doi:10.1017/ajil.2025.9

The End of the U.S.-Backed International Order and the Future of International Law

By Monica Hakimi and Jacob Katz Cogan***

Abstract

The international order that the United States has for decades led and maintained is undergoing dramatic change. In this Essay, we explain that international law during this period was constituted with, and dependent on, U.S. power; that the two became (in odd-couple fashion) entwined together; and that, as the international order changes, the international legal system, its content and its architecture, will also inevitably change.

I. Charting the Future

The international order that the United States has led and maintained since the end of World War II is undergoing dramatic change.[1] That order broadly promoted trade, statehood, democracy, human rights, multilateralism, international law, and international institutions. Its specific elements developed and evolved, incrementally and unevenly, through complicated interactions and negotiations among many different participants. Its norms and rules, often severely contested, had global and heterogenous origins and contributors.[2] Still, there is little question that the United States was its principal guarantor and had an outsized impact in establishing, preserving, and sustaining it. The order that for decades defined

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[1] *See, e.g.*, Amitav Acharya, *After Liberal Hegemony: The Advent of a Multiplex World Order*, 31 Ethics & Int'l Affs. 271 (2017); G. John Ikenberry, *The End of Liberal International Order?*, 94 Int'l Affs. 7 (2018); G. John Ikenberry, *Three Worlds: the West, East and South and the Competition to Shape Global Order*, 100 Int'l Affs. 121 (2024); Symposium, *Challenges to the Liberal International Order: International Organization at 75*, 75 Int'l Org. 225 (2021); Richard H. Steinberg, *The Rise and Decline of a Liberal International Order*, *in* Is the International Legal Order Unraveling? 37 (David L. Sloss ed., 2022).

[2] *See, e.g.*, Bandung, Global History, and International Law: Critical Pasts and Pending Futures (Luis Eslava, Michael Fakhri & Vasuki Nesiah eds., 2017); Adom Getachew, Worldmaking After Empire: The Rise and Fall of Self-Determination (2019); Eric Helleiner, Forgotten Foundations of Bretton Woods: International Development and the Making of the Postwar Order (2014); Mark Mazower, No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations (2009); Umut Özsu, Completing Humanity: The International Law of Decolonization, 1960–82 (2023); Odd Arne Westad, The Global Cold War: Third World Interventions and the Making of Our Times (2005).

international policies and practices—what some have called "liberal" or "rules-based,"[3] but we simply call "U.S.-backed"—was, in critical ways, a reflection of and dependent on U.S. power.[4]

The United States' continued commitment to this order, shaky in recent years,[5] is now in serious doubt, and it is clear that the geopolitical contest over what will replace it, already actively in progress,[6] is accelerating. Many states have already asserted and are poised to continue using their own power regionally and globally. The substantive claims and priorities of these states often take aim at key assumptions, organizations, and norms of the U.S.-backed order.[7] Even if they do not, or do not intend to, destroy that order entirely, they are now actively, if haltingly,[8] seeking to constitute an alternative international order that is dissimilar to, and possibly entirely different from, the U.S.-backed one.[9]

As the international order is reconstituted, the international legal system, as we have come to know it, its architecture and content, will also inevitably change. The U.S.-backed order was heavily legalized and institutionalized, especially relative to the international orders that preceded it.[10] International courts, tribunals, and other international institutions, many of them universal in ambition (if not reach), flourished during this period. Subjects that had previously been within the traditional interstate paradigm of international law—such as the use of force, the stabilization of boundaries, the conduct of hostilities, international law enforcement, and arms control—became much more developed and entrenched. Other subjects, which had been considered primarily within states' domestic jurisdictions—including human rights, trade and investment, anti-corruption, health, and the environment—became central to international law. The global economy, supported by an

[3] For discussions and critiques of these terms, see, for example, David Sloss, *Introduction: Preserving a Rules-Based International Order*, *in* Is the International Legal Order Unraveling?, *supra* note 1, at 1–2; John Dugard, *The Choice Before Us: International Law or a "Rules-Based International Order"?*, 36 Leiden J. Int'l L. 223 (2023); and Malcolm Jorgensen, *The Jurisprudence of the Rules-Based Order: The Power of Rules Consistent with But Not Binding Under International Law*, 22 Melb. J. Int'l L. 221 (2021).

[4] We define "power" as "the capacity of one party to a relationship to influence the behaviour of another party to that relationship." W. Michael Reisman, *The Quest for World Order and Human Dignity in the Twenty-First Century: Constitutive Process and Individual Commitment*, 351 Recueil des Cours 95 (2012).

[5] *See, e.g.*, Jack Goldsmith & Shannon Togawa Mercer, *International Law and Institutions in the Trump Era*, 61 Ger. Y.B. Int'l L. 11 (2018); Mark A. Pollack, *Trump as a Change Agent in International Law: Ends, Means, and Legacies*, *in* The Many Paths of Change in International Law 35 (Nico Krisch & Ezgi Yildiz eds., 2023).

[6] *See* Ingrid Brunk & Monica Hakimi, *The Prohibition of Annexations and the Foundations of Modern International Law*, 118 AJIL 417 (2024).

[7] *See, e.g.*, Wayne Sandholtz, *Resurgent Authoritarianism, Rights, and Legal Change*, *in* The Many Paths of Change in International Law, *supra* note 5, at 179; Tom Ginsburg, *Authoritarian International Law?*, 114 AJIL 221 (2020).

[8] It might take some time before any new order emerges, and it is too early to predict what will come next. *See* Patryk I. Labuda, *International Law After the Russo-Ukrainian War: From the* Zeitenwende *to Multipolarity*, 27 Max Planck Y.B. UN L. 587 (2023).

[9] Since the early 2010s, the role of non-Western powers, particularly the BRICS countries, in international relations and to a lesser extent international law has been a popular topic among international relations and legal scholars and practitioners. The inquiry has often focused on whether non-Western countries would reject or embrace international law. *See, e.g.*, William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 Harv. Int'l L.J. 1, 2 (2015). More recent literature seeks to disaggregate the concept of international order and complicate the framework for analysis. *See, e.g.*, Alastair Iain Johnston, *China in a World of Orders: Rethinking Compliance and Challenge in Beijing's International Relations*, 44 Int'l Security 9 (2019).

[10] For a helpful explication of the relationship between international law and U.S. power, see Shirley V. Scott, International Law, US Power: The United States' Quest for Legal Security (2012).

https://doi.org/10.1017/ajil.2025.9 Published online by Cambridge University Press

intricate web of legal norms and institutions, grew at exponential rates, with worldwide, if significantly uneven, effects. And on the whole, states themselves became more, though of course still not perfectly, secure, reversing centuries-long practices of territorial conquest and colonization that had, in their own time, been encoded in a very different international law.[11]

Nothing about this international legal system was inevitable. Though a continuation of a prior era, it was also, in meaningful ways, distinct. Contending visions of international law—for example, "Soviet international law" and the "New International Economic Order"—had to be actively rebuffed or partially integrated to sustain it. And there is little doubt that it, and the order that it helped to create, reflected primarily, though of course not exclusively, the values, priorities, and interests of the United States and U.S. allies, which together exercised disproportionate influence in establishing and maintaining it.

The gradual contemporary turn away from the U.S.-backed order, including now, ironically, by the United States, presents opportunities for both states and non-state actors that have been disgruntled by its policies and processes. Of course, there are many. Whatever might be said of the international orders that preceded it,[12] the U.S.-backed one had its own set of failings. Not least among them was the extent to which it was dominated by the United States. Often enough (how often is a matter of some debate), the United States took liberties that it refused to afford to others. And often enough (again, how often is a matter of some debate), it used its massive power for its own gain, to the detriment of others. Many, from all parts of the world, will say good riddance to an order that did not incorporate, assist, or protect them, that treated them unjustly and unequally, that did not share equitably the material benefits of its economic development, did not assign responsibility for the environmental harms associated with that development, did not sufficiently acknowledge or provide reparation for the legacies of colonialism and imperialism that undergirded it, and did not make good on its universalist promises.[13] In advocating for a different future, those who now push away from the U.S.-backed order often make claims (diverse in their substance) for a better world—but usually not (at least not explicitly) for a world without international law.[14]

We, too, would like to live in a better world and see a lot to criticize in the international order that is now in decline. We do not support all components of, or ourselves romanticize, this order. Neither do we support U.S. dominance in the world, whether in the abstract or as it has actually been exercised over the years. Quite the contrary. We would strongly prefer a more balanced international order, with a much smaller U.S. footprint, and a United States that is less driven by international events and more focused on its vast domestic problems. We also, like many, are skeptical of the massive scale of the U.S. military apparatus, the grotesque disparities in wealth and power in the United States and around the world, the United States' too frequent resort to unilateralism, the large-scale suffering that the U.S. government's actions and policies have caused in much of the world, often without meaningful

[11] *See* Brunk & Hakimi, *supra* note 6.

[12] *See, e.g.*, Ayşe Zarakol, Before the West: The Rise and Fall of Eastern World Orders (2022).

[13] *See* Rebecca Adler-Nissen & Ayşe Zarakol, *Struggles for Recognition: The Liberal International Order and the Merger of Its Discontents*, 75 Int'l Org. 611, 615 (2021).

[14] *See, e.g.*, Cai Congyan, *On the "International Law-Based International Order,"* 44-3 Soc. Sci. in China 20 (2023).

https://doi.org/10.1017/ajil.2025.9 Published online by Cambridge University Press

accountability, and of course the evident hypocrisy that too often marked the gulf between U.S. pronouncements and U.S. practice. This Essay is not a defense of the foreign policy or global dominance of the United States. And it is not a nostalgic idealization of, or elegy for, the international order and legal system that the United States was so instrumental in establishing and that is evidently on the wane.

Rather, we write this Essay to identify what is at stake in, and what challenges are presented by, the rapid decline of U.S. support for the established international order.[15] While the prospect of a new international order with less U.S. dominance has obvious appeal, we worry that many international lawyers and policymakers fail to appreciate the consequences of the shift. Part of the problem, we suspect, is a flawed conception of the ideal relationship between international law and what might colloquially be called "power politics" (or just "power" or "politics"). Many seem to believe that one of the main functions of international law (like public law generally) is to constrain national power and thus that international law must operate at some remove from, or even be independent of, the sources of state power, if it is not to be sidelined, corrupted, or usurped by that power.[16] Indeed, for decades, international lawyers have eschewed or even been disdainful of the role of power in international law.[17] Oscar Schachter noted twenty-five years ago that "many [international lawyers] see power as antithetical to law."[18] More recently, Michael Reisman observed that, "for many students of international law, power is not simply a professionally irrelevant word; it is virtually obscene."[19] Wariness of power is so deeply ingrained in the field that it sometimes seems like the default professional stance.

International lawyers who adopt this conception—skeptical or wary of the influences of national power—no doubt understand that international law is not and realistically can never really be wholly independent of national power. But few seem to acknowledge the extent to which, despite international law's studied indifference to national power in its formal rules, the opposite is true. International law can only ever be interdependent with other sources of power. It (like law generally) cannot be "antithetical" or "irrelevant" to power,

[15] For some prior discussions of power, specifically hegemony, and international law prompted by the fall of the Soviet Union and the unipolarity of the 1990s, see, for example, José E. Alvarez, *Hegemonic International Law Revisited*, 97 AJIL 873 (2003); Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 372 (2005); Detlev F. Vagts, *Hegemonic International Law*, 95 AJIL 843 (2001); Johan van der Vyver et al., *The Single Superpower and the Future of International Law*, 94 ASIL PROC. 64 (2000); and Symposium, *American Hegemony and International Law*, 1 CHI. J. INT'L L. 1 (2000).

[16] These assumptions have a long tradition in international law. *See* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989). Concern about the commandeering of international law by powerful states is common in the literature. *See, e.g.*, Vagts, *supra* note 15, at 845; M. Sornarajah, *Power and Justice in International Law*, 1 SING. J. INT'L & COMP. L. 28, 35 (1997); Nico Krisch, *More Equal Than the Rest? Hierarchy, Equality and US Predominance in International Law*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 135, 136 (Michael Byers & Georg Nolte eds., 2003). Critiquing this perspective, Rosalyn Higgins explains that: "It is the initial faulty perspective of law as the vindication of authority over power that leads . . . [to the supposition] that, if power is in harmony with authority . . ., then what one has cannot be law." ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 15–16 (1995).

[17] *See* Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AJIL 64, 64 (2006).

[18] Oscar Schachter, *The Role of Power in International Law*, 93 ASIL PROC. 200, 200 (1999).

[19] Reisman, *supra* note 4, at 95.

https://doi.org/10.1017/ajil.2025.9 Published online by Cambridge University Press

because it is, and must be, constituted together with power.[20] Law constitutes power, and power, law.

The fact that law and power are not and cannot be independent of each other—that they must instead be constituted together and are therefore interdependent—has significant implications for how we think about the enterprise, especially at a moment, like this one, when international law and the principal source of power with which it has for decades been co-constituted are undergoing such dramatic change. Because international law works, and works most effectively, when it is aligned (that is, constituted) with other forms of power, the decline in U.S. support for it and the broader international order of which it was a part will threaten some norms that have defined the field since the end of World War II.

The difficult question, at this point, thus is not whether we should want a different international law or, more specifically, an international law with less U.S. backing. That is already in the offing, whether we want it or not. The difficult question, for those who value the legalization of international relations over the past eight decades or support (all or a part of) the content, processes, and institutions of contemporary international law, is how to identify and salvage the best of that legal order and constitute a better one going forward, in a future where power is more dispersed and exercised differently.

This short Essay, which is designed to provoke, is, despite its broad implications, quite narrow in focus. We do not provide a justification for U.S. power or, again, an apology for U.S. actions. We do not explain exactly how the current system was created or why U.S. power is in (relative) decline. We do not argue that the United States is or has ever been the only source of power in the international legal system. We do not deny that international law itself has autonomous power.[21] We do not dispute the importance of law to constraining state power. We do not defend all aspects of the international legal system or call for its wholesale preservation. We do not claim that it has ever been anywhere near perfect. Neither do we claim that it has been entirely reliant on, or constituted by, the United States or that the decline in U.S.-backing will alone cause it to fall apart.

Instead, we explain the role that powerful states play in international law and the consequences of the geopolitical changes that are now underway for the enterprise. International law is historically contingent; its content, institutions, and processes are not inevitable, unchangeable, or static; and so its continuity and relevance cannot be taken for granted. Only by understanding that U.S. power and the post-World War II international legal system were constituted together, that they (in odd-couple fashion) became entwined together, and thus that they are likely in the near future to deteriorate together, can we begin to think about—and plan for—a future international law that is constituted and sustained with considerably less U.S. power.

II. The Co-constitution of International Law and Power

International law and national power have their own distinctive attributes and intrinsic limitations. International law has an inherent authority by virtue of the collective processes

[20] *See id.*

[21] *See* Steinberg & Zasloff, *supra* note 17, at 85; Shirley V. Scott, *International Law as Ideology: Theorizing the Relationship Between International Law and International Politics*, 5 Eur. J. Int'l L. 313 (1994).

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through which it is created. It confers this authority on the policies that it advances. But it cannot alone, through its authority, ensure that its policies are implemented. The reverse is true of national power. It can often be used to operationalize its preferred policies, but it is, on its own, deficient in authority. Thus, international law and national power each has a key attribute—authority or operational efficacy—that the other, acting alone, lacks. Each also has the ability to use that attribute to complement and enhance the other: law's authority can be used to facilitate and thereby bolster particular exercises of national power,[22] while national power can be used to implement and make effective law's authoritative policies.

Despite the evident synergies that result from their working together, cooperation between the two is not inevitable. International law and national power each can exist without the other, albeit (due to their inherent limitations) not maximally. Their cooperation requires that those on each side choose to work with, rather than antagonistically against or even indifferently toward, the other. The support is inevitably conditional. Law supports power on the expectation that power will act through law's authoritative processes and strictures. Power supports law on the expectation that law will confer authority on power's preferred policies. Bringing them together requires each to find ways to adapt to, if not fully align with, the other. Power must be willing to work with and through law, and law, with and through (certain exercises of) power.

This process of reciprocal influence and support is how international law and national power co-constitute—and reinforce—each other. Power constitutes law by engaging with law's processes and institutions, shaping its authoritative content, committing to its implementation, and influencing others to do the same. In these ways, power works to establish law's relevance and substance, strengthening and centralizing law's role. Law constitutes power by conferring on power law's authority for actions that are taken consistently with law's processes and norms. Law works to establish power's normative standing within the community and legitimize (certain of) its actions. As law and power are co-constituted, each uses the other to promote and obtain its own goals and to define the content and contours of the other, and each is enhanced in the process.[23]

In other work, we have mapped, along a conceptual spectrum, the interactions between international law and national power.[24] At one end of the spectrum, international law and national power are mutually supportive in the ways that we have just described. At the other end of the spectrum, each confronts and challenges the other. The sources of national power deny law the authority that it claims, and the sources of international law deny states the authority that they might seek. Between these two ends, the relationship of law and power might be more or less accommodating, where each permits the other space to operate on its own terms, without affirmatively supporting or challenging it.

Thus, despite the evident advantages of an alliance between international law and national power, whether of short- or long-term duration, the possibilities for breakdown are abundant. Power's natural instinct is to resist constraint, so if law prevents power's attainment of critical

[22] For an explication of how authority empowers those to whom it is granted, see Monica Hakimi, *Exorcising Hobbes's Ghost: A Future for Constitutional and International Law*, MICH. L. REV., manuscript at 11–16 (forthcoming 2025), *available at* https://ssrn.com/abstract=4947916.

[23] For examples of how this constitutive process has worked, even outside the formal rules on the exercise of national military power, see Monica Hakimi, *The* Jus ad Bellum*'s Regulatory Form*, 112 AJIL 151 (2018).

[24] *See* Monica Hakimi & Jacob Katz Cogan, *The Two Codes on the Use of Force*, 27 EUR. J. INT'L L. 257 (2016).

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goals, power will look for ways to evade it. Law's primary allegiance is to its own processes and rules, not the preferences of the powerful. If power's demands become, in the eyes of the relevant collective, excessive, law will not comply and will instead work to resist it. For both power and law, there are lines that cannot be crossed. It is no surprise, then, that the alignment between the two is imperfect, impermanent, and highly contingent.[25] Law and power will sometimes go their separate ways.

But not all breakdowns are the same. The depth, severity, and frequency of any rupture matter. A breakdown can be a one-off occurrence (a blip or exception), or it can represent a disintegration, or foretell the dissolution, of an established order, in which the sources of law and power that need to be accommodated, or the terms on which they demand their due, are fundamentally altered.

III. The U.S.-Backed International Legal System

The collaboration between international law and U.S. power became one of the defining characteristics of the post-World War II period. Four structural and substantive features defined their relationship—and the international order that resulted: (1) a deep legalization; (2) a commitment to international institutions; (3) support for states as states; and (4) the extensive regulation of states.[26]

First, the U.S.-backed international order was highly legalized.[27] This intense legalization reflected concerted decisions not only to use law as an instrument for achieving discrete policy goals but also to treat law as a dominant mode of interaction. Legal tools and practices—manifested in the texts, norms, institutions, categories of thought, and methods of reasoning that are emblematic of the discipline—became pervasive. They were used to lock in specific policies through law's claim of bindingness, to resolve conflicts through legally constituted processes, to regulate power with legal norms, and to commit to making more decisions and agreements at the international level in legal forms. International (and regional) courts and tribunals flourished during this period. And the breadth and scope of international law expanded substantially through the elaboration of multilateral treaty regimes and the proliferation of bilateral instruments.[28] The use of international law in the U.S.-backed order went well beyond preceding eras, prioritizing law in the conduct of international relations.

The United States, itself a highly legalistic state, actively supported this legalization. It played critical roles in advocating for or drafting many international agreements that then took on lives of their own, including the agreements of the World Trade Organization, the Rome Statute of the International Criminal Court, and the Paris Agreement on Climate Change.[29] It also developed and advanced its preferred "model" agreements in its bilateral relations with many other states—for example, on foreign investment, civil aviation,

[25] Because of the awkwardness inherent in the alignment between law and power, these interactions are often hidden; they manifest operationally but not formally. *See* Jacob Katz Cogan, *Representation and Power in International Organization: The Operational Constitution and Its Critics*, 103 AJIL 209 (2009).

[26] For a discussion, see Scott, *supra* note 10, at 136–51.

[27] *See generally* Special Issue: Legalization and World Politics, 54 Int'l Org. 385 (2000).

[28] *See* Jacob Katz Cogan, The Scale and Scope of International Law (unpublished manuscript).

[29] *See, e.g.*, Scott, *supra* note 10, at 79.

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mutual legal assistance in criminal matters, and extradition.[30] Even when it deviated from what many took to be black-letter law or pressed for controversial positions in law, it still engaged in the practice of law, explaining its positions in legal terms and institutions, for others to assess and evaluate.[31] It itself engaged with and supported the use of international law across a broad range of issues.

Second, the U.S.-backed order was strongly institutionalized. Permanent international institutions, like law, allowed the United States to exercise power through authoritative mechanisms. They also, like law, operated separately from, and sometimes against the interests of, the United States, which is part of how they sustained their authority and, perhaps counterintuitively, their usefulness to the United States. To facilitate the successful operation of international organizations, the United States contributed substantial funding (in both assessed and voluntary contributions) across many organizations for many years and provided other forms of material and non-material support for them to accomplish their tasks.[32] In fiscal year 2022 alone, the United States provided over $21 billion to 179 international organizations and multilateral entities, including substantial percentages of the budgets of major organizations, such as the United Nations, the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), the International Organization for Migration (IOM), and the World Health Organization (WHO).[33] The United States also maintained, sustained, and enhanced organizations by actively participating in their work, encouraging their use, referring to and following their decisions and guidelines, and giving them "business," whether as negotiating or decisionmaking fora, as mechanisms for the distribution of aid and assistance, or as the loci or generators of research and expertise. Indeed, the United States engaged with international institutions, even when non-institutional options, including unilateral action or ad hoc procedures, were available.[34] Like law itself, international institutions became a key component of the U.S.-backed international order, a technique that allowed the United States (and many other states) to undertake activities and achieve goals that would have been, at best, more difficult to accomplish without them.

Third, the legal and institutional structure of the U.S.-backed order entrenched the state system as its bedrock. International law, in its current manifestation, places states at the center, making them the primary actors, decisionmakers, lawmakers, and representatives at the international level. Its foundational principles—on state sovereignty, sovereign equality, the

[30] *See, e.g.*, *id.* at 163.

[31] On the significance of its engagement with international law, even where it departed from more mainstream positions, see Monica Hakimi, *Why Should We Care About International Law?*, 118 MICH. L. REV. 1283 (2020).

[32] *See* Report to Congress on U.S. Contributions to International Organizations, Fiscal Year 2022, at 4 (Sept. 2024), *at* https://www.state.gov/wp-content/uploads/2024/09/FY22-U.S.-Contributions-to-International-Organizations_Updated-9-2024.pdf [https://perma.cc/GP5H-5LWR] [hereinafter Report to Congress on U.S. Contributions]. U.S. support for international institutions comes in many different forms. *See, e.g.*, R. Jeffrey Smith, *Serb Leaders Hand Over Milosevic for Trial by War Crimes Tribunal*, WASH. POST (June 28, 2001), *at* https://www.washingtonpost.com/archive/politics/2001/06/29/serb-leaders-hand-over-milosevic-for-trial-by-war-crimes-tribunal/a209e0ed-e7d5-428e-a462-d0999d29961c ("The extradition [to the International Criminal Tribunal for the Former Yugoslavia] came as the United States was threatening to withhold reconstruction aid [form Serbia] unless Milosevic was surrendered.").

[33] *See* Report to Congress on U.S. Contributions, *supra* note 32.

[34] A well-known—and highly formative—example is the U.S. decision to work through the Security Council in 1990 to gain authorization to use force against Iraq, when it could also have acted outside the Council in collective self-defense on Kuwait's behalf.

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settlement of territorial borders, non-aggression, non-interference, and self-determination—are all designed to bolster and protect states as states, taking them to represent the optimal unit for the maintenance of world order.

The statist structure of the international order is not self-actualizing. The United States has invested substantially in undergirding and maintaining it. It has allocated billions of dollars in foreign aid and other financial and technical support, and has granted beneficial trade preferences, to support the economies, militaries, and basic governance functions of states worldwide. It has, through its defense alliances, helped to preserve the territories of dozens of states that would not have been able to protect their own territories from attack, without its weight behind them.[35] It has, through other security arrangements, helped to train and fund the security forces of many more states, so that they could defend themselves and provide basic security to their peoples. It has, through the Security Council, repeatedly provided for "stabilization" operations—operations designed to assist at-risk states from failure within their own territories.[36] And it has repeatedly sustained international law's norms on the preservation of states' territorial borders, when these norms have been directly at issue.[37] Examples include the operations to enforce the prohibition of annexations in response to Iraq's invasion of Kuwait, to protect Iraq's borders from ISIS's onslaught in 2013, to support states across the Sahel from violent extremist groups, and to defend Ukraine from Russia between 2022 and 2025.

Fourth, a defining feature of this international order was its expansive regulation of state action, both within and across national borders. The regulatory reach of international law during this period extended deeper into the domestic sphere, and covered more substantive ground, than ever before.[38] Here again, the United States played an outsized role. It was instrumental in creating the contemporary trade system, restricting the ability of states to limit the import of goods and services, first through the General Agreement on Tariffs and Trade and then through the WTO. It used its military power to police global trade routes, maintaining the law of sea rules pertaining to innocent passage and international straits,[39] and it supported the system for international civil aviation, so that goods could be transported without disruption, whether by sea or by air, to and from virtually anywhere in the world.[40] It took the lead in drafting and implementing many agreements that regulated the global environment, including the Montreal Protocol on Ozone-Depleting Substances.[41] It played key roles in creating and preserving the norms that prohibit the proliferation of nuclear weapons and the use of biological and chemical weapons. It used its influence, including unilateral sanctions, to promote international human rights and international

[35] *See* Adam Taylor, *Map: The U.S. Is Bound by Treaties to Defend a Quarter of Humanity*, WASH. POST (May 30, 2015), *at* https://www.washingtonpost.com/news/worldviews/wp/2015/05/30/map-the-u-s-is-bound-by-treaties-to-defend-a-quarter-of-humanity; Brunk & Hakimi, *supra* note 6.

[36] *See* Jacob Katz Cogan, *Stabilization and the Expanding Scope of the Security Council's Work*, 109 AJIL 324 (2015).

[37] For a more extensive discussion of the international law prohibiting annexation and the role of the United States in preserving it, see Brunk & Hakimi, *supra* note 6.

[38] *See* Jacob Katz Cogan, *The Regulatory Turn in International Law*, 52 HARV. INT'L L.J. 321 (2011).

[39] *See* UN Convention on the Law of the Sea, Arts. 17–25, 37–44, Dec. 10, 1982, 1833 UNTS 397.

[40] For a discussion of U.S. practice since October 2023, see Jacob Katz Cogan, Contemporary Practice of the United States, 118 AJIL 338, 366 (2024).

[41] *See* SCOTT, *supra* note 10, at 136–38.

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anticorruption regimes.[42] It has sought to establish and maintain countless other legal frameworks, large and small, from foreign investment, to global health, to the Antarctic Treaty system.

The U.S. commitment to international law, along each of these four dimensions, was neither neutral nor disinterested. The United States promoted international law to achieve its own goals, and its policy preferences came to define much of the field. Its support of the global health regime, for example, while beneficial to many around the world, also prioritized U.S. health security and the protection the U.S. pharmaceutical industry. The content of the regimes for international trade and investment reflected U.S. economic goals and disproportionately benefited the United States. Moreover, the United States has not bolstered international law across the board. Indeed, it has undermined some legal norms, including the strictest readings of the UN Charter's prohibition on the use of military force—its expansive claims regarding self-defense and its conduct in the 2003 Iraq war being obvious examples. It has refused to comply with and even affirmatively challenged certain decisions of the International Court of Justice. It has declined to join numerous multilateral treaties, including some that it played a heavy hand in negotiating. It has undercut some international institutions, including the International Criminal Court.

None of this is surprising. The United States has worked to establish and bolster the international legal norms that it supports, and not the ones with which it disagrees. It has also more consistently applied these norms for its own benefit than for the benefit of everyone else. To say that the U.S. commitment to the international legal system was high does not imply a U.S. commitment to everything produced through international legal processes or a commitment to comply with international law in all cases. Its withholding of support, and in some cases its non-compliance, have also shaped international law, if not in form, then certainly in function. U.S. support for international law was never an all-or-nothing proposition. But the fact that its support was partial and imperfect does not negate the fact that its support was also extraordinary—and fundamentally constitutive of the international order, and legal system, with which we had all become accustomed.

IV. The Challenge Going Forward

The international order that the United States has been so instrumental in constituting with international law is undergoing dramatic change. Many, including many within the United States—most obviously, its current administration—have decided that this order is no longer worth preserving. Though many others remain committed to it (or at least to certain elements of it), their voices seem increasingly inaudible or ineffective against the contrary forces that are acting to transform it. The U.S. power that has for so long sustained this international order appears now to be highly antagonistic.

In the abstract, the prospect of a new international order, with less U.S. dominance, has obvious appeal. Many are sharply critical of the ways in which the United States has historically exercised its power—and for good reason. U.S. dominance has repeatedly reproduced the economic injustices of the international order's colonial past through its maintenance of transnational capitalism, which has disproportionately benefited the global north and harmed

[42] *See id.* at 138–40.

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those in the global south.[43] U.S. dominance has also caused immense suffering to the many who have experienced the brute force of U.S. military power, such as the Iraqis since 2003; of U.S. economic power, such as the Cubans and Iranians who have experienced debilitating sanctions for decades; or of their own dictatorial governments (too many to name) that the United States has backed and supported. All of this is to say nothing of those who, in a world as diverse as ours, want or need things that are different from what the U.S. government pursues and whose preferences have been overridden or ignored.

U.S. dominance has also imposed significant and underappreciated costs on Americans. The U.S. military, which has been instrumental to sustaining this dominance, consumes about half of the U.S. government's discretionary spending every year.[44] What is more, most decisions to expand or use the U.S. military over the past few decades, like U.S. foreign policy decisions generally, have been made and implemented with little public justification or debate, undermining the basic tenets of democratic governance.[45] These decisions have had incalculable ripple effects on U.S. national identity, domestic politics, and the individual lives of ordinary Americans. There is thus much to recommend in the United States pulling—or as the case might be, being pushed—back.

But as the U.S. power structure that undergirds critical components of international law changes, so too will the architecture and content of international law. International lawyers who address the relationship between U.S. power and international law have, on the whole, failed to appreciate the extent to which the two have been constituted together, each in various ways supporting the other. They tend instead to focus on the ways in which U.S. power has undercut or corrupted international law, impeding the realization of its full potential in solving collective problems and achieving emancipatory change. And of course, the United States has not always operated within the law or for the broader common good (however defined).

But conceiving of U.S. power and international law as antagonistic does not capture the full extent of their relationship. The United States has used its power, to an extraordinary degree, in ways that have constructed and ensured the relevance of international law. Because international law and institutions are not self-maintaining, dependent as they are on states for engagement, enforcement, and financing, U.S. support and commitment have been essential. A more illuminating conceptualization, therefore, recognizes that U.S. power and the international legal system have been constituted together. Each has in critical ways enhanced, and relied on, the other, even though each has also at times undermined the other.

Given how extensively the two have been intertwined, we anticipate that reduced U.S. backing will result in dramatic changes to the international legal system. International law is not and has never been independent from national power, so the project of international law cannot be for it to try to shield itself from such power, however desirable that might seem

[43] For an anti-capitalist critique of international law, see, for example, JOHN LINARELLI, MARGOT E. SALOMON & M. SORNARAJAH, THE MISERY OF INTERNATIONAL LAW: CONFRONTATIONS WITH INJUSTICE IN THE GLOBAL ECONOMY (2018).

[44] *See* Congressional Budget Office, An Update to the Budget and Economic Outlook: 2024 to 2034, at 25 (June 2024), *at* https://www.cbo.gov/system/files/2024-06/60039-Outlook-2024.pdf [https://perma.cc/YS32-YJF4].

[45] *See* Oona A. Hathaway, *National Security Lawyering in the Post-war Era: Can Law Constrain Power?*, 68 UCLA L. REV. 2 (2021).

https://doi.org/10.1017/ajil.2025.9 Published online by Cambridge University Press

in the abstract. Because international law and national power are co-constituted, new sources of power, including those with illiberal visions for international law, will define what it becomes, just as U.S. power so heavily defined what it has been. Indeed, there are serious signs that each of the constitutive features of the U.S.-backed order—its legalization, its institutionalization, its support for states as states, and its intense regulation of states—is under significant strain and may not persist, at least not robustly or globally. Thus, whatever else changes in the coming decades, the kind of international law that we get, and the work that that international law does, will also change as law becomes co-constituted with new constellations of power. Nothing from the current order, including the legalization of international relations itself, is guaranteed.

Recognizing this reality presents a daunting challenge to those who believe in some, if not all, of the contemporary international legal system. We must now look ahead and ask: What can and should be done to maintain that legal system—or more specifically, the parts of it that remain desirable—in a very differently ordered future? What sources of power, if any, will work to sustain and improve the international legal system going forward? And what kind of legal system and international order will be plausible? Because for good and for ill, *this* international legal system, the one that came with the U.S.-backed order, will change, and it will probably change quite dramatically. We, as international lawyers, best be prepared to think creatively about how to shape what comes next.