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Comments: At the Intersection of National Interests and International Law: Why American Interests Should Assume The Right of Way

Clark Smith
University of Baltimore School of Law

AT THE INTERSECTION OF NATIONAL INTERESTS AND INTERNATIONAL LAW: WHY AMERICAN INTERESTS SHOULD ASSUME THE RIGHT OF WAY

CLARK SMITH

ABSTRACT:
Following the interwar period and disastrous results of an isolationist foreign policy, the United States changed course coming out of the Second World War. Assuming the global leadership role, the U.S. led the international effort to design and build the international institutions and organizations that would ensure and manage the global recovery from the war that ravaged the world's economy, deter future wars by providing checks on and a balance of power, and that would ensure, to some degree, international systems based on rule of law. Pursuit of U.S. interests should, when possible, be carried out within that international legal framework. The U.S. should conform its actions to international legal norms, so long as it does not create a substantial departure from pursuit of national interests. In considering ratification of conventions and treaties in areas of security and human rights, the U.S. should consider whether ceding sovereignty to unelected committees charged with monitoring U.S. compliance with the terms of those agreements is in U.S. interests. On the other hand, ceding sovereignty as a result of continued global leadership in the international economic institutions built by the U.S. and its allies may actually weigh in favor of U.S. interests. Finally, diverging from traditional international rules when dealing with contemporary challenges may also be in U.S. interests, particularly when adhering to values concerning the rule of law that respects human rights. To that end, the U.S. should consider, with partners when possible, the evolvement of new norms through action. Justification based on legitimacy is a valid interest. The U.S. should also rely on national institutions in managing the conflict between national interests and international cooperation, but always with the awareness of national interests.

AUTHOR:
Clark Smith is a 2015 J.D. candidate at the University of Baltimore School of Law, where he has served as a Center for International and Comparative Law student fellow and Journal of International Law staff editor.

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"*Do you never stop to reflect just what it is that America stands for? If she stands for one thing more than another, it is for the sovereignty of self-governing peoples . . .*"

- President Woodrow Wilson[1]

I. INTRODUCTION

Chief among United States values are the principles of sovereignty and self-determination, both of which are sacred in the U.S. system of government and, accordingly, central to U.S. policy interests. As such, U.S. decisions to enter into international agreements, or otherwise adhere to international law, should not be made solely in accordance with commitments to international institutions or organizations, particularly at the expense of commitments to our own principles and interests. As an example, certain treaties—such as the U.N. Convention on the Law of the Sea Treaty (UNCLOS) and the U.N. Convention on the Rights of Persons with Disabilities (CRPD)—favored by one or the other political branches might do little to promote broad U.S. interests and, instead, would risk subjecting the U.S. to sources of law inconsistent with our principles of government.[2]

The Executive, when signing treaties knowing that Senate support is insufficient, commits the U.S. under international law "to refrain from acts which would defeat the object and purpose" of those treaties.[3] Despite such international legal commitment, however, those

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[1]. Woodrow Wilson, Speech on Military Preparedness at Soldiers' Memorial Hall, Pittsburgh, PA (Jan. 29, 1916), *in Addresses of President Wilson*, UNITED STATES CONGRESSIONAL SERIAL SET, 11 (1916).

[2] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; United Nations Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD]; U.S. CONST. art. VI, cl. 2 (treaties ratified by the U.S. become the "supreme Law of the Land," on par with federal statutes, and the treaty's terms, or the interpretation of those terms by a treaty committee, may not conform to either existing state and federal law or prevalent social, cultural, and economic norms observed in the U.S.).

[3] Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 (the U.S. has not ratified the treaty but many parts are considered customary international law); *cf.* Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48

treaties have no domestic legal effect.[4] Further, the assertion that the U.S. should engage broadly in international commitments is inconsistent with public opinion polls conducted by the Pew Research Center in December 2013.[5]

Since the Second World War, the U.S. has exercised global leadership in the creation and management of international institutions and organizations built to rehabilitate damaged economies, promote and sustain economic development and growth, deter war and preserve peace, and facilitate international cooperation in many other necessary areas. The growth of those institutions and organizations has been accompanied by a growth in treaties, conventions, and international agreements, as well as evolving customary international law.

Some agreements, such as the multilateral North Atlantic Treaty, have been and continue to be consistent with U.S. interests.[6] Others reach a point where they are simply incompatible with U.S. interests.[7] Some conventions appear to the Executive to be in U.S.

HARV. INT'L L.J. 307, 308 (2007) (construing the obligation "as precluding only actions that would substantially undermine the ability of the parties to comply with, or benefit from, the treaty after ratification.").

[4] *See* Medellín v. Texas, 552 U.S. 491, 504-05 (2008) (holding that while a treaty may constitute an international commitment, it is not binding domestic law without Congressional implementing legislation or the treaty itself conveys the intention that it be self-executing and ratified on that basis.); *Medellín*, 552 U.S. at 525-26 (stating that the President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them; responsibility for transforming international obligation arising from non-self-executing treaty into domestic law is Congress's responsibility.).

[5] Pew Research Center, *Public Sees U.S. Power Declining as Support for Global Engagement Slips* (Dec. 3, 2013), http://www.people-press.org/files/legacy-pdf/12-3-13%20APW%20VI%20release.pdf.

[6] *See generally* Jane E. Stromseth, *The North Atlantic Treaty and European Security After the Cold War*, 24 CORNELL INT'L L.J. 479 (1991).

[7] Douglas J. Ende, *Reaccepting the Compulsory Jurisdiction of the International Court of Justice: A Proposal for A New United States Declaration*, 61 WASH. L. REV. 1145 (1986).

interests, but agreement cannot be found in the Senate.[8] And, finally, some international conventions simply have no political support regarding U.S. interests.[9]

This paper argues that international legal instruments and norms governing international cooperation are not always consistent with U.S. interests, and that pursuit of U.S. interests should prevail when inconsistent with those instruments and norms. Following this introduction, part II of this paper will look at the historical transition in the first half of the twentieth century from a U.S. isolationist foreign policy to a fully engaged foreign policy of multilateralism beginning in the early 1940s. Part II will also look at the role of the U.S. as it engaged in that policy, including the creation of the U.N. and associated institutions, and look at the rise of international law following the Second World War and why states adhered to international law. While part III looks at some of the threats from the interpretation, and manipulation, of international law to U.S. interests, part IV looks at how U.S. political and legal frameworks might coexist with international law and transform international legal institutions to better align with U.S. interests.

II. THE ROLE OF THE U.S. IN THE RISE OF INTERNATIONAL LEGAL AGREEMENTS AND INSTITUTIONS

A. Pre-WWII – U.S. Isolationist Policy

Multilateralism has been defined as "international governance of the 'many,'" with its principal focus being the "opposition [of] bilateral and discriminatory arrangements . . . believed to enhance the leverage of the powerful over the weak and to increase international conflict."[10] Thus, cooperation among many states is likely to reduce conflict. But in the early part of the last century starting around 1920-

[8] *See generally* Kevin Walker, *Comparing American Disability Laws to the Convention on the Rights of Persons with Disabilities with Respect to Postsecondary Education for Persons with Intellectual Disabilities*, 12 NW. U. J. INT'L HUM. RTS. 115 (2014).
[9] *See generally* David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999).
[10] Miles Kahler, *Multilateralism with Small and Large Numbers*, 46 INT'L ORG. 681, 681 (1992).

30's, U.S. foreign policy was much more akin to an isolationist policy.[11]

The U.S. departed briefly from this policy when it declared war on Germany in 1917, following continued German submarine attacks on U.S. ships in the North Atlantic.[12] Following the war, and despite the efforts of President Woodrow Wilson to assume a broader multilateral role for the U.S. in foreign relations, the U.S. resumed its isolationist policies when the Senate rejected both the Treaty of Versailles and the Covenant of the League of Nations.[13] One of the principal obstacles to achieving the two-thirds consent required by the Senate was opposition to Article X of the treaty, which, according to opponents, ceded U.S. war powers, and, thus, elements of U.S. sovereignty, to the Council of the League of Nations.[14] Thus, Congressional opponents, fearing consequences of wading into increasingly complex European affairs likely to result from the peace treaty, retreated to the habitual aversion to involvement beyond the confines of the Western Hemisphere.

This aversion to a multilateral approach to foreign relations following the First World War has been cited as one of the reasons leading to the rise in German nationalism and, eventually, the Second World War.[15] Prior to hostilities beginning in 1914 and dating back to the end of the nineteenth century, Britain had been ceding ground to

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[11] *Milestones: 1899–1913*, OFFICE OF THE HISTORIAN, BUREAU OF PUB. AFFAIRS, U.S. DEPT. OF ST., http://history.state.gov/milestones/1899-1913 (last visited Mar. 1, 2014).

[12] *Milestones: 1914–1920*, OFFICE OF THE HISTORIAN, BUREAU OF PUB. AFFAIRS, U.S. DEPT. OF ST., http://history.state.gov/milestones/1914-1920/wwi (last visited Mar. 1, 2014).

[13] *See* Max Boot, When War Weariness Wears Off, THE WEEKLY STANDARD (Jan. 20, 2014), http://www.weeklystandard.com/articles/when-war-weariness-wears_774085.html.

[14] *The League of Nations, 1920*, OFFICE OF THE HISTORIAN, BUREAU OF PUB. AFFAIRS, U.S. DEPT. OF ST., http://history.state.gov/milestones/1914-1920/league (last visited Mar. 1, 2014); U.S. CONST. art. I, § 8, cl. 11; art. II, § 2, cl. 1.

[15] *See* THOMAS OATLEY, INTERNATIONAL POLITICAL ECONOMY 17-19 (5th ed. 2011).

Germany, and the U.S., as the main infrastructure of the developing global economy.[16] After the Treaty of Versailles was concluded, and throughout the decade following the war, Britain and France were compelled to enforce the debilitating reparations imposed on Germany.[17] This imposition on post-war Germany, without any relief, can be sourced to U.S. decisions refusing any debt relief for Britain and France.[18] The allies had borrowed heavily from the U.S. to finance their war efforts and, following the conclusion of hostilities, the U.S. refused any debt concessions.[19] The U.S. further shunned Europe by restricting the number of immigrants permitted entry into the U.S. Quotas were introduced in 1921, and by 1929 only 150,000 immigrants per year were permitted entry into the U.S.[20]

One result of the lack of cooperation was that Germany's pre-war growing economy was unable to recover and this impacted all of Europe, if not the U.S. as well.[21] Economies of Europe, as well as the U.S. economy, contracted and instead of cooperative solutions, states began retreating further into economic isolation via trade barriers discriminating against foreign markets and favoring, instead, domestic manufacturers and producers.[22] The resulting stock market crash of 1929 and global economic decline fueled German nationalism, paving the way for the Nazi party's rise and the century's second Great War on the European continent barely twenty years after the end of the first.[23]

Around 1940, the momentum for a shift from an isolationist to a multilateral approach in U.S. foreign relations gathered steam with recent German military success in Europe being the impetus behind the

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16 *Id.* at 17.
17 *Id.*
18 *Id.*
19 *Id.*
20 *The Immigration Act of 1924 (The Johnson-Reed Act)*, OFFICE OF THE HISTORIAN, BUREAU OF PUB. AFFAIRS, U.S. DEPT. OF ST., http://history.state.gov/milestones/1921-1936/immigration-act (last visited Mar. 1, 2014).
21 *See* OATLEY, *supra* note 15.
22 *Id*.
23 *Milestones: 1937–1945*, OFFICE OF THE HISTORIAN, BUREAU OF PUB. AFFAIRS, U.S. DEPT. OF ST., http://history.state.gov/milestones/1937-1945 (last visited Mar. 1, 2014).

shift.[24] The U.S. feared not only German military success in Europe, but also Japanese military success in East Asia, and worried that the Western Hemisphere could be a subsequent target.[25] By July 1941, the U.S. froze Japanese assets and ceased supporting Japan with oil and other commodities, and Japan had become heavily dependent upon those U.S. exports to sustain its imperial ambitions in East Asia.[26] Japan viewed U.S. hegemony in the West, and U.S. assertion of the Monroe Doctrine, as justification for its own imperial ambitions. Seeing the U.S. as threatening both Japan's reputation and economy, Japan saw itself in a position in which the only choices were war, or subservience, to the U.S.[27] It was not until the attack at Pearl Harbor, however, that the U.S. finally galvanized for total war, and a permanent repeal of a primarily isolationist policy.

B. Post-WWII – Transition to a Policy of Multilateralism

Even before the end of the Second World War, Western countries agreed on the need to engage in multilateral negotiations. These negotiations intended to create international agreements and institutions designed to facilitate the management of historical conflicts and the rebuilding of war-ravaged countries.[28] Many of these new institutions were economic in nature designed along the premise that

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[24] *Milestones: Lend-Lease and Military Aid to the Allies in the Early Years of World War II*, OFFICE OF THE HISTORIAN, BUREAU OF PUB. AFFAIRS, U.S. DEPT. OF ST., http://history.state.gov/milestones/1937-1945/lend-lease (last visited Mar. 1, 2014).

[25] *Milestones: Japan, China, the United States and the Road to Pearl Harbor, 1937–41*, OFFICE OF THE HISTORIAN, BUREAU OF PUB. AFFAIRS, U.S. DEPT. OF ST., http://history.state.gov/milestones/1937-1945/pearl-harbor (last visited Mar. 1, 2014).

[26] *See* Dr. Jeffrey Record, *Japan's Decision for War in 1941: Some Enduring Lessons*, STRATEGIC STUDIES INSTITUTE (SSI) (Feb. 9, 2009), http://strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=905.

[27] *Id.*

[28] *Milestones: Wartime Conferences, 1941–1945*, OFFICE OF THE HISTORIAN, BUREAU OF PUB. AFFAIRS, U.S. DEPT. OF ST., http://history.state.gov/milestones/1937-1945/war-time-conferences (last visited Mar. 1, 2014).

mutual economic interdependence would be a strong deterrence to war.[29]

The architecture of this post-war global economic interdependent system was created at Bretton Woods, New Hampshire, and became known as the Bretton Woods Conference.[30] The primary outcomes of Bretton Woods were the establishment of the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (World Bank).[31]

The IMF was designed to monitor balance of payments and assist in the reconstruction of the global international payment system.[32] Member states contribute to a pool through a quota system from which states with payment imbalances may temporarily borrow funds.[33] Through this and other activities such as monitoring other member states' economies and the demand for self-correcting policies, the IMF improves member states' economies.[34]

The World Bank was responsible for financing and supervising international reconstruction and development of European nations devastated by the Second World War.[35] After the reconstruction of Europe, the World Bank advanced global economic development and poverty eradication efforts.[36]

The General Agreement on Tariffs and Trade (GATT) was signed later in 1947. The purpose of the GATT, which became the World Trade Organization (WTO) in 1995, was the regulation of international trade, to include the substantial reduction of barriers to

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[29] MARGOT HORSPOOL & MATTHEW HUMPHREYS, EUROPEAN UNION LAW 14 (6th ed. 2012).

[30] *Milestones: Bretton Woods-GATT, 1941–1947*, OFFICE OF THE HISTORIAN, BUREAU OF PUB. AFFAIRS, U.S. DEPT. OF ST., http://history.state.gov/milestones/1937-1945/bretton-woods (last visited Mar. 1, 2014).

[31] *Id*.

[32] *See* OATLEY, *supra* note 15, at 214-15; Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2614 (1997).

[33] *See* OATLEY, *supra* note 15, at 214.

[34] *Id.*; Koh, *supra* note 32.

[35] *See* OATLEY, *supra* note 15, at 300; Koh, *supra* note 32.

[36] *See* OATLEY, *supra* note 15, at 300; Koh, *supra* note 32.

free trade.[37] Regional economic communities reinforced these multilateral economic organizations, and are governed by their own international agreement.[38]

C. The United Nations

The most significant multilateral institution to be created out of the Second World War was when the U.N. Representatives from the U.S., Britain, the Soviet Union, and China met in August and September of 1944 in Washington to create a post-war organization based on collective security principles.[39] Major components of this new, multilateral, collective security organization included the General Assembly, represented by all member states, and the Security Council, represented by only the few remaining major powers following the Second World War.[40]

The U.N., a multilateral, international organization, was officially established on October 24, 1945, to promote international peace and cooperation.[41] The U.N. also created a substantial body of international law through numerous treaties and conventions.[42] States bind themselves legally under international law when they become signatories to the U.N. Charter, as well as various associated treaties and conventions.[43] Now bound under international law, these same states essentially cede, voluntarily, a portion of their sovereignty by permitting, in advance, the U.N. to take enforcement action against them should they violate certain articles of the Charter.[44]

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[37] *See* OATLEY, *supra* note 15, at 4.
[38] *See* Koh, *supra* note 32.
[39] *Milestones: The Formation of the United Nations, 1945*, OFFICE OF THE HISTORIAN, BUREAU OF PUB. AFFAIRS, U.S. DEPT. OF ST., http://history.state.gov/milestones/1937-1945/un (last visited Mar. 29, 2014).
[40] *Id.*
[41] *Id.*
[42] *See Role of the United Nations in International Law*, 2011 TREATY EVENT: TOWARDS UNIVERSAL PARTICIPATION AND IMPLEMENTATION, https://treaties.un.org/doc/source/events/2011/Press_kit/fact_sheet_5_english.pdf (last visited Mar. 29, 2014).
[43] *See, e.g.*, Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.
[44] *See, e.g.*, U.N. Charter ch. VII.

The U.S. thought the U.N. was capable of success where the League of Nations was not.[45] President Franklin Roosevelt, with the benefit of hindsight, took a different approach than that of President Wilson to ensure U.S. Senate support for membership in this global governing institution.[46] President Roosevelt worked for bipartisan support, in addition to public support, for U.S. membership in a global organization designed to prevent future wars like those fought in Europe twice in the past thirty years, as well as in the Pacific.[47] President Roosevelt's approach garnered overwhelming Senate approval.[48]

The lessons learned from the U.S. refusal to accept its global leadership role following the First World War, corresponding with its return to an isolationist policy, were key in spurring U.S. policymakers to action in planning for a new, post-war world order even before the Second World War was concluded.[49] It was clear that the Second World War was caused, at least in part, by the U.S. refusal to lead a rebuilding effort for the global economy in the 1920s.[50] But the U.S. emerged from the Second World War powerful, capable, and willing to assume a global leadership role. Leading a multilateral effort in creating the international institutions that would deter future wars, spur global economic recovery, growth, stability, and promote human rights.[51]

D. Why Do Nations Comply with International Law?

The success of the U.S.-led post-war efforts depended upon the member states' commitment, including that of the U.S., to adhering to the binding legal agreements into which they had entered. Violation of Article 2(4) of the U.N. Charter, for example, might trigger an enforcement action designed to compel a member state into

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[45] *See Milestones: The Formation of the United Nations*, *supra* note 39.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *See* OATLEY, *supra* note 15, at 17-18.
[50] *Id.* at 18.
[51] *Id.* at 19.

compliance.[52] But not all violations of the agreements entered into by states trigger enforcement actions, and so motivation by member states to comply must lie, at least in part, elsewhere.

Generally, international rules often go unenforced; however, states still obey those rules nonetheless.[53] This is demonstrated by the belief on the part of the state that it has a legal obligation to adhere to the rules (known as *opinio juris sive necessitatis*).[54] Adherence to those rules has also been attributed to several factors including: the declining notion of sovereignty; an increase in the number of international organizations and non-state actors; an increased blurring of the lines between public and private; the proliferation of treaty-based and customary rules; and the homogenization of domestic and international systems.[55]

During the Cold War, the superpowers' adherence to international law, which derived from international organizations, institutions, and agreements, fell in importance and gave way to political, as opposed to legal, concepts such as realism.[56] According to realism, world politics is driven by competitive self-interest and not constrained by international legal obligations.[57] Interstate cooperation took a back seat to competitive self-interest during this period, until new entities began crowding the field of international law.[58]

The latter part of the twentieth century saw the growth of non-state actors, such as multinational corporations and international non-governmental organizations, intersecting legally with states and compelling greater legal cooperation among states and non-state actors.[59] The collapse of the Soviet Union and the conclusion of the Cold War seemed to create a further resurgence in international

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[52] *See, e.g.*, U.N. Charter art. 2, para. 4.

[53] Koh, *supra* note 32, at 2603 (citing HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 249-52 (2nd ed. 1954)).

[54] *See* Alan Watson, *An Approach to Customary Law*, 1984 U. ILL. L. REV. 561, 562-63 (1984).

[55] *See* Koh, *supra* note 32, at 2604.

[56] *Id*. at 2615.

[57] *See generally* JOHN ROURKE, INTERNATIONAL POLITICS ON THE WORLD STAGE (2007).

[58] *See* Koh, *supra* note 32, at 2624.

[59] *Id.* at 2625.

cooperation.[60] In 1991, the U.N. authorized the forcible removal of Iraq from Kuwaiti territory, and a large multi-national force was cobbled together for just that task.[61] In 1992, members of the European Community signed the Treaty of Maastricht.[62] Thereafter, in 1994, the U.S., along with its North American partners, concluded the North American Free Trade Agreement.[63] New international law was being created through multilateral engagement, but challenges to international cooperation would highlight the difficulties of global legal governance.[64]

III. THE RISING THREAT TO AMERICAN INTERESTS FROM THE RISING INFLUENCE OF INTERNATIONAL LAW

A. Globalization and the Effects on U.S. Interests

Globalization is a fiercely disputed topic.[65] What is not disputed, however, is that it creates an ever-increasing body of regulation and corresponding obligations to manage the state-to-state and state-to-non-state interactions of those seeking to benefit from globalization.[66] For example, conventions such as the UNCLOS and CRPD are perceived as necessary because of globalization. However, globalization is not ordered only according to the principles of international legal agreements.[67] Thus, not every international agreement on a topic *pertaining to U.S. interests*, whether globalization-related or not, is seen by the U.S. *to be in its interests*.[68]

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[60] *Id.* at 2630.
[61] S.C. Res. 678, para. 2, U.N. Doc. S/RES/678 (Nov. 29, 1990).
[62] Treaty on European Union (Maastricht text), July 29, 1992, 1992 O.J. C 191/1.
[63] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289.
[64] *See* Koh, *supra* note 32, at 2616.
[65] *See* OATLEY, *supra* note 15, at 346-68.
[66] *Id.* at 358-67.
[67] Rafael Domingo, *The Crisis of International Law*, 42 VAND. J. TRANSNAT'L L. 1543, 1546 (2009); *see generally* Ryan Morrow, *Treaties and the Federal Balance in an Era of Globalization*, E-INTERNATIONAL RELATIONS (Jan. 18, 2011), http://www.e-ir.info/2011/01/18/treaties-and-the-federal-balance-in-an-era-of-globalization/.
[68] *See generally* Peter Roff, *Kill the Law of the Sea Treaty*, U.S. NEWS (May 10, 2012), http://www.usnews.com/opinion/blogs/peter-

Treaties like the UNCLOS and CRPD risk permitting international officials to set policy in areas intended to be regulated by the U.S. government, and such treaties risk infringing state sovereignty.[69] For example, UNCLOS empowers a U.N. agency, the International Seabed Authority, to transfer technology and wealth from developed to undeveloped nations.[70] Thus, on some issues of global importance, the U.S. elects not to become a signatory by either not concluding the agreement at all or by the Senate choosing not to grant consent to the treaty.[71] This is not the same as the U.S. neither observing nor adhering to certain agreements to which the U.S. has decided not to become a signatory, but instead that the U.S., in foregoing ratification of the treaty, chooses not to be legally bound under international law by the specific international agreement.[72]

B. Lawfare – An Example of the Effects of International Law on U.S. Interests

An area in which the ability to address security interests is being hampered is lawfare.[73] The term, "lawfare," was first used extensively by Major General Charles Dunlap, the former Deputy

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roff/2012/05/10/kill-the-law-of-the-sea-treaty; Stian Reklev, *Australia's opposition backs Kyoto 2*, REUTERS (Aug. 16, 2012), http://www.reuters.com/article/2012/08/16/us-australia-kyoto-idUSBRE87F0A520120816.

[69] U.S. Senator Ted Cruz, *Limits on the Treaty Power*, 127 HARV. L. REV. F. 93, 94 (2014).

[70] Melody Finnemore, *Fluid Body of Law from Maritime Statutes of Old to New Developments in Wave and Tidal Energy, Ocean Law Continues to Evolve*, OR. ST. B. BULL., May 2010, at 19, 23; *see also* George F. Will, *The LOST sinkhole*, WASH. POST (June 22, 2012), http://articles.washingtonpost.com/2012-06-22/opinions/35461763_1_royalty-payments-reagan-adviser-sea-treaty.

[71] *See* Roff, *supra* note 68; *see generally* Reklev, *supra* note 68.

[72] *See e.g.*, CRPD, *supra* note 2.

[73] *See* Sebastian Gorka, *Briefing: White House Review Threatens Counter-Terrorism Operations*, THE LAWFARE PROJECT (Dec. 5, 2011), *available at* http://www.thelawfareproject.org/summary-of-white-house-review-briefing.html (last visited Mar. 2, 2014) (summarizing that this action is "directly impacting the capacity of federal agencies . . . to protect the United States from . . . threats to our security.").

Judge Advocate General of the U.S. Air Force.[74] Dunlap defines lawfare "as the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective."[75] As such, the term can be used for positive and negative purposes.[76] More often, and more recently, the term is used as a label to criticize those who manipulate international law, legal proceedings, and judicial systems to make claims against the state, especially in areas related to strategic military and political goals.[77]

While the term is controversial, the increased use of the concept is undeniable.[78] Lawfare is often used as a weapon in asymmetrical warfare by guerrillas or terrorists against larger nations where the rule of law is developed.[79] As an example, lawfare can be the exploitation of actual or orchestrated violations of the Law of Armed Conflict by non-state enemy combatants as a strategy to counter the effectiveness of a superior armed force.[80] Israel is a frequent target of lawfare, as noted by legal scholar Anne Herzberg. She writes that the

> detractors of the Jewish state are increasingly using civil lawsuits and criminal investigations around the world to tie Israel's hands against Palestinian terror by accusing Jerusalem of "war crimes" and "crimes against humanity." In the process, the NGOs also subvert and interfere with the diplomatic relations of

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[74] Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFF. 146, 146 (2008).
[75] *Id.*
[76] *Id.* at 147.
[77] Brooke Goldstein & Benjamin Ryberg, *The Emerging Face of Lawfare: Legal Maneuvering Designed to Hinder the Exposure of Terrorism and Terror Financing*, 36 FORDHAM INT'L L.J. 634, 637 (2013).
[78] *See generally* David Scheffer, *Whose Lawfare Is It, Anyway?*, 43 CASE W. RES. J. INT'L L. 215 (2010).
[79] *See* Nathaniel Burney, *International Law: a Brief Primer*, THE BURNEY LAW FIRM, LLC, http://www.burneylawfirm.com/international_law_primer (last visited Mar. 2, 2014).
[80] *See* Maj. Gen. Charles J. Dunlap Jr., *Lawfare amid warfare*, WASH. TIMES (Aug. 3, 2007), http://www.washingtontimes.com/news/2007/aug/03/lawfare-amid-warfare/.

> Western countries with Israel. These lawsuits typically ignore the difficulty Israel faces in fighting terrorists who target Israeli civilians while hiding among their own civilian populations. The accusations also ignore the measures Israel takes to avoid civilian casualties, including the strictest rules of engagement for any Western army. While Israel is not the only country that has been subject to this sort of lawfare – several prominent NGOs have filed similar suits against U.S. officials in France and Germany – it is a primary target.[81]

Lawfare can also include frivolous lawsuits against journalists and politicians who speak publicly about issues of national security.[82] In 2005, for example, the Islamic Society of Boston filed a defamation lawsuit against seventeen media defendants for speaking publicly about the Society's alleged connections to radical Islam and for commenting critically on the construction of the Society's Saudi-funded Boston mosque.[83] Eventually, the suit was dismissed.[84]

Misuse of legal terminology to influence public opinion is also considered lawfare.[85] As an example, the U.N. has passed a Resolution on Combating Defamation of Religions nearly every year since 1999.[86] There are claims that the Resolution is a political attempt to stifle any criticism of Islam and, in turn, free speech.[87] But international law

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[81] *See* Anne Herzberg, *Lawfare Against Israel*, WALL ST. J. (Nov. 5, 2008), http://online.wsj.com/news/articles/SB122583394143998285.html.

[82] Susan W. Tiefenbrun, *Semiotic Definition of "Lawfare"*, 43 CASE W. RES. J. INT'L L. 29, 53 (2010).

[83] *See* Global Relief Found., Inc. v. New York Times Co., 2003 WL 403135 (N.D. Ill. Feb. 20, 2003).

[84] Global Relief Found., Inc. v. New York Times Co., 390 F.3d 973, 990 (7th Cir. 2004) (affirming district court decision "to enter summary judgment in favor of the defendants because their reports about GRF were substantially true.").

[85] *See* Tiefenbrun, *supra* note 82, at 56.

[86] *See* Robert Evans, *Islamic bloc drops U.N. drive on defaming religion*, REUTERS (Mar. 25, 2011), http://in.reuters.com/article/2011/03/24/idINIndia-55861720110324.

[87] *See* Tiefenbrun, *supra* note 82, at 56.

attorney Elisabeth Samson argues that defamation of a religion is a legal impossibility, and thus a form of lawfare.[88] A religion is not a ""person, business, group or government," all of which are tangible entities required by the legal definition of defamation."[89] Instead, religion is a set of beliefs.[90] U.S. recognition of such a resolution would not be compatible with the First Amendment, which provides that "Congress shall make no law . . . abridging the freedom of speech."[91] Further, "the hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting."[92]

Exploitation of universal jurisdiction laws has been labeled lawfare as well.[93] Cited examples include: Jordan's extradition demand for a Dutch politician to stand trial for blasphemy of Islam, Belgium's attempted prosecution of former U.S. President George Bush and British Prime Minister Tony Blair for war crimes, and a South African legal organization's call for U.S. President Barack Obama's indictment for crimes against humanity and genocide.[94] Of course, not all lawsuits similar to the types discussed are acts of lawfare. But manipulation of Western court systems, use of Western "hate speech laws," and other products of political correctness employed to harm democratic principles are unsupportable.[95]

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88 *Id.*
89 *Id.*
90 *Id.*
91 U.S. CONST. amend. I.
92 Virginia v. Black, 538 U.S. 343, 358 (2003).
93 *See* Tiefenbrun, *supra* note 82, at 58.
94 Brooke Goldstein, Opening Remarks at the Lawfare Conference (March 11, 2010), http://www.thelawfareproject.org/141/opening-remarks; Press Release – Obama Docket, THE MUSLIM LAWYERS ASSOCIATION, http://www.mlajhb.com/press-release-obama-docket (last visited Mar. 2, 2014).
95 *See* Brooke Goldstein & Aaron Eitan Meyer, *"Legal Jihad": How Islamist Lawfare Tactics Are Targeting Free Speech*, 15 ILSA J. INT'L & COMP. L. 395, 409 (2009).

E. Ceding American Sovereignty

6. The Threat to U.S. Democracy from Global Governance

Sovereignty is a concept viewed quite differently among different states.[96] For example, the U.S. is quite principled with regards to sovereignty while European states are willing to cede sovereignty in many areas.[97] The European Union (EU) has developed a new body of international economic law and permitted individual European states, by ceding parts of their national sovereignty, to achieve economies of scale in negotiations with non-EU states.[98] This, in turn, has improved their negotiation positions with other states.[99] Whatever the criticism of the individual European states' ceding of national sovereignty through the EU, it has demonstrated some success for many EU states in areas of economic growth despite the turmoil from the global economic downturn beginning in 2008.[100]

But where the EU may benefit from the imposition on their individual states' democratic processes of supranational or international law, the U.S. would not. Whether international law derives from decisions of courts addressing international issues or from rules and regulations of international organizations like those created in the aftermath of the Second World War, both have implications for a democratic state in that both may impose legal outcomes without the direct involvement of the democratic state's lawmaking functionaries.[101]

In the case of law deriving from court decisions, there is no involvement of a state's popular decision-making process.[102] On the

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[96] *See* Robert O. Keohane, *Ironies of Sovereignty: The European Union and the United States*, 40 JCMS: J. OF COMMON MARKET STUD., 743, 744-46 (2002).
[97] *Id.*; *see also* Alex Newman, *The EU: Regionalization Trumps Sovereignty*, THE NEW AMERICAN (Aug. 20, 2013), http://www.thenewamerican.com/world-news/item/16343-the-eu-regionalization-trumps-sovereignty.
[98] Paul B. Stephan, *International Governance and American Democracy*, 1 CHI. J. INT'L L. 237, 243 (2000).
[99] *Id.*
[100] *Id.* at 244.
[101] *Id.* at 245.
[102] *Id.*

other hand, law created by the establishment of international organizations permits some limited role for the U.S. executive and legislative branches in drafting the details of the agreement to which the U.S. will accede.[103] In turn, each branch has a say in crafting the impending legislation, assuming necessity, to determine how international law will become domestic law.[104] Further, both branches may agree to withdraw the U.S. from its commitment should that commitment be considered no longer consistent with U.S. interests.[105] While checks on the latter may afford the U.S. greater flexibility than on the former, checks on international law created by international organizations are not necessarily sufficient.[106]

7. Use of Force

Decisions concerning whether to threaten or actually use military force are among the most, if not the most, important decisions a state considers. Limiting a state's authority for those decisions by subjecting them to a supranational authoritative source diminishes a state's sovereignty.[107] Of course an entirely unilateral, non-coalition use of force extraterritorially by a state for reasons based solely on national self-interest should never be justified or permitted by the international community. But just because international officials and legal scholars invoke the U.N. Charter as rationale for the illegality of the use of force does not make the action illegitimate or even impermissible.[108]

In March 1999, air forces from member states of the North Atlantic Treaty Organization (NATO) began bombing targets in the former Yugoslavia in order to end widespread violations of international law perpetrated by Serbian military and police forces against Kosovar Albanians.[109] Because the U.N. Security Council action did not sanction the NATO action, many legal observers

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[103] *Id.*
[104] *Id.* at 244.
[105] *Id.* at 245.
[106] *See generally id.* at 252-53.
[107] John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205, 208 (2000).
[108] *See generally* INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT * INTERNATIONAL RESPONSE * LESSONS LEARNED 163-201 (2001).
[109] *Id.* at 33-98; *see* Bolton, *supra* note 107, at 208.

considered the action a violation of the U.N. Charter.[110] But attempt by the U.N. Security Council to instead condemn the action was actually defeated by a wide margin.[111] NATO member states found justification in the action. The U.S. concluded the action was justified based on excessive and indiscriminate use of force by Serbian forces, pending actions by Serbian forces targeting Kosovar Albanians, and the threat to the wider region including Albania, Macedonia, and NATO allies Greece and Turkey.[112] Britain also found legal justification in that force is permissible in extreme circumstances in order to prevent a pending humanitarian atrocity.[113]

8. International Criminal Court

Another international legal instrument that risked ceding U.S. sovereignty was the International Criminal Court (ICC).[114] Initially supportive of the ICC, the U.S. ultimately renounced its signature of the treaty.[115] U.S. personnel would have come under the jurisdiction of the ICC if either the U.S. ratified the treaty or if U.S. personnel engaged in conduct determined by the ICC to be under their criminal jurisdiction and occurring within the territory of a state party to the

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[110] *See generally* Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L. 824 (1999); *cf. generally* Robert J. Delahunty & Antonio F. Perez, *The Kosovo Crisis: A Dostoievskian Dialogue on International Law, Statecraft, and Soulcraft*, 42 VAND. J. TRANSNAT'L L. 15 (2009).

[111] Ian Williams, *The UN's Surprising Support*, INSTITUTE FOR WAR & PEACE REPORTING (Apr. 19, 1999), http://iwpr.net/report-news/uns-surprising-support.

[112] Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 628, 631 (1999).

[113] *See* KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION: SELECTIVE INDIGNATION, COLLECTIVE ACTION, AND INTERNATIONAL CITIZENSHIP 137 (Albrecht Schnabel & Ramesh Thakur eds., 2000).

[114] *See generally* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3.

[115] *See* Scheffer, *supra* note 9; Richard J. Goldstone, *U.S. Withdrawal from ICC Undermines Decades of American Leadership in International Justice*, THIRD WORLD TRAVELER, http://www.thirdworldtraveler.com/International_War_Crimes/USWithdrawal_ICC_Goldstone.html (last visited Mar. 2, 2014).

treaty.[116] The risk to U.S. sovereignty is the transfer of authority to make law to an international institution.[117] The ICC can expand the definition of offenses covered under the statute by gaining the approval of only two-thirds of the states party to the treaty.[118] Additionally, some descriptions of crimes covered under the statute may not be interpreted uniformly and, therefore, permit the ICC to conclude its own jurisdiction through such non-uniform interpretation.[119]

9. Convention on the Rights of Persons with Disabilities (CRPD)

The CRPD, signed by the Executive and awaiting the advice and consent of the Senate, is intended to protect the rights and dignity of persons with disabilities.[120] From a public diplomacy perspective, it is presumed that the U.S. would boost its global reputation by holding itself to high human rights standard. However, acceding to the treaty, without reservations, would risk ceding authority to an international committee of *appointed* experts from, potentially, countries with questionable human rights records.[121] Similar human rights treaties often establish such a committee of experts to periodically review implementation of the treaty by the parties. These committees, however, are not democratically elected, but instead appointed by state parties to the treaty, regardless of their human rights record.

With regards to the CRPD, the committee "shall make such suggestions and general recommendations on the report as it may consider appropriate . . . and may request further information from States Parties relevant to the implementation of the present Convention."[122] Such recommendations may not be consistent with U.S. cultural, social, economic, and legal traditions and norms. More important, with regards to U.S. interests and persons, the U.S. already

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[116] *See* Stephan, *supra* note 98, at 254.
[117] *Id.*
[118] *Id.*
[119] *Id*. at 253-55.
[120] *See generally* CRPD, *supra* note 2.
[121] U.N. Watch, *What if dictatorships judged the world on human rights?*, YOUTUBE (Feb. 19, 2014), http://www.youtube.com/watch?v=s_mIQNNhnpM.
[122] CRPD, *supra* note 2, at art. 36(1).

has ample domestic laws protecting the rights of disabled individuals.[123] Additionally, numerous federal agencies are also charged with protecting those rights.[124] Thus, affected U.S. persons would experience no discernible benefit from U.S. accession to this treaty.

IV. HOW PRIORITIZING AMERICAN INTERESTS MIGHT COEXIST WITH INTERNATIONAL LAW

That international law, including customary international law, treaties, conventions, and other international agreements, cannot coexist with U.S. interests is inaccurate. The U.S. has provided global leadership since the Second World War and it would run counter to U.S. interests to disengage from existing and beneficial international legal institutions and obligations and risk losing that global leadership role. There are several areas in which U.S. interests can facilitate the transformation of international law.

A. Intervention Based on Legitimacy, Not Just Legality

The 1999 NATO Kosovo action was condemned by several states, including two of the five permanent Security Council members, as being illegal.125 However, the U.S. and its NATO allies, in using military force to halt the indiscriminate and excessive use of force by the Serbian military and paramilitary forces, acted on legitimate grounds.126 Following the Kosovo intervention, international legal scholar Antonio Cassese suggested that "under certain strict conditions resort to armed force may gradually become justified, even absent any

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[123] *See e.g.*, 29 U.S.C. § 794 (2012); 42 U.S.C. ch. 126 (2011); Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (2012); Fair Housing Act, 42 U.S.C. §§ 3601-3631 (2011); 42 U.S.C. ch. 20, subchapter I-F (2011).

[124] Some of the federal agencies charged with protecting those rights include the U.S. Dep't of Justice Civil Rights Div.; U.S. Dep't of Transp. Fed. Transit Admin.; U.S. Dep't of Educ. Office for Civil Rights; U.S. Dep't of Health and Human Servs. Office for Civil Rights; U.S. Dep't of Labor Civil Rights Center; U.S. Dep't of House. and Urban Dev.; U.S. Dep't of Interior Office of Civil Rights; and the U.S. Dep't of Agric. Office of the Assistance Sec'y for Civil Rights.

[125] *See* Williams, *supra* note 111.

[126] *See* Murphy, *supra* note 112; *see also* KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION, *supra* note 113.

authorization by the Security Council."[127] Indeed, international lawyer Celeste Poltak notes that:

> while the terms of the Charter seem clear, in that Article 2(4) contains an absolute prohibition on the use of force, Article 2(4) may nevertheless lend itself to a narrow exception. The idea that the well-founded prohibition on the use of force is capable of exception in cases of extreme humanitarian need is consistent with: the principles of interpretation applicable to constituent documents; the evolution of the human rights paradigm at international law; and the evolving notion of a "threat to the peace." While the core prohibition on the use of force remains as relevant in the twenty-first century as it did in 1945 when the Charter first came into force in order to preserve a stable global order, the international context in which the prohibition was first articulated has changed.[128]

Poltak further indicates that the long-term flexibility of a:

> treaty rests largely on its ability to adapt to the changing needs of the context in which it functions" and that excising "a restrictive exception to the prohibition on the use of force in cases of humanitarian catastrophes involving the large scale loss of life is consistent with the overarching goals and purposes of the Charter and contemporary international law.[129]

In 2001, the Canadian government presented to the U.N. General Assembly findings from research regarding ways to protect vulnerable populations in a manner that could be considered legitimate,

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[127] Antonio Cassese, *Ex Injuria ius Oritur: Are We Moving Towards Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23, 27 (1999).

[128] Celeste Poltak, *Humanitarian Intervention: A Contemporary Interpretation of the Charter of the United Nations*, 60 U. TORONTO FAC. L. REV. 1, 2-3 (2002).

[129] *Id.* at 3.

and thus legal.[130] The doctrine is referred to as the Responsibility to Protect, or R2P, and emphasizes prevention of manmade humanitarian catastrophes, reaction to those catastrophes when they do arise, and rebuilding following any necessary intervention.[131] The R2P report lists six criteria legitimizing intervention, despite claims of illegality, in such circumstances: appropriate authority, just cause, appropriate intention, last resort, proportional means, and reasonable prospects for success.[132]

Despite this framework proposing the legitimization of intervention into the territory of another state for purposes of abating a state-made humanitarian crisis, the international community failed to intervene into the Darfur region of Sudan after 2003 when Arab militias began an ethnic cleansing campaign against non-Arab Sudanese in the region. Unfortunately, continued arguments to the contrary emphasize that any intervention, including on humanitarian grounds, is permissible "only in self defense or in actions authorized by the Security Council."[133]

Darfur was an example where R2P provided both justification and authority for intervention on humanitarian grounds. Additionally, the U.N. Charter could have been cited as facilitating intervention under R2P by permitting U.N. Members to take action to achieve universal respect for human rights and fundamental freedoms without distinction to race or religion.[134] Further, a combined intervention in Darfur would have served not only humanitarian interests, but regional security interests as well.[135]

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[130] RESPONSIBILITY TO PROTECT: THE GLOBAL MORAL COMPACT FOR THE 21ST CENTURY 23-24 (Richard H. Cooper & Juliette Voïnov Kohler eds., 2009).

[131] *See generally* International Commission on Intervention and State Sovereignty, THE RESPONSIBILITY TO PROTECT (Dec. 2001), *available at* http://responsibilitytoprotect.org/ICISS%20Report.pdf.

[132] *Id.* at 32-37.

[133] SIMON CHESTERMAN, JUST WAR OR JUST PEACE?: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 2 (2003).

[134] U.N. Charter arts. 55, 56.

[135] *See generally* Clionadh Raleigh & Caitriona Dowd, *Governance and Conflict in the Sahel's 'Ungoverned Space'*, 2 STABILITY: INT'L J. OF SEC. AND DEV., issue 2, 1 (2013), *available at* http://www.stabilityjournal.org/article/download/sta.bs/97.

Syria is another example of where a sovereign state leader harmed his own people. President Barack Obama laid out the justification, under both domestic and international law, for intervention in Syria in September 2013, but ultimately elected not to do so.[136] Some legal experts agreed that President Obama would have violated both domestic and international law had he intervened.[137] But the Justice Department's Office of Legal Counsel has argued on prior occasions that the credibility of the U.N. Security Council is in U.S. interests and, therefore, can justify the President's authority to use military force absent prior authorization from Congress.[138] Under international law, the U.S. and coalition partners could have cited the doctrine of R2P, building upon the purposes of the Kosovo intervention and pushing the boundaries for a new, and necessary, international norm.

B. Working within National Institutions and Transforming International Institutions

U.S. interests can also better coexist within the international legal structure if the U.S. better utilizes existing national institutions and works to transform international institutions.

10. Sovereignty and International Cooperation

By cooperating internationally, in international trade and capital markets for example, the U.S. does necessarily—and appropriately—cede some control of its domestic economy to

[136] President Barack Obama, *Remarks by the President in Address to the Nation on Syria* (Sep. 10, 2013), http://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria (accessed Feb. 11, 2014); *see also* George Bisharat, *Stumbling Forward in Syria*, 37 HASTINGS INT'L & COMP. L. REV. 159 (2014).

[137] *See* Bisharat, *supra* note 136, at 160-61.

[138] Ganesh Sitaraman, *Credibility and War Powers*, 127 HARV. L. REV. F. 123 (2014); Auth. to Use Military Force in Libya, 35 Op. O.L.C., 2011 WL 1459998, at 10 (Apr. 1, 2011); Deployment of U.S. Armed Forces to Haiti, 28 Op. O.L.C., 2004 WL 5743940, at 4 (Mar. 17, 2004); Auth. to Use U.S. Military Forces in Som., 16 Op. O.L.C. 6, 11 (1992).

international organizations.[139] The "international law" created by these international organizations does restrict the U.S. in its ability to carry out preferred domestic policy choices.[140] But effecting transformation of those international institutions needs to take place within the context of the U.S. Constitution, ensuring no risk to sovereignty is ceded unnecessarily.

The Supremacy Clause provides that the "Constitution . . . shall be the supreme Law of the Land," followed by "the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States."[141] Therefore, participation in the international economic legal order, for example, necessarily takes place within the U.S. Constitution's system of politics and laws.[142] The "sovereignty of self-governing peoples" is flexible.[143] According to legal scholars Julian Ku and John Yoo, sovereignty of self-governing peoples:

> does not undermine the Constitution's allocation of powers or its guarantees of individual rights. Indeed,

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[139] *See* OATLEY, *supra* note 15, at 23-24; *see also* JULIAN KU & JOHN YOO, TAMING GLOBALIZATION: INTERNATIONAL LAW, THE U.S. CONSTITUTION, AND THE NEW WORLD ORDER 2-4; 19-25 (2012).

[140] *See e.g.*, DAVID HELD ET AL., GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS, AND CULTURE 187 (1999) ("policies supporting domestic industry and even domestic laws with respect to business competition and safety standards are subject to growing international scrutiny and regulation.").

[141] U.S. Const. art. VI; *see also* Julian Ku & John Yoo, *Globalization and Sovereignty*, 31 BERKELEY J. INT'L L. 210, 211 (2013) ("Article VI's Supremacy Clause creates a hierarchy of federal law that places the Constitution first, followed by 'the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States.' This establishes the Constitution's superiority over all other authorities, including international laws and norms."); *see also* Reid v. Covert, 354 U.S. 1, 16-18 (1957) (explaining that the "Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.").

[142] *See* Ku & Yoo, *supra* note 141, at 211.

[143] Woodrow Wilson, President of the U.S., Address at the Soldiers' Memorial
Hall (Jan. 29, 1916), in H.R. DOC. NO. 803, 13 (1916).

> popular sovereignty already assumes that the U.S. government operates under substantial and fundamental constraints within its territory. The U.S. cannot fully control external constraints on its sovereignty ... but it can restrict legal limits on its sovereignty by international organizations and multilateral treaties by withholding its consent to international regimes.[144]

International trade and collective action necessitate international cooperation. Resolving conflict that arises from international cooperative efforts by looking first to international law that trumps national sovereignty is not consistent with U.S. interests or the Constitution.[145] However, the structural provisions of the Constitution do permit the coexistence of international legal institutions and U.S. political and legal institutions so that the U.S. may realize the benefits of international cooperation.[146]

11. Transforming the U.N. to Align with U.S. Interests

It remains in U.S. interests to assist with the transformation of international institutions, most importantly the U.N. The U.S. must engage its allies to shape the institutions to conform to U.S. interests when mutual, just as it did following the Second World War.[147] The U.N. itself has advocated for transformational reform.[148] Some of the more important proposals, cited by legal scholar Anne-Marie Slaughter, in the 2004 U.N. report included: adding human security to state security in the context of international peace and security; adopting the

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[144] *See* Ku & Yoo, *supra* note 141, at 234.
[145] *Id.* at 234-35.
[146] *Id.* at 235.
[147] *See* Anne-Marie Slaughter, *Building Global Democracy*, 1 CHI. J. INT'L L. 223, 225 (2000).
[148] See U.N. Secretary General's High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility (2004), *available at* http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf.

R2P doctrine; and reforming the Security Council.[149] Each brings its own challenges, and unsurprisingly, none have been officially adopted by the U.N.

The addition of human security, which refers to security of the individual from such dangers as disease, violence, or violation of individual rights, to state security shifts the emphasis of traditional security policy. Human security emphasizes a non-coercive approach to security that is incompatible with traditional security policies of deterring and addressing foreign aggression.[150] But human security, like the doctrine of R2P, is viewed differently between developed and developing countries. Similar to R2P, effective reform efforts would create a framework to permit intervention to promote human security when the subject country lacks the capacity, or will, to secure their own population.[151] Reform of the Security Council is equally challenging. And although some experts believe the Security Council is destined for irrelevance without reform, what such reform might bring remains unforeseeable.[152] On the subject of reform through enlargement, the U.S. is seen by some as "ambivalent" due, in part, to concern over whether new members would accept policies consistent with U.S. interests.[153] However, in 2004, the U.S. Congress also established a task force for the purpose of recommending measures designed to make the U.N. more effective in realizing the goals of the Charter.[154] The U.S. report identified several areas consistent with both U.S. and U.N.

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[149] Anne-Marie Slaughter, A New U.N. for A New Century, 74 FORDHAM L. REV. 2961, 2963 (2006).

[150] *See generally* Shahrbanou Tadjbakhsh, *Human Security In International Organizations: Blessing or Scourge?*, 4 HUMAN SEC. J. 8, (2007); Human Security Report Project, HUMAN SECURITY REPORT 2013: THE DECLINE IN GLOBAL VIOLENCE: EVIDENCE, EXPLANATION, AND CONTESTATION (2013), *available at* http://www.hsrgroup.org/.

[151] International Commission on Intervention and State Sovereignty, *supra* note 131, at ¶ 2.31.

[152] *See* Slaughter, *supra* note 149, at 2965.

[153] *See generally* U.N. Council on Foreign Relations, UN Security Council
Enlargement and U.S. Interests, COUNCIL SPECIAL REPORT NO. 59 (Dec. 2010) (Kara C. McDonald & Stewart
M. Patrick).

[154] Report of the Task Force on the United Nations, AMERICAN INTERESTS AND U.N. REFORM 2 (2005), http://www.usip.org/sites/default/files/file/usip_un_report.pdf.

interests: (1) legitimacy, as the one place where countries can debate as equals; (2) diplomatic offices, for mediation and similar third-party assistance in brokering disputes; (3) special expertise, in areas such as election preparations and assistance with displaced persons; and (4) leverage, in areas such as preventing national rivalries from impairing humanitarian efforts.[155]

Additionally, the U.S. agenda for proposed U.N. reform included: (1) institutional reforms; (2) specific steps to improve U.N. effectiveness in counter-terrorism and trafficking of weapons of mass destruction; (3) specific steps to prevent genocide and other human rights violations; (4) poverty eradication and political, legal, and economic infrastructure development; and (5) increased capacity in peacekeeping operations.[156] The task force recommended neither reforms requiring revisions to the Charter nor expansion of the Security Council.[157] What these reports do highlight, however, are areas where the U.S. can remain committed internationally while leading the transformation effort of an international institution and ensuring the end state is consistent with U.S. interests and law.

V. CONCLUSION

It is certainly not in the U.S. interest to disengage from existing international commitments. However, it is equally unadvisable to submit further to international agreements that advance no substantive U.S. interests beyond, for example, promoting public diplomacy.

Where the U.S. remains a party to multilateral international agreements that have become wholly incompatible with U.S. interests, the U.S. should take action to withdraw from such agreements.[158] And

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[155] *Id.* at 3.
[156] *Id.* at 6-7.
[157] *Id.* at 7.
[158] *See generally* Ilene R. Cohn, Nicaragua v. United States: Pre-Seisin Reciprocity and the Race to the Hague, 46 OHIO ST. L.J. 699 (1985) (exploring the consequences the U.S. faced in disagreeing with the assertion that the International Court of Justice held jurisdiction); John Quigley, The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences, 19 DUKE J. COMP. & INT'L L. 263 (2009) (discussing the controversy regarding the withdrawal as well as arguing for a reconstruction of U.S.

where the U.S. remains a party to those agreements that appear, perhaps, less consistent with U.S. interests, the U.S. should mobilize efforts to transform such institutions.[159]

To that end, the U.S. should look, with partners whenever possible, to create new norms. Justification based on legitimacy, when legality is questionable under traditional criteria, should not be avoided. The U.S. should also use national institutions to manage the conflicts between national interests and international cooperation, but always in a manner consistent with the U.S. Constitution and always with a tendency towards national interests.

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international policy).

[159] *See* Report of the Task Force on the United Nations, *supra* note 154, at 5.