

BIDEN’S INTERNATIONAL LAW RESTORATION

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## I. INTRODUCTION

“Are these the shadows of the things that Will be, or  
are they shadows of the things that May be only?”

CHARLES DICKENS, *A CHRISTMAS CAROL*

Despite sanguine assessments to the contrary,<sup>1</sup> the Trump presidency has had a consequential—and generally negative—impact on international law and U.S. compliance with international law that will last for years to come. The Biden administration is likely to conduct damage control, but expectations for a full reset after the 2020 election need to be lowered. The coming international law restoration, while real, will probably be tempered.

Trump’s single term cemented the following characteristics within U.S. foreign policy: (1) a pronounced preference for alternative normative instruments in lieu of multilateral treaties requiring approval by either or both houses of Congress; (2) a more hostile approach towards China; (3) deep skepticism of the world trading system; (4) reliance on trade sanctions to punish ‘bad’ actors; (5) circumspection towards U.N. system organizations; (6) avoidance of most international courts and tribunals; (7) aversion to never-ending wars and resistance to humanitarian use of force; and (8) ever more iron-clad commitments to Israel’s security. A Biden administration can be expected to modify each of these trends and adopt a

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1. Harold Hongju Koh, for example, argues that international and domestic rule of law safeguards stayed fast, leaving Trump with victories that were not worth the cost. For elaboration, see Harold Hongju Koh, *The Trump Administration and International Law*, 56 WASHBURN L.J. 413 (2017); Harold Hongju Koh, *Trump v. International Law: Who’s Winning?*, 24 AUSTL. INT’L L.J. 1 (2018); HAROLD HONGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* (2018). See also Stewart M. Patrick, *What a Biden Win Would Mean for the Future of Multilateralism*, WORLD POL. REV. (Oct. 26, 2020), <https://www.worldpoliticsreview.com/articles/29165/what-a-biden-win-would-mean-for-the-future-of-multilateralism> [<https://perma.cc/P7XW-ZM9X>] (discussing predictions for a “swift and dramatic double-reverse” on the “hyper-nationalist, unilateralist and sovereigntist mindset” of Trump or a “hopeful restoration” likely to induce whiplash in observers); Alex Ward, *Joe Biden’s Plan to Fix the World*, VOX (Aug. 18, 2020), <https://www.vox.com/2020/8/18/21334630/joe-biden-foreign-policy-explainer> [<https://perma.cc/RNZ6-VF3X>] (describing President Biden’s “‘across-the-board restoration project’” of foreign policy). For a far less sanguine view arguing that liberal internationalism is past saving, see Walter Russell Mead, *The End of the Wilsonian Era: Why Liberal Internationalism Failed*, FOREIGN AFF., Jan.–Feb. 2021.

more measured diplomatic tone with respect to all of them, but it is likely that all eight will remain recognizable aspects of U.S. action in the international law space.<sup>2</sup> Further, given internal structural constraints upon the United States (such as a divided Congress, a resistant federal judiciary, path-dependent federal civil servants, and limits on reversing federal regulations quickly) and external limits (chiefly the international community's loss of faith in the competence and credibility of the United States and U.N. system organizations), even restoring the place international law held during the Obama years will prove difficult.

This measured response will partially be the product of who Biden is. While a number of his foreign policy initiatives are likely to be predictable responses to the excesses of Trump's presidency, President Biden will not set out to systematically dismantle everything associated with his predecessor. Unlike "Terminator Man" Trump,<sup>3</sup> who sought to undo all things Obama, Biden is too careful, too thoughtful, too bipartisan, too rational, and too respectful of the rule of law to follow Trump's vengeful path. This is particularly likely to be the case given Biden's overriding objective to unite a pathologically divided nation.

Part II of this article canvasses how the eight foreign policy trends outlined above are likely to inform the Biden administration's actions. Part III describes the tempered restoration of international law that is predicted to emerge and some of its structural underpinnings. Part IV imagines an alternative scenario, suggesting how Biden's embrace of allies might challenge both existing foreign policy trends and underlying struc-

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2. Indeed, the 2020 Democratic Platform itself supports a number of these tendencies, including wariness towards China, skepticism of free trade agreements, opposition to "Forever Wars," and an "ironclad" security commitment to Israel. DEMOCRATIC NAT'L COMM., 2020 DEMOCRATIC PARTY PLATFORM 20, 75–76, 85, 88, 91 (2020), <https://www.demconvention.com/wp-content/uploads/2020/08/2020-07-31-Democratic-Party-Platform-For-Distribution.pdf> [<https://perma.cc/WQ9E-4YUQ>].

3. See Marc Corominas, *Schwarzenegger: Trump Is a Terminator and a Threat to Progress*, AGENCIA EFE (Sept. 22, 2019), <https://www.efe.com/efe/english/destacada/schwarzenegger-trump-is-a-terminator-and-threat-to-progress/50000261-4069596> [<https://perma.cc/7YX6-YMY6>] ("Arnold Schwarzenegger said US president Donald Trump was a 'Terminator' intent on doing away with any progress . . .").

tural constraints to produce a far more radical break with the past than is currently expected. A brief conclusion follows.

## II. THE BIDEN ADMINISTRATION AND EIGHT ABIDING CHARACTERISTICS OF U.S. FOREIGN POLICY

The following eight foreign policy trends, entrenched under President Trump, are likely to continue to influence the Biden administration.

### A. *Reluctance to Enter into Multilateral Treaties*

Those who focus on multilateral treaties, the bright shining objects that draw the most attention of international lawyers, and hope that President Biden will usher in new U.S. accessions to treaties that much of the civilized world joined long ago are going to be brutally disappointed. It is more plausible that President Biden will join (or rejoin) high-profile multilateral arrangements only if they do not require congressional approval.

Although Democrats managed (just) to regain control of the Senate, it is unlikely that the United States will ratify the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the American Convention of Human Rights, the Convention on the Rights of the Child, the United Nations Convention on the Law of the Sea (UNCLOS), or the Statute of the International Criminal Court (Rome Statute) or its Kampala amendments on the crime of aggression. Similarly, the Biden administration probably will not rescind all U.S. reservations from the International Covenant on Civil and Political Rights (ICCPR) or even the Convention Against Torture. The country that took some forty years to ratify the Genocide Convention does not change its spots quickly; certainly it will not do so at a time when much of the world (not only the United States) has been exceedingly wary about negotiating new global treaties.<sup>4</sup>

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4. See, e.g., Joost Pauwelyn et al., *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 EUR. J. INT'L L. 733 (2014) (finding that formal international law is being replaced with "informal international lawmaking").

President Biden has already fulfilled his promise to have the United States rejoin the Paris Agreement on Climate Change,<sup>5</sup> a move made easier by the fact that reentering the treaty did not require Congress's approval,<sup>6</sup> even though changes in U.S. law requiring congressional action would be desirable to make the agreement truly effective. His administration is also likely to pledge, as has China, that it will significantly lower the level of U.S. carbon emissions by a certain date. Changes to EPA policies and individual U.S. states' climate change mitigation efforts may achieve such a goal even if Congress fails to act.<sup>7</sup> Consistent with Pope Francis's plea to protect the planet in his encyclical letter, *Laudate*,<sup>8</sup> and Biden's embrace of climate change issues, the new administration could embrace related international proposals that received the back of the hand from Trump, including ideas for a global phase-out of fossil fuel subsidies through the G20 and WTO, efforts to protect the Arctic in the Arctic Council, or initiatives to reduce greenhouse gas emissions in maritime

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5. Coral Davenport & Lisa Friedman, *Biden Cancels Keystone XL Pipeline and Rejoins Paris Climate Agreement*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2021/01/20/climate/biden-paris-climate-agreement.html> [<https://perma.cc/8Q4N-SNGN>].

6. See Oona Hathaway, *Reengaging on Treaties and Other International Agreements (Part II): A Path Forward*, JUST SECURITY (Oct. 6, 2020), <https://www.justsecurity.org/72690/reengaging-on-treaties-and-other-international-agreements-part-ii-a-path-forward/> [<https://perma.cc/8ALH-JT25>] (noting that the Paris Agreement was "largely concluded as an executive agreement authorized in advance by a prior international treaty or agreement").

7. On Sept. 22, 2020, Xi Jinping announced that China would aim to "achieve carbon neutrality before 2060." Xi Jinping, President, China, Statement at the General Debate of the 75th Session of the United Nations General Assembly (Sept. 22, 2020), [https://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1817098.shtml](https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1817098.shtml) [<https://perma.cc/Q9T8-TGM7>]. For its part, the Biden campaign proposes that the United States achieve "a 100 percent clean energy economy and net-zero emissions no later than 2050." *The Biden Plan for A Clean Energy Revolution and Environmental Justice*, BIDEN FOR PRESIDENT, <https://joebiden.com/climate-plan/> [<https://perma.cc/3VHK-YA3V>] (last visited Jan. 8, 2021).

8. *Encyclical Letter Laudato Si' of the Holy Father Francis on Care for Our Common Home*, VATICAN, [http://www.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco\\_20150524\\_enciclica-laudato-si\\_en.pdf](http://www.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si_en.pdf) [<https://perma.cc/LF6J-B4BE>] (last visited Jan. 22, 2021).

shipping under the International Maritime Organization.<sup>9</sup> Because they do not require congressional approval, soft law pacts, such as the 2018 Global Compact for Safe, Orderly and Regular Migration intended to mitigate the harms of climate change migration,<sup>10</sup> are also likely to attract the attention of Biden and his Climate Change czar, John Kerry.<sup>11</sup> Of course, whether such soft commitments will actually affect the number of immigrants admitted into the United States remains unclear, particularly if majorities in Congress resist the more open immigration policies expected under the new administration.

Since the United States and China jointly account for forty percent of global greenhouse gas emissions, Biden is also likely to try to reignite the United States-China bilateral climate relationship begun under Obama. However, given the current level of hostility towards China, such efforts will likely encounter considerably stiffer political headwinds than in Obama's time. An attempt to negotiate, for example, a United States-China cooperation arrangement to tap into the United States' strength in inventing and China's capacity to commercialize and cheaply produce clean energy technology (such as solar panels or electric batteries for zero-emission vehicles) would win the support of those who prioritize climate change efforts,<sup>12</sup> but would risk antagonizing those worried about the export of U.S. jobs to China and who expect Biden to abide by

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9. See, e.g., Daniel Bodansky, *Climate Change: Reversing the Past and Advancing the Future*, 115 AM. J. INT'L L. UNBOUND 80 (2021) (arguing that Biden should begin by reversing "what Trump did" in the climate sphere).

10. Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration, *Draft Outcome Document*, ¶ 18, UN Doc. A/CONF.231/3 (July 30, 2018).

11. Ellen Knick Meyer, *Biden Names Climate Statesman John Kerry as Climate Envoy*, ASSOCIATED PRESS (Nov. 23, 2020), <https://apnews.com/article/joe-biden-climate-climate-change-john-kerry-national-security-ee05316df77b8d532921a2e299388a62> [<https://perma.cc/LCM2-PFG4>].

12. See, e.g., Jonas Nahm, *Why We Can't Fix the Climate Crisis Without China* (Penn Project on the Future of U.S.-China Relations, Working Paper), [https://cpb-us-w2.wpmucdn.com/web.sas.upenn.edu/dist/b/732/files/2020/10/Jonas-Nahm\\_Why-We-Cant-Fix-the-Climate-Crisis-Without-China\\_Final.pdf](https://cpb-us-w2.wpmucdn.com/web.sas.upenn.edu/dist/b/732/files/2020/10/Jonas-Nahm_Why-We-Cant-Fix-the-Climate-Crisis-Without-China_Final.pdf) [<https://perma.cc/NFF6-TUEL>] (last visited Jan. 22, 2021) (presenting China's "unique skills in the production of clean energy" and arguing in favor of United States-China cooperation on climate change).

his promise of creating new green jobs at home to replace jobs lost by the turn away from fossil fuels.<sup>13</sup>

Apart from the 2020 election's failure to produce a "blue wave" to give Democrats clear majorities in both houses of Congress,<sup>14</sup> there are many structural reasons why the U.S. return to international law will occur largely through occasional bilateral treaties that can secure congressional support, sole executive agreements, soft law instruments, or national law initiatives instead of high-profile multilateral treaty ratifications. As was clear in the Obama years—which saw an ever-dwindling number of attempts to get treaties through either the Senate by a two-thirds vote or a majority of both houses of Congress—the U.S. constitution and Capitol Hill traditions make concluding treaties purposely difficult. Indeed, one senator alone can prevent a treaty from emerging from the Senate Foreign Relations Committee.<sup>15</sup> In the best of circumstances, presidents need the help of senators invested in foreign affairs. While the United States can enter into Congressional-Executive agreements by a simple majority vote in both houses, a President still needs to secure those majorities and is constrained by constitutional traditions requiring that some treaties (such as those involving human rights) respect the Senate's two-thirds vote prerogative. Biden will have a difficult time amassing supporters to ratify treaties, as internationalist senators have been overtaken by those who subscribe to Trump's "America First" mentality.<sup>16</sup> Nor is he likely to find

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13. Katie Glueck & Lisa Friedman, *Biden Announces \$2 Trillion Climate Plan*, N.Y. TIMES (Aug. 11, 2020), <https://www.nytimes.com/2020/07/14/us/politics/biden-climate-plan.html> [<https://perma.cc/9NDE-LAB9>].

14. Lauren Gambino, *Democrats Left to Sift Through Aftermath of 'Blue Wave' that Never Crested*, GUARDIAN (Nov. 8, 2020), <https://www.theguardian.com/us-news/2020/nov/08/democrats-blue-wave-joe-biden-analysis> [<https://perma.cc/F2RD-72ZT>].

15. For a description of the power of wielded by Senator Jesse Helms in his years as chair of the Senate Foreign Relations Committee, see, for example, Christopher Hitchens, *Farewell to the Helmsman*, FOREIGN POL'Y (Nov. 18, 2009), <https://foreignpolicy.com/2009/11/18/farewell-to-the-helmsman/> [<https://perma.cc/HB3Q-6YJL>].

16. See *Tracking Congress in the Age of Trump*, FIVETHIRTYEIGHT, <https://projects.fivethirtyeight.com/congress-trump-score/> [<https://perma.cc/6WU7-88S7>] (last visited Jan. 20, 2021) (scoring senators based on how often they vote in line with Trump).

many senators who would relinquish their power over treaties by sharing a majority vote with the House.

This dynamic explains why Obama entered the Paris Agreement and the Iran Deal through mechanisms that, as Harold Koh has noted, ignore the familiar U.S. triptych of Senate Article II treaties, Congressional-Executive Agreements, or even traditional Sole Executive Agreements.<sup>17</sup> Obama tended to go for international agreements that, according to his lawyers, were already authorized under existing U.S. law (including under a previously concluded treaty) and therefore did not require congressional approval or implementing legislation. While they facilitate commitment initially, the downsides of these instruments are obvious: Such pacts are easier for subsequent presidents to withdraw from, and, to the extent their legally binding status is more dubious, to violate.<sup>18</sup>

UNCLOS is a case in point. The last serious effort to have the Senate consider this treaty, after the 2004 elections, failed despite the backing of every Chairman of the Joint Chiefs, every Chief of Naval Operations, every combatant commander of the United States, every living legal adviser to the U.S. Department of State, every President since Reagan, and a dizzying and politically diverse array of organizations extending from environmental groups to the American Petroleum Institute.<sup>19</sup> U.S. interests in defending the law of the sea and in interpreting it correctly over time—most particularly its interests in protecting its high seas freedoms and transit rights as a maritime power—are today stronger than ever given the continuing threats to those rules posed by China's actions in and around the South China Sea.<sup>20</sup> Even Secretary of State

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17. Harold Hongju Koh, *Triptych's End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 *YALE L.J.F.* 338 (2017).

18. See generally Jean Galbraith, *The President's Power to Withdraw the U.S. from International Agreements at Present and in the Future*, 111 *AM. J. INT'L L. UNBOUND* 445 (2017) (arguing that the constraints on presidential treaty exit tend to be political, not legal).

19. *Defense Department Has Consistently Advocated Ratification of UNCLOS*, UNCLOSEBATE, <https://www.unclosdebate.org/argument/648/defense-department-has-consistently-advocated-ratification-unclos> [https://perma.cc/44R2-XNKH] (last visited Jan. 20, 2021).

20. See, e.g., Press Statement, Michael R. Pompeo, U.S. Position on Maritime Claims in the South China Sea, (July 13, 2020), <https://2017-2021.state.gov/u-s-position-on-maritime-claims-in-the-south-china-sea/index.html> [https://perma.cc/49BV-KJQQ] (stating that U.S. interests in “up-



Pompeo, who rarely invoked international law, acknowledged as much in July 2020 when he praised the UNCLOS (PCA) 2016 arbitration ruling in *Philippines v. China*<sup>21</sup> and urged all parties to abide by that “legally binding” decision.<sup>22</sup> It is clear today, no less than in 2004, that it is in the national security interest of the United States to formally accede to UNCLOS and accept binding dispute settlement within its terms. And yet, no D.C. insider predicts that the Biden administration will spend the political capital needed to secure U.S. accession to UNCLOS. The best that anyone can expect is that the Biden administration will use every occasion to voice support for UNCLOS, follow the convention’s rules, and continue to build support among relevant domestic and foreign constituencies to press for eventual U.S. accession.

Another reason for timidity on treaty initiatives is the resilience of the populist mindset that propelled Trump to the White House and continues to fuel his supporters. While Biden will never utter the phrase “America First,” that sentiment will compel him to justify every foreign policy action he takes in terms of how it will benefit the United States.<sup>23</sup> He will accordingly prioritize those foreign policy proposals that address his daunting domestic to-do list. International law will come to the fore over the next four years with respect to “inter-mestic” issues, i.e. international initiatives that have a clear domestic policy significance and therefore can draw support from even sovereigntists on Capitol Hill.<sup>24</sup> Biden is most likely

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hold[ing] freedom of the seas in a manner consistent with international law” and “maintain[ing] the unimpeded flow of commerce” in the South China Sea have “come under unprecedented threat from [China].”).

21. *South China Sea Arbitration (Phil. v. China)*, PCA Case No. 2013-19, Award (Perm. Ct. Arb. 2016).

22. Pompeo, *supra* note 20.

23. As a close ally of Biden, Senator Chris Coons has argued that Trump’s “America First” narrative taps into a long-standing strain of isolationism in U.S. politics and resonates with those who question the benefits of globalization and military engagements abroad. Coons argues for a foreign policy that answers such concerns and has bipartisan appeal by showing the links between domestic and foreign policy concerns. Chris Coons, *A Bipartisan Foreign Policy Is Still Possible*, FOREIGN AFF. (Oct. 7, 2020), <https://www.foreignaffairs.com/articles/united-states/2020-10-07/bipartisan-foreign-policy-still-possible> [<https://perma.cc/W393-AH2G>].

24. See, e.g., *Election 2020 U.S. Foreign Policy Forum Virtual Meeting*, COUNCIL ON FOREIGN RELS. (Oct. 26, 2020), <https://www.cfr.org/event/election-2020-us-foreign-policy-forum-0> [<https://perma.cc/8YFB-SMUY>] (describing the

to focus on international efforts if these relate to, for example, ridding the United States of the Covid-19 pandemic and shoring up the U.S. economy, repairing frayed relations between social factions (whites and racial minorities, republicans and democrats, rural and urban, etc.), reversing rising income inequality, or responding to pressing social movements such as Black Lives Matter and Me Too. He will fill out international lawyers' wish list only insofar as these further the interests of his target audience: blue collar workers on "Main Street."<sup>25</sup> Re-entry into the Paris Agreement, for example, will be sold to the U.S. public on the basis that it is needed to make sure that Main Street is not flooded, burnt to the ground, or torn apart by hurricanes thanks to climate change. Return to the World Health Organization (WHO) and its global scripts for testing/contact tracing/isolation will not be justified by abstract commitments to multilateralism but rather on the simple premise that this will keep more Americans alive, Main Street open for business and U.S. borders open for trade.

The turn to 'inter-mestic' rationales can improve U.S. compliance with international law. Even without passage of new domestic laws, proactive efforts to protect the rights of African-Americans by a newly invigorated Civil Rights division within a Biden Justice Department and comparable efforts by progressive municipalities responsive to the Black Lives Matter movement will enable the United States to provide somewhat better answers the next time it comes before the Human Rights Committee<sup>26</sup> or the Committee on the Elimination of Racial Discrimination.<sup>27</sup> Greater attention to how Black stu-

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Covid-19 and climate change crises as "intermestic" issues, i.e., "international and domestic together").

25. See, e.g., Coons, *supra* note 23 (defending a foreign policy "for the middle class").

26. The Human Rights Committee is a body of independent experts responsible for monitoring implementation of the ICCPR. *Human Rights Committee*, U.N. HUM. RTS. OFF. OF HIGH COMM'R, <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx#:~:text=THE%20Human%20Rights%20Committee%20is,Rights%20by%20its%20State%20parties.&text=the%20Committee%20examines%20each%20report,form%20of%20%22concluding%20observations%E2%80%9D> [https://perma.cc/PZQ3-8VXV] (last visited Jan. 22, 2021).

27. The Committee on the Elimination of Racial Discrimination monitors the implementation of the Convention on the Elimination of All Forms of Racial Discrimination. *Committee on the Elimination of Racial Discrimi-*

dents are disproportionately disciplined in schools, promoting diversity in colleges and K-12 classrooms, changing how law enforcement officers are sanctioned or prosecuted for their actions at the state or municipal level, increasing efforts to prevent and prosecute threats and acts by white supremacists, promulgating rules to reduce or eliminate private prisons, and reducing penalties for minor drug offenses are only some of the ways that the United States may achieve somewhat better compliance with its obligations under the ICCPR and CERD. Such efforts would indicate that the United States takes seriously its duty under CERD to respect the “right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.”<sup>28</sup> Should the United States return to the U.N. Human Rights Council, as seems likely, it may even support appointing a Commission of Inquiry to investigate systemic racism in law enforcement (including within the United States).

Expected greater enforcement of the right to organize and to strike in accordance with promises made during Biden’s campaign would advance the most fundamental of the International Labor Organization’s (ILO) goals.<sup>29</sup> Those rights have long been presumed to be embraced by the ILO’s Constitution, and, for that reason, that organization has long enabled trade unions to file complaints of violation to the specially created ILO Committee on Freedom of Association even if the state charged with violation has not ratified the underlying ILO Conventions on point.<sup>30</sup> The Biden administration’s

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nation, U.N. HUM. RTS. OFF. OF HIGH COMM’R, <https://www.ohchr.org/en/hrbodies/cerd/pages/cerdindex.aspx#:~:text=the%20Committee%20on%20the%20Elimination,Discrimination%20by%20its%20State%20parties> [<https://perma.cc/PU8B-UNQX>] (last visited Jan. 22, 2021).

28. Convention on the Elimination of All Forms of Racial Discrimination, art. 5(b), Dec. 21, 1965, 660 U.N.T.S. 195.

29. DEMOCRATIC NAT’L COMM., *supra* note 2, at 14–15; Int’l Labor Org. [ILO], Declaration on Fundamental Principles and Rights at Work (June 18, 1998), [https://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—declaration/documents/normativeinstrument/wcms\\_716594.pdf](https://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/normativeinstrument/wcms_716594.pdf) [<https://perma.cc/NPS9-8KAA>].

30. *Committee on Freedom of Association*, INT’L LABOR ORG., <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang—en/index.htm> [<https://perma.cc/F3AK-BVHN>] (last visited Jan. 25, 2021).

anticipated support for labor unions and unionization in general will elevate the status and the credibility of the United States in the ILO even while it remains a notorious laggard with respect to formally acceding to ILO conventions.<sup>31</sup>

The Biden administration is also expected to address the pervasive forms of discrimination that continue to occur against women and deter economic development around the world. It began to address those issues within days in office by rescinding executive orders barring U.S. aid to entities around the world that support reproductive rights.<sup>32</sup> Such actions would further the goals of a number of human rights instruments and enhance the credibility of the United States before human rights bodies without the country joining CEDAW. Other anticipated efforts include enhanced Justice Department enforcement of domestic laws against gender discrimination and the creation of a White House Council on Gender Equality.<sup>33</sup>

Biden, who, in May 2012, as Vice President endorsed same-sex marriage before President Obama did, is also likely to embrace global LGBTQ+ priorities identified in the Democratic Party platform.<sup>34</sup> This includes appointing senior leaders at the State Department, USAID, and the National Security Council committed to recapturing the U.S. position of global leadership on LGBTQ+ issues, removing Trump's ban on military service for transgendered persons, and rescinding former Secretary of Education DeVos's guidance preventing trans-

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31. See Richard McIntyre & Matthew M. Bodah, *The United States and ILO Conventions 87 and 98*, in JUSTICE ON THE JOB: PERSPECTIVES ON THE EROSION OF COLLECTIVE BARGAINING IN THE UNITED STATES 231, 231 (Richard N. Block et al. eds., 2006) (noting that the United States is among the countries with the fewest ILO convention ratifications, having ratified only 14 of 184 conventions).

32. Bhadra Sharma et al., *Health Providers Worldwide Welcome Biden Reversal of Anti-Abortion Rule*, N.Y. TIMES (Jan. 29, 2021), <https://www.nytimes.com/2021/01/29/world/asia/gag-rule-abortion.html> [<https://perma.cc/4287-C63K>].

33. See, e.g., Susan Markham & Stephenie Foster, *Reviving the US Commitment to Women's Rights and Gender Equality: The UN Commission on the Status of Women*, JUST SECURITY (Dec. 15, 2020), <https://www.justsecurity.org/73870/reviving-the-us-commitment-to-womens-rights-and-gender-equality-the-un-commission-on-the-status-of-women/> [<https://perma.cc/2DR9-SKLL>] (discussing how the Biden administration may promote gender equality).

34. DEMOCRATIC NAT'L COMM., *supra* note 2, at 83.

gendered students from choosing their own school bathrooms. Likewise, the Biden administration will shelve former Secretary of State Pompeo's notorious "Commission on Unalienable Rights," which attempted to confine international human rights to certain civil and political rights while narrowing the meaning of those to limit protections for LGBTQ+ persons.<sup>35</sup>

Finally, eliminating the policy of separating immigrant children from their parents will advance the goals of the Convention on the Rights of the Child, the rights of the family in numerous human rights instruments (including the American Convention on Human Rights), and the ban on torture and cruel, inhuman and degrading treatment in customary international law, the ICCPR, and the Torture Convention.<sup>36</sup> Other anticipated changes to the most egregious Trump executive orders relating to immigration, such as restoring the rights of Dreamers, eliminating the Muslim Ban, and reversing asylum and non-refoulement constraints will make U.S. actions more compliant with a number of human rights instruments, including the Torture and Refugee Conventions.<sup>37</sup> However, it would take even a uniquely dedicated President more than

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35. The Commission elevated religious freedom and property rights above other rights, and denigrated other rights and the idea that civil and political rights and economic, social, and cultural rights are indivisible. In addition, rather than affirming women's right to choose and marriage equality as protected human rights, the Commission dismissed both as "divisive social and political controversies." See, e.g., Aya Fujimura-Fanselow et al., *An Exercise in Doublespeak: Pompeo's Flawed "Unalienable Rights" Commission*, JUST SECURITY (July 29, 2020), <https://www.justsecurity.org/71705/an-exercise-in-doublespeak-pompeos-flawed-unalienable-rights-commission/> [https://perma.cc/KXV8-LDQE].

36. See Juan E. Méndez & Kathryn Hampton, *Forced Family Separation During COVID-19: Preventing Torture and Inhumane Treatment in Crisis*, JUST SECURITY (July 8, 2020), <https://www.justsecurity.org/71291/forced-family-separation-during-covid-19-preventing-torture-and-inhumane-treatment-in-crisis/> [https://perma.cc/G4DN-9YY8] (noting that the characteristics of family separation are "the very features that constitute the definition of torture in the UN Convention Against Torture").

37. Jaya Raji-Nogales, *Non-Refoulement Under the Trump Administration*, ASIL INSIGHTS (Dec. 3, 2019), <https://www.asil.org/insights/volume/23/issue/11/non-refoulement-under-trump-administration> [https://perma.cc/TZ95-RZ88]; see also Oona Hathaway et al., *COVID-19 and International Law Series: States' Obligations to Refugees and Migrants in Detention*, JUST SECURITY (Dec. 2, 2020), <https://www.justsecurity.org/73661/covid-19-and-international-law-series-states-obligations-to-refugees-and-migrants-in-detention/>

four years to comb through and alter the roughly 400 federal agency actions taken under the oversight of the Trump White House's self-proclaimed white nationalist, Stephen Miller.<sup>38</sup> Trump's anti-immigration efforts, which were aided and abetted by a decision to effectively shut down immigration on the United States' southern border under a 1944 public health law in the age of Covid-19, will take time to roll back.<sup>39</sup> It is not likely that a single Biden term will enable the United States to reclaim the mantle of being a nation of immigrants.

Although President Biden began to reverse Trump executive orders on his first day in office<sup>40</sup> and can immediately issue new ones without going through Congress, the constraints of the Administrative Procedures Act will make it more difficult to reverse Trump-era federal regulations or issue new ones.<sup>41</sup> Yet despite these constraints, there is much that President Biden could do to reverse, for example, the Trump administration's active discouragement of foreign students seek-

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[<https://perma.cc/7JYX-4SHJ>] (noting that states' duties to asylum seekers, refugees, and immigrants are laid out in these documents).

38. Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes under the Trump Presidency*, MIGRATION POL'Y INST. (July 2020), <https://www.migrationpolicy.org/research/us-immigration-system-changes-trump-presidency> [<https://perma.cc/5463-KMZT>]. See also Ben Collins, *Democrats Call for Stephen Miller to Resign After Leak of Xenophobic Emails*, NBC NEWS (Nov. 13, 2019), <https://www.nbcnews.com/politics/immigration/democrats-call-stephen-miller-resign-after-leak-xenophobic-emails-n1081941> [<https://perma.cc/LHQ5-Y75A>] (reporting the release of emails purportedly linking Stephen Miller to white nationalist websites).

39. See, e.g., Zolan Kanno-Youngs, *Federal Court Lifts Block on Trump Policy Expelling Migrant Children at the Border*, N.Y. TIMES (Jan. 29, 2021), <https://www.nytimes.com/2021/01/29/us/politics/biden-migrant-children-coronavirus.html> [<https://perma.cc/PV35-2GKD>] (reporting on federal appeals decision lifting prior judicial ban on Trump policy to deny entry and asylum consideration for children at the border due to COVID-19).

40. Seung Min Kim, *On His First Day, Biden Signs Executive Orders to Reverse Trump's Policies*, WASH. POST (Jan. 20, 2021), [https://www.washingtonpost.com/politics/biden-trump-orders-masks/2021/01/20/7b6a1bec-5a98-11eb-b8bd-ee36b1cd18bf\\_story.html](https://www.washingtonpost.com/politics/biden-trump-orders-masks/2021/01/20/7b6a1bec-5a98-11eb-b8bd-ee36b1cd18bf_story.html) [<https://perma.cc/3N7E-F6JS>].

41. See Maeve P. Carey, *Can a New Administration Undo a Previous Administration's Regulations?*, CRS INSIGHT (Nov. 21, 2016), <https://fas.org/sgp/crs/misc/IN10611.pdf> [<https://perma.cc/7QJD-8QSJ>] (describing the usual requirements under the Administrative Procedures Act for notice and comment and time tables for amending or repealing a formal rule as compared to the expedited (but more rarely) deployed procedure under the Congressional Review Act for overturning an existing regulation).

ing to study in the United States. The Biden administration will likely be prompt in reversing processing delays and visa policies responsible for the (pre-pandemic) steep decline in international student enrollments over the course of Trump's presidency.<sup>42</sup> As former U.S. Ambassador to the U.N., Samantha Power, has argued, a return to the years when the United States saw a steady annual rise in the number of international students admitted into the country is likely to draw bipartisan support given the evident economic and other benefits to the United States.<sup>43</sup> As Power also suggests, greater efforts to enforce pre-existing U.S. laws under a Biden presidency are not just likely to improve U.S. compliance with international human rights law: Expected efforts by Biden's Attorney General to enforce the Foreign Corrupt Practices Act may help to restore the United States' moral leadership and credibility with respect to global anti-corruption efforts.<sup>44</sup>

As these examples suggest, Biden may avoid new treaty ratifications and still restore some of the United States' lost soft power in the field of human rights through termination of Trump executive orders, issuance of new executive orders, and changes in the daily practice of U.S. executive branch agencies.<sup>45</sup> The ethnic and racial dimensions common to all of Biden's top inter-mestic priorities suggest significant synergies among them as well as with international law. Many hope that this intersectionality will encourage the inclusion of foreign policy tools into the 'whole of government' approaches

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42. See Samantha Power, *The Can-Do Power: American's Advantage and Biden's Chance*, 100 FOREIGN AFF., Jan.–Feb. 2021, at 10, 19–20 (urging a Biden administration to prioritize lowering visa hurdles to permit more international students to study in the United States).

43. *Id.*

44. *Id.* at 21–24. The inter-mestic rationales for prioritizing worldwide anti-corruption efforts are self-evident, as such efforts would emerge naturally from internal “measures to clean up after the most corrupt and self-dealing presidency in U.S. history.” *Id.* at 22.

45. See, e.g., Coons, *supra* note 23 (arguing that the United States can outcompete China by being the “best version of itself” and reaching for a foreign policy rooted in “American ideals”); Symposium, *The Biden Administration and the International Legal Order*, 115 AM. J. INT'L L. UNBOUND (Jan. 22, 2021) (featuring essays by a number of scholars urging Biden's domestic efforts to respond to election interference, reverse Trump's immigration policies, redress racial inequalities, address climate change, and mitigate health risks to foster greater credibility on enhanced compliance with international law).

needed to improve criminal justice, combat climate change, rebuild the U.S. economy, and defeat COVID-19.<sup>46</sup> Success in the simultaneous pursuit of these goals could, in addition, enhance the country's standing vis-à-vis China,<sup>47</sup> a topic discussed further below.

### B. *A More Hostile View of China*

Aided and abetted by President Xi Jinping's transition to authoritarian "President for life," the Trump administration shifted U.S. attitudes toward China.<sup>48</sup> Gone are lingering hopes that China's economic interests will eventually transform it into a faithful rule follower within the post-WWII liberal order.<sup>49</sup> U.S. and global perspectives on China and its economic and geopolitical prominence had grown somber prior to Xi's new status,<sup>50</sup> and views have only hardened since. Potential foreign policy advisers to Biden have even gone on re-

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46. See, e.g., Jim Takersley & Lisa Friedman, *For Biden's Economic Team, an Early Focus on Climate*, N.Y. TIMES (Dec. 11, 2020), <https://www.nytimes.com/2020/12/11/business/biden-global-warming-economic-team.html> [<https://perma.cc/3C49-D7HN>] (observing that Biden emphasized action to boost clean energy and reduce emissions by announcing key economic advisers in his administration).

47. See, e.g., Julian Gewirtz, *China Thinks America Is Losing: Washington Must Show Beijing It's Wrong*, 99 FOREIGN AFF., Nov.–Dec. 2020, at 62 ("Nothing is as important to competing effectively with China as what the United States does at home, revitalizing its economic fundamentals, technological edge, and democratic system . . . Policy makers must get the COVID-19 crisis under control, implement economic policies that benefit all Americans, welcome immigrants who enrich U.S. society, pursue racial justice to show the world that U.S. democracy can remain a beacon of freedom and equality, make smart investments in U.S. defense capabilities, and scale up federal funding for research and development.").

48. The Chinese government's own recent actions have opened the door to such changing perceptions in the United States and around the world. See, e.g., Power, *supra* note 42, at 14–17 (discussing how China's recent actions have caused its global approval ratings to drop); Rana Mitter, *The World China Wants: How Power Will—and Won't—Reshape Chinese Ambitions*, 100 FOREIGN AFF., Jan.–Feb. 2021, at 161 (arguing that Chinese authoritarianism might generate mixed or even hostile reactions toward China around the world).

49. For a prescient and skeptical survey of such views, see Ann Kent, *China's International Socialization: The Role of International Organizations*, 8 GLOBAL GOVERNANCE 343 (2002).

50. See, e.g., FOREIGN AFFAIRS COMMITTEE, CHINA AND THE RULES-BASED INTERNATIONAL SYSTEM, 2017–19, HC 612 (UK) (calling China "either an am-



cord to argue that the only real remaining question is which path China intends to take to achieve “global domination.”<sup>51</sup> Where such views have hardened into law, Biden’s capacity to take a more moderate tone and thaw U.S.-Chinese relations will be limited.<sup>52</sup>

Biden himself has described China as the United States’ principal adversary and sole strategic competitor for leading power status. He does not want the two nations to ‘decouple’ and is deeply skeptical of the value of Trump’s much-touted trade wars, particularly because U.S. tariffs on imports were paid by U.S. businesses and consumers.<sup>53</sup> Biden and his closest advisers have also argued that a U.S.-China tariff war is ineffective without a larger coordinated strategy with others who are equally affronted by China’s stance on trade and intellectual property protections. Absent significant developments (such as a Chinese attempt to invade Taiwan),<sup>54</sup> Biden can be expected to try to avoid a descent into a de facto United States-China Cold War because he knows that both countries are economically codependent, both are critical to the survival of global capitalism, and both are needed to address global commons challenges like climate change.

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bivalent partner or an active challenger” on various matters of international concern).

51. Hal Brands & Jake Sullivan, *China Has Two Paths to Global Domination*, FOREIGN POL’Y (May 22, 2020), <https://foreignpolicy.com/2020/05/22/china-superpower-two-paths-global-domination-cold-war/> [https://perma.cc/P8L6-F2SS].

52. See, e.g., Ana Swanson & Keith Bradsher, *Chinese Companies to Face More Scrutiny as Bill Clears House*, N.Y. TIMES (Dec. 2, 2020), <https://www.nytimes.com/2020/12/02/business/economy/chinese-companies-to-face-more-scrutiny-as-bill-clears-house.html> [https://perma.cc/NCG4-KULY] (discussing how the U.S. House of Representatives passed the Holding Foreign Companies Accountable Act to increase oversight of Chinese companies listed on American stock markets and scrutinize their financial ties with the Chinese Communist Party).

53. Mary Amity et al., *Who’s Paying for the US Tariffs? A Longer-Term Perspective* 1 (Nat’l Bureau of Econ. Res., Working Paper No. 26610, 2020), <https://www.nber.org/papers/w26610> [https://perma.cc/N4H6-YGTK].

54. There are uncertainties about what Biden will do should Taiwan’s current status be threatened. See, e.g., Clarissa Wei, *If Taiwan Calls, Will Biden Answer? A Pro-Trump Democracy Braces for Uncertainty*, VICE (Dec. 2, 2020, 10:57 PM), <https://www.vice.com/en/article/n7v7bb/if-taiwan-calls-will-biden-answer-a-pro-trump-democracy-braces-for-uncertainty> [https://perma.cc/2W7X-8AKA] (noting the “underlying sense of unease of what a Biden administration might mean for U.S.-Taiwan relations” within Taiwan).

Biden, ever the centrist, can be expected to deploy the tools of statecraft or, as a Mao-era expression would have it, “walk on two legs.”<sup>55</sup> He will likely treat China as hostile power, strategic competitor, or ally as needed to advance particular U.S. goals. The Biden administration will make clear that it will consider certain Chinese actions (e.g., interference with transit rights on the high seas, arbitrary detention of foreign nationals, or threats to invade Taiwan) to be unacceptably hostile to the status quo, while simultaneously signaling that it wants to cooperate on joint efforts to reduce the threat of climate change, terrorism, the spread of weapons of mass destruction, or North Korean missile launches.

Bipartisan suspicion, even hostility, towards China on matters of trade and finance will require comparable multi-track approaches in a Biden administration. The Committee on Foreign International Investment in the United States (CFIUS) will probably continue to discourage the entry of many Chinese enterprises, but it may be more discerning and take action only when the transaction presents genuine data privacy or other national security issues.<sup>56</sup> While there will likely be no attempt to revive the prospects for a United States-China Bilateral Investment Treaty, China’s own growing network of free trade agreements may push the United States to conclude rival agreements with the European Union or the existing members of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11), despite expected opposition from the progressive wing of the Democratic Party.

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55. See ROSS TERRILL, *MAO: A BIOGRAPHY* 274 (1999) (describing Mao’s philosophy as one centered around the ebb and flow of relationships).

56. This caution could mean a more nuanced approach to Chinese enterprises, like TikTok, whose threats to U.S. national security or consumer privacy are less clear than is the case with respect to other Chinese enterprises, such as Huawei. Compare Russell Brandom, *Trump’s TikTok Ban is a Gross Abuse of Power*, THE VERGE (Sept. 18, 2020, 10:08 AM), <https://www.theverge.com/2020/8/11/21363405/trumps-tiktok-ban-legal-corruption-free-speech-china> [<https://perma.cc/K4NE-2SJX>] (opining that the “national security concerns [imposed by TikTok] are still abstract”), with PATRICIA MOLONEY FIGLIOLA, CONG. RSCH. SERV., R46543, *TIKTOK: TECHNOLOGY OVERVIEW AND ISSUES* (2020), <https://crsreports.congress.gov/product/pdf/R/R46543> [<https://perma.cc/GN7T-3TNT>] (noting that some believe that “TikTok and other Chinese-owned apps pose a serious security risk to the United States”).

Biden will treat China as a strategic competitor with respect to, for example, aid and infrastructure projects in the developing world. His administration is likely to continue to view China's formidable Belt and Road Initiative (BRI) with great suspicion. While Biden may not endorse the overly simple narrative that BRI projects are invariably exploitative debt traps for Least Developed Countries (LDCs), his administration will counter China's "gloeonomic influence"<sup>57</sup> and court the hearts and minds of LDCs with established U.S. aid programs and perennial Commerce Department efforts. Biden will be open to initiatives that would enable U.S. businesses, particularly those in high tech, to better compete with Chinese companies. Such initiatives would enhance U.S. exports and, more importantly, place U.S. industry standards in competition with Chinese efforts to promulgate technology that enhances surveillance at the expense of privacy.<sup>58</sup> Where Biden's Justice Department will land with respect to continuing, downplaying, or even eliminating the controversial "China Initiative," which targets Chinese nationals and companies for criminal prosecutions under a number of U.S. laws, particularly dealing with the alleged theft of intellectual property, remains to be seen.<sup>59</sup>

The Biden administration can be expected to clash with China more often than its predecessor with respect to certain human rights violations, such as events in Xinjiang and Hong

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57. See Philippe Le Corre, *China's Rise as a Gloeonomic Influencer: Four European Case Studies* (Carnegie Endowment for Int'l Peace, Working Paper, 2018), <https://carnegieendowment.org/2018/10/15/china-s-rise-as-gloeonomic-influencer-four-european-case-studies-pub-77462> [<https://perma.cc/H4E8-35RY>] (describing China's increased influence on the policies of certain governments).

58. See, e.g., Matthew S. Erie & Thomas Streinz, *The Beijing Effect: China's Digital Silk Road as Transnational Data Governance* (forthcoming 2021) (copy on file with author).

59. See Press Release, Off. Pub. Affs., U.S. Dep't Just., *The China Initiative: Year-in-Review (2019-20)* (Nov. 16, 2020), <https://www.justice.gov/opa/pr/china-initiative-year-review-2019-20> [<https://perma.cc/Z7TB-YRDG>] (describing the Department of Justice's increased investigation and prosecution of "trade secret theft and economic espionage"). The prior administration's controversial "China Initiative" will challenge an administration that does not want to be seen as weak on China but also wants to correct Trump's callous disrespect for discriminatory applications of U.S. law. Margaret K. Lewis, *Criminalizing China*, 111 J. CRIM. L. & CRIMINOLOGY (forthcoming 2021) (on file with author).

Kong,<sup>60</sup> but there may be unexpected areas of congruence even on these issues. Given Xi Jinping's pronouncements on the need for greater national commitments to ensure the "protection of women's rights and interests" and the rise of social movements within China to combat domestic violence, there may even be occasions on the Human Rights Council for the United States and China to find common ground.<sup>61</sup>

### C. *Deep Skepticism of the WTO and Free Trade Agreements*

Biden inherited a substantial WTO reform agenda.<sup>62</sup> Turbulent relations between the United States and the WTO and its members will not immediately cease on inauguration day. The United States has become disenchanted with the WTO as a forum to negotiate new trade rules to respond to new products and markets, to monitor states' trade policies, or to resolve trade disputes fairly among the organization's 164 member states. As evidenced by the Obama administration's refusal to affirm the appointment of certain Appellate Body members,<sup>63</sup> WTO-US tensions predate Trump and will outlast his administration. There is bipartisan consensus within the United States that while the world has changed, the WTO has not. Although Trump might have been the first president to repeatedly threaten to leave the WTO,<sup>64</sup> bipartisan congres-

60. See *infra* notes 84–87 and 95 and accompanying text (discussing Chinese policies at the Human Rights Council and on Chinese sanctions).

61. Elsie Chen, *Her Abuse Was a Family Matter, Until It Went Live*, N.Y. TIMES (Nov. 15, 2020), <https://www.nytimes.com/2020/11/15/world/asia/china-women-domestic-abuse.html> [<https://perma.cc/8ZW6-2E9L>].

62. For an overview of the many issues, see Marianne Schneider-Pet-singer, *Reforming the World Trade Organization*, CHATHAM HOUSE (Sept. 11, 2020), <https://www.chathamhouse.org/2020/09/reforming-world-trade-organization> [<https://perma.cc/DGQ6-BRYB>]. A starting point for a Biden administration may be the extensive list of ideas for "WTO modernization" outlined by the European Union. *Concept Paper: WTO Modernisation* (Sept. 2018), [https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157331.pdf](https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf) [<https://perma.cc/T665-8UNT>].

63. Steve Charnovitz, *The Obama Administration's Attack on Appellate Body Independence Shows the Need for Reforms*, INT'L ECON. L. & POL'Y BLOG (Sept. 22, 2016, 6:23 PM), <https://worldtradelaw.typepad.com/ielpblog/2016/09/the-obama-administrations-attack-on-appellate-body-independence-shows-the-need-for-reforms.html> [<https://perma.cc/YT4Z-DDQP>].

64. *Trump Threatens to Pull US out of World Trade Organization*, BBC (Aug. 31, 2018), <https://www.bbc.com/news/world-us-canada-45364150> [<https://perma.cc/AT2Y-X6U2>].

sional resolutions to support such an exit have been repeatedly introduced in Congress and retain support.<sup>65</sup>

Biden, like the U.S. business community, will resist talk of WTO exit and emphasize the need for voice. His administration can be expected to re-engage with WTO reform efforts to prevent a slide towards disastrous protectionist actions, particularly at a time when countries need to facilitate trade on COVID-related goods. Following a centrist path on WTO issues will be especially daunting, however, given progressive Democrats' deep suspicion of trade pacts<sup>66</sup> and concerns across the aisle that the WTO's rules to liberalize trade are ill-suited to the modern era of e-commerce, subsidies and forced tech transfers by non-market economies and state-owned enterprises, unfair special concessions to China, and WTO members' repeated failures to notify others of their contestable trade actions.<sup>67</sup> While President Trump contended (falsely) that the United States lost most of its cases at the WTO,<sup>68</sup> his more sophisticated U.S. Trade Representative, Robert Lighthizer, perhaps more accurately argued that, over time, the WTO's Appellate Body had absorbed all the regime's law-making capacity and that the WTO had ceased to be an effective forum for negotiating rules to protect the world from contemporary forms of protectionism and intellectual property theft.<sup>69</sup>

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65. Such resolutions were introduced in the 106th and 109th Congress, for example, and were seriously considered by both houses. Doug Palmer, *Exclusive: Congress Can Take Vote to Withdraw from WTO in July*, POLITICO (June 23, 2020), <https://www.politico.com/news/2020/06/23/exclusive-congress-can-take-vote-to-withdraw-from-wto-in-july-336115> [https://perma.cc/RPJ9-F5D2].

66. The progressive wing's influence can be seen in parts of the *2020 Democratic Party Platform*. See DEMOCRATIC NAT'L COMM., *supra* note 2, at 85 ("For too long, the global trading system has failed to keep its promises to American workers. Too many corporations have rushed to outsource jobs . . . We will not negotiate any new trade deals before first investing in American competitiveness at home.").

67. Schneider-Petsinger, *supra* note 62.

68. Robert Farley, *Trump Wrong About WTO Record*, FACTCHECK.ORG (Oct. 27, 2017), <https://www.factcheck.org/2017/10/trump-wrong-wto-record/> [https://perma.cc/B9SJ-XE7D].

69. Robert E. Lighthizer, *How to Set World Trade Straight*, WALL ST. J. (Aug. 20, 2020, 7:32 PM), <https://www.wsj.com/articles/how-to-set-world-trade-straight-11597966341> [https://perma.cc/K6YA-KX9A] (arguing that the Appellate Body of the WTO has become "empowered to create a new common

Unlike President Trump, who seemed content to throw grenades at the WTO and watch them explode, the Biden administration will probably make specific proposals to resolve the most immediate problem, namely the United States' refusal to agree to the appointment of Appellate Body members.<sup>70</sup> The current paralysis of the WTO dispute settlement system threatens to return the world to tit-for-tat retaliatory tariffs imposed by the economically powerful against the weak and even sometimes against each other. Although Trump appeared to revel in that possible outcome, Biden is likely to want to avoid such races to the bottom.<sup>71</sup> His first instinct will likely be to work with others, particularly the European Union, to seek common transatlantic proposals that could lead to consensus reforms to WTO dispute settlement, the monitoring of protectionist state actions, more acceptable criteria for states entitled to special benefits as developing countries, and coherent rules to govern state-owned enterprises.<sup>72</sup>

Despite increased skepticism of trade agreements under Trump, Biden will probably seek renewal of fast track authority (which expires in mid-2021) to give his administration the credibility to conclude bilateral or regional trade agreements.<sup>73</sup> This will likely involve a high profile battle in Con-

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law of free trade," and "has consistently reversed [decisions] by interpreting the WTO rules in ways that diminish rights and create new obligations not found in the text").

70. See Tom Miles, *Trump's Bonfire of the Treaties Sweeps Toward the WTO*, REUTERS (May 18, 2018), <https://www.reuters.com/article/us-usa-trade-wto-analysis/trumps-bonfire-of-the-treaties-sweeps-towards-the-wto-idUSKCN1J1K9> [<https://perma.cc/83YD-PGLR>] ("Trump has effectively engineered a crisis in the WTO's system of settling global disputes by vetoing all appointments of judges to its appeals chamber.").

71. A Biden administration is not likely to follow in the Trump administration's footsteps and alienate allies such as Canada by imposing tariffs on steel and aluminum on dubious legal grounds. Kevin Breuninger, *Canada to Impose Tariffs on \$2.7 Billion in U.S. Goods After Trump Reignites Trade Feud*, CNBC (Aug. 7, 2020), <https://www.cnbc.com/2020/08/07/canada-to-impose-tariffs-on-2point7-billion-in-us-goods-after-trump-reignites-trade-feud.html> [<https://perma.cc/NW6G-UXP2>].

72. The European Union shares many of the United States' concerns with the WTO. See *Concept Paper: WTO Modernisation*, *supra* note 62 (suggesting ways to make the WTO more effective and "more relevant and adaptive to a changing world").

73. Fast track authority permits the Executive to conclude trade agreements consistent with terms set by Congress that receive expedited consider-

gress and among Democrats themselves—and Biden's success is not guaranteed. Moreover, even if Biden secures fast track authority, he has suggested that his administration will not devote the political capital needed to gain joint congressional support for new trade agreements in the short term.<sup>74</sup> Nonetheless, there will be considerable push for the United States to enter some such agreements, particularly while the WTO remains at a stalemate.

Biden will likely not disturb the consensus achieved in the United States-Mexico-Canada Agreement (USMCA), including the U.S. decision to eliminate investor-state dispute settlement with Canada and cut it back dramatically with Mexico. However, he will face increasing demands from U.S. businesses isolated from global supply chains now covered under regional trade agreements to which the United States is not a party, including the TPP-11,<sup>75</sup> the Regional Comprehensive Economic Partnership (RCEP),<sup>76</sup> and the European Union-China investment pact announced on December 30, 2020.<sup>77</sup> Should

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ation, an up and down vote with no amendments, and assurance of consideration of implementing legislation. IAN F. FERGUSSON & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43491, TRADE PROMOTION AUTHORITY (TPA): FREQUENTLY ASKED QUESTIONS 3 (2019).

74. See Joseph R. Biden, Jr., *Why America Must Lead Again: Rescuing U.S. Foreign Policy After Trump*, 99 FOREIGN AFF., Mar.–Apr. 2020, at 64, 70 (“I will not enter into any new trade agreements until we have invested in Americans and equipped them to succeed in the global economy.”).

75. Trump abandoned TPP-11 negotiations in his first days in office. Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html> [<https://perma.cc/353H-W97R>].

76. Concluded just after the 2020 U.S. Presidential election, RCEP involves all ten members of ASEAN as well as Australia, China, Japan, New Zealand, and South Korea. *With RCEP Agreement Signed, Eyes Turn to Interactions Among Trade Deals in the Asia-Pacific Region*, IISD (Nov. 25, 2020), <https://sdg.iisd.org/commentary/policy-briefs/with-rcep-agreement-signed-eyes-turn-to-interactions-among-trade-deals-in-the-asia-pacific-region/#:~:text=leaders%20from%2015%20Asia%2DPacific,the%20trade%20and%20investment%20accord> [<https://perma.cc/7TL7-CXXB>].

77. European Commission Press Release IP/20/2541, EU and China Reach Agreement in Principle on Investment (Dec. 30, 2020). See, e.g., Ana Swanson & Emily Cochrane, *A Top House Democrat Prods Biden to Reopen E.U. Trade Talks*, N.Y. TIMES (Dec. 11, 2020), <https://www.nytimes.com/2020/12/11/business/economy/neal-biden-europe-trade.html> [<https://perma.cc/4GSV-22WD>] (noting that Representative Richard E. Neal called for “a trade agreement with the European Union would help deal with the

Biden attempt to restore some kind of equilibrium vis-à-vis China by returning to the Trans-Pacific Partnership (which the Obama administration negotiated precisely for that purpose and Trump foolishly abandoned in his first days in office)<sup>78</sup> or by renewing efforts to conclude a United States-European Union free trade deal, such negotiations will be all the more arduous given expected demands from certain Democrats to include provisions on, for example, climate change mitigation.<sup>79</sup>

#### D. *Continued Use of Sanctions Against Bad Actors*

The Biden administration is likely to maintain many existing sanctions, particularly those on China and Russia, but advance different rationales for them. President Biden will likely keep Russian sanctions in place—and possibly escalate them—because of Russia’s interference in U.S. elections, its seizure of Crimea, the bounties it put on U.S. soldiers in Afghanistan, and, most recently, Russia’s apparent involvement in the Solarwinds cyberattack.<sup>80</sup> Biden’s relationship with Pu-

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rising economic threat from China”); James Bacchus, *America Cannot Afford a Timeout on Trade*, CATO INST. (Nov. 24, 2020), <https://www.cato.org/publications/commentary/america-cannot-afford-timeout-trade> [https://perma.cc/7LQM-VC7K] (expressing concerns that “Americans will be left on the sidelines at a competitive disadvantage in the world economy,” particularly after the Regional Comprehensive Economic Partnership was concluded by China and other Asian Pacific countries). For further background, see Keith Bradsher & Ana Swanson, *China-Led Trade Pact is Signed, in Challenge to U.S.*, N.Y. TIMES (Nov. 15, 2020), <https://www.nytimes.com/2020/11/15/business/china-trade-rcep.html> [https://perma.cc/K9CX-DCT5] (opining that the Regional Comprehensive Economic Partnership “stands as a potent symbol of Beijing’s growing economic sway in Southeast Asia at a time of uncertainty over Washington’s economic ties with the region”).

78. Matt Spetalnick, *Obama Says Momentum Building on ‘Historic’ Trans-Pacific Trade Deal*, REUTERS (Nov. 10, 2014), <https://www.reuters.com/article/us-china-apec-usa/obama-says-momentum-building-on-historic-trans-pacific-trade-deal-idUSKCN0IU0CW20141110> [https://perma.cc/QE7Z-MSA4].

79. See, e.g., *Using Trade Policy to Fight Climate Change*, NEW AM., <https://www.newamerica.org/political-reform/reports/trade-2020-whats-it-all-about/using-trade-policy-to-fight-climate-change/> [https://perma.cc/MG6H-AVRU] (last visited Jan. 22, 2021) (discussing proposals by Democratic presidential candidates to integrate climate change mitigation into trade policy).

80. See David Kris, *What Hard National Security Choices Would a Biden Administration Face?*, LAWFARE (May 27, 2020), <https://www.lawfareblog.com/what-hard-national-security-choices-would-biden-administration-face> [https://



tin will, of course, be dramatically different from Trump's, but nuance is still possible. For example, it is quite likely that Biden will simultaneously retain Russian sanctions and attempt to revive the Intermediate-Range Nuclear Forces Treaty that Trump terminated due to Russia's violations.<sup>81</sup> Unlike Trump, who escalated the global nuclear threat in a number of ways,<sup>82</sup> Biden is more likely to prioritize the need to avoid nuclear proliferation and treat Russia's purported violations of existing nuclear agreements as an opportunity to renegotiate or continue such pacts, not simply walk away from them.<sup>83</sup>

The Biden administration's continued trade sanctions on China may be premised on the Hong Kong security law or China's treatment of Uyghurs instead of the contention that China manipulates its currency<sup>84</sup> or was responsible for spreading the "China virus."<sup>85</sup> The Biden administration is not

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/perma.cc/7PHZ-B6PV] (predicting that Russian cybercrime will be a national security priority); Michael Schmitt, *Top Expert Backgrounder: Russia's SolarWinds Operation and International Law*, JUST SECURITY (Dec. 21, 2020), <https://www.justsecurity.org/73946/russias-solarwinds-operation-and-international-law/> [https://perma.cc/4BCF-QWZG] (describing Russia's "ongoing software supply-chain attack against SolarWinds, a company whose products are used by over 300,000 corporate and government customers—including most Fortune 500 companies, Los Alamos National Laboratory (which as nuclear weapons responsibilities), and Boeing").

81. C. Todd Lopez, *U.S. Withdrawals from Intermediate-Range Nuclear Forces Treaty*, U.S. DEP'T OF DEF. (Aug. 2, 2019), <https://www.defense.gov/Explore/News/Article/Article/1924779/us-withdraws-from-intermediate-range-nuclear-forces-treaty/> [https://perma.cc/URP5-8JHK]; David E. Sanger, *Biden Plans Renewed Nuclear Talks with Russia While Punishing Kremlin, Adviser Says*, N.Y. TIMES (Jan. 4, 2021), <https://www.nytimes.com/2021/01/03/us/politics/biden-russia-iran.html> [https://perma.cc/LT6K-PDD3].

82. Tamsin Shaw, *Trump's Impact on Nuclear Proliferation*, JUST SECURITY, <https://www.justsecurity.org/73422/trumps-impact-on-nuclear-proliferation/> [https://perma.cc/RT4V-KMG8] (last updated Jan. 21, 2021).

83. *Cf.* Sanger, *supra* note 81 (suggesting President Biden plans to "mov[e] to punish Russia while keeping New Start . . . from lapsing and setting off a new arms race").

84. Fred Imbert, *Trump Accuses China of 'Currency Manipulation' as Yuan Drops to Lowest Level in More than a Decade*, CNBC (Aug. 5, 2019), <https://www.cnbc.com/2019/08/05/trump-accuses-china-of-currency-manipulation-as-yuan-drops-to-new-low.html> [https://perma.cc/62AH-WHMJ].

85. See Jérôme Viala-Gaudefroy & Dana Lindaman, *Donald Trump's 'Chinese Virus': The Politics of Naming*, CONVERSATION (Apr. 21, 2020), <https://theconversation.com/donald-trumps-chinese-virus-the-politics-of-naming-136796> [https://perma.cc/BV94-74B6] ("The president used the expression "Chinese virus" more than 20 times between March 16 and March 30.").

likely to reverse the Trump administration's last minute stance that China's actions towards the Uyghurs constitute genocide.<sup>86</sup> On the contrary, Biden is likely to increase pressure on China with respect to that issue by, for example, joining U.S. allies that have been pressing U.N. Secretary-General Guterres to be more vocal about the situation in Xinjiang to secure access for the U.N. Office of the High Commissioner for Human Rights. This would be a 180-degree shift from the absence of U.S. engagement on this critical human rights issue and a welcome change from President Trump's reported statement to Xi Jinping that building Uyghur internment camps was "the right thing to do."<sup>87</sup> Even if Biden himself does not plan to act, it is possible that his hand on this and other human rights issues may be forced by action in Congress.

#### E. *Circumspection with Respect to U.N. System Organizations*

Given his extensive foreign policy experience, Biden knows that for the most part, neither Congress nor the general public are deeply invested in the U.N. system. Bipartisan consensus in favor of such institutions—and in fully funding them—began to break down long before Trump and has only worsened over the past four years.<sup>88</sup> U.N. system organizations have faced competition from less formal governance alternatives, such as networks of government regulators, hybrid part-

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86. Edward Wong & Chris Buckley, *U.S. Says China's Repression of Uyghurs Is 'Genocide'*, N.Y. TIMES (Jan. 19, 2021), <https://www.nytimes.com/2021/01/19/us/politics/trump-china-xinjiang.html> [<https://perma.cc/F4K7-2T5B>].

87. Connor O'Steen, *U.S. and Multilateral Policy Options to Address Abuses Against Uyghurs in Xinjiang*, JUST SECURITY (July 30, 2020), <https://www.justsecurity.org/71621/u-s-and-multilateral-policy-options-to-address-abuses-against-uyghurs-in-xinjiang/> [<https://perma.cc/ZQ7W-BMC5>].

88. While public opinion surveys indicate that a majority of the U.S. public holds a favorable opinion of the United Nations, sharp partisan divides have become evident over time. A majority of Republicans (fifty-one percent) now hold an unfavorable view of the organization. Memorandum from Bill McInturff et al., Hart Res. Assocs., to Interested Parties 2 (Sept. 14, 2020), <https://betterworldcampaign.org/wp-content/uploads/2020/09/Executive-Summary-September-U.S.-UN-Poll.pdf> [<https://perma.cc/M478-7Q3M>]. Scholarly views of the continued value of liberal internationalism have also dimmed over time. *E.g.*, Mead, *supra* note 1.

nerships of public and private actors, purely private actors, and regular meetings or committees of the parties.<sup>89</sup>

Many hope that the Biden administration will completely reverse Trump's indifference to, and sometimes overt hostility toward, the U.N. system.<sup>90</sup> There is, to be sure, good reason for such hope. Biden and his nominee for Secretary of State, Antony Blinken, are long-standing proponents of multilateralism and global alliances.<sup>91</sup> Unlike Trump, the new administration is likely to view these post-WWII institutions and the liberal economic order that they generally support as strengthening rather than weakening sovereignty. Biden and Blinken see the absence of the United States from U.N. institutions as detrimental to U.S. interests, particularly if the void it leaves is filled by China. Biden's nominee for U.S. Ambassador to the United Nations, veteran diplomat Linda Thomas-Greenfield, has signaled that the new administration will likely take the United Nations more seriously and re-engage with multilateral forums like the U.N. Human Rights Council and the WHO.<sup>92</sup> His administration will also, as noted, likely tackle inter-mestic policy issues that could enhance U.S. credibility in some U.N. human rights bodies and other U.N. system organizations that Trump ignored or disparaged, like the ILO. But there is only so much President Biden can do to increase interest in and funding for the U.N. system. Foreign affairs were not a priority during the most recent presidential campaign or during the presidential debates, and the Biden administration will have its hands full addressing more pressing inter-mestic issues. Of course, the government's resources to address matters not di-

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89. These developments are sometimes termed "global administrative law." For an overview, see Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005).

90. See, e.g., Patrick, *supra* note 1 (predicting that President Biden would reengage with U.N. institutions).

91. Lara Jakes et al., *Biden Chooses Antony Blinken, Defender of Global Alliances, as Secretary of State*, N.Y. TIMES (Dec. 2, 2020), <https://www.nytimes.com/2020/11/22/us/politics/biden-antony-blinken-secretary-of-state.html> [<https://perma.cc/3TCN-RQA8>].

92. See, e.g., Richard Gowan, Commentary, *Repairing the Damage to U.S. Diplomacy in the UN Security Council*, INT'L CRISIS GRP. (Dec. 18, 2020), <https://www.crisisgroup.org/global/repairing-damage-us-diplomacy-un-security-council> [<https://perma.cc/E6G2-N4ZD>] (discussing the relationship between the United States and different actors in the Security Council that the new administration will seek to restore).

rectly related to providing relief for a faltering economy will be under considerable strain.

In addition, Trump's disengagements, withdrawals, or threats to withdraw from U.N. forums, however misguided, have raised expectations that the United States will re-engage with these institutions so long as they address long-standing U.S. grievances.<sup>93</sup> It is unclear what will happen should these expectations for U.N. institutional reforms go unfulfilled or clash with those sought by other member states, including U.S. allies. The Biden administration will likely attempt to resume global leadership over the battered liberal international order by insisting on institutional reforms to make these entities 'work as intended'. His administration will probably maintain in some form Trump's "UN Integrity" initiative, for example. This was an effort to call attention to particular risks of China's rise—namely the threat allegedly posed to the independence of international civil servants and the potential for corrosive effects on the apolitical contributions of U.N. technocratic organizations, including those now led by Chinese nationals such as the Food and Agriculture Organization, the International Civil Aviation Organization, the International Telecommunication Union, and the Industrial Development Organization).<sup>94</sup> Instead of appearing as little more than a cynical at-

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93. For a brief survey of Trump's actions, see Oona Hathaway, *Reengaging on Treaties and Other International Agreements (Part I): President Donald Trump's Rejection of International Law*, JUST SECURITY (Oct. 2, 2020), <https://www.justsecurity.org/72656/reengaging-on-treaties-and-other-international-agreements-part-i-president-donald-trumps-rejection-of-international-law/> [https://perma.cc/4UYN-N4L4].

94. The special envoy charged with enhancing UN Integrity was Mark Lambert. Colum Lynch, *U.S. State Department Appoints Envoy to Counter Chinese Influence at the U.N.*, FOREIGN POL'Y (Jan. 22, 2020, 12:09 PM), <https://foreignpolicy.com/2020/01/22/us-state-department-appoints-envoy-counter-chinese-influence-un-trump/> [https://perma.cc/P5D9-RKLH]. Lambert attempted to call attention to the pressure tactics deployed by China with respect to U.N. elections, and contributed to a successful U.S.-led effort to resist electing a Chinese national to head up the World Intellectual Property Organization (WIPO). Lambert also called out pressure tactics used to exclude Taiwan from continuing as an observer within U.N. system organizations. See generally Yaroslav Trofimov et al., *How China is Taking Over International Organizations, One Vote at a Time*, WALL ST. J. (Sept. 29, 2020, 12:33 PM), <https://www.wsj.com/articles/how-china-is-taking-over-international-organizations-one-vote-at-a-time-11601397208> [https://perma.cc/X97Q-6EWC] ("Beijing is pushing its civil servants, or those of clients and

tempt to undermine China's emerging global aspirations, continued efforts by the Biden administration to protect whistleblowers within the U.N. system, defend the integrity of U.N. elections, and empower public servants with apolitical expertise will have more credibility if led by a President who actually protects whistleblowers, does not undermine the integrity of U.S. elections, and appears to value and trust experts.

If re-elected to the U.N. Human Rights Council, the United States will likely express displeasure over the Council's recent decision to admit China, Saudi Arabia, and Cuba to its ranks, remind the Council that it is supposed to take the human rights records of its members into account, resist China-led efforts to turn the body's Universal Periodic Review into empty celebratory occasions to commend human rights violators for their 'progress,' and oppose recent Council resolutions that, for example, denigrate the need to protect human rights defenders.<sup>95</sup>

As a re-engaged member of the WHO, the United States will pay the dues that Trump withheld but also attempt to use its financial leverage over the organization to promote institutional reforms and secure a genuine, candid assessment of what the organization did wrong from the time the first Covid-19 case emerged in China through to the present day. A President who possibly owes his election to his predecessor's failure to contain a pandemic can be counted on to see threats to global health as the national security threats that they are and act accordingly.<sup>96</sup> The United States' new 'health care' Presi-

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partners, to the helm of U.N. institutions that set global standards for air travel, telecommunications and agriculture.”). China has been able to deploy its global clout in organizations like the ITU to secure approval for industry standards (as for facial recognition and surveillance) favored by Chinese companies. Anna Gross, Madhumita Murgia & Yuan Yang, *Chinese Tech Groups Shaping UN Facial Recognition Standards*, FIN. TIMES (Dec. 1, 2019), <https://www.ft.com/content/c3555a3c-0d3e-11ea-b2d6-9bf4d1957a67> [<https://perma.cc/LLU7-W7YE>].

95. See generally TED PICCONE, BROOKINGS INSTITUTION, CHINA'S LONG GAME ON HUMAN RIGHTS AT THE UNITED NATIONS (2018), [https://www.brookings.edu/wp-content/uploads/2018/09/FP\\_20181009\\_china\\_human\\_rights.pdf](https://www.brookings.edu/wp-content/uploads/2018/09/FP_20181009_china_human_rights.pdf) [<https://perma.cc/RFC9-JW2U>] (examining China's emerging role as a “pivotal player in the international human rights system”).

96. See, e.g., Joia Mukherjee, *Global Health is National Security*, JUST SECURITY (Sept. 30, 2020), <https://www.justsecurity.org/72623/global-health-is-na->

dent is likely to take seriously the WHO's Constitution's premise that there is a fundamental right to health and treating health as a global public good, not a zero sum game.<sup>97</sup> He will likely agree with the WHO's premise that the failure of one state to prevent the spread of a contagious disease presents a common danger to all and that all states benefit when each protects the health of its people.<sup>98</sup> Like China's President Xi, Biden will, at a minimum, take a stand against 'vaccine nationalism' by contributing to and joining COVAX, the alliance that ensures that any vaccine developed by contributing wealthy nations will also be available to ninety-two low-income countries based on need and vulnerability.<sup>99</sup>

The WHO's failings in preventing over forty million infected worldwide and over a million dead from Covid-19 will drive the Biden administration to support a number of reforms suggested (but ignored) in the wake of the organization's prior institutional failures, such as Ebola. Rather than leave the only organization designed to handle pandemics, Biden will try to fix it. The United States is likely to support structural reforms within the WHO to make proclamations of Public Health Emergencies of International Concern (PHE-ICs) more effective and transparent, enable greater input from frontline medical whistleblowers and personnel regarding containment strategies, increase accountability for states

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tional-security/ [<https://perma.cc/AZ7P-YVAA>] (explaining how detrimental the Trump administration was to the institutions that protect global—and U.S.—health); COUNCIL ON FOREIGN RELS., INDEPENDENT TASK FORCE REPORT NO 78: IMPROVING PANDEMIC PREPAREDNESS 7 (2020) (urging the United States to treat pandemics as a “serious national security and economic threat”).

97. Constitution of the World Health Organization, pmbl., July 22, 1946, 11 U.S.T. 2553, 14 U.N.T.S. 186.

98. *See id.* (“The achievement of any State in the promotion and protection of health is of value to all. Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger.”).

99. Huizhong Wu, *China Joins COVAX Coronavirus Vaccine Alliance*, AP NEWS (Oct. 9, 2020), <https://apnews.com/article/virus-outbreak-xi-jinping-taiwan-china-archive-aae1708207d3510a434d35aec994d4d1> [<https://perma.cc/7PTS-J5UT>]. Indeed, Biden is aware that the United States will not be safe so long as COVID rages elsewhere. As COVAX is only expected to reach only a quarter of the world population by the end of 2021, Biden may even launch other vaccine outreach initiatives. Power, *supra* note 42, at 17–19.

that fail to adhere to the life and death obligations required by the International Health Regulations, and enable name-and-shame techniques against states that either fail to act (à la Trump) or overreact at the expense of human rights (such as by imposing disproportionate or discriminatory quarantines, travel bans, or lockdowns).<sup>100</sup> While some U.S. reform efforts at the WHO—such as continued calls to allow Taiwan to resume participation in the organization as an observer—are likely to generate Chinese resistance, other proposed reforms—such as increasing the transparency of PHEICs—may not.<sup>101</sup> It is not clear whether the Biden administration will find sufficient allies within U.N. system organizations to pursue its desired institutional reforms. Much turns on whether others share the administration's goals, or see them as efforts to launder and institutionalize the policy preferences of the U.S. State Department. Even if the Biden team were to prioritize re-engagement with the U.N. system, years of U.S. disengagement, combined with insistence on U.S. reforms, may generate resistance.

#### F. *Keeping International Courts and Tribunals at a Distance*

Biden will not disrupt the United States' traditional reluctance to submit to supranational forms of adjudication. He is not likely to resolve the stalemate over the WTO's Appellate Body (AB) simply by agreeing to the appointment of new AB members and will insist on a quid pro quo for bringing the WTO's dispute settlement system back to life. Biden's nominee for U.S. Trade Representative (USTR), Katherine Tai, will probably not go as far as Trump's USTR, Robert Lighthizer,

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100. See, e.g., José E. Alvarez, *The WHO in the Age of the Coronavirus*, 114 AM. J. INT'L L. 578 (2020) (arguing that the WHO "shares five disorders common to other UN system expert-driven organizations: overdependence on states; singular reliance on 'managerial' approaches to enforcement; inflexible emergency declarations; absence of regularized systems for inter-regime collaboration; and common bureaucratic pathologies"); Jennifer Nuzzo, *To Stop a Pandemic: A Better Approach to Global Health Security*, 100 FOREIGN AFF., Jan.-Feb. 2021, at 36 (explaining how states and the WHO can become better prepared for future pandemics).

101. See, e.g., Shitong Qiao, *A New Age for the WHO?*, USALI PERSP. (Jan. 4, 2021), <https://usali.org/usali-perspectives-blog/a-new-age-for-the-who> [<https://perma.cc/TDD5-ELZG>] (analyzing potential WHO reforms China might support).

who proposed that the AB be abandoned in favor of single-tiered arbitrations not correctable on appeal but subject to being overruled by WTO members in exceptional cases.<sup>102</sup> But Tai, who helped to negotiate the USMCA, is likely to seriously consider proposals for more modest reforms. One set of proposals, backed by a group of states led by Ambassador David Walker of New Zealand and summarily rejected by Trump,<sup>103</sup> suggests limiting the time for the AB to conclude appeals to ninety days, increasing the number of AB members to nine, requiring members to serve a single non-renewable term of eight years, restricting AB jurisdiction to issues that are necessary to resolve disputes, and establishing an annual meeting between WTO members and the AB to address systemic jurisprudential issues, such as whether AB rulings should be treated as *de facto* precedent.<sup>104</sup>

One of the most trenchant (albeit perhaps mostly symbolic) matters of WTO reform is getting China to agree that it should no longer be treated as a developing state. This issue might be subject to other tradeoffs that go through the WTO's dispute settlement system. For example, China might be persuaded to acquiesce to such a change if the United States accepts recent panel rulings like *US-Tariff Measures on Certain Goods from China*.<sup>105</sup> That ruling, which found U.S. tariff measures taken in response to intellectual property complaints directed at China to be illegal, echoes other recent decisions that require WTO states attempting to use the "essential security" exception of the General Agreement on Tariffs and

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102. Lighthizer, *supra* note 69.

103. Christopher Hyner, *The United States Rejects the European Union's Proposal to Reform the WTO Dispute Settlement Process*, KING & SPALDING (Jan. 9, 2019), <https://kslawemail.com/80/4797/pages/article2.asp> [<https://perma.cc/S7EK-UFGL>].

104. Schneider-Petsinger, *supra* note 62, at 18–19. Other more radical proposals might also be considered, including replacing the current two-tiered WTO dispute settlement system with a single tier of panelists who would be directed to adjudicate disputes but not to invent law in order to do so. Under this proposal, panelists would be encouraged to issue findings of non-liquet, thereby leaving certain issues to members to resolve. For further discussion of this proposal, see Bernard M. Hoekman & Petros C. Mavroides, *To AB or Not to AB? Dispute Settlement in WTO Reform*, 23 J. INT'L ECON. L. 703, 712–17 (2020).

105. Panel Report, *United States—Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/R (adopted Sept. 15, 2020).



Trade<sup>106</sup> to do something more than invoke security as a magical dispensation from third-party scrutiny.<sup>107</sup> It is possible that a more sober USTR might accept the old-fashioned idea that the United States gets reciprocal benefits when legally implausible arguments to defend protectionist actions fail to gain traction.<sup>108</sup> Accepting such rulings might convince other WTO members that the United States still supports a rule-based system for trade and that its proposals for institutional reform are made in good faith.

But while U.S. wariness over “persistent overreaching”<sup>109</sup> by WTO adjudicators might be overcome with institutional reforms, the U.S. government will not become a sudden convert to the virtues of other international courts. Biden is no more likely than Trump to sign onto the compulsory jurisdiction of the International Court of Justice (ICJ), nor to reverse the United States’ policy of opposing compulsory ICJ reference clauses in new treaties (even while the United States is likely to continue to be one of that court’s most frequent litigants under existing treaties containing such clauses). Although the Biden administration will give human rights higher foreign policy priority, it is not likely to press for expanding the jurisdiction of international human rights adjudicatory bodies over the United States. Biden will not want to draw Republican ire by attempting to submit to the jurisdiction of the Inter-American Court of Human Rights or allowing individual complaints to be brought against the United States before the Human

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106. General Agreement on Tariffs and Trade art. XXI(a), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

107. See Panel Report, *Russia—Measures Concerning Traffic in Transit*, ¶¶ 7.27, 7.82, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019) (denying Russia’s argument that the dispute settlement panel lacked jurisdiction because the essential security clause was self-judging).

108. U.S. tariffs on steel and aluminum from Canada is an example in this context. *Steel and Aluminum*, GOV. OF CAN., [https://www.international.gc.ca/trade-commerce/controls-controles/steel\\_alum-acier\\_alum.aspx?lang=eng](https://www.international.gc.ca/trade-commerce/controls-controles/steel_alum-acier_alum.aspx?lang=eng) [<https://perma.cc/DCK7-94P7>] (last modified Oct. 5, 2020).

109. Press Release, Off. of the U.S. Trade Representative, USTR Issues Report on the WTO Appellate Body (Feb. 11, 2020), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/february/ustr-issues-report-wto-appellate-body#:~:text=through%20persistent%20overreaching%2C%20the%20Appellate,States%20and%20other%20WTO%20Members.&text=these%20actions%20have%20harmed%20the,the%20WTO%20dispute%20settlement%20system> [<https://perma.cc/96S8-WSEV>].

Rights or Torture Committees. As noted above, the new administration will also continue to resist the appeal of the International Tribunal for the Law of the Sea and other modes for arbitrating maritime issues, despite the seemingly clear net benefits of adjudicating important U.S. interests (such as the right of innocent passage through the territorial sea and transit rights elsewhere).<sup>110</sup> Like China, the United States is unlikely to resort to international courts or tribunals for such purposes.

Nor should anyone expect President Biden to seriously back many proposals for new global courts, such as a World Court of Human Rights, an International Court to Combat Human Trafficking, an International Court Against Terrorism, a Multilateral Investment Court, an International Anti-Corruption Court, an International Environmental Court, or an International Arbitration Tribunal for Business and Human Rights, even though most of these adjudicatory bodies have been endorsed by prominent European states.<sup>111</sup>

Similarly, Biden will likely not attempt to re-sign, much less ratify, the International Criminal Court's (ICC) Rome Statute. While the United States deserves credit for innovative Security Council action launching a number of international criminal courts (most prominently the International Criminal Tribunals for Yugoslavia and Rwanda) and for referring two situations (Libya and Sudan) to the ICC, none of those posed real prosecution risks for U.S. nationals. However, the new administration can be expected to adopt a kinder, gentler policy towards the ICC. The John Bolton-inspired executive order penalizing anyone who dares work for the ICC should be among the many Trump era executive orders to go.<sup>112</sup> Similarly, un-

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110. See Roncevert Gana Almond, *U.S. Ratification of the Law of the Sea Convention*, DIPLOMAT (May 24, 2017), <https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/> [https://perma.cc/4YFN-VGB5] (outlining the "significant costs that the United States has incurred and continues to pay by remaining a non-party" to UNCLOS).

111. See generally José E. Alvarez, *Mythic Courts* (iCourts Working Paper Series, No. 2014, 2020), <https://www.iilj.org/wp-content/uploads/2020/10/Alvarez-Mythic-courts.pdf> [https://perma.cc/QC8G-Z8PU] (critiquing common rationales offered for establishing new global courts or tribunals).

112. Exec. Order No. 13928, 85 Fed. Reg., 36, 139 (June 11, 2020). That Trump executive order has been the subject of a court challenge as well as worldwide criticism. E.g., Pranshu Verma, *Trump's Sanctions on International Court May Do Little Beyond Alienating Allies*, N.Y. TIMES (Oct. 18, 2020), <https://>

less compelled by law, the Biden administration will not attempt to restrict military aid for states that cooperate with the ICC or seek to resume the conclusion of bilateral agreements ensuring that ICC members never transfer U.S. nationals to the ICC for prosecution.<sup>113</sup> Despite widespread dissatisfaction with the court, the new administration is likely to recognize that the ICC's continued existence coincides with U.S. interests in promoting accountability for mass atrocities and enforcing international humanitarian law. At the same time, the prospect that the ICC is intent on pursuing criminal prosecutions for Bush-era torture in Afghanistan or against Israelis for actions in Palestine continues to make the ICC a political third rail that few U.S. politicians dare cross. Biden will likely tone down the anti-ICC rhetoric and, like Obama, provide some quiet behind the scenes assistance to the court within the limits set by the Foreign Relations Authorizations Act of 2000–01 and the 2002 American Service-members Protection Act.<sup>114</sup>

Like President Obama, Biden will recognize that even without U.S. participation, the actions and rulings of the ICC will continue to influence international criminal law and may affect other emerging international law issues. He is accordingly likely to send a more prominent and more engaged U.S. delegation to the ICC's Assembly of State Parties as a non-party. An administration filled with Obama-era officials will not forget the influence that Obama administration officials

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[/www.nytimes.com/2020/10/18/world/europe/trump-sanctions-international-criminal-court.html](http://www.nytimes.com/2020/10/18/world/europe/trump-sanctions-international-criminal-court.html) [<https://perma.cc/9Y4A-VNKK>].

113. *Article 98 Agreements and the International Criminal Court*, U.S. DEP'T OF STATE ARCHIVE, <https://2001-2009.state.gov/t/pm/art98//index.htm> (last visited Jan. 25, 2021). Even the Bush administration, which initiated these agreements, ultimately came to see them and the U.S. threats to withhold military aid to pressure states into concluding such pacts as counterproductive. *The United States and the International Criminal Court: The Bush Administration's Approach and a Way Forward Under the Obama Administration*, HUMAN RTS. WATCH (Aug. 2, 2009), <https://www.hrw.org/news/2009/08/02/united-states-and-international-criminal-court-bush-administrations-approach-and-way#> [<https://perma.cc/QU89-TE27>].

114. These laws restrict making funds available for use by or to support the ICC and prohibit the extradition of U.S. nationals to the Court. The Biden administration is likely to resume in-kind assistance as needed and may invoke the Dodd amendment to the ASPA, which allows it to “render assistance to international efforts to bring to justice . . . foreign nationals accused of genocide, war crimes, or crimes against humanity.” American Service-members' Protection Act, Pub. L. No. 107-206, 116 Stat. 820 (2002).

like Harold Koh had on critical issues, such as the meaning of the crime of aggression during the negotiation of the Kampala amendment.<sup>115</sup> Within the Assembly, the United States will probably continue to resist the politically sensitive issue of Afghanistan. The United States will probably avoid legally implausible arguments like the claim (pushed strongly under the Bush administration) that the ICC has no jurisdiction over crimes committed by U.S. soldiers in an ICC party state and instead turn to the slightly more sympathetic argument that allegations of torture stemming from Bush-era actions in Afghanistan, the subject of extensive congressional review and documentation, have been in the public domain for some time. In private, Biden officials can be expected to make the case to ICC proponents that it is simply unrealistic to expect an administration under pressure to criminally prosecute former President Trump to simultaneously allow prosecutions directed at another former Republican administration. Yet it is also likely that President Biden will vow not to issue pardons for war criminals, unlike his predecessor.<sup>116</sup>

Biden officials may also address the ICC's more controversial investigations (both in Afghanistan and in Palestine)<sup>117</sup> by

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115. See Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AM. J. INT'L L. 257 (2015) (analyzing where the United States "might or should be headed with respect to the crime of aggression").

116. See Falih Hassan & Jane Arraf, *Blackwater's Bullets Scarred Iraqis. Trump's Pardons Renew the Pain*, N.Y. TIMES (Dec. 23, 2020), <https://www.nytimes.com/2020/12/23/world/middleeast/blackwater-trump-pardon.html> [<https://perma.cc/AW8K-5PAZ>] (describing dismayed Iraqi reactions to Trump's pardoning of four Blackwater security guards who opened fire on Iraqi civilians with machine guns and grenade launchers). The pardons have been criticized as a violation of international humanitarian law. *Trump Pardon of Blackwater Iraq Contractors Violates International Law - UN*, REUTERS (Dec. 30, 2020), <https://www.reuters.com/article/us-iraq-blackwater-un/trump-pardon-of-blackwater-iraq-contractors-violates-international-law-un-idUSKBN294108> [<https://perma.cc/MSM3-63Y9>].

117. See generally International Criminal Court, *ICC Prosecutor's Annual Report on Preliminary Examination Activities (2020) – Situation in Palestine – Report (Excerpts)*, <https://www.un.org/unispal/document/icc-prosecutors-annual-report-on-preliminary-examination-activities-2020-situation-in-palestine-report-excerpts/> [<https://perma.cc/DAM9-47Y2>]; Press Release, International Criminal Court, Afghanistan: ICC Appeals Chamber Authorizes the Opening of an Investigation (Mar. 5, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=PR1516> [<https://perma.cc/YH57-X8PG>].

encouraging changes in how the Court or its Office of the Prosecutor prioritizes cases and investigations. The United States is likely to endorse some of the proposals for reforms made by an independent group of experts commissioned by the Assembly, including requirements for higher levels of gravity and more definitive findings of feasibility before ICC investigations are initiated.<sup>118</sup> Of course, the U.S. position on the ICC's crime of aggression, as articulated by former legal adviser Harold Koh, will not change: The Biden administration will continue to insist that aggression be narrowly limited to manifest violations of the U.N. Charter.<sup>119</sup>

In general, President Biden will justify U.S. resistance to international courts and tribunals through familiar arguments of exceptionalism, highlighting the country's unique role and global burdens. While such arguments are not likely to win many new converts, diplomats around the world tired of four years of unpredictable late-night tweets will be relieved by this return to Obama-style jawboning over abrupt termination of dialogue.

#### G. *R.I.P., R2P*

Biden was reportedly never a fan of Obama's decision to lead from behind with respect to NATO's action in Libya.<sup>120</sup> Like Trump, he will be averse to starting new, or staying in old, never-ending wars, even those waged for humanitarian reasons. He will find no resistance on that score from fellow veto-wielding Security Council members Russia and China and will get only token resistance from fellow NATO members.

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118. INDEPENDENT EXPERT REVIEW OF THE INTERNATIONAL CRIMINAL COURT AND THE ROME STATUTE SYSTEM, FINAL REPORT, ¶¶ 633–50 (Sept. 30, 2020), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf) [<https://perma.cc/6UZB-3CUR>].

119. See Koh & Buchwald, *supra* note 115, at 270–71 (“[S]tandard definitions of the word ‘manifest’ suggest something that is evident, obvious, apparent, or plain, without necessarily connoting the egregiousness or flagrancy that would ordinarily be considered essential to distinguish aggression for which individual criminal liability might lie from other illegal uses of force . . .”).

120. See Ted Galen Carpenter, *Biden Needs to Repudiate Obama's Policy Legacy: The Case of Libya*, CATO INST. (Dec. 31, 2020), <https://www.cato.org/publications/commentary/biden-needs-repudiate-obamas-policy-legacy-case-libya> [<https://perma.cc/ST6T-DWMJ>] (noting that Biden was against military intervention in Libya).

Whether that is a positive or negative development turns on whether one is a fan of Responsibility to Protect (R2P), whether or not it is invoked by the Security Council.<sup>121</sup> It is also possible that Biden's pledge to end never-ending wars portends a greater reluctance to resort to use of force more generally and may therefore prompt changes to the U.S. National Security Strategy to move away from preemptive self-defense. In addition, congressional action may leave the new administration more constrained with respect to the use of military force than prior presidents. Congress could restrict the scope of presidential war power by amending the War Powers Resolution, clarifying the 2001 Authorization for Use of Military Force, or limiting the president's discretion to resort to nuclear weapons. In the wake of the especially erratic Trump presidency and bipartisan concerns over imperial presidential powers, legislative reforms to put additional safeguards on the powers of the president are more likely now than at any time since Nixon's resignation.<sup>122</sup>

At the same time, Biden's nominees for Secretary of State and Ambassador to the United Nations predispose a genuine effort to make the Security Council relevant—if not great—again. His administration is likely to support efforts short of authorizing humanitarian use of force in the Security Council for U.N. peace operations, at least for “second order” conflicts where divisions among the P5 might be overcome.<sup>123</sup> Biden might even be inclined to use the Security Council to send new situations to the ICC should a suitable case arise that does

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121. For criticisms of R2P, see, for example, José E. Alvarez, *The Schizophrenias of R2P*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE (Philip Alston & Euan MacDonald eds., 2008). The Security Council famously invoked R2P in authorizing the Libyan intervention in S.C. Res. 1973 (Mar. 17, 2011).

122. See, e.g., BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* 281–314 (2020) (discussing possible reforms to the president's war powers). Bauer and Goldsmith also consider other reforms to presidential powers with foreign policy implications, such as possible changes to election laws to counter foreign state influence, *id.* at 23–47, criminal investigations against former presidents, *id.* at 231–51, and constitutional amendments to limit the president's pardon power, *id.* at 111–35.

123. Richard Gowan, *UN Peacekeeping in a Fragmenting International Order*, INT'L CRISIS GRP. (Nov. 25, 2020), <https://www.crisisgroup.org/global/un-peacekeeping-fragmenting-international-order> [https://perma.cc/HM4V-B3MZ].

not generate resistance from Russia or China. Unlike Trump, whose insistence on blaming China for Covid-19 stalled efforts to secure Security Council action during the pandemic,<sup>124</sup> Biden would be far more amenable to using the Council to complement the WHO's pandemic response efforts. He would also not hesitate to use the Council's Chapter VII powers to compel states to take their obligations to protect the health of their populations more seriously.<sup>125</sup> His administration would also support additional funding for U.N. or regional peacekeeping missions to facilitate pandemic prevention and treatment, greater aid by international financial institutions, and more consistent interactions among U.N. specialized agencies or between U.N. system organizations and entities like the Vaccine Alliance, GAVI.

#### H. *Ironclad Security Commitments to Israel*

Biden's predicted recommitment to a two-state solution will encounter permanent obstacles left behind in Trump's wake. While Biden is widely expected to voice strong support for protecting Palestinian rights in any Middle East peace deal, including by rejecting Israeli annexation of West Bank land needed to establish a future Palestine, this path is hindered by real and symbolic changes on the ground that he cannot or will not undo without (unlikely) congressional acquiescence. Despite considerably icier relations with Netanyahu, Biden has indicated that he will not relocate the U.S. embassy currently in Jerusalem.<sup>126</sup> He is also not likely to attempt to reopen the

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124. Josh Lederman, *U.S. Insisting that the U.N. Call out Chinese Origins of Coronavirus*, NBC NEWS (Mar. 25, 2020, 8:41 PM), <https://www.nbcnews.com/politics/national-security/u-s-insisting-u-n-call-out-chinese-origins-coronavirus-n1169111> [<https://perma.cc/M3J2-LQB6>].

125. See Rob Berschinski, *What the UN Security Council Can Do on Coronavirus: A Global Good Coordination Mechanism*, JUST SECURITY (Mar. 24, 2020), <https://www.justsecurity.org/69336/what-the-un-security-council-can-do-on-coronavirus-a-global-goods-coordination-mechanism/> [<https://perma.cc/M5AS-LDJY>] (discussing the benefits of a Security Council resolution on COVID-19).

126. Bill Barrow, *Biden Says He'd Leave US Embassy in Jerusalem if Elected*, AP NEWS (Apr. 29, 2020), <https://apnews.com/article/47c2d807cbb563b747cee29aaefeda5a> [<https://perma.cc/CQQ9-KUZV>]. For a survey of Trump's political presents to Netanyahu, including many of questionable international legality, see, David M. Halbfinger, *For Netanyahu and Israel, Trump's Gifts Kept on Coming*, N.Y. TIMES (Nov. 21, 2020), <https://www.nytimes.com/>

Palestine Liberation Organization's diplomatic mission in Washington and has expressed support for normalization of relations or peace agreements like those Trump encouraged with Sudan, Bahrain, and the United Arab Emirates.<sup>127</sup> Those agreements, which have undermined the traditional Arab posture against recognition of Israel until a Palestinian state is established, are the rare Trump foreign policy initiative to win bipartisan praise in the United States.<sup>128</sup> They also exemplify Trump's preference for bilateral over multilateral arrangements, another trend that might outlast his time in office. It is not clear, however, whether those peace agreements actually advance prospects of an eventual Middle East peace deal. Indeed, many observers in the region believe Trump's actions have undermined the possibility that the United States can ever be seen as an honest, impartial broker for such a deal.<sup>129</sup> The "ironclad" commitment to Israel's security in the Democratic Party platform<sup>130</sup> will also continue to complicate the United States' posture in forums that are now and likely to remain sympathetic to Palestine, such as UNESCO and the U.N. General Assembly.<sup>131</sup>

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2020/11/21/world/middleeast/netanyahu-trump-israel-gifts.html [https://perma.cc/469E-VU3E].

127. See, e.g., Peter Baker et al., *Israel and United Arab Emirates Strike Major Diplomatic Agreement*, N.Y. TIMES (Sept. 2, 2020), <https://www.nytimes.com/2020/08/13/us/politics/trump-israel-united-arab-emirates-uae.html> [https://perma.cc/9BER-EVCE] (reporting on Israel and the United Arab Emirates' "landmark accord" under which the parties agreed to "full normalization of relations" in exchange for Israel suspending annexation of occupied West Bank territory").

128. Dan Murphy & Emma Graham, *UAE Lauds Bipartisan Support for Israel Accord, Downplays Potential Change of U.S. Presidency*, CNBC (Sept. 15, 2020), <https://www.cnbc.com/2020/09/15/uae-lauds-bipartisan-support-for-israel-accord.html> [https://perma.cc/M66P-PBAV].

129. See generally Adela Suliman, *Progress, Not Peace: Breaking Down the Trump-brokered Deals Between Israel, Arab States*, NBC NEWS (Sept. 18, 2020), <https://www.nbcnews.com/news/world/progress-not-peace-breaking-down-trump-brokered-deals-between-israel-n1240298> [https://perma.cc/P5EF-QFMT] (stating that critics view the deals as a betrayal of the Palestinian cause).

130. DEMOCRATIC NAT'L COMM., *supra* note 2, at 91.

131. UNESCO embraced Palestine as a member in 2011. Steven Erlanger & Scott Sayare, *Unesco Accepts Palestinians as Full Members*, N.Y. TIMES (Oct. 31, 2011), <https://www.nytimes.com/2011/11/01/world/middleeast/unesco-approves-full-membership-for-palestinians.html> [https://perma.cc/DKB3-DVW6]. Any Biden effort to have the United States rejoin UNESCO would



### III. A TEMPERED RESTORATION

A kind of U.S. international law restoration is coming, but it will take place in a world transformed by Trump's years in office, global anti-democratic trends, and disenchantment with globalization and the international legal and economic order, including the U.N. system. The Covid-19 pandemic, which has generated more than a million deaths, economic calamity, and human rights violations for some of the world's poorest and most vulnerable populations (e.g., migrants, children, the elderly, prisoners, racial minorities), has exacerbated these adverse trends. Dissatisfactions with the institutions of international law result not only from a flawed WHO response but from a paralyzed U.N. Security Council unwilling or unable to take any action in response, even in the face of famines and migrations that may result from the on-going pandemic. It is clear that the post-WWII legal order that was supposed to address problems of the global commons through multilateral cooperation has repeatedly failed to protect human life—whether in conflict zones like Syria, on migrant-filled rafts in the Mediterranean, amidst forest fires in Australia or California, or in intensive care units around the world. Biden is heir to deep-seated skepticism about the efficacy of international organizations and the capacity of the post-WWII hegemon to improve them.

This is one reason why the Biden administration is not likely to result in a de facto Obama third term with respect to foreign affairs, despite the presence of many Obama officials among Biden's nominees for high office. To be sure, President Biden will revive many of Obama's initiatives, such as attempting to close down Guantanamo, demanding presidential scrutiny to identify specific and proportionate drone targets, renouncing the use of torture, resuscitating the moribund two-state solution for Israel and Palestine, resurrecting the Joint Comprehensive Plan of Action (JCPOA or Iran Deal), returning to the Paris Agreement, and re-engaging with the United Nations and its human rights system.<sup>132</sup> But even these predictable efforts to reset the clock will confront new realities

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need to surmount considerable Congressional antipathy, including within the Democratic Party.

132. See, e.g., Ward, *supra* note 1 (listing potential foreign policy priorities for the Biden administration).

and take different shapes. For example, given Iran's apparent march toward nuclear weapons capacity in the wake of Trump's unilateral withdrawal from the JCPOA, the ticking clock on that original deal, and the United States' lost credibility among that agreement's other parties, the Iran Deal cannot simply be revived; it will need to be renegotiated from the ground up. And any new agreement is likely to look substantially different, for yet another reason: European allies and Iran itself can no longer be sure that the United States will respect *pacta sunt servanda* over the long term.<sup>133</sup>

Biden's effort to embrace science and combat climate change will confront new realities that will make that effort both harder and easier. Trump's denial of climate change and war on U.S. states that individually attempted to do something about it, and his efforts to decouple from China on all fronts (including Obama's climate change side agreement with China) have undermined any claims that the United States had to leadership on the issue. At the same time, new developments, such as Japan's commitment to achieve carbon neutrality by 2050,<sup>134</sup> have opened up new opportunities for China+side agreements to Paris that were not available to Obama—as have technological and diplomatic innovations by others, such as U.S. states like California and industry leaders.<sup>135</sup> There has also been a change in mindset about how best to combat climate change. The emphasis now is less on imposing taxes on coal and more on transitioning to a new green economy that offers the promise of combatting climate change while pro-

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133. For description of the polarization of views generated in the wake of Trump's actions on the JCPOA, see Marc Weller, *The Controversy about the Iranian Nuclear Sanctions Snapback*, ASIL INSIGHTS (Oct. 19, 2020), <https://www.asil.org/insights/volume/24/issue/27/controversy-about-iranian-nuclear-sanctions-snapback> [<https://perma.cc/2PDE-YZLM>].

134. Japan is the world's fifth largest emitter of greenhouse gasses. *Telephone Talk Between Prime Minister SUGA Yoshihide and United Nations Secretary-General António Guterres*, MINISTRY FOREIGN AFF. JAPAN (Oct. 27, 2020), [https://www.mofa.go.jp/ic/ch/page4e\\_001105.html](https://www.mofa.go.jp/ic/ch/page4e_001105.html) [<https://perma.cc/R2FL-R7N5>].

135. See, e.g., Neal E. Boudette & Carol Davenport, *G.M. Announcement Shakes Up U.S. Automakers' Transition to Electric Cars*, N.Y. TIMES (Jan. 29, 2021), <https://www.nytimes.com/2021/01/29/business/general-motors-electric-cars.html> [<https://perma.cc/6GNL-XSS4>] (discussing the impact of G.M.'s announcement that it will manufacture only zero-emission vehicles by 2035).

ducing millions of new jobs for those who jobs are displaced.<sup>136</sup>

More generally, the Trump presidency has made even a return to Obama-era policies more difficult because it managed to eviscerate trust that the United States can actually do what it promises. The loss of confidence in U.S. competence complicates any renewed efforts for international collaboration on climate change, closing Guantanamo, or rendering suspects accused of terrorism.<sup>137</sup> It may take decades to restore a reputation lost in four years. No one can be sure how much time it will take to regain the trust of traditional allies whom we have spurned. While Biden has indicated his intention to embrace democratic leaders and reset the tone of discourse with authoritarian rulers that Trump befriended (such as Russia's Putin, Saudi King Salman and Mohammed bin Zayed, the Philippine's Duterte, Brazil's Bolsonaro, Turkey's Erdogan, Hungary's Orban, and Poland's Duda), political realities may compel his administration to work even with authoritarian leaders to secure mutually beneficial goals.<sup>138</sup> Convincing both democratic allies and authoritarian rulers that the United States is now committed to and is able to undertake a starkly different path from that set by Trump may also be difficult since all are aware that nearly half of U.S. voters supported an extremely unilateralist president—and that it is possible that over half of U.S. voters may elect in 2024 another chief executive with similar inclinations who is just slightly more competent. That reality means that NATO members may welcome Biden's embrace while continuing to have a plan B for secur-

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136. See, e.g., INT'L LABOR ORG. & INTER-AM. DEV. BANK, JOBS IN A NET-ZERO EMISSIONS FUTURE IN LATIN AMERICA AND THE CARIBBEAN 4 (2020), [https://www.ilo.org/wcmsp5/groups/public/—americas/—ro-lima/documents/publication/wcms\\_752069.pdf](https://www.ilo.org/wcmsp5/groups/public/—americas/—ro-lima/documents/publication/wcms_752069.pdf) [<https://perma.cc/53GU-JENH>] (reporting that “2.5 million Latin American and Caribbean jobs could be lost to heat stress alone by 2030” but that 15 million green jobs could be created).

137. See, e.g., Power, *supra* note 42, at 12–13 (highlighting examples of “America the incompetent” in the Trump era and the need for a Biden administration to demonstrate its own competence).

138. For an argument that Biden has been so repelled by Trump's embrace of authoritarian leaders that he may act differently than he did as Vice President, when he took a more *realpolitik* view of such leaders, see Nahal Toosi, *Joe Biden's First Diplomatic Fight Will Be at Home*, POLITICO (Oct. 9, 2020), <https://www.politico.com/news/magazine/2020/10/09/bidens-first-diplomatic-mission-427230> [<https://perma.cc/89X8-C7QZ>].

ing Europe.<sup>139</sup> No one—newly embraced ally or those newly unfriended—knows whether Biden’s restoration of international law will last.

Another factor that complicates a return to Obama-era policies is that, over the past four years, there has been massive change in the U.S. foreign and intelligence services. Steve Bannon’s attempts to deconstruct the administrative state extended beyond government meteorologists and public health professionals. The Trump administration sidelined career diplomats, fired independent inspector generals, and made enemies of foreign policy and intelligence agency whistleblowers trying to uphold their constitutional oaths.<sup>140</sup> Many distinguished public servants resigned or were forced out.<sup>141</sup> In addition, Trump made a record number of political appointees ambassadors—some of whom have embarrassed themselves as well as the United States by embracing far right political parties, ignoring the advice of experienced diplomats, or praising actions by authoritarian leaders at odds with human rights or rule of law values.<sup>142</sup> As a result, the U.S. foreign service has reportedly experienced the biggest drop in applications in a decade, thereby reversing any progress towards recruiting a more diverse workforce.<sup>143</sup>

The absence of foreign policy and intelligence expertise, essential to an administration that aspires to more closely adhere to international law, will be keenly felt, particularly in the

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139. Roger Cohen, *Macron Tells Biden That Cooperation with U.S. Cannot Be Dependence*, N.Y. TIMES (Jan. 29, 2021), <https://www.nytimes.com/2021/01/29/world/europe/macron-biden.html> [https://perma.cc/2R43-XEGS].

140. Lisa Rein, *How Trump Waged War on His Own Government*, WASH. POST (Oct. 29, 2020), [https://www.washingtonpost.com/politics/trump-federal-civil-servants/2020/10/28/86f9598e-122a-11eb-ba42-ec6a580836ed\\_story.html](https://www.washingtonpost.com/politics/trump-federal-civil-servants/2020/10/28/86f9598e-122a-11eb-ba42-ec6a580836ed_story.html) [https://perma.cc/AY4R-3SKU].

141. *See id.* (“Many civil servants quit Trump’s government in frustration. Others were forced out, if not by overt firings then by efforts to make their jobs untenable.”).

142. *See* William J. Burns & Linda Thomas-Greenfield, *The Transformation of Diplomacy: How to Save the State Department*, 99 FOREIGN AFF. NOV.–DEC. 2020, at 100, 101 (describing embarrassing behavior of U.S. ambassadors to Germany, Hungary, and Iceland).

143. Only four out of the United States’ current 189 ambassadors are Black. *Id.* at 102. The fact that one of the authors of this devastating report on the state of the U.S. foreign service is Biden’s nominee for U.S. ambassador to the United Nations indicates that the new administration will prioritize the foreign service gaps highlighted in that report.

early days before new positions throughout the federal government are filled. The Biden administration will undoubtedly attempt to reassert the value of apolitical intelligence, foreign policy expertise, and compliance with ethical standards.<sup>144</sup> It can also be expected to take seriously the need to ‘race’ U.S. foreign policy so that its diplomats look more like the United States itself—with possible knock-on benefits in making the United States a more influential opponent of structural racism around the world, in drawing greater diplomatic attention to regions and countries U.S. diplomacy has long ignored, and in treating racial justice as a critical component to effective efforts to promote peace, security, and democracy.<sup>145</sup> But making diplomacy professional again, even if Biden were to distribute MDPAs in lieu of MAGA ones, is not the sexiest of projects. Restoring the U.S. diplomatic corps will be a tremendous lift for an administration facing unprecedented challenges with greater political salience.

In the meantime, Biden will have to work with the decimated State Department that he has inherited. This includes working with Trump-era lower-level deputies who have now acquired the status of civil service employees and will remain in place. If past is prologue, these officials will not immediately get with the new program.<sup>146</sup> Trump’s ‘deep state’ may ironically, live on—this time to delay, obstruct, and sometimes even derail the new President’s priorities. This is regrettable insofar as it will slow down an administration with an ambitious agenda, but this form of bureaucratic stasis has a (modest) positive side: It makes it less likely that U.S. allies and opponents will experience severe cases of whiplash. If Trump taught Biden anything, it is that stability matters when it comes to foreign affairs. While President Biden has every incentive to

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144. Kris, *supra* note 80.

145. Matiangal Sirleaf, *Racing National Security: Introduction to the Just Security Symposium*, JUST SECURITY (July 13, 2020), <https://www.justsecurity.org/71373/racing-national-security-introduction-to-the-just-security-symposium/> [https://perma.cc/B6XP-A6GK].

146. See Michael Stratford, *DeVos Urges Career Staff to ‘Be the Resistance’ as Biden Takes Over*, POLITICO (Dec. 15, 2020), <https://www.politico.com/news/2020/12/15/betsy-devos-biden-education-department-445900> [https://perma.cc/6TZ4-E29D] (“Education Secretary Betsy DeVos urged career employees at the Education Department on Tuesday to ‘be the resistance’ when the Biden administration comes into power.”).

reverse Trump's disastrous disrespect for foreign policy expertise with all due speed, he will also want to avoid encouraging U.S. adversaries to think that all they need to do is wait out his term for another 180-degree reversal brought on by a new Republican president.

The predicted tempered restoration of international law suggests that Harold Koh's conclusion that a single term of a Trump presidency would lead only to "pyrrhic" short term victories against "resilient" international law was a tad premature and optimistic.<sup>147</sup> Koh's hopeful take on Trump's impact on the U.S. judiciary and foreign relations law is a case in point.<sup>148</sup> Trump's notorious success in appointing relatively young, conservative judges to lifetime positions on the U.S. Supreme Court and on lower federal courts is likely to fuel reliance on doctrines that make it more difficult for advocates to deploy international law as a sword—the very essence of what Koh calls "transnational legal process."<sup>149</sup> Trump-era judges, all of whom survived the gauntlet of close Federalist Society scrutiny, include many constitutional originalists of a particular persuasion. Trump did not manage to appoint to the bench only Justice Kavanaugh, whom Koh correctly describes as a "young, reliably conservative, international-law skeptic,"<sup>150</sup> He has appointed many others who are likely to demand clear statutory text to incorporate customary international law, require explicit self-executing language before permitting treaties to be invoked in U.S. courts, be exceedingly skeptical of using foreign or international law to interpret the U.S. Constitution, and revive federalist concerns with the scope of President's treaty power to override U.S. state laws and the scope of

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147. Koh, *Trump v. International Law*, *supra* note 1. But Koh should not be unfairly singled out. International lawyers have often shared a faith in a progress narrative. See, e.g., *PROGRESS IN INTERNATIONAL LAW* (Russell A. Miller & Rebecca M. Bratspies eds., 2008) (analyzing significant issues in international law to gain insights about the current status and future of international law). Many, including this author, can be accused of seeing international law as more firmly embedded in U.S. law than is the case. José E. Alvarez, *The Internationalization of U.S. Law*, 47 *COLUM. J. TRANSNAT'L L.* 537 (2009).

148. Koh, *Trump v. International Law*, *supra* note 1, at 2–9 (describing *Trump v. Hawaii* and other immigration rulings).

149. Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181 (1996).

150. *Id.* at 2.

Congress's power to enact legislation to give effect to a treaty. The new 6-3 Supreme Court conservative majority may even be activist enough to revive the long discredited idea of subject-matter limits on the scope of the treaty power, consistent with Justice Thomas's concurring opinion in *Bond v. United States*.<sup>151</sup>

Despite the United States' dwindling soft power, judges around the world still pay attention to what U.S. courts say, particularly when it comes to questions of common concern such as whether, or to what extent, to give effect to international law. The "transjudicial forms of communication" on which the hopes of some liberal international lawyers once rested may now transmit skepticism towards international law around the world.<sup>152</sup> Of course, U.S. judicial views of international law will be most keenly felt with respect to the foreign affairs powers of the executive and the interpretation of U.S. law. Absent unlikely structural changes to the federal judiciary, such as the number or tenure of Supreme Court justices, there is little that President Biden can do to eliminate the possibility that even his foreign policy initiatives, while traditionally accorded considerable deference, will be resisted by the third 'least dangerous' branch.

As this suggests, Trump's promotion of new and revived isolationist tendencies in U.S. foreign policy have gone global, thereby making the expected restoration of international law within the United States difficult.<sup>153</sup> That effort is hemmed in by structural realities: a divided Congress, resistance by some federal judges and bureaucrats, legal constraints on prompt reversals of federal regulations, and loss of faith in the credibility and competence of U.N. system organizations as well as in the United States itself. These realities pose challenges for

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151. *Bond v. United States*, 572 U.S. 844, 882–96 (2014) (Thomas, J., concurring) (urging the Court to consider drawing a clear line between "matters of international discourse" that can be subject to treaty-making and "matters of purely domestic regulation" that cannot).

152. Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1999).

153. Indeed, even the tempered restoration described in this article is overly optimistic for some. See, e.g., Michael Beckley, *Rogue Superpower: Why this Could Be an Illiberal American Century*, 99 FOREIGN AFF., Nov.–Dec. 2020, at 73 (arguing that Trump's influence will "endure long after Trump himself is gone").

those who have emphasized the capacity of international law to overcome its state-centric origins in pursuit of global community interests.<sup>154</sup> Indeed, the fear expressed in Koh's articles—that eight years of Trump could permanently overcome international law's resiliency—should inspire caution about the staying power of the liberal international order. If the standard tenure of a single U.S. President can dismantle the nearly eighty-year effort to construct the post-WWII international legal order, that order is far more fragile than many believed it to be. Trump's reign provides a lesson in humility for international lawyers generally.

Those who hope for a newfound respect for international law under Biden or believe that his election proves the system's durability and longevity need to accept, with due humility, that the United States has rarely demonstrated respect for international law not of its own making. While the probable U.S. return to more faithful compliance with its own laws (such as longstanding civil rights legislation) will make its actions more consistent with some of its treaty obligations, that form of compliance is not the same thing as changing one's own national laws and practices because international obligations so demand. The United States routinely insists, for example, that other states hold their nationals responsible for international crimes or that they comply with environmental treaties, even if these actions require extensive changes to their internal laws and practices. But the United States does not practice what it preaches when it comes to holding its own bad actors accountable under international criminal law, and its negotiating power affords it the luxury of automatically being in compliance with treaties whose terms it deeply influences from the start. The United States can take advantage of UNCLOS's regime on the continental shelf as customary law without accepting the convention's rules for submitting at least some disputes to binding adjudication because President Truman unilaterally changed custom.<sup>155</sup> The same can be said for much else in that convention, such as its 200-mile fishing zone,

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154. See, e.g., FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOR OF BRUNO SIMMA (Ulrich Fastenreth et al. eds., 2011) (arguing that international law strengthens "the entire international community by protecting human security, the global environment, and human rights.").

155. See MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS 107–22 (2013) (dis-



which owes much to a premature U.S. statute that affirmed it long before treaty law played catch-up.<sup>156</sup> The United States (along with four other privileged states) has the luxury (and the hubris) to demand that all states comply with Chapter VII decisions by the U.N. Security Council while its veto power protects it from such unwanted sovereign intrusions. Whether under Bush, Obama, or Biden, the United States has argued that killing alleged terrorists through the use of drones is somehow more legal than torturing them.<sup>157</sup> Such examples of how international law and its many gaps and ambiguities privilege the United States over other countries are endless. It is shocking just how much Trump ignored this fact and how hard Biden will have to work to convince other U.S. politicians that this remains the case.

Biden's response to inter-mestic concerns may lend the United States somewhat greater credibility with respect to human rights, but it will not make up for U.S. failure to actually enter into a vast number of human rights treaties or its unwillingness to enter without a litany of reservations, understandings, and declarations. Removing questionable reservations to the Convention Against Torture or the ICCPR that limit their underlying rights to those protected under existing U.S. law and embracing those treaties' individual complaints mechanisms would make it more difficult for any future U.S. President or Congress to violate those rights. That kind of restoration would go farther in convincing the world that the United States sees international law as real law imposing binding obligations, and not merely a cudgel to be used against others.

From this broader perspective, Biden's election will see the return only of what is *normal behavior for the United States*. This hedged restoration will seem quite exceptional and hypocritical to states with less power, and they may accordingly push back on Biden's initiatives requiring multilateral cooper-

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cussing how the Truman Proclamation on the Continental Shelf shaped the customary law of the sea).

156. U.S. P. L. 94-265, also known as the Magnuson Fishing Conservation and Management Act, established a 200-mile fishing zone effective Mar. 1, 1977, long before the UNCLOS's 200-mile economic zone.

157. See e.g., Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Addendum: Study on Targeted Killings*, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (criticizing such drone killings).

ation. Not everyone is likely to be enthusiastic about a reform agenda for the WHO that presumes that certain prophylactic techniques (e.g., expensive testing, contact tracing, and isolation) are suited to all nations irrespective of available resources or culture, for example. Some states may prefer prioritizing lower cost techniques for prevention or treatment or the study of the origin of zootopic diseases that can lead to future pandemics. Not everyone will be amenable to branding China's Xinjiang transgressions as international crimes or targeting individuals for such crimes. This includes, for instance, Indonesia, a country that fears what Xinjiang and other semi-autonomous regions bode for the prospects of external 'self-determination,' or others who may see any efforts to punish China as hypocritical given the United States' own extreme reactions to post-9/11 terrorism.<sup>158</sup> As during Obama's term, not all states will value U.S. leadership on human rights, particularly if they prioritize economic, cultural, and social rights over the U.S.-preferred civil and political rights or differ from the United States with respect to internationalizing respect for LGBTQ+ or reproductive rights. The 'culture wars' that have bedeviled U.S. domestic politics for some time have international parallels.<sup>159</sup>

#### IV. TOOL OF TEMPERED RESTORATION OR TRANSFORMATION?: *FRATELLI TUTTI*

If there is any theme that is likely to define the Biden administration, it will be its reliance on allies. President Biden's reluctance to go it alone may be the single biggest contrast historians eventually draw between him and his predecessor. Biden highlighted this contrast himself when he relied on

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158. *Explaining Indonesia's Silence on the Uyghur Issue*, INST. FOR POL'Y ANALYSIS OF CONFLICT (June 20, 2019). See, e.g., Darren Byler, *Human Rights in China: The Case of Xinjiang* 9–10 (Penn Project on the Future of U.S.-China Relations, Working Paper, 2020), [https://cpb-us-w2.wpmucdn.com/web.sas.upenn.edu/dist/b/732/files/2020/10/Darren-Byler\\_Human-Rights-in-China-The-Case-of-Xinjiang\\_Final.pdf](https://cpb-us-w2.wpmucdn.com/web.sas.upenn.edu/dist/b/732/files/2020/10/Darren-Byler_Human-Rights-in-China-The-Case-of-Xinjiang_Final.pdf) [<https://perma.cc/D725-U5CY>] (discussing parallels between the U.S. and Chinese responses to terrorism).

159. See, e.g., Neil MacFarquhar, *In a First, Gay Rights Are Pressed at the U.N.*, N.Y. TIMES (Dec. 18, 2009), <https://www.nytimes.com/2008/12/19/world/19nations.html> [<https://perma.cc/ZD83-JHY7>] (describing opposition to a declaration seeking to decriminalize homosexuality despite support from 66 states).

Pope Francis's had called for *fratelli tutti*, or fraternal openness, in his FDR-inspired address at Warm Springs, Georgia, a climactic moment of his campaign.<sup>160</sup> In his encyclical of October 3rd, 2020, Pope Francis called for "fraternal openness that allows us to acknowledge, appreciate and love each person, regardless of physical proximity, regardless of where he or she was born or lives."<sup>161</sup> As a practicing Catholic, Biden was clearly drawn to the Pope's plea for *fratelli tutti* to overcome Trump's unilateralist policies.

In every foreign policy speech given by Biden and every paper published by his most prominent foreign policy advisers, the starting point for resolving difficult challenges involves reliance on existing allies and searching for new ones. For Biden, a key advantage enjoyed by the United States over competitors like China is the power of its alliances, its *fratelli*. Indeed, *fratelli* are Biden's go-to response when asked about how he would address issues such as continued threats from North Korea, Russia's actions in Ukraine, cyberattacks, or China's malign behavior in the South China Sea, towards Hong Kong or Taiwan, or involving trade or intellectual property.<sup>162</sup>

Biden's response to threats posed to Europe will be, of course, to return to NATO's embrace, even while insisting (more softly and diplomatically than his predecessor) that NATO allies increase their financial contributions. His response to the unfolding Pacific Century and the rise of China will be to strengthen ties with key allies in the region, including Japan, South Korea, and Australia, and robust engagement with regional institutions like the ASEAN. His response to China's new military aggressiveness will include joining others, particularly Japan, in an Indo-Pacific counter-offensive.<sup>163</sup> This

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160. Joseph R. Biden, Jr., Democratic Presidential Candidate, Campaign Speech at Warm Springs, Georgia (Oct. 27, 2020), <https://www.rev.com/blog/transcripts/joe-biden-campaign-speech-transcript-warm-springs-ga-october-27> [<https://perma.cc/B23Z-3RFD>].

161. *Encyclical Letter Fratelli Tutti of the Holy Father Francis on Fraternity and Social Friendship* ¶ 1, VATICAN (Oct. 3, 2020), [http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco\\_20201003\\_enciclica-fratelli-tutti.html](http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20201003_enciclica-fratelli-tutti.html) [<https://perma.cc/2WVF-BN74>] [hereinafter *Fratelli Tutti*].

162. See, e.g., Biden, *supra* note 74, at 65 ("As president, I will take immediate steps to renew U.S. democracy and alliances.").

163. See Hiroyuki Suzuki, *Japan's Leadership Role in a Multipolar Indo-Pacific*, CTR. FOR STRATEGIC & INT'L STUD. (Oct. 23, 2020), <https://www.csis.org/>

will require more care and feeding of the Quadrilateral Security Dialogue (QUAD) between the United States, Japan, Australia, and India and its impressively large scale joint military exercises.<sup>164</sup> Although he will not turn away from the United Nations like Trump, Biden may continue his predecessor's penchant for deploying less institutionalized alternatives for securing cooperation when the U.N. system fails or is insufficient.

As these examples demonstrate, Biden will probably not be turning to all or *tutti fratelli*. He will likely embrace distinct friends for distinct reasons. Some of his allies will be non-state actors—including hybrid public/private entities, NGOs, philanthropies, and commercial enterprises—and not just fellow states. The Biden administration will resort to a reinvigorated transatlantic partnership to achieve greater energy security while combating climate change, secure common solutions to governing big data flows while respecting both freedom of expression and data privacy, and renew attempts to devise consensus rules on how states can protect themselves and others against cyberattacks.<sup>165</sup> Biden era alliances will include joint

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analysis/japans-leadership-role-multipolar-indo-pacific [https://perma.cc/N8AK-H2AD] (explaining that Japan cooperates under the Quadrilateral Security Dialogue with Australia, India, and the United States, and is considering using ASEAN “as a platform to support autonomous responses” to challenges to the Indo-Pacific region).

164. *Contra* Céline Pajon, *Japan's Indo-Pacific Strategy: Shaping a Hybrid Regional Order*, WAR ON THE ROCKS (Dec. 18, 2019), <https://warontherocks.com/2019/12/japans-indo-pacific-strategy-shaping-a-hybrid-regional-order/> [https://perma.cc/6J5C-YF3D] (“The absence of a joint statement and the failure to operationalize the Quad suggest that its framework might be a limited concept for advancing security cooperation, rather than an empowering one”).

165. But reaching agreement even within the transatlantic alliance on a number of outstanding international legal issues will not be easy. As is evident from the latest European Union-China investment pact, European states are likely to prioritize economic ties with China over concerns with China's violations of human rights. See Steven Lee Myers, *With Concessions and Deals, China's Leader Tries to Box Out Biden*, N.Y. TIMES (Jan. 19, 2021), <https://www.nytimes.com/2021/01/03/world/asia/china-eu-investment-biden.html> [https://perma.cc/EHB3-449E] (commenting that by concluding the investment agreement with the E.U. countries, China has “demonstrated once again that it pays little or no diplomatic cost for abuses that violate European values”). The United States would also have to work hard to find consensus on constructing rules for digital cooperation that bridge current transatlantic divides. Jared Cohen & Richard Fontaine, *Uniting the*

efforts with industry leaders to achieve all of those same goals. President Biden will reach for Iraqi help to ensure a lasting defeat of the Islamic State, and he will turn to European partners to protect the humanitarian needs of Syrians. He will attempt to address his main concerns in the western hemisphere, namely attacking the root causes of migration in Central America, protecting the Amazon from deforestation, and assisting Caribbean and Central American states in adapting to the impacts of climate change, through regional forums like the Organization of American States or through trilateral talks among Canada, Mexico, and the United States.<sup>166</sup>

These pronouncements would be pabulum but for the fact that geopolitical realities demand cooperation. Biden knows the United States can no longer afford to go it alone and needs the help of others. Furthermore, as his own personal political history demonstrates, turning to allies is intrinsic to Biden's character. The search for *fratelli* is inherent to Biden's predisposition to find common ground with political opponents, whether in Congress or abroad. Biden's instinct is to elicit consensus by emphasizing fact over fiction, science over conspiracy theories, and deference to experienced diplomats over CEOs with bank accounts. Whether in multilateral or bilateral negotiations, the Biden administration will try to elevate reciprocal public benefit, even if long term, over the purely transactional short term benefits favored by his 'art of the deal' predecessor. Whether the Biden approach will be more successful than his predecessor's specialty—exchanges that trade short-term profits on Trump businesses for a legiti-

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*Techno-Democracies: How to Build Digital Cooperation*, 99 FOREIGN AFF., Nov.–Dec. 2020. On current legal challenges with respect to the handling of cyberattacks, see Schmitt, *supra* note 80. On current efforts to draft rules to address hacks or cyberattacks, see Dapo Akande et al., *Oxford Statement on the International Law Protections Against Cyber Operations Targeting the Health Care Sector*, JUST SECURITY (May 21, 2020), <https://www.justsecurity.org/70293/oxford-statement-on-the-international-law-protections-against-cyber-operations-targeting-the-health-care-sector/> [https://perma.cc/2BQP-242F]; Michael Schmitt, *New Zealand Pushes the Dialogue on International Cyber Law Forward*, JUST SECURITY (Dec. 8, 2020), <https://www.justsecurity.org/73742/new-zealand-pushes-the-dialogue-on-international-cyber-law-forward/> [https://perma.cc/BM82-EY6Q].

166. *The Biden Plan to Build Security and Prosperity in Partnership with the People of Central America*, BIDEN FOR PRESIDENT, <https://joebiden.com/centralamerica/> [https://perma.cc/E2S7-E39S] (last visited Jan. 26, 2021).

mizing photo-op with a U.S. President—remains to be seen. The success of Biden’s deal-making may depend on whether those across the table are equally able to extend their time horizon for measuring success and willing to consider the reciprocal and public benefits Biden has in mind.

This return to reliance on the United States’ traditional network of allies, starkly different from Trump’s unilateralist inclinations, provides a significant counterweight to the aforementioned eight foreign policy trends favoring stasis. It is likely to be a significant engine for the tempered restoration of international law. But can it be more? If taken in a transformational direction, a *fratelli tutti* policy could be an agent for an FDR-inspired New Deal in the United States’ use of international law. It is worth considering what it might mean should Biden, together with a democratic Congress, be willing to break with traditional U.S. policies and act with *tutti fratelli* in more dramatic fashion.

Pope Francis’ unusually political encyclical letter criticized a concept of “popular and national unity influenced by various ideologies . . . creating new forms of selfishness and a loss of the social sense under the guise of defending national interests,” the “growing loss of the sense of history,” “limitless consumption,” and “empty individualism.”<sup>167</sup> The letter condemned the strategy of employing “ridicule, suspicion and relentless criticism” that “denies the right of others to exist or have an opinion,” evinces the “hubris of the powerful,” and “degenerates into a permanent state of disagreement and confrontation.”<sup>168</sup> The tendency to erect “new walls . . . for self-preservation” leaving those outside “no longer considered human beings possessed of an inalienable dignity” was particularly concerning to the Pope.<sup>169</sup> He criticized those who become “prisoners of a virtual reality” and lose the sense of the “truly real,”<sup>170</sup> those who use “mobile devices” to express themselves with “impunity” in pursuit of “shameless aggression,”<sup>171</sup> those who shield themselves from dialogue and debate and end up “closed circuits [that] facilitate the spread of fake news

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167. *Fratelli Tutti*, *supra* note 161, ¶ 13.

168. *Id.* ¶ 15.

169. *Id.* ¶ 27.

170. *Id.* ¶ 33.

171. *Id.* ¶¶ 44, 45.

and false information,”<sup>172</sup> those “who appear to feel encouraged or at least permitted by their faith to support varieties of narrow and violent nationalism, xenophobia and contempt, and even the mistreatment of those who are different,”<sup>173</sup> and those who are principally concerned about “a drop in the polls” and not about finding effective solutions to the gravest challenges facing the planet.<sup>174</sup> This litany of the vices of populism was followed by a call for virtues few would associate with Trump, such as “the ability to sit down and listen to others” and the capacity to “transcend narcissism.”<sup>175</sup> Pope Francis argued that honest dialogues among *fratelli* need to be accompanied by “clear thinking, rational arguments, a variety of perspectives . . . and the reality of objective truth.”<sup>176</sup>

Although *Fratelli Tutti* made scant references to law, there were policy prescriptions among its list of vices and virtues. Pope Francis praised those who welcome migrants, extend “full citizenship” to “arrivals [who] already participate in the fabric of society,” and seek “global governance” to plan for migration movements not limited to emergencies.<sup>177</sup> He argued that it was “essential to devise stronger and more efficiently organized institutions” that could provide for the global common good and the defense of “fundamental human rights.”<sup>178</sup> The Pope noted the need for reform in the United Nations and in financial institutions to enable the family of nations to establish “clear legal limits to avoid power being co-opted only by a few countries.”<sup>179</sup> He deemed the rule of law and “tireless recourse to negotiation, mediation and arbitration” to be essential.<sup>180</sup> Finally, he specifically urged states to be faithful to *pacta sunt servanda* and to prioritize multilateral agreements which, in his view, were more likely to “promote the common good and protect weaker states.”<sup>181</sup>

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172. *Id.* ¶ 45.

173. *Id.* ¶ 86.

174. *Id.* ¶ 188.

175. *Id.* ¶ 48.

176. *Id.* ¶¶ 211, 212.

177. *Id.* ¶¶ 129, 131, 132.

178. *Id.* ¶ 172.

179. *Id.* ¶ 173.

180. *Id.*

181. *Id.* ¶ 174.

The following paragraphs contemplate an alternative future in which a Biden administration transforms the Pope's ideals into a governing framework for U.S. foreign policy and the use of international law. Were *Fratelli Tutti* to inspire a transformational new deal with respect to international law this would challenge the eight foreign policy trends that have framed this article at their roots.

A. *The Rise of Multilateral Treaties*

The Pope's encyclical emphasizes the need to consider *tutti fratelli*, not just select friends as needed. Only contemplating the whole—as multilateral treaties and institutions do—can lead to equal protection for all, including the least privileged. It would be a radical break from the past, including the Obama administration, for the Biden administration to take this idea seriously and reach across the aisle to overcome the gridlock that prevents U.S. action on treaties as ambitious as UNCLOS and the Rome Statute.

An administration that prioritizes the Pope's instruments for the “truly universal good” would also seek to advance the “fundamental human rights” that the encyclical emphasizes.<sup>182</sup> Were the United States to adhere to the many global human rights treaties it has avoided, remove all reservations (except those constitutionally required) from those it has ratified, and accept the jurisdiction of relevant human rights committees for individual complaints, its claim to human rights leadership would rest on far more solid ground than where the United States only engages in inter-mestic human rights compliance as it chooses. Were the United States to overcome its fifty-year resistance to the so-called positive rights in the ICESCR by acknowledging that they are fully consistent with FDR's famous Four Freedoms speech at the height of the Great Depression (the last time Americans faced levels of hunger comparable to those seen in the age of Covid-19), —that single step could do more to enhance the real enjoyment of human rights within the United States than virtually any other action.<sup>183</sup>

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182. *Id.* ¶ 172.

183. Like China (which has adhered to the ICESCR but not the ICCPR), the United States has treated only one of the two human rights covenants as legitimate. It has repeatedly insisted that only the civil and political rights in the ICCPR are cognizable human rights and resisted repeated U.N. affirma-



What prevents U.S. accession to multilateral human rights treaties is less law than politics. What stops the U.S. from pursuing genuine multilateralism are political realities, not constitutional impossibilities. Most of the United States' roadblocks to treaty accession result from history, tradition, and political preferences. No U.S. law accords power to a sole senator to prevent consideration of a treaty by the whole Senate.<sup>184</sup> Nothing in the Constitution demands that human rights treaties require two-thirds of senators to agree to their ratification. It is unlikely that a federal court would dare to prevent Congress from deciding that, in the case of CEDAW or UNCLOS, for example, accession can be secured by presidential action joined by bare majorities in each House. The internal structural constraints on U.S. treaty-making can, at least in theory, be unmade using the Pope's favored tools for fraternal discourse. Current trends favoring alternatives to multilateral treaties are political and not set in stone. What "May be" can change from "What is." In a world alive to an alternative political calculus, we have the power to alter Tiny Tim's fate.

### B. *Coupling with China*

A United States-China relationship inspired by Pope Francis's call for tireless dialogue attentive to common interests would be starkly different from tit-for-tat deals that could easily devolve into a new cold war. In a *fratelli tutti* imagining, both states could pursue institutional reforms within the U.N. system on issues of shared interest, such as WHO reforms to bet-

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tions that the two covenants present an indivisible set of rights. Were the Biden administration to take serious steps to address economic inequalities in the United States even without acceding to the ICESCR, such inter-mestic effects would be hard to ignore. See Gillian MacNaughton & Mariah McGill, *Economic and Social Rights in the United States: Implementation Without Ratification*, 4 NE. U. L.J. 365, 366–67, 376–86 (2012) (introducing the failed U.S. effort to ratify the ICESCR and discussing the degree to which the United States is protecting social and economic rights); Philip Alston, U.N. Special Rapporteur on Extreme Poverty & Hum. Rts., Statement on Visit to the USA (Dec. 15, 2017) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22533> [<https://perma.cc/4D3F-34YQ>] (commenting on the insufficient protection of economic and social rights in the United States and noting that the administration's rejection of economic and social rights as "full-fledged human rights" does not vitiate responsibility).

184. See *supra* note 15 and accompanying text.

ter handle future pandemics, a menu of climate change initiatives, and other reforms to deploy their formidable resources to help the world achieve the sustainable development goals (SDGs).

Were both states inclined to go, as the Pope urges, beyond ideology, they may rediscover underlying common interests even with respect to seemingly intractable differences, like how best to protect their essential security. Joint U.S.-Chinese initiatives are possible if both sides were willing to let go of ideological blinders and focus on reducing clear threats to the common good such as human trafficking, the marketing of human organs, the sexual exploitation of children, slave labor, transnational organized cybercrime, terrorism, and the spread of weapons of mass destruction. While there currently exist sharp differences between the two states on whether and to what extent commercial enterprises, including those involved in big data, threaten security and consumer privacy, global agreement on what constitutes a fair process for screening incoming foreign investors from either China or the United States may still be within reach, particularly since both states have strong interests in doing business across borders. Moreover, encouraging such business can contribute to both countries' goals, such as mitigating climate change.<sup>185</sup> Given criticisms of the old Washington Consensus model for economic development pursued by the United States and its favored financial institutions, the United States may even want to borrow some aspects of the more flexible and LDC-friendly "Beijing Consensus" embraced by China's favored entities, such as the Asian Infrastructure Investment Bank.<sup>186</sup> After all, both countries have an interest in proving that they can "transcend narcissism" and both want to secure the hearts and minds of the developing world.<sup>187</sup> And, despite distinct rhetoric, in real-

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185. See, e.g., Keith Bradsher, *G.M.'s Electric Car Push Could Put China in the Driver's Seat*, N.Y. TIMES (Jan. 29, 2021), <https://www.nytimes.com/2021/01/29/business/gm-china-electric-cars.html> [https://perma.cc/87JB-V5YW] (discussing how Chinese government incentives helped to convince G.M. to adopt ambitious zero-emission goals for its vehicles).

186. See generally Gregory Shaffer & Henry Gao, *A New Chinese Economic Law Order*, in EMERGING POWERS (Gregory Shaffer ed., forthcoming 2021) (on file with author) (contrasting the elements of the "Beijing Consensus" with those of the "Washington Consensus").

187. *Fratelli Tutti*, *supra* note 161, ¶ 48.

ity both want to convince the planet that global capitalism can be consistent with advancing the global good.

Despite insurmountable conflicts on a number of subjects—from human rights to the status of Taiwan—genuine dialogue informed by indisputable facts could generate breakthroughs on other hard topics on the world's trading agenda, like the treatment of e-commerce, how best to conform the actions of state-owned enterprises, or constraining impermissible beggar-thy-neighbor trade policies.<sup>188</sup> Biden and Xi could discover that they have a mutual interest in resolving trade and investment disputes fairly and equitably without resort to tariff wars.<sup>189</sup> Eventually, concerns that supranational dispute settlement undermines sovereignty might even dissipate enough to inspire both countries to resort to international courts and tribunals they currently resist, including those encompassed by UNCLOS.

### C. *Embracing a Changed World Trading System*

An administration driven by a need to advance the economic prosperity of the United States while feeding the poorest of the world and equalizing the relative institutional powers of rich and poor could lead to a re-conception of the world trading system. Pope Francis' call to heed the “pressure created by foreign debt” and countries' needs to fulfill their financial obligations without “compromising their very existence and growth”<sup>190</sup> holds lessons for what the goals of free

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188. For a series of proposals to address harmful beggar-thy-neighbor trade policies and other U.S.-China trade differences, see *US-China Trade Relations A Way Forward*, US-China Trade Policy Working Group (Oct. 27, 2019), <https://rodrik.typepad.com/US-China%20Trade%20Relations%20-%20A%20Way%20Forward%20Booklet%20%28for%20print%29.pdf> [<https://perma.cc/5ASP-G7QM>].

189. An indication of China's continued endorsement of WTO dispute settlement is its decision to join the U.S.-European allies in pre-committing to an interim arbitration process under Article 25 of the DSU while the stalemate over the Appellate Body remains unresolved. See European Comm'n, *Interim Appeal Arbitration Pursuant to Article 25 of the DSU* (July 25, 2019), [https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc\\_158273.pdf](https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158273.pdf) [<https://perma.cc/GJV8-ELKA>] (explaining the interim arbitration process). For other suggestions for modified U.S.-China trade relations, see Gregory Shaffer, *Governing the Interface of U.S.-China Trade Relations* (HILJ-YILJ China Symposium, Working Paper) (on file with author).

190. *Fratelli Tutti*, *supra* note 161, ¶ 126.

trade and capital flows ought to be and what balances international financial institutions and trade and investment pacts should strike in attaining such flows. *Fratelli Tutti* may even hold lessons for how best to restart the WTO dispute settlement system to the satisfaction of both its biggest repeat players and weaker states. Greater regard to the full range of dispute settlement remedies urged by Pope Francis' encyclical could inspire more flexible approaches to WTO and investor-state dispute settlement—from negotiation to mediation to conciliation—that may be more efficacious because they are perceived as more legitimate or fair.

#### D. *Nuanced Sanctions for a New Age*

*Fratelli Tutti* walks a cautious line when it comes to balancing forgiveness with the need to punish wrongdoing. Pope Francis argues that “true love for an oppressor means seeking ways to make him cease his oppression.”<sup>191</sup> It “does not mean allowing him to keep oppressing us, or letting him think that what he does is acceptable.”<sup>192</sup> “Forgiveness,” he writes, “does not entail allowing oppressors to keep trampling on their own dignity and that of others, or letting criminal continue their wrongdoing.”<sup>193</sup> Under this view, economic sanctions on bad actors as a tool of statecraft may continue to be necessary. But the encyclical's demand for empathy elevates the need to ensure that any sanctions that are imposed target real evils, affect actual wrongdoers and not those that are simply deemed different, avoid harm to the innocent, and are necessary and proportionate. These concerns would discourage resort to unilateral sanctions, such as those imposed under § 301 of the Trade Act of 1974 in defiance of WTO obligations.<sup>194</sup> The clear implication of *Fratelli Tutti* is that when states seek to punish wrongdoing via sanctions, they should do so through

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191. *Id.* ¶ 241.

192. *Id.*

193. *Id.*

194. The WTO panel decision in *United States—Sections 301–310 of the Trade Act of 1974* established that the United States cannot use its domestic authority under § 301 to unilaterally impose tariffs in response to allegedly protectionist actions taken by a fellow WTO member if it does not first secure authorization from the WTO. Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, WTO Doc. WT/DS152/R (adopted Jan. 25, 2000).

the intercession of those international institutions the encyclical urges states to strengthen, such as the U.N. General Assembly and the U.N. Security Council.<sup>195</sup> Under this framework, sanctions on bad actors are only legitimate when they are taken on the basis of clear and consistently applied criteria, abide by the rule of law, and draw the support of the international community.

#### E. *A Genuine Embrace of the U.N. System*

Pope Francis' demand for more effective international organizations, including within the U.N. system, is a call to abandon any lingering disinterest in those institutions. *Fratelli Tutti* demands a genuine (and well-funded) devotion to institutional betterment. At the same time, the encyclical's criticism of organizations that only serve the interests of a few states warns against institutional reforms that privilege states with resources. An administration attentive to the Pope's cautions would seek only institutional reforms that would enable organizations to be more fully accountable to all states and particularly to the most vulnerable in need of their services. U.S. proposals for institutional reforms should not be, in short, mere vehicles to restore the "liberal hegemonic order" that the United States was so influential in constructing.<sup>196</sup>

#### F. *Accepting International Courts and Tribunals*

There is nothing in Pope Francis' list of vices or prescriptions that implies that states should avoid settling their disputes peacefully in formal courts and tribunals. On the contrary, his call to respect fundamental rights is consistent with a demand that forums be available to individuals from every nation, including the United States, to seek justice in regional human rights courts and U.N. human rights bodies. It is also consistent with a demand that victims of international crimes have recourse to forums for international criminal justice as last resort. Of course, resort to international courts and tribunals are consistent with the Pope's call to "ensure the uncontested rule of law"<sup>197</sup> and the respect U.N. Charter, including

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195. *Fratelli Tutti*, *supra* note 161, ¶ 173.

196. For further elaboration, see G. JOHN IKENBERRY, *LIBERAL LEVIATHAN: THE ORIGINS, CRISIS, AND TRANSFORMATION OF THE AMERICAN SYSTEM* (2011).

197. *Fratelli Tutti*, *supra* note 161, ¶ 257.

the ICJ. The United States could practice the enlightened sovereignty that Pope Francis preaches by becoming the next permanent member of the U.N. Security Council to accept the compulsory jurisdiction of the ICJ or the next great maritime power to accept binding dispute settlement under UNCLOS. Doing both would go some way towards mitigating the perception that the international rule of law, because it fails to demand that powerful states be exposed to supranational judicial scrutiny, is inherently unequal.

### G. *A Readiness to Defend Life*

There is admittedly little in the Pope's encyclical that runs counter to the seventh trend discussed in Part II, RIP, R2P. Nothing in *Fratelli Tutti* encourages resort to force. The Pope does not say that states ought to kill, even in order to save lives. Pope Francis is silent on the Responsibility to Protect in any of its iterations over time or humanitarian intervention as such. But a transformative Biden administration may read *Fratelli Tutti* as imposing a moral duty to save others, including by force. *Fratelli Tutti* leaves open the possibility that the international community has an obligation to protect defenseless peoples facing slaughter if it can. The U.N. Charter, which the encyclical elevates to near constitutional norm, would not be responsive to "the dignity and worth of the human person"<sup>198</sup> if the organization was precluded from preventing the next foreseeable genocide, even if doing so required force. It seems consistent with the Pope's encyclical to permit the Security Council to authorize proportionate force in response to such threats to life, as the open terms of "threat to the international peace" in the UN Charter invites. International law should not preclude states from discharging their moral duty to rescue, at least when they act as a collective and not on their own.

### H. *Being an Honest Broker for Middle East Peace*

A true friend is one that counsels with hard truths. Honest dialogue and fruitful negotiations are grounded, pursuant to *Fratelli Tutti*, in real facts and the rule of law. If the United States still entertains hopes that it can be a force to achieve a lasting peace in the Middle East, particularly between Israel

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198. U.N. Charter pmbl.

and Palestine, it cannot ignore hard truths or hard law. Trump-created “facts on the ground” would not override the illegality of occupied territories, the impropriety of locating the U.S. embassy on contested ground,<sup>199</sup> or the injustices, both symbolic and real, of a fence or wall (as found by the ICJ in its advisory opinion).<sup>200</sup> An honest peace broker secures credibility, not opprobrium, when it calls out violations of law and fundamental human rights committed by either Israel or Palestine. Of course, a credible peacemaker also must have legitimate means of hearing both sides, including through regular exchanges in permanent missions located in the United States.

#### V. CONCLUSION: A RETURN TO FAITH?

If the Biden administration approached the eight trends left over from the Trump presidency according to the values espoused in *Fratelli Tutti*, the world could see a more transformative U.S. approach to international law instead of the more likely tempered return to normalcy. Yet even the latter rightly generates sighs of relief among most international lawyers and within the U.S. foreign policy establishment. In the minds of many, Biden's restoration, even if modest, will be a massive improvement over the prior administration's manifold transgressions against national and international law. At the very least, Biden's election will forestall a fearsome slide towards greater international disorder and “global authoritarianism”<sup>201</sup> and return the United States to relatively stable relations with nations entitled to respect. Biden, like most prior U.S. presidents, will try to explain, sometimes implausibly, how his actions comport with international law. The Trump administration rarely bothered to do that much and often flaunted international law.<sup>202</sup> Even on his way out the door, Trump vio-

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199. Tom Bateman, *Trump's Middle East Peace Plan: Smiles and Sorrow on the Ground*, BBC (Jan. 28, 2020), <https://www.bbc.com/news/world-middle-east-51289917> [<https://perma.cc/MCN6-QYK4>].

200. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

201. See Koh, *Trump v. International Law*, *supra* note 1, at 11–13 (describing President Trump's embrace of authoritarians and the threat to domestic and international rule of law).

202. For example, consider the mediocre and contradictory legal arguments the Trump administration suggested to justify its strike on Soleimani.

lated internationally accepted norms governing free and fair elections.<sup>203</sup>

Biden's election will bring international lawyers back into "the room where it happens."<sup>204</sup> What they do when they get there remains a work in progress.

The 2020 election demonstrates that U.S. politics continue to be defined by sharp divides between 'values' voters who often identify as evangelical Christians and secular, largely urban elites on the east and west coasts. Ironically, the successful candidate most strongly backed by 'coastal elites' turned out to be a practicing Catholic apt to pay heed to Pope Francis's call to defend common humanity (*Fratelli Tutti*) and protect the planet (*Laudato si'*). Fortunately for the United States and perhaps the world, President Biden seems to agree with those who still have faith that international law and its institutions can help achieve both of these goals.

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Stephen Pomper, *The Soleimani Strike and the Case for War Powers Reform*, JUST SECURITY (Mar. 11, 2020), <https://www.justsecurity.org/69124/the-soleimani-strike-and-the-case-for-war-powers-reform/> [<https://perma.cc/H2KY-8SJK>]; Harold Hogju Koh, *Is Preemptive Assassination the New Trump Doctrine?*, FOREIGN POL'Y (Jan. 9, 2020), <https://foreignpolicy.com/2020/01/09/preemptive-assassination-suleimani-new-trump-doctrine-legal/> [<https://perma.cc/G3RF-63A4>].

203. See generally INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, INTERNATIONAL ELECTORAL STANDARDS: GUIDELINES FOR REVIEWING THE LEGAL FRAMEWORK OF ELECTIONS (2002), <https://www.idea.int/sites/default/files/publications/international-electoral-standards-guidelines-for-reviewing-the-legal-framework-of-elections.pdf> [<https://perma.cc/9MDV-QFGG>] (setting out internationally recognized standards applicable across a range of areas of electoral legislation intending to assess whether an election is free and fair). Trump's January 2021 actions flew in the face of these standards. Fabiola Cineas, *Donald Trump Is the Accelerant*, VOX, <https://www.vox.com/21506029/trump-violence-tweets-racist-hate-speech> [<https://perma.cc/XPB3-BWWN>] (last updated Jan. 9, 2021).

204. LIN-MANUEL MIRANDA ET AL., *The Room Where It Happens*, in HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (2015). Of course, this assumes that the international lawyers that have the ear of the new administration are those in the U.S. mainstream, like Harold Koh (who served under Obama) or John Bellinger (who served under Bush II) and not ersatz ones like John Bolton. As Anthea Roberts reminds, differences among international lawyers around the world exist and can be profound. For her explanation of these differences, see ANTHEA ROBERTS, *IS INTERNATIONAL LAW INTERNATIONAL?* (2017).