

Consequences of the US Election: The Coming International Law ‘Restoration’ (Work in Progress, Nov. 12, 2020)(comments welcome at jose.alvarez@nyu.edu)

José E. Alvarez¹

Introduction

Despite sanguine assessments to the contrary, the Trump presidency has had a consequential -- and generally negative -- impact on international law and US compliance with it that will last for years to come.² Expectations for a full reset after the 2020 election need to be lowered. The coming international law ‘restoration,’ while real, will be tempered.

Trump’s single term cemented the following characteristics within US 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 wary/hostile approach towards China; (3) deep skepticism of the world trading system; (4) reliance on punishing ‘bad’ actors through trade sanctions; (5) circumspection towards UN system organizations; (6) avoidance of most international courts and tribunals; (7) aversion to ‘never-ending’ wars and resistance to humanitarian use of force (RIP for R2P); and (8) ever more ‘ironclad’ commitments to Israel’s security. A Biden administration can be expected to modify at the margin each of these trends and adopt a more measured diplomatic tone with respect to all of them but four years hence it is likely that all eight will remain recognizable aspects of US actions in the

¹ Herbert and Rose Rubin Professor of International Law, NYU School of Law. This is an extended version of a speech delivered at the Annual Meeting of the Canadian Council of International Law on Nov. 12, 2021. The author is grateful for comments received from Jerry Cohen, Peter Dutton, Mark Kantor, Benedict Kingsbury, Bernard Oxman, Mark Shulman, and Frank Upham. Remaining errors are the author’s own.

² Compare 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 Australian Int’l L. J. 1 (2018); Harold Hongju Koh, The Trump Administration and International Law (2018). Koh argues that the international and domestic rule of law “guardrails” held and Trump managed only “pyrrhic” victories against “resilient” international law and its institutions.

international law space. Further, given structural constraints internal to the US (such as a divided Congress, a resistant federal judiciary, path dependent civil servants, and limits on reversing federal regulations quickly) and external ones (chiefly loss of faith in the competence and credibility of the US and UN system organizations), even an effort to restore the place international law held during the Obama years will prove difficult.

Some of this will be the product of who Biden is. A President Biden will not set out to systematically dismantle everything associated with his predecessor. Unlike Trump (aka ‘Termination Man’), who sought to undo all things Obama, Biden is too careful, too thoughtful, too bipartisan, too rational, and too respectful of rule of law processes to emulate Trump that way. This is particularly likely to be the case if he installs a bipartisan cabinet in an overriding effort to unite the red and the blue of a nearly equally divided nation.

The following addresses how the eight trends above are likely to continue to influence the incoming administration.

(1) Reluctance/inability to enter into multilateral treaties

Those who focus on the bright shining objects that draw the most attention of international lawyers – multilateral treaties – and the prospect that a new president will usher in new US accessions to treaties that much of the civilized world joined long ago, are going to be brutally disappointed. Over the near term, a President Biden will join (or rejoin) high profile international arrangements only if these do not require Congressional approval.

Even if Democrats manage to regain control of the Senate, do not expect the US to ratify CEDAW, the ICESCR, the American Convention of Human Rights, the Rights of the Child Convention, the Law of the Sea Convention, or the Statute of the International Criminal Court or

its Kampala protocol on the crime of aggression. Do not expect the Biden administration to remove all US reservations from the ICCPR or even the Torture Convention. The country that took some 40 years to ratify the Genocide Convention does not change its spots quickly and certainly not at a time when much of the world, and not only the US, has been exceedingly wary about ambitious treaty-making.³

A President Biden will fulfill his promise to have the US rejoin the Paris Agreement on Climate Change because, while changes in US law required by Congressional action would be desirable to make that Agreement truly effective, re-entering that treaty does not require Congress to approve.⁴ It is also probable that, over time, Biden would pursue other international efforts consistent with his endorsement of a ‘green new deal framework’ – as well as Pope Francis’s plea to protect the planet in his encyclical letter, *Laudate si*.⁵ Since the US and China jointly account for 40 percent of global greenhouse gas emissions, Biden is likely to try to reignite the US-China bilateral climate relationship begun under Obama. He will face stiff opposing head winds with respect to that attempt, however (see item 2 above). The US may also join China in pledging to lower the level of its carbon emissions by a date certain⁶ -- and attempt to rely on changes to EPA policies and to climate change mitigation efforts by US states to achieve such a goal even if Congress fails to act. Biden may also attempt a joint US-Chinese

³ See, e.g., Joost Pauwelyn, R.A. Wessel, and J. Wouters, “When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking,” 25 EJIL 435 (1999).

⁴ See, e.g., Oona Hathaway, “Reengaging on Treaties and Other International Agreements (Part II): A Path Forward,” Just Security, Oct. 6, 2020.

⁵ See Encyclical Letter, *Laudato si*, at.

http://www.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si_en.pdf.

⁶ On Sept. 22, 2020, Xi Jinping announced that China would aim to “achieve carbon neutrality before 2060.” Statement, General Debate of the 75th session of the G.A., Min. of Foreign Affairs, People’s Republic of China, Sept. 22, 2020. For its part, the Biden campaign proposes that the US achieve “a 100 percent clean energy economy and net-zero emissions no later than 2050.” See Climate, Biden for President, at <https://joebiden.com/climate-plan/>.

cooperation arrangement that would tap into the two countries' respective strengths: US talents in inventing and China's capacity to commercialize and cheaply produce clean energy technology (such as solar panels).⁷ A Biden administration could also be expected to embrace related international initiatives that received the back of the hand from his predecessor, such as the 2018 Global Compact for Safe, Orderly and Regular Migration that can help to mitigate the harms of climate change migration.⁸ Such soft law compacts, not requiring Congressional approval, remain fair game.

Apart from Biden's failure to be elected by the anticipated blue wave that would have given his party clear majorities in both houses of Congress, there are many other structural reasons why the US's return to international law will occur largely through sole executive agreements, soft law instruments, or national law initiatives instead of high profile multilateral treaty ratifications. As was clear at least since the Obama years – which saw an ever dwindling number of attempts to get treaties through either the Senate by 2/3 vote or a majority of both houses of Congress – the US constitution and Capitol Hill traditions make concluding treaties purposely difficult. Now as ever, one senator – in the Bush era the notorious Senator Helms – can prevent a treaty from emerging from the Senate Foreign Relations Committee. In the best of circumstances, presidents need the help of senators invested in foreign affairs. While the US 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 political traditions that require that some treaties (such as those involving human rights) respect the Senate's 2/3

⁷ See, e.g., Alex L. Wang, "Why We Can't Fix the Climate Crisis Without China," Working Paper, Penn Project on the Future of US-China Relations. This would be consistent with Biden's plan for \$2 trillion in spending for Green New Deal measures that emphasize, among other things, clean energy technology. See Katie Glueck and Lisa Friedman, "Biden Announces \$2 Trillion Climate Plan," NY Times, Aug. 11, 2020.

⁸ Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration, Draft Outcome Document, UN Doc. A/CONF.231/3 (July, 30, 2018).

prerogative. Biden is not likely to find many senators who prioritize ratifying a particular treaty. Prominent internationalists with clout like former Senators Pell, Fulbright, or Lugar have today been displaced by prominent self-described sovereigntists.

This explains why Obama entered the Paris Agreement and the Iran Deal through mechanisms that, as Harold Koh has noted, ignore the familiar US triptych of Senate Article II treaties, Congressional-Executive Agreements or even traditional Sole Executive Agreements.⁹ Obama tended to go for international agreements that his lawyers argued were already authorized under existing US law (including a previously concluded treaty) -- and therefore did not require Congressional approval or implementing legislation. The downsides of such instruments are obvious: such agreements are easier for subsequent Presidents to withdraw from and perhaps violate (particularly if their legally binding status is dubious).

The UN Convention on the Law of the Sea (UNCLOS) is a case in point. The last time there was a serious effort to have the Senate consider this treaty – after the 2004 election – that effort failed despite the backing of every Chairman of the Joint Chiefs, every Chief of Naval Operations, every combatant commander of the US, every living legal adviser to the US Department of State, every President since Reagan, and a dizzying and politically diverse array of organizations that extended from environmental groups to the American Petroleum Institute. Today, US 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 stronger than ever given the continuing threats to those rules (and possibly to international peace and security) posed by China’s actions in and around the South China Sea.

⁹ Harold Koh, “Triptych’s End: A Better Framework to Evaluate 21st Century International Lawmaking,” 126 Yale L.J. F. 338 (2016-2017).

Even Secretary of State Pompeo, who rarely addresses international law, acknowledged as much in July 2020 when he praised the UNCLOS (PCA) 2016 arbitration ruling in *Philippines v. China* and urged all parties to abide by that “legally binding” decision.¹⁰ It is clear today, no less than in 2004, that the US would clearly benefit from affirming that UNCLOS consists of binding treaty law to which it commits, along with that treaty’s duty to accept binding dispute settlement at least with respect to some issues. And yet, no DC insider predicts that the Biden administration will spend the political capital needed to secure US accession to UNCLOS. The best that anyone expects from a Biden administration is that it will use every occasion to voice support for UNCLOS, take seriously that convention’s rules with respect to its own actions, and continue to build support among relevant constituencies here and abroad to press for eventual US accession.

Another reason for continued timidity on treaty initiatives is the resilience of the populist mindset that propelled Trump to the White House and very nearly kept him there for a second term. President Biden will be keen to restore the US’s place in the world but he will be equally intent on prioritizing those foreign policy initiatives that address -- and do not distract from -- his daunting domestic ‘to do’ list. International law will come to the fore over the next four years if it can be connected to ridding the US of the COVID plague and shoring up the US economy; to restoring the frayed social fabric between white/black and brown, men/women, republicans and democrats, rural/urban, and those living in red versus blue states; to reversing rising income inequality and changing the US tax code accordingly; or to responding to the pressing social movements of our time: Black Lives Matter and MeToo.

¹⁰ See, e.g., Mark Nevitt, “Secretary Pompeo’s Surprising Defense of International Law, Allies, and the Law of the Sea Convention,” *Just Security*, July 15, 2020.

A Biden presidency is likely to prioritize what Madeline Albright calls ‘inter-mestic’ issues – international initiatives that have a clear domestic policy significance and therefore can draw support from even sovereigntists on Capitol Hill. Biden will never utter the phrase “America First,” but that sentiment will compel him to justify every foreign policy action he takes in terms of how it will benefit the people of the United States.¹¹ In his possible single term in office, Biden will spend precious political capital on filling out international lawyers’ wish list only insofar as these further the interests of his target audience – blue collar workers on ‘Main Street.’¹² Reentry into the Paris Agreement, for example, will be sold to the US 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. The US return to the WHO and its global scripts for testing/contract tracing/isolation will not be justified by abstract commitments to multilateralism but on the simple promise that this will keep more Americans alive, Main Street open for business, and permit us to re-open the US-Canadian border and re-engage in trade.

As this suggests, the turn to ‘inter-mestic’ rationales can be a recipe for improving US compliance with international law. Even without passage of new US 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 US to have somewhat better answers the next time it comes before the Human Rights Committee. Changes to how law enforcement officers are disciplined and prosecuted for their actions at the state or municipal level, greater prosecutions of

¹¹ As a close ally of Biden, Senator Chris Coons, has argued, Trump’s “America First” narrative taps into a long-standing strain of isolationism in US 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 and domestic and foreign policy concerns. Cris Coons, “A Bipartisan Foreign Policy Is Still Possible,” *Foreign Affairs*, Oct. 7, 2020.

¹² See, e.g., Coons, id. (defending a foreign policy ‘for the middle class’).

threats and acts by white supremacists, rules that eliminate private prisons and that reduce penalties inflicted for minor drug offenses are only some of the ways that US may achieve somewhat better compliance with its obligations under the ICCPR and CERD, including the latter's duty 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 any individual group or institution" (CERD, Art. 5(b)). Should the US return to the UN 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 US laws that protect the rights of organized labor will elevate the status and credibility of the US with respect to international labor rights and in the International Labor Organization.

Efforts to correct and prevent the pervasive forms of discrimination that continue to occur against women (as through enhanced efforts by Biden's Justice Department), the expected lifting of the 'gag' rule barring US aid to entities that support reproductive rights, as well as other actions inspired by the MeToo movement widely embraced by Democrats would further the goals of a number of human rights instruments and enhance the credibility of the US before human rights bodies even without the US joining CEDAW.

Biden, who as vice president got ahead of his president by endorsing same sex marriage, is also likely to embrace global LGBTQ+ priorities identified in the Democratic Party Platform. This includes appointing senior leaders at the State Department, USAID, and the National Security Council to recapture the US position of leadership worldwide on LGBTQ+ issues. (For these reasons and others, the Biden administration will shelve Secretary of State Pompeo's

notorious “Commission on Unalienable Rights” and its attempt to redefine and narrow the meaning of protectable human rights and their role in US foreign policy.)¹³

Eliminating the policy of separating immigrant children from their parents will advance the goals of the Rights of Child Convention, the rights of the family in a number of human rights instruments including the American Convention, and the ban on torture and cruel, inhuman and degrading treatment in customary international law and the Torture Convention. Other anticipated changes to the most egregious Trump executive orders relating to immigration – from the elimination of his revamped ‘Muslim ban’ to reversing constraints imposed on the exercise of the rights of asylum and non-refoulement – will make US actions more compliant with a number of human rights instruments, including the Torture and Refugee Conventions.¹⁴ At the same time, as indicated by the Migration Policy Institute, it would take even a dedicated President more than 4 years to comb through and alter the roughly 400 actions taken by a sprawling number of federal agencies overseen by the White House’s white nationalist in waiting, Stephen Miller.¹⁵ Trump’s anti-immigration efforts, which were aided and abetted by a decision to effectively shut down immigration on the US’s southern border under a 1944 public health law in the age of COVID, will take time to roll back. It is not likely that a single term of a Biden

¹³ The Commission elevates religious freedom and property rights above other rights and denigrates 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 dismisses both as “divisive social and political controversies.” See, e.g., Aya Fujimura-Fanselow, Jayne Huckerby, and Sarah Knuckey, “An Exercise in Doublespeak: Pompeo’s Flawed “Unalienable Rights” Commission,” Just Security, July 29, 2020.

¹⁴ See, e.g., Jaya Raji-Nogales, “Non-Refoulement under the Trump Administration,” ASIL Insights, Dec. 3, 2019.

¹⁵ Sarah Pierce and Jessica Bolter, “Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes under the Trump Presidency,” July 2020, available at <https://www.migrationpolicy.org/research/us-immigration-system-changes-trump-presidency>. As for Mr. Miller’s expressed sympathies for white nationalism, see, e.g., Ben Collins, “Democrats call for Stephen Miller to resign after leak of xenophobic emails,” CBS News, Nov. 19, 2019, at <https://www.nbcnews.com/politics/immigration/democrats-call-stephen-miller-resign-after-leak-xenophobic-emails-n1081941>.

presidency will enable the US to reclaim its claim to be the ‘nation of immigrants’ worthy of the welcome at the base of the Statute of Liberty. As this reminds us, while a President Biden can reverse Trump executive orders on his first day in office—when he can also immediately issue new ones without going through Congress-- it will take much more time and effort to override the constraints of the Administrative Procedures Act when it comes to reversing Trump era federal regulations or issuing new ones.

‘Under the hood’ actions such as termination of Trump executive orders, issuance of new executive orders, and changes in the day to day practice of US executive branch agencies, bereft of new treaty ratifications, will be the principal way that a Biden administration will attempt to restore some of the US’s lost ‘soft power’ on human rights.¹⁶

(2) A more hostile view of China

Aided and abetted by President Xi’s transition to authoritarian ‘president for life,’ the Trump administration has shifted how China is viewed within the United States. Gone are lingering hopes in influential policy circles that China’s economic interests will gradually make it a faithful ‘rule taker’ of the post-WWII liberal order. Perspectives on China within the US (and in many other places) took more sober tones given China’s evident economic and geopolitical rise even prior to Xi’s new found status.¹⁷ Views concerning China have only hardened since – to the point where even some of those mentioned as potential foreign policy advisers in a Biden administration have suggested that the only real issue is just which path

¹⁶ See, e.g., Coons, *supra* note 11 (arguing that the US can outcompete China by being the ‘best version of itself’ and reaching for a foreign policy rooted in “American ideals”).

¹⁷ See, e.g., United Kingdom, House of Commons, Foreign Affairs Committee, “China and the Rules-Based International System,” Sixteenth Report of Session 2017-19.

China intends to take to achieve “global domination.”¹⁸ Biden’s prior actions and current rhetoric suggest much more nuance and a less binary choice but those instincts will need to operate amidst deep bipartisan suspicions of China.

Revealingly, Biden has described China as the US’s principal adversary and sole strategic competitor for leading power status. Plainly, Biden does not want US-China ‘decoupling.’ Absent miscalculations (such as an attempt by China to invade Taiwan) Biden will seek to avoid a descent into a de facto US-China Cold War because he knows that both countries are now economically co-dependent, both are critical to the survival of global capitalism, and only the actions of both can address (as noted) certain global commons challenges. Biden is deeply skeptical of the value of Trump’s much touted trade ‘wars,’ particularly but not only with respect to allies like Canada since US tariffs on imports are largely paid by US consumers of those goods. He realizes that the much touted US-China tariff ‘war’ was ineffective without a larger coordinated strategy aligned with others equally affronted by China’s stance on trade and intellectual property protections.

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.’ He will treat China as hostile power/strategic competitor/ally as needed to advance particular US goals. A 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 actions against the status quo, while simultaneously signaling that it wants to cooperate

¹⁸ See, e.g., Hal Brands and Jake Sullivan, “China has two paths to global domination,” *Foreign Policy*, May 22, 2020.

on joint efforts to reduce the threat of climate change, terrorism, the spread of weapons of mass destruction, or missile launches by North Korea.

The US's newly chastened view of China on matters of trade and finance will require comparable multi-track approaches with respect to investment issues involving China. Biden's Committee on Foreign International Investment in the US (CFIUS) will continue to discourage the entry of any number of Chinese enterprises (but only when these present genuine data privacy or other national security issues) while keeping open (admittedly now remote) prospects for bilateral trade and investment pacts with China contemplated in the early Obama administration.

Biden will treat China as a strategic competitor – not fellow rule complier -- with respect to, for example, aid and infrastructure development projects in the developing world. His administration is likely to continue to view with great suspicion China's formidable Belt and Road Initiative (BRI). While Biden may not accept the simplistic posture that BRI initiatives present purely exploitative 'debt traps' for LDCs, he understands that the BRI effort – like decades-old US AID programs as well as perennial Commerce Department efforts to encourage outgoing US investment -- are tools for 'geoeconomic influence' as well for winning hearts and minds.¹⁹ He also understands that US businesses, like Chinese SOEs, are powerful market tools for spreading industry standards that favor certain values and need to compete with the Chinese juggernaut if, for example, commerce dependent on big data can be expected to protect consumers' privacy.²⁰

¹⁹ See, e.g., Philippe Le Corre, "China's Rise as a Geoeconomic Influencer: Four European Case Studies," Carnegie Endowment for International Peace, Working Paper (Oct. 2018).

²⁰ See, e.g., Matthew S. Erie and Thomas Streinz, "The Beijing Effect: China's Digital Silk Road as Transnational Data Governance" (forthcoming 2021).

(3) Deep skepticism of the WTO and ‘free trade’ agreements

Multi-track approaches at the bilateral and multilateral level and with different groups of states will also define continued turbulent relations between a Biden administration and members of the WTO. The US’s disenchantment with the WTO as a forum for negotiating new trade rules to respond to new realities, as a place to monitor states’ trade policies, and as an effective forum for resolving trade disputes between its 164 members predate the Trump administration and will outlast it. There is bipartisan consensus within the US that while the world has changed, the WTO has not. While Trump may have been the first president to repeatedly threaten to defund and ultimately leave the WTO, bipartisan Congressional resolutions to support such an exit have been introduced in Congress and retain support.

Biden, like the US business community, will oppose any such talk and will re-engage with WTO reform efforts in order to prevent a slide towards disastrous protectionist actions (particularly at a time when countries need to facilitate trade on COVID-related goods). But steering a centrist path on the WTO will be especially daunting given not only the Sanders/Warren wing of his party, but concerns across the aisle that the WTO’s rules are ill-suited to liberalize trade in the age of digital trade, e-commerce, subsidies and forced tech transfers by non-market economies and their SOEs, unfair special concessions given to relatively well-off self-identified ‘developing countries’ like China, and repeated failures by WTO members to notify fellow WTO members of their contestable trade actions.²¹ While President Trump contended (falsely) that the US lost most of its cases at the WTO, his more sophisticated US Trade Representative Robert Lighthizer argued, more accurately, that, over time, the WTO’s

²¹ See, e.g., USTR, Report on the Appellate Body of the World Trade Organization, Feb. 2020; Marianne Schneider-Petsinger, “Reforming the World Trade Organization,” Chatham House, Research Paper, US and the Americas Programme, Sept. 2020.

Appellate Body had absorbed all the regime's law-making capacity and that the WTO had ceased to be an effective forum for negotiating new rules needed to protect the world from new forms of protectionism and new ways to steal old and new forms of intellectual property.

Which part of the substantial WTO reform agenda that Biden inherited he will act on remains a guessing game.²² Much turns on who will replace the current head of USTR, Robert Lighthizer (or indeed whether he will be replaced in the immediate short term). Unlike President Trump, who seemed content to throw grenades at the WTO and watch it disintegrate, the Biden administration will probably make specific proposals to resolve the most immediate problem, namely the US's refusal to agree to the appointment of Appellate Body members. The current paralysis of WTO dispute settlement threatens to return us to a world of tit-for-tat retaliatory tariffs imposed by the economically powerful against the weak. Although Trump reveled in that outcome, Biden is likely to want to avoid such races to the bottom.²³ His likely first instinct will be to work with others, particularly the EU, to work out common transatlantic proposals that could eventually be brought to the wider membership to seek consensus on ways to reform WTO dispute settlement and devise new WTO rules that better monitor states' trade policies, define and limit the number of 'developing nations,' and enhance trade discipline with respect to state-owned enterprises.²⁴

Despite widespread skepticism of 'trade agreements' that accelerated in the age of Trump, a Biden presidency would probably seek renewal of fast-track authority (which expires

²² For an overview of the many issues, see Schneider-Petsinger, *supra* note 21.

²³ A Biden administration is not likely to alienate allies such as Canada by imposing, as did the Trump administration, tariffs on steel and aluminum on dubious legal grounds.

²⁴ As is suggested by EU concept papers on WTO reform, the EU shares many if not all of the same concerns with the WTO. See, e.g., EU Concept Paper on WTO Reform, Sept. 18, 2018, available at <https://www.wita.org/atp-research/eu-concept-paper-on-wto-reform/>.

in mid-2021) to enable his administration to have the credibility to conclude bilateral or regional trade agreements. This will involve a high profile battle in Congress – and among Democrats themselves – with no assurance that Biden will win. Moreover, even if he does, it remains highly unlikely that Biden will actually conclude such agreements in the short to medium term – no matter how much need there may be for them while the WTO remains at a stalemate.

Biden is not otherwise likely to disturb the existing trade status quo. He will not disturb the consensus achieved in the USMCA (including the decision to eliminate investor-state dispute settlement between the US and Canada and cut it back dramatically even between US and Mexico). Indeed, should a President Biden attempt to restore some kind of equilibrium vis-à-vis China by returning to the Trans-Pacific Partnership that Trump foolishly abandoned in his first days in office, that return is likely to come with attempts by the US, either through its own reservations or through a much more difficult renegotiation effort, to make changes inspired by the USMCA and respond to demands by ‘progressive’ Democrats. Thus, US re-entry into the renamed Comprehensive and Progressive Agreement for Transpacific Partnership might be conditioned on changes to investor-state dispute settlement and additions to protect labor rights and the environment (including to mitigate climate change).

(4) Continued use of sanctions on ‘bad’ actors

A Biden administration is likely to keep in place many existing sanctions (particularly on China and Russia) but advance different rationales for them. A President Biden will keep Russian sanctions in place (and possibly escalate them) because of Russia’s interference in US elections, its seizure of Crimea, and the bounties put on US soldiers in Afghanistan.²⁵ Continued

²⁵ See, e.g., David Kris, “What Hard National Security Choices Would a Biden Administration Face?,” Lawfare, May 27, 2020.

trade sanctions on China may be premised on the Hong Kong security law or China's treatment of Uyghurs -- and less on the contention that China 'manipulates' its currency or was responsible for spreading the 'China virus.' Indeed, given the level of bipartisan hostility towards China the Biden administration is likely to be under some pressure to follow the lead of Canada's Parliamentary Committee and brand China's actions towards the Uyghurs as "genocide" (as well as a crime against humanity). At a minimum, he is likely to join US allies who have been pressing UN Secretary-General Guterres to be more vocal about Xinjiang in the hope of securing access for the UN Office of the High Commissioner for Human Rights. This would be a 180 degree shift from the lack of US engagement on this critical human rights violation and certainly from President Trump's reported statement to Xi Jinping that building Uyghur internment camps was "the right thing to do."²⁶

(5) Keeping international organizations at bay

The Biden administration will walk back from the US's recent high profile departures from multilateral forums like the UN Human Rights Council and the WHO. It will also, as noted above, reengage with other UN system organizations that Trump ignored or disparaged, like the ILO and the WTO. Unlike Trump, Biden realizes that disengagement with the institutions of international law and order weakens rather than strengthens sovereignty.²⁷ Biden also knows, as apparently Trump did not, that the absence of the US from UN system institutions leaves a void that other states, particularly China, are willing to fill – to the US's, and perhaps the world's, detriment.

²⁶ See, e.g., Connor O'Steen, "U.S. and Multilateral Policy Options to Address Abuses Against Uyghurs in Xinjiang," *Just Security*, July 30, 2020.

²⁷ See, e.g., Peter G. Danchin, Jeremy Farrall, et al, "The Pandemic Paradox in International Law," 114 *AJIL* 598 (2020).

But Trump's withdrawals from such forums, however misguided, provide Biden with some leverage to address long-standing US grievances. The Biden administration will attempt to resume global leadership over the tattered remains of the liberal international order by insisting on institutional reforms to make these entities 'work as intended.' His administration will likely continue, for example, Trump's 'UN Integrity' initiative – designed 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 contribution of UN technocratic organizations (including those now led by Chinese nationals such as the Food and Agriculture Organization, ICAO, the International Telecommunication Union, and the UN Industrial Development Organization).²⁸ Under a Biden administration this initiative to protect the integrity of UN system organizations might be perceived as something more than a cynical attempt to undermine China's emerging global aspirations. A US effort to protect whistleblowers within the UN system, defend the integrity of UN elections, and empower public servants with apolitical expertise is likely to have more credibility if it is led by a government that actually protects its own whistleblowers, does not undermine the integrity of its own elections, and appears to value and trust experts.

If re-elected to the UN Human Rights Council the US will express displeasure over the Council's recent decision to admit China, Saudi Arabia, and Cuba to its ranks, remind the Council that its membership was supposed to take the human rights records of its members into

²⁸ The special envoy charged with enhancing UN Integrity was Mark Lambert. See Colum Lynch, "U.S. State Department Appoints Envoy to Counter Chinese Influence at the U.N.," *Foreign Policy*, Jan. 22, 2020. Lambert attempted to call attention to, among other things, the pressure tactics deployed by China with respect to elections to UN bodies, including a successful effort by the US and allies 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 UN system organizations. See generally, Yaroslav Trofimov, Dreew Hinshaw, and Kate O'Keeffe, "How China is Taking Over International Organizations, One Vote at a Time," *Wall Street Journal*, Sept. 29, 2020.

account, resist China-led efforts to turn that 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.²⁹

As a re-engaged member of the WHO, the US will pay the dues that Trump withheld but also attempt to use its financial leverage over the organization to back institutional reforms and secure a genuine, candid assessment of what the organization did wrong from the time the first COVID case emerged in China through to the present day. A president elected largely because his predecessor failed 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.³⁰ The US's new 'health care' president is likely to take seriously the WHO's Constitution's premise that there is a fundamental right to health and that protecting peoples' health is a global public good and not a zero sum game. A President Biden will agree with the premise of the WHO 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 inhabitants. Like China's President Xi he will take a step against 'vaccine nationalism' by contributing to and joining COVAX – the alliance that ensures that any vaccine developed by contributing rich nations will also be available to 92 low income countries based on need and vulnerability.

But the WHO's failings in the face of over 40 million infected worldwide and over a million dead will drive the Biden administration to back a number of WHO reforms suggested (but ignored) in the wake of prior institutional failures such as Ebola. Rather than leave the only

²⁹ Compare Ted Piccone, "China's Long Game on Human Rights at the United Nations," Foreign Policy, Brookings, Sept. 2018, available at <https://www.brookings.edu/research/chinas-long-game-on-human-rights-at-the-united-nations/>.

³⁰ See, e.g., Joia Mukherjee, "Global Health is National Security," Just Security, Sept. 30, 2020; Council on Foreign Relations, "Improving Pandemic Preparedness," Independent Task Force Report No. 78.

organization we have designed to handle pandemics, Biden will try to fix it. The US is likely to support structural reforms within the WHO to make proclamations of Public Health Emergencies of International Concern (PHEICs) more effective and transparent, enable greater input by front line medical whistleblowers and personnel (including with respect to the best available ways to prevent the spread of the disease), provide more effective accountability for states that fail to adhere to the life and death obligations required by the International Health Regulations, and enable name/shame techniques against states that either fail to act (a la Trump) or overreact at the expense of human rights through disproportionate or discriminatory quarantines, travel bans, or lockdowns.

(6) Keeping international courts and tribunals at a distance

Biden will only tinker at the margins with respect to the US's traditional reluctance to submit to supranational forms of adjudication. He is not likely to resolve the stalemate over the WTO's Appellate Body merely by agreeing to the appointment of new Appellate Body members but will insist on extracting a quid pro quo for bringing the WTO's dispute settlement system back to life. Biden is not likely to propose, as has the USTR's Lighthizer, that the WTO's Appellate Body be abandoned in favor of a single tiered arbitration mechanism not correctable on appeal but subject to being overruled by the WTO members in exceptional cases.³¹ But he is more apt to re-examine proposals for more modest reforms. These include those summarily rejected by Trump that have been backed by a group of states led by Amb. David Walker of New Zealand. Those reforms include limiting to 90 days the time frame for the Appellate Body to conclude appeals, increasing the number of Appellate Body members to 9 and requiring they

³¹ Robert E. Lighthizer, "How to Set World Trade Straight," Wall St. J., Aug. 21, 2020, at 15.

serve a single non-renewable term of 8 years, clarifying that the Appellate Body would address only issues that are necessary to resolve disputes, and establishing an annual meeting between WTO members and the Appellate Body to address systemic jurisprudential issues such as whether Appellate Body rulings should be treated as de facto precedent.

One of the most trenchant matters of WTO ‘reform’ – getting China to agree that it should no longer be treated as a ‘developing state’-- might be subject to other trade-offs that go through the WTO’s dispute settlement system. China might be persuaded to acquiesce to such a change if the US were to accept recent panel rulings like *US-Tariff Measures on Certain Goods from China*.³² That ruling, which found US tariff measures taken in response to IP complaints directed at China illegal, echoes other recent decisions that require WTO states attempting to use the ‘essential security’ exception of the WTO (Art. XXI) to do something more than cite to ‘security’ as magical dispensation from third-party scrutiny. It is possible that a more sober USTR might accept the old-fashioned idea that the US itself gets reciprocal benefits when legally implausible arguments to defend protectionist actions (e.g., US tariffs on steel and aluminum from Canada) fail to get traction.³³ Accepting such rulings might begin to convince other WTO members that the US still supports a rule-based system for trade.

But while the US’s wariness with respect to what it called “persistent overreaching” by WTO adjudicators might be overcome with institutional reforms, the US government will not become a sudden convert to the virtues of other international courts. A Biden administration is no more likely than President Trump to sign onto the compulsory jurisdiction of the ICJ, even while the US is likely to continue to be one of that Court’s most frequent (if reluctant) litigants.

³² *US-Tariff Measures on Certain Goods from China*, Panel Report, WT/DS543/R (Sept. 15, 2020).

³³ See, e.g., Government of Canada, Steel and Aluminum, Notice, Oct. 5, 2020, available at https://www.international.gc.ca/trade-commerce/controls-controles/steel_alum-acier_alum.aspx?lang=eng.

The expected re-emergence of human rights as a higher foreign policy priority in a Biden administration will probably not produce a change in the US's traditional reluctance to submit to forms of international adjudication for such purposes. A Biden administration will not want to draw Republican ire by attempting to submit to the jurisdiction of the Inter-American Court of Human Rights or even by accepting the possibility that individual complaints can be brought against the US before the Human 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 or other modes for arbitrating law of the sea issues even though it seems clear to maritime experts that the net benefits of adjudicating important US interests (such as the right of innocent passage through the territorial sea and transit rights elsewhere) vastly exceed the risks that the US may lose on other matters. The US – no less than China – is unlikely to use international courts or tribunals for such purposes.

Nor should anyone expect a President Biden to seriously back many proposals for new global courts – 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 have been endorsed by prominent European states.³⁴ While the US deserves credit for launching, through innovative Security Council action, a number of international criminal courts (most prominently the ICTY and ICTR) and for sending two situations (Libya and Sudan) to the International Criminal Court (ICC), none of those posed real prosecution risks for US nationals.

³⁴ See generally, Jose E. Alvarez, "Mythic Courts," iCourts Working Paper Series, No. 2014 (2020), available at <https://www.iilj.org/publications/mythic-courts/alvarez-mythic-courts/>.

While Biden will not attempt to re-sign, much less ratify, the Rome Statute for the ICC, he can be expected to adopt a kinder, gentler policy towards it. The John Bolton-inspired executive order penalizing anyone who dares work for the ICC will be among the first of many Trump era executive orders to go.³⁵ But the prospect that the ICC is intent on pursuing criminal prosecutions in Afghanistan for Bush-era torture or against Israelis for actions in Palestine continues to make the ICC a political third rail that few US politicians dare cross. Biden will tone down the anti-ICC rhetoric and, like Obama, provide some assistance to the Court quietly and behind the scenes within the limits set by the American Servicemembers Protection Act (signed into law in 2002 by President Bush).

A Biden administration is likely to participate actively (as did high level Obama administration officials like Harold Koh to some effect) in the ICC's Assembly of State Parties since that is that is the principal forum for influencing the Court's policies and financing for both ICC parties and non-parties. Within the Assembly, the US will probably turn to different arguments to explain continued US resistance to politically sensitive issues like Afghanistan. The US 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 US 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 likely to face continuing pressure to criminally prosecute

³⁵ For worldwide criticism of that Trump executive order, see, e.g., Pranshu Verma, "Allies Balk at U.S. Sanctions on Rights Lawyer," NY Times, Oct. 19, 2020, at A13.

former President Trump to simultaneously reopen prosecutions directed at another former Republican administration.)

Biden officials may also address the ICC's more controversial investigations (both in Afghanistan and in Palestine) by encouraging changes in how the Court (or its Office of the Prosecutor) prioritizes cases or investigations. It is likely to join current proposals made by an independent group of experts commissioned by the Assembly that would require higher levels of 'gravity' and more definitive findings of 'feasibility' before investigations are begun.³⁶ Of course, the US 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 UN Charter.³⁷

On this and other issues, President Biden will rely on familiar arguments that justify US 'exceptionalism' (including its resistance to international courts and tribunals) on the basis of the US's 'exceptional' role and global burdens. While such arguments are not likely to win many new converts, diplomats around the world who are tired – like the rest of us -- of four years of unpredictable late night tweets filled with fire and rage will be relieved by this return to Obama era jaw-boning/engagement in lieu of abrupt termination of dialogue via tweet.

(7) Rest in peace, Responsibility to Protect

Biden was reportedly never a fan of Obama's decision to 'lead from behind' with respect to NATO's action in Libya. Like Trump, he will be adverse to starting new or staying in old never-ending wars, even for humanitarian reasons. He will find no resistance on that score from

³⁶ See Independent Expert Review of the International Criminal Court and the Rome Statute System, at paras. 633-650 (Sept.30, 2020).

³⁷ Harold Hongju Koh and Todd F. Buckwald, "The Crime of Aggression: The United States Perspective," 109 AJIL 257 (2015).

fellow veto-wielding Security Council members Russia and China and, I suspect, only token resistance by fellow NATO members. Whether that is a positive or negative development turns on whether one is a fan of R2P, whether or not it is invoked by the Security Council.³⁸

At the same time, his administration can be expected to be more genuinely engaged in trying to make the Security Council relevant – if not ‘great’ – again. A Biden administration might be inclined, for example, to use the Security Council to send new situations to the ICC but would need to counter predictable resistance by Russia and/or China. Trump resisted Security Council action during the current COVID crisis – including the possibility of declaring the pandemic (like Ebola before) a threat to international peace and (human) security – on the petty ground that the Council needed to blame China in any resolution for its ‘China virus.’ A President Biden would be more amenable to using the Council should this promise to make states take more seriously their obligations to protect the health of their populations and the rest of us. His administration would also likely support Council action that anticipates additional funding for UN or regional peacekeeping missions to facilitate pandemic prevention and treatment, greater aid by international financial institutions, and more consistent interactions among both UN specialized agencies (as between the WHO and ICAO and its stakeholders such as airlines) or between UN system organizations and entities like the Vaccine Alliance, GAVI.

(8) ‘Ironclad’ security commitments to Israel

Biden’s expected recommitment to a ‘two-state’ solution encounters permanent obstacles left behind in Trump’s wake. While Biden is widely expected to voice stronger commitments to protecting Palestinian rights in any Middle East peace deal, including by rejecting Israeli

³⁸ This author has never been a fan. See, e.g., José E. Alvarez, “The Schizophrenias of R2P,” in Human Rights, Intervention, and the Use of Force (P. Alston and E. MacDonald, eds.) (2008)

annexation of West Bank land needed to establish a future Palestine, this path is hindered by changes on the ground that he cannot or will not undo without (unlikely) Congressional acquiescence. Despite considerably more icy relations between himself and Netanyahu, Biden has indicated that he will not relocate the US embassy (now in Jerusalem). He is also not likely to attempt to reopen the PLO's diplomatic mission in Washington and has expressed support for additional 'normalization of relations' or 'peace agreements' like those Trump encouraged with Sudan, Bahrain, and the UAE. 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 within the US. (They are also examples of Trump's preference for bilateral as opposed to multilateral arrangements, another tendency that might outlast his time in office.) It is not clear, however, whether those peace agreements actually advance a broader Middle East peace deal. For many, Trump's actions in the region have undermined any prospect that the US can ever be seen as an honest impartial broker to make such a deal possible.

The 'ironclad' commitment to Israel's security extended in the Democratic Party Platform will also continue to complicate US relations with forums that will remain very sympathetic to Palestine such as UNESCO and the UN General Assembly.³⁹

Fratelli Tutti: turning to friends

³⁹ Indeed, UNESCO's decision to embrace Palestine as a member in 2011 (despite strong opposition by President Obama) triggered US statutes authorizing the US to withhold funds from international organizations that do just that. Given the mounting arrears to the organization, the Trump administration's decision to withdraw from the organization (which took effect in 2018) was not unexpected. A President Biden effort to have the US rejoin UNESCO would need to surmount considerable Congressional antipathy, including within the Democratic party.

If there is any theme that is likely to define the Biden presidency it will be its reliance on allies, his reluctance to go it alone. This may be the single biggest change that a Biden administration will bring. It is a significant counterweight to the eight trends in favor of stasis canvassed above.

Biden's marked departure from Trump's erratic belligerence, which will remind his co-religionists of Pope Francis's call for *fratelli tutti* (fraternal openness), is grounded in geopolitical realities.⁴⁰ The US is no longer the sole superpower on the block. As noted above, it needs the help of others, including its chief geopolitical rival, China. But the reach for 'fratelli' reflects Biden's personality and his inter-mestic agenda.

In every foreign policy speech given by Biden, every paper published by his most prominent foreign policy advisers, the starting point for resolving every difficult challenge involves reliance on existing allies and a search for new ones. For Biden a key source of US power over competitors like China is the power of its alliances. That is Biden's go to response when asked about how he would respond to continued threats from North Korea; Russia's actions in Ukraine; common threats to democracy posed by cyberattacks; or China's malign behavior in the South China Sea, towards Hong Kong or Taiwan, or with respect to trade or intellectual property.⁴¹

His response to the 'unfolding Pacific Century' – and the rise of China -- is to strengthen ties with key allies in the region, including Japan, South Korea, and Australia, and to have

⁴⁰ Encyclical Letter, Pope Francis, *Fratelli Tutti*, Oct. 3, 2020. The Pope defined the term as "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." In a speech at Warm Springs, Georgia on Oct. 27, 2020, seen as his closing message in his campaign, Biden cited this encyclical, including Pope Francis's warning against "unhealthy populism . . . appealing to the basest and most selfish inclinations of certain sectors of the population." (para. 159, Encyclical).

⁴¹ See, e.g., Joseph R. Biden, Jr., "Why America Must Lead Again," *Foreign Affairs*, March/April 2020.

‘robust engagement’ with regional institutions like the ASEAN. His response to China’s new military aggressiveness will predictably be greater commitment to the care and feeding of the Quadrilateral Security Dialogue (the QUAD) between the US, Japan, Australia, and India. That effort among democracies – which includes joint military exercises of impressive scale – is symptomatic of another recent trend that will outlast Trump: recourse to relatively non-institutionalized alternatives for securing cooperation outside the UN system when that system fails.

Of course, Biden will not usually be turning to all or *tutti* fratelli. He will embrace distinct friends for distinct reasons. A Biden administration will resort to a “reinvigorated transatlantic partnership” to achieve greater energy security while combating climate change and to secure common solutions to governing big data flows while respecting both freedom of expression and data privacy. It will reach for Iraqi help to ensure a lasting defeat of ISIS; European partners to reinvigorate diplomacy to protect the humanitarian needs of Syrians; and hemispheric cooperation (as in forums like the OAS or trilateral talks among Canada, Mexico and the US) to address announced Biden priorities in this hemisphere, namely attacking the root causes of migration in Central America, protecting the Amazon from deforestation, and assisting Caribbean and Central American states to adapt to the impact of climate change.

All this would be insipid pabulum but for the fact that Biden seems to mean it and that this return to normalcy is so dramatically at odds with the unilateralist inclinations of his predecessor. The search for ‘fratelli’ is inherent in Biden’s tendency 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 QAnon, and deference to experienced diplomats over businessmen (and they have been mostly men) 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 (and often unsavory) benefits favored by his ‘art of the deal’ predecessor. Whether the Biden approach will be more successful than his predecessor’s specialty -- transactions that exchange short term profits on Trump businesses for a legitimizing photo-op with a US President -- remains to be seen. The success of Biden’s deal-making may depend on whether others across the table are equally willing to extend their time horizon for measuring ‘success’ to take into account the reciprocal benefits Biden has in mind.

A tempered ‘restoration’

As all this suggests, a kind of US international law restoration is indeed coming but it will occur in a world transformed by Trump’s years in office, anti-democratic trends around the world (including in established democracies), and disenchantment with the international legal order, including the UN system. The US and the world has changed in four years. This is not only because of an on-going pandemic that has produced excess deaths, economic calamity, and human rights violations for some of the world’s poorest and most vulnerable (e.g., migrants, children, the elderly, prisoners, racial minorities). It is also because we have witnessed a paralyzed UN Security Council unwilling or unable to take any action in response, even given the likelihood that the longer the crisis continues, the more likely it is that COVID-induced famines and migrations will threaten the internal and external peace among nations. Over the past few years it has become clearer than ever before that the post-WWII legal order that was supposed to address problems of the global commons through multilateral cooperation repeatedly fails 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 – which failed to prevent the spread of COVID among its own people -- to improve them.

This is one reason why a Biden administration is not likely to result, as some have suggested, in an Obama ‘third term’ with respect to foreign affairs. To be sure, President Biden will, like Obama, attempt (once again) to close down Guantanamo, reassert Presidential level scrutiny on targeting only specific and ‘proportionate’ drone targets, renounce (once again) the use of torture, attempt to revive the moribund two-state solution with respect to Israel and Palestine, attempt to revive the Joint Comprehensive Plan of Action (JCPOA) (aka ‘the Iran Deal’), return to the Paris Agreement, and re-engage with the UN and its human rights system.⁴² But even these predictable efforts to reset the clock confront new realities and will take different shapes.

Given Iran’s apparent march toward nuclear weapons capacity in the wake of Trump’s unilateral withdrawal from, the clicking clock on that original deal, and the US’s lost credibility among all JCPOA parties, the Iran Deal would need to be re-negotiated – at a time when European allies and Iran itself can no longer be sure that the US will over the longer term respect *pacta sunt servanda*.⁴³

Biden’s effort to embrace science and the reality of climate change confront new realities that make that effort both harder and easier. Trump’s denial of climate change, war on even those US states that have attempted to do something about it on their own, and his efforts to ‘decouple’ from China on all fronts (including Obama’s climate change side agreement with

⁴² See, e.g., Alex Ward, “Joe Biden’s plan to fix the world,” Vox, Aug. 18, 2020.

⁴³ For description of the polarization of views generated in the wake of Trump’s actions on the JCPOA, see, e.g., Marc Welle, “The Controversy about the Iranian Nuclear Sanctions Snapback,” ASIL Insights, Oct. 19, 2020.

China) have undermined any claim that the US had to leadership on that issue. At the same time, new commitments to achieve carbon neutrality by 2050 by Japan, the world's fifth largest emitter of greenhouse gases, for example, 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 US states like California and industry leaders.

More generally, the Trump presidency has made even a return to Obama era policies more difficult because it managed to eviscerate trust that the US will keep its word or that, having given it, the US can actually do what it promises. This alone will complicate any renewed efforts to seek the help of others on climate change, closing Guantanamo, or rendering suspects accused of terrorism. It may take decades to restore a reputation lost in four. Even the US's traditional allies are aware that nearly half of US voters (and a substantial number of their representatives in Congress) supported an extremely unilateralist president – and that over half of US voters may yet elect another chief executive who is just slightly more competent. That reality means that NATO members will welcome Biden's embrace but continue to assume that in the future they will need to have a plan B for securing Europe. No one can be sure how much time it will take to regain the trust of traditional allies whom we have spurned and reset the tone of discourse with authoritarian rulers newly unfriended (such as Saudi King Salman and Mohammed bin Zayed, the Philippine's Duterte, Brazil's Bolsonaro, or Turkey's Erdoğan).⁴⁴

Making diplomacy professional again

⁴⁴ For an argument that Biden, who has, as a candidate, promised to defend democracy and human rights abroad, 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 real politick view of such leaders, see Nahal Toosi, "Joe Biden's First Diplomatic Fight Will Be at Home," Politico, Oct. 9, 2020.

Another factor that complicates attempts to return to Obama era policies is that, over the past four years, there has been massive change in the US 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 who attempted to uphold their constitutional oaths.⁴⁵ Many distinguished public servants have resigned or have been forced out. 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. As a result, the US foreign service has reportedly experienced the biggest drop in applications in a decade, thereby reversing any progress towards recruiting a more diverse workforce. Today, only 4 of the US's 189 ambassadors are Black.⁴⁶

The absence of foreign policy and intelligence expertise will be keenly felt, particularly in the early days of a new administration before new positions throughout the federal government are filled. The Biden administration will undoubtedly seek to reassert the value of apolitical intelligence, foreign policy expertise, and compliance with ethical standards.⁴⁷ It can be expected to take seriously the need to 'race' US foreign policy so that its diplomats look like the US itself – with expected knock-on benefits in making the US a more opponent of structural racism around the world, by calling for greater diplomatic attention to regions and countries US

⁴⁵ For a description of some of the adverse consequences, see, e.g., Alex Joel, "Seek and Speak the Truth," *Just Security*, Apr. 16, 2020.

⁴⁶ See William J. Burns and Linda Thomas-Greenfield, "The Transformation of Diplomacy," *Foreign Affairs*, Sept. 23, 2020.

⁴⁷ See Kris, *supra* note 25.

diplomacy has long ignored, and by treating racial justice as a critical component to effective efforts to promote peace, security, and democracy.⁴⁸ But ‘making diplomacy professional again’ – even if Biden were to distribute ‘MDPA’ hats in lieu of MAGA ones – is not the sexiest of projects. Restoring the US diplomatic corps will be a tremendous lift for an administration facing unprecedented other challenges with far greater political salience.⁴⁹

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.’ It may take some time for Trump era civil servants to accept that, for example, the United States’ all-out war on the ICC is passé – particularly if, as predicted, such a change occurs sub-rosa without public fanfare. Trump’s ‘deep state,’ ironically, will 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 US 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 a President Biden has every incentive to reverse Trump’s disastrous disrespect for foreign policy expertise with all due speed, he is also likely to be cautious about doing things that encourage US adversaries to think

⁴⁸ See, e.g., Ruth Gordan, “Racing U.S. Foreign Policy,” Just Security, July 13, 2020; Jeffrey Smith and Richard Ashby Wilson, “Researchers on Atrocity Prevention Warn: US on Path to Widespread Political Violence,” *id.*

⁴⁹ These difficulties are likely to prove more grave to the extent Biden appointees face resistance or considerable delays in securing Senate confirmation and his administration needs to resort to ‘acting’ appointments with more limited clout.

that all they need to do is wait out his term for another 180 degree reversal brought on by a new Republican president.

The tempered ‘restoration’ of international law described above suggests that Harold Koh’s conclusion, circa 2017-18, that the Trump presidency leads only to ‘pyrrhic’ short term victories against ‘resilient’ international law was a tad premature and overly optimistic.⁵⁰

Koh’s hopeful take on Trump’s impact on the US judiciary and US foreign relations law, while not the subject of this essay, is a case in point. Trump’s notorious success in appointing conservative (and often relatively young) judges to life time positions not only on the US Supreme Court but on lower federal courts is likely to fuel reliance on doctrines that make it ever more difficult for advocates to deploy international law as a sword – the very essence of what Koh calls ‘transnational legal process.’ Trump-era judges, all of whom survived the gauntlet of close Federalist Society scrutiny, include many ‘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”).⁵¹ His many judicial appointments are likely to: demand clear statutory text to incorporate customary international law, require explicit self-executing treaty language before permitting such treaties to be invoked in US court, be exceedingly skeptical of using foreign or international law to interpret the US Constitution, and revive federalist concerns with the scope of the treaty power that impact on the President’s power to override US states’ laws and even the scope of Congress’s power to enact legislation that is ‘necessary and proper’ to give effect to a treaty. The new 6-3 Supreme Court ‘conservative’ majority may even be activist enough to revive the once discredited idea of

⁵⁰ See Koh, *Trump v. International Law*, *supra* note 2.

⁵¹ *Id.*, at 2.

subject-matter limits on the scope of the treaty power, consistent with Justice Thomas's concurring opinion in *Bond v. United States*.⁵²

Despite the US's dwindling soft power, judges around the world still pay attention to what US 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 skepticism towards international law shared by many Trump judges may prove to have normative ripples elsewhere – thanks to the 'transjudicial forms of communication' on which the hopes of some liberal international lawyers once rested.⁵³ Of course, US judges' views of international law will be most keenly felt with respect to the foreign affairs powers of the executive and the interpretation of US law. Absent highly unlikely structural changes to the US federal judiciary (including the number or tenure of Supreme Court justices), there is little that a President Biden can do to eliminate the possibility that even his foreign policy initiatives, while traditionally accorded considerable deference, will encounter resistance by the third 'less dangerous' branch.

As we approach the end of Trump's tenure, we can better appreciate just how much his administration promoted new and revived old isolationist tendencies in US foreign policy that will probably outlast him. We can also see that his adverse impact on international law has gone global. Trump fueled global skepticism in the UN system and particularly in international human rights everywhere.

⁵² *Bond v. United States*, 572 US 844 (2014), J. Thomas, 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). As commentators have noted, this suggests a ticking time bomb that may blow up the US's capacity to enter into human rights treaties, for example.

⁵³ See, e.g., Anne-Marie Slaughter, "A Typology of Transjudicial Communication," 29 *Univ. Rich. L. Rev.* 99 (1999).

All of this will make the expected ‘restoration’ of international law within the US difficult under the best of circumstances. As discussed here, that effort is hemmed in by structural realities – a divided Congress; path dependencies among federal bureaucrats; legal constraints on the quick reversal of federal regulations; a more resistant federal judiciary; and loss of faith in the credibility and competence of UN system organizations as well as the US.

These realities pose challenges for those of us who have emphasized the capacity for international law to overcome its state-centric origins in pursuit of global community interests.⁵⁴ Indeed, the fear expressed in Koh’s articles – that eight years of Trump could permanently overcome international law’s resiliency – should give us pause. If a single US President can dismantle the nearly 80 year effort to construct the post-WWII international legal order, that order is far more fragile, and political realism more resilient, than many of us thought. Trump reign provides a lesson in hubris – not only for Trump, but for international lawyers generally.

Those who hope for a full return to ‘respect’ for international law under a new US president or that Biden’s election means that the ‘guardrails’ of the international rule of law held (and will now continue to operate as before) need to accept, with due humility, that the US has rarely demonstrated that it respects international law *not of its own making*. While it is a good thing that under a new administration the US will return to more faithful compliance with its own law (such as civil rights laws long in place) and that this will make its actions more consistent with some of its treaty obligations, that is not the same thing as changing one’s own national laws and practices *because* international obligations so demand or *in response to them*. The US routinely insists that others do that. We demand that states hold their nationals responsible for

⁵⁴ See, e.g., Ulrich Fastenreth, et al., ed., From Bilateralism to Community Interest (OUP 2011).

international crimes or that they complying with environmental treaties, for instance. As noted, the US does not practice what it preaches when it comes to holding its own bad actors accountable under international criminal law. And it has the luxury of being ‘in compliance’ with environmental treaties whose terms it deeply influenced from the start. Similarly, the US can take advantage of UNCLOS’s regime on the continental shelf as ‘customary law’ (but without accepting UNCLOS’s rules for submitting at least some disputes to binding adjudication) because a US president (Truman) unilaterally defined it. The same can be said for much else in that convention, such as its 200 mile fishing zone which owes much to a premature US statute that affirmed it long before treaty law played catch-up. The US (along with four other privileged states) has the luxury (and the hubris) to demand that all states comply with Chapter VII decisions by the UN Security Council, including possibly to respond to COVID-19 or future pandemics – confident that its veto power protects it from unwanted sovereign intrusions imposed on others. Whether under Bush, Obama or Biden the US argues that killing alleged terrorists through the use of drones is somehow more legal than torturing them.

The examples of how international law, and its many gaps and ambiguities, were designed with US interests in mind are endless. It is shocking just how much Trump ignored this fact and how hard the US’s new president will have to work to convince other US politicians that this remains the case.

We can all applaud that Biden’s response to ‘inter-mestic’ concerns will enable the US to have somewhat greater credibility with respect to human rights – but let’s not pretend that the US’s failure to actually enter into a vast number of human rights treaties or to enter them with a litany of reservations, understandings, and declarations does not matter. Becoming a party to the Torture Convention or the ICCPR without questionable reservations that limit their underlying

rights to those protected under existing US law and with a full embrace of their individual complaints mechanisms would enhance the prospect that any future US president or any future Congress will not be tempted to violate those rights. That kind of ‘restoration’ would go far in convincing the world that the US sees international law as real law – and not merely a cudgel against others.

From this broader perspective, Biden’s election returns us only to what is ‘*normal*’ *behavior for the US*. This ‘restoration’ will seem quite exceptional and possibly hypocritical to many others with less power.

A return to faith?

Despite these sobering caveats, Biden’s hard-fought and narrow win will bring justified signs of relief among international lawyers and within the US foreign policy establishment. At the very least, Biden’s election will forestall a fearsome slide towards ever greater international disorder. It returns the US to relatively more stable relations with nations entitled to respect. Those nations, like most prior US presidents, try to explain, however implausibly, how their actions comport with international law. The Trump administration rarely bothered to do even that much. At the very least Biden’s election will bring international lawyers back into ‘the room where it happens.’⁵⁵ What they do when they get there remains a work in progress.

The 2020 election demonstrates once more that US politics continues to be defined by sharp divides between ‘values’ voters who often identify as evangelical Christians and secular,

⁵⁵ Lin-Manuel Miranda, “The Room Where It Happens,” Hamilton. Of course, this assumes that the international lawyers that have the ear of the new administration are those in the US ‘mainstream’ (like Harold Koh) and not ersatz ones like John Yoo or John Bolton. As Anthea Roberts has reminded us, it is also clear that differences among international lawyers around the world exist (even among those associated with the ‘transatlantic alliance’) and can be profound. Anthea Roberts, *Is International Law International?* (2017).

largely urban, elites on the east and west coasts. Ironically, the presidential candidate most strongly backed by ‘coastal elites’ turns out to be a practicing Catholic apt to take seriously Pope Francis’s call to defend common humanity (*Fratelli Tutti*) and to protect the planet (*Laudato si*). Our incoming president also seems inclined to take seriously those of us who still have faith that international law and its institutions can help achieve both of these goals.