributed a strong legal brief pleading for strict compliance. The Soviets threatened to leave the UN if deprived of their vote.

The UN treaded water for months, nervously agreeing to conduct the entire 1964-1965 session of the General Assembly without calling any record votes. Eventually, the protagonists fashioned a crude compromise that created an alternative mechanism for funding critical peacekeeping operations, afforded France and the Soviet Union a face-saving path to begin working down their arrearages, and dodged insolvency for the UN.³¹ In grudging acceptance of this accommodation, Arthur Goldberg, the U.S. Permanent Representative to the UN, announced, "if any Member can insist on making an exception to the principle of collective financial responsibility with respect to certain activities of the organization, the United States reserves the same option to make exceptions if, in our view, strong and compelling reasons exist for doing so. There can be no double standard among the members of the organization."³²

Goldberg's predecessor as U.S. ambassador to the UN, Adlai E. Stevenson, had made the point with exquisite clarity: "The UN is faced with a financial and constitutional crisis which must be solved if the Organization is to continue as an effective instrument. The Charter cannot be ignored. Faith cannot be broken. Commitments must be met. Bills must be paid."³³

Unfortunately, international politics soon turned in a different direction. By the 1970s, the United States had conspicuously lost the

prior “automatic majority” it had enjoyed in the General Assembly and meaningful votes began to swing routinely against U.S. positions. As the organization resisted Washington’s preferences, enthusiasm for the institution—and support for fully funding it—waned. Instead of championing the UN, the United States became a reluctant funder and a routine debtor.

Sometimes, instead of exerting its financial leverage via the dues allocation to extort reforms in UN institutional practices, prompt changes in policies, and punish wayward programs, the United States has withdrawn altogether from selected UN agencies. The United States left the International Labor Organization in 1977, citing anti-U.S. politicization within the organization; it later re-joined in 1980. Similarly, the United States exited UNESCO in 1984, complaining about the organization’s mismanagement and anti-Western bias, and did not return until 2003. (In fact, in 2011, the United States halted its \$60 million dues payments to UNESCO after the organization admitted Palestine as a member, but the United States did not withdraw.) While withdrawal is a more severe step than the suspension of dues payments, it is at least a lawful maneuver; withdrawal terminates the obligation to pay future assessments, as well as

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the opportunity to participate in the organization’s decision-making and to benefit from its programming.

The United States is not only the founder, host, leader, and main benefactor of the UN, it is also arguably its biggest beneficiary, as global programs related to public health, human rights, environmental degradation, natural disasters, and counter-terrorism get shortchanged without U.S. financial support and leadership. But Uncle Sam the Deadbeat has repeatedly failed to pay its aliquot share of the costs. Some impoverished states sometimes cannot pay their just debts; the United States can pay, but sometimes just decides not to.

IMPLICATIONS OF THE REPEATED VIOLATIONS

So what? Why does it matter that the United States violates treaties, and occasionally does so without a shred of legal cover? Perhaps that is the *realpolitik* privilege of the global hegemon: to be able to sustain hypocrisy,

asserting that its unique international responsibilities and its “exceptional” position in the world enable the United States explicitly to welch on its debts, fudge on its obligations, and adopt a “do as we say, not as we do” approach with other countries.

However, there is a cost when the world’s strongest state behaves this way. One potential danger is that other countries may mimic this disregard for legal commitments and justify their own cavalier attitudes toward international law by citing U.S. precedents. Reciprocity and mutuality are fundamental tenets of international practice; it is foolhardy to suppose that other parties will indefinitely continue with treaty compliance if they feel that the United States is taking advantage of them by unilateral avoidance of shared legal obligations.

So far, there has not been significant erosion of the treaties discussed in the three examples. The United States and Russia will fall years short of compliance with the CWC destruction obligations, but other parties, with the notable exception of Iran, have reacted with aplomb, comfortable with the two giants’ unequivocal commitment to eventual compliance. Likewise, the VCCR is not unraveling, even if other states lament the asymmetry in consular access to detained foreigners. And while many states pay their UN dues late and build up substantial arrearages, that recalcitrance seems to stem more from penury than from a deliberate choice to follow the U.S. lead.

But that persistent flouting undermines the treaties—and by extension, it jeopardizes the entire fabric of international law. Chronic noncompliance—especially ostentatious, unexcused, unjustified noncompliance—also sullies the nation’s reputation and degrades U.S. diplomats’ ability to drive other states to better conform with their obligations under the full array of treaties and other international law commitments from trade to human rights to the Law of

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of the Sea. The United States depends upon the international legal structure more than anyone else: Americans have the biggest interest in promoting a stable, robust, reliable system for international exchange. It is shortsighted and self-defeating to publicly and unblushingly undercut the system that offers the United States so many benefits. It is especially damaging when, following an indisputable violation, the United States acknowledges its default, participates in an international dispute resolution procedure, and

apologizes—but then continues to violate the treaty. The CWC implementation bodies, the International Court of Justice, and even the UN General Assembly and Security Council are unable to effectively do much to sanction or penalize the mighty United States, but it is still terrible for U.S. interests to disregard those mechanisms.

CONCLUSION

A unifying theme underlies the three violations described above. They all rely upon an insidious combination of a constitutional design that automatically elevates domestic U.S. law above international law; a superpower status that enables the United States to default on treaty obligations without risking immediate meaningful adverse consequences; and a domestic legal and political culture that too often disregards international affairs and foreign opinion, with the result that our government's violations attract little popular attention and outrage.

At this point, little can be done to remedy these three specific violations. The 2012 CWC deadline has passed, and even heroic and expensive remedial efforts today could not destroy the remaining chemical

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weapons much faster than the current enterprise. The violations of Consular Relations obligations are not “inevitable,” but the Department of State can do little to compel state and local law enforcement officials to be more attentive to a treaty that they have no perceived stake in upholding. The United States' persistent withholding of dues to the UN and its constituent bodies is a deliberate political choice by congressional and executive leaders who profess little shame in driving the country into violation of its interna-

tional legal commitments. Our perspective in reflecting upon the three indisputable violations, therefore, must be forward-looking.

International law affords a state multiple options when confronting a proposed treaty that it largely agrees with, but for which it doubts its ability to fully comply. The state may propose key alterations during the treaty negotiations or, if the document has already been concluded, it may propound amendments. Often, it can join the treaty with “reservations,”

which create certain legally allowable unilateral exemptions. Sometimes, the wise course is to delay joining the treaty until the state can be certain of its ability to comply. If it has already joined, it might take advantage of a “withdrawal” clause to exit the accord. But in the interest of international credibility of the state and the international mandate, what it should *not* do is to join the treaty unconditionally, accept the full array of legal obligations, demand that other countries extend to it the promised benefits, and then undeniably flout its responsibilities.

The United States has too often embarrassed itself by playing fast-and-loose with international law and there is plenty of blame to spread around. Sometimes Congress has been at fault; sometimes it was the executive branch in the lead. Sometimes the violation is deliberate; at other times it is an unintended consequence of other policies or failures. But what these three unlovely cases have in common is insufficient attention to the obligation to “faithfully execute” a treaty as “supreme law”—and that failure is both foolish and illegal.

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This is not an argument that the specific costs of these particular indisputable violations are, or will soon become, unbearable. The United States is so big and powerful—and international law is so underdeveloped and flimsy—that in the short-run a superpower can “get away with” these transgressions. But in the long-run, lawless behavior is unsustainable; elevating domestic policy preferences above binding international legal obligations is profoundly not in the U.S. interest. Even if the feeble enforcement mechanisms of the international community cannot compel the United States to honor its commitments, the country itself should work to promote the rule of law by its deeds as well as by its rhetoric.

John Jay warned in Federalist Paper No. 64 on March 7, 1788, “that a treaty is only another name for a bargain, and 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.” President Obama made the same point in his celebrated April 5, 2009 speech in Prague: “Rules must be binding. Violations must be punished. Words must mean something.” That is true, even for the United States. ■

ENDNOTES

- 1 See: U.S. Department of State, "Treaties in Force 2011," <http://www.state.gov/s//treaty/tif/index.htm> (identifying hundreds of bilateral and multilateral treaties in force for the United States on a wide range of subjects); U.S. Department of State, "Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments," 2011, available at <http://www.state.gov/t/avc/rls/rpt/170447.htm> (expressing judgments about other states' conformity with arms control agreements).
- 2 See: U.S. Government Accountability Office, *Chemical Weapons and Materiel: Key Factors Affecting Disposal Costs and Schedule* (GAO/NSIAD-97-18, February 1997); U.S. Government Accountability Office, *Chemical Weapons Disposal: Improvements Needed in Program Accountability and Financial Management* (GAO/NSIAD-00-80, May 2000); U.S. Government Accountability Office, *Chemical Weapons: Sustained Leadership, Along with Key Strategic Management Tools, Is Needed to Guide DoD's Destruction Program* (GAO/NSIAD-03-1031, September 2003).
- 3 National Defense Authorization Act for Fiscal Year 1995, Public Law 103-337, sec. 143, 108 Stat. 2663 (1994), 50 U.S.C.A. 1512a (prohibiting transport of a chemical weapon outside the state in which it was located on October 5, 1994).
- 4 In a series of enactments, Congress directed the U.S. Army to pursue alternatives to incineration of chemical weapon stocks. First, the National Defense Authorization Act for Fiscal Years 1988 and 1989, Public Law 100-180, 101 Stat. 1019, sec. 125, December 4, 1987, required the Department of Defense to evaluate non-incineration technologies and present to Congress "an alternative concept plan" by March 15, 1998. Then, the National Defense Authorization Act for Fiscal Year 1993, Public Law 102-484, 106 Stat. 2315, sec. 173-75, October 23, 1992, required additional study of alternatives to incineration. Next, the National Defense Authorization Act for the Fiscal Year 1997, Public Law 104-201, 110 Stat. 2422, October 1996, sec. 142, required further study and demonstration of alternatives. Then, the 1997 Omnibus Consolidated Appropriations Act, Public Law 104-208, sec. 8065, required pilot funding for two non-incineration alternatives. The Strom Thurmond National Defense Authorization Act for FY 1999, Public Law 105-261, sec. 142, reorganized the Army's chemical demilitarization apparatus and underscored the pursuit of alternatives to incineration. The Military Construction Appropriations Act of 2000, Public Law 106-52, sec. 131 and the Fiscal Year 2000 Supplemental Appropriations, Public Law 106-246, 114 Stat. 511 (2000), prohibited construction of any chemical weapon destruction facility at Lexington until six different alternatives to incineration were demonstrated. Finally, the Floyd D. Spence National Defense Authorization Act for FY 2001, Public Law 106-398, sec. 151, limited the operations at Pueblo to incineration and the alternative technologies that had been demonstrated by May 1, 2000.
- 5 Statement by U.S. Ambassador Robert P. Mikulak at the 16th Session of the Conference of the States Parties, OPCW, C-16/NAT.31, November 29, 2011, 2; Statement by Ambassador Robert P. Mikulak, United States Delegation to the OPCW at the 65th Session of the Executive Council, EC-65/NAT.8, July 12, 2011, 2.
- 6 A consul is similar to a diplomat, functioning to promote commercial relationships between the two states and to protect the interests of tourists and visiting business-people from the sending state.
- 7 Euna Lee, "Consular Access: A Two-Way Street on a Crucial Right," *Washington Post*, June 26, 2011.
- 8 U.S. Department of State, *Digest of U.S. Practice in International Law* (2010), 25, <http://www.state.gov/documents/organization/179316.pdf>.

- 9 U.S. Department of State, *Consular Notification and Access*, 3rd ed. (September 2010), http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf.
- 10 It is important to note that under Article 94 of the UN Charter, each member “undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.” If a state fails to honor such a decision, the other state may have recourse to the Security Council.
- 11 *Vienna Convention on Consular Relations (Paraguay v. United States of America)* (Request for the Indication of Provisional Measures: Order) April 9, 1998, para. 41, <http://www.icj-cij.org/docket/files/99/7599.pdf>.
- 12 *Vienna Convention on Consular Relations (Paraguay v. United States of America)* (Request for the Indication of Provisional Measures: Order) April 9, 1998, para. 18, 29, <http://www.icj-cij.org/docket/files/99/7599.pdf>.
- 13 Letter from Secretary of State Madeleine Albright to Governor James S. Gilmore III, April 13, 1998, <http://www.state.gov/documents/organization/65744.pdf>.
- 14 *Breard v. Greene*, 118 S.Ct. 1352 (1998).
- 15 Curtis A. Bradley, *International Law in the U.S. Legal System* (Oxford University Press, forthcoming Feb 2013).
- 16 *LaGrand (Germany v. United States of America)* (Judgement) June 27, 2001, para. 128 (7), <http://www.icj-cij.org/docket/files/104/7736.pdf>.
- 17 *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Judgment) March 31, 2004, para. 149, <http://www.icj-cij.org/docket/files/128/8188.pdf>.
- 18 Charles Lane, “U.S. Quits Pact Used in Capital Cases,” *Washington Post*, March 9, 2005, <http://www.washingtonpost.com/wp-dyn/articles/A21981-2005Mar9.html>.
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- 20 Charter of the United Nations, June 26, 1945, T.S. No. 993, art. 17.2.
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- 25 Alvarez, *supra* note 24; Zoller, *supra* note 24; Nelson, *supra* note 24.
- 26 Edith M. Lederer, “United Nations Cuts U.S. Dues,” *ABC News*, <http://abcnews.go.com/International/story?id=81871&page=1>.
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