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FROM CHAMPION TO SKEPTIC? AN APPRAISAL OF THE UNITED STATES POSITION TOWARDS INTERNATIONAL ADJUDICATION

By

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Abstract

The proliferation of international tribunals is widely regarded as one of the most significant development in International law over the past century. This article identifies various International Courts and Tribunals and the role of the United States in their establishment. The article discusses the declining support of the United States towards International Courts and tribunals especially following the decision of the International Court of Justice (ICJ) in the Nicaragua's case. At the same time, the United States not only contributed in the 1990's to the creation of the World Trade Organisation ((WTO) and the Dispute System body (DSB) it has not withdrawn from the ICJ. The article discusses some of the impacts of US withdrawal on International law and US affairs. It concludes with a recommendation for the US to change its attitude towards International adjudication since many of the problems facing the world, including the US cannot be solved by one nation alone ranging from global warming to the fight against terrorism.

Keywords: International Criminal Court, Tribunal, International Court of Justice (ICJ), World Trade Organization (WTO), United States, UNCLOS.

1.1 Introduction

A wide variety of international courts and tribunals have developed during the past century.. The emergence of these various methods of adjudicating international disputes is a marked change from earlier eras and rightly has been described as one of the significant developments in international law during the twentieth century.[1] Never before in the history of international relations has international adjudication been as intensive as today.[2] International adjudication refers to the legally binding settlement of international disputes by an impartial third party. It broadly encompasses any form of adjudicatory or quasi-adjudicatory process in which states participate in resolving international disputes –

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[1] Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter," Legalized Dispute Resolution: Interstate and Transnational", 54 Int'L ORG 457, (2000); Roger P. Alford, "The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance (2000) Scholarly Works Paper 9, p. 160. At http://scholarship.law.nd.edu/law_faculty_scholarship/9Accessed 01/03/2018.

[2] See The Project on International Courts and Tribunals (PICT) which maintains a list of international tribunals and a database of developments in the field of international adjudication. See Project on Int'L Courts and Tribunals, The International Judiciary in Context (2004) at http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf assesed 27/02/2018.

including litigation, arbitration, conciliation, mediation, and advisory reports.[3] International courts and tribunals are increasing in numbers, and the caseload of some institutions appears to explode.[4] Nowadays, International courts issue binding decisions that solve multibillion dollar trade disputes between the world's major trading powers.[5] They enforce the laws of the sea involving matters ranging from seizure of ships to law enforcement searches to the use of seabed resources. They may have been a crucial force behind the integration of Europe into a single economic and political unit.[6] International courts even seek to protect the basic human rights of citizens against their own governments, and to punish war criminals throughout the world.[7] Such third party adjudication of international disputes is an expression of both the universal and American values- peace, equality and fairness.[8] Hence the active support of the United States for international adjudication of disputes between states.

What is a cause of concern, however, is that this traditional support for international adjudication seems to be diminishing. Such declining support coincides with the emergence of the United States as the sole remaining superpower in the world.[9] It is precisely this status of the United States which renders its attitude towards the peaceful settlement of international disputes by legal means so decisive.[10] According to Singer, "the United States once sought to build international institutions as a means of extending global justice, peace and stability. More recently, it has sought to tear them down."[11] Benjamin Ference, one of the last surviving American military prosecutors at Nuremberg trials, is among those who worry about how the ideals that won World War II are being lost.[12] Speaking at the opening of the ICC, he noted, "The current leadership of the United States seems to have forgotten the lessons that we tried to teach the rest of the world."[13]

The purpose of this paper is to discuss the declining support of the United States for international adjudication of disputes. The paper will begin with a historical background of the early US championship of international arbitration and adjudication. It

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[3] Gary Born, "A New Generation of International Adjudication", (2012) Duke Law Journal, Vol. 61 No. 4, p.783; Thomas Buergenthal, Proliferation of International Courts and Tribunals: Is It Good or Bad?, 14 Leiden J. Int'L L. 267, 267 (2001).

[4] See Bruno Simma, ' International Adjudication and U.S. Policy- Past, Present, Future' in Dorsen/Gifford (eds.), *Democracy and the Rule of Law* (2001) 39 at 41 et seq. at http://www.loc.gov.bicentennial/abstracts_simma.html assessed 08/12/2017.

[5] John C. Yoo and Eric A. Posner, "A Theory of International Adjudication", (John M. Olin Program in Law and Economics Working Paper No. 206, 2004.) p.1. . at http://www.law.uchicago.edu/lawecon/index.html accessed on 15/02/2018

[6] Ibid.

[7] See Cesare Romano, 'The Proliferation of International Judicial Bodies: The Piece of the Puzzle', 31 NYU J. Int'l L. & Pol. 709 (2000).

[8] Simma, supra note 4.

[9] Ibid

[10] Ibid

[11] P.W. Singer, *Children at War*, (New York; Pantheon Books: 2005) p.152-3.

[12] Ibid. p 153

[13] Ibid.

will discuss briefly the establishment of various international courts and tribunals and the role of the United States in their establishment. The Paper will then discuss recent developments in the international adjudications involving the United States and other States. The paper will also discuss the impact of the U.S actions on both international law and on the US participation in the global arena. It concludes with some recommendations on how to advance US interests in promoting multilateral cooperation on a range of issues globally.

1.2 Historical Background: The US as supporter of International Adjudication

The idea of adjudication of disputes largely developed in the nineteenth century. At that time, war was considered an ordinary, necessary, and proper way in which to resolve international disputes. It was simply a continuation of political intercourse carried on by other means.[14] With the conclusion of the Jay Treaty in 1794[15], the young United States was at the cradle of the development of international adjudication.[16] From 1794 to the end of the 19th century the United States was actively involved in most international arbitration proceedings. The success of the Alabama Claims Arbitration[17] and the growing peace movement spurred the U.S. Congress to express support for the concept of general arbitration and thus a momentum for the conclusion of arbitration treaties was established.[18]Even after the U.S had established itself as a rising great power, at the Hague Peace Conferences in 1907, the United States championed the compulsory arbitration of disputes. It was so disappointed by the modest result of the commission that it abstained.[19] However, the US ratified the Hague Convention with only one reservation regarding the Monroe doctrine and political questions.[20]

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[14] See Fred L. Morrison, *The Future of International Adjudication*, 75 Minn. L.Rev.827 (1991) at 828.

[15] The Jay Treaty Arbitrations between US and Britain was considered a landmark in the history of modem arbitration. It settled both territorial issues and pecuniary claims in the wake of the American Revolutionary War.

[16]See Simma, supra, note, 4.

[17]The *Alabama Claims Arbitration* was merely the most famous of the Arbitrations undertaken pursuant to the Treaty of Washington of May 8,1871 (US-Britain, 17 stat. 863,T.S No, 133) to adjudicate claims arising out of the American Civil war and to settle certain boundary and fishing disputes. Important innovations -. such as the introduction of neutral arbitrations and the incorporations in the compromise of the governing legal rules (relating in this case to the obligations of neutrals in wartime)-set the Alabama arbitrations apart from the Jay Treaty arbitrations. For the Alabama arbitrations, the U.S. was awarded $15, 500, 000.In some of the other Washington Treaty Arbitrations, the award went against the United States, but overall the United States was the net winner. For a summary of these Arbitrations as well as U.S.-British Arbitrations in the intervening years, see Jackson H. Ralston, *International Arbitration from Athens to Locamo* (Garland Library ed.; N.Y. and London: Garland, 1972), pp. 191-200.

[18]See Michla Pomerance, *The United States and The World Court as a "Supreme Court of The Nations': Dreams, Illusions and Disillusion* (kluwer Law International: 1996) p.24.

[19] Simma, supra note 4 at 45.

[20]A.S. Hershey, ' Convention for the Peaceful Adjustment of International Differences', 2 AJIL (1908) 29 at 45; See also Yoo and Posner, supra note 2, p.7-8

Until 1899, there was no international Courts and tribunals of a permanent, standing nature. The first international tribunal, which was neither a court nor permanent, was the Permanent Court of Arbitration.[21]

i) **Permanent Court Of Arbitration**

The Permanent Court of Arbitration (PCA) at The Hague traces it legal foundations to the 1899 and 1907 Conventions for the Pacific Settlement of International Disputes.[22] At the two conferences, the establishment of a permanent international tribunal was one of the central concerns of the United States delegation.[23] The Permanent Court of Arbitration consisted of a list of arbitrators nominated by states to be available to adjudicate interstate disputes and a permanent secretariat.[24] After a promising beginning in which the number of major disputes were heard and settled, the number of cases to the Permanent Court of Arbitration fell drastically, however more recently the PCA has started to play an increasingly important role.[25] Nevertheless, The Hague Conference marked the beginning of the institutionalization of international adjudication. Since its inception, the Permanent Court of Arbitration has provided the mechanism for the hearing of several cases, including some of the considerable importance, e.g. the *Island* of *Palmascase*[26] *and the South China Sea Arbitration.*[27] The Permanent Court of Arbitration is currently acting as a registry in 4 interstate proceedings, 78 investor- state arbitrations and 47 cases under contracts involving a state or other public entity.[28]

ii) **Permanent Court of International Justice**

Two decades later the first international body of truly judicial character, the Permanent Court of International Justice, was again inspired by USA preparatory work.[29] The Permanent Court of International Justice (permanent Court) established in 1921, complemented the Permanent Court of Arbitration by providing a full -time tribunal to deal with international disputes[30].

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[21]See Philippe J. Sands, "The Future of International Adjudication", 14 Conn. J. int'l L. 2.

[22]See Mark W. Janis, ed., *International Courts for the Twenty First Century*, (Martinus Nijhoff Publishers, 1992) p. 43; Rebecca M.M. Wallace and Olga Martin-Ortega, *International Law*, (7th ed., Sweet & Maxwell, 2013) p.336-8.

[23]See Simma, supra, note 4.

[24]See Ibid.; See also Convention for the Pacific Settlement of International Disputes, July29, 1899,32 stat.1779,T.S No. 392

[25]See Janis, supra, note 22; See also, Malcolm N. Shaw, *International Law*, (5th ed., Cambridge University Press, 2003) p.953

[26] 2R.I.A. A. 829 (1929); See Wallace and Martin-Ortega, supra note 22.

[27] The South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China), The Hague, 12 July 2016 at http://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-press-Release-NO-11-English Assessed 20/02/2018.

[28] See Cases, Permanent Court of Arbitartion, at https://pca-cpa.org/en/cases Accessed 15/01/2018

[29]See Simma, supra, note 4.

[30]The Permanent Court of Arbitration is composed of ad hoc panels of Arbitrators convened understanding organization to resolve individual disputes. The Permanent Court of International Justice, in contrast, consisted of a standing body of jurists who would hear all cases. This structure was intended to provide uniformity of decision making.

The Statute of the Permanent Court of International Justice provided for two basic kinds of jurisdiction.[31] One was based on treaties that referred specific cases or classes of cases between the treaty partners to the court[32]. The other was based on unilateral declarations, under which individual states could declare their readiness to accept adjudication of cases submitted by other states.[33] It was hoped that most nations would eventually submit these declarations so that courts rather than war, would eventually resolve international disputes.

However, despite political reservations that prevented the United States from entering the League of Nations, the United States government seriously considered joining in the work of the Permanent Court, but the Senate's objections to international adjudication kept the country out of this institution as well[34], Nevertheless, several distinguished Americans served among the judges, including Frank Kellogg of St. Paul, the former Senator and Secretary of State who had been instrumental in formulating the Kellogg-Briand Pact.[35]Thus when the League of Nations ceased to exist at the end of the World War II, the Permanent Court went with it[36]. The Permanent Court was immediately replaced by the "new" International Court of Justice under the auspices of the "new" United Nations[37].

iii) **International Court of Justice (ICJ)**

The International Court of Justice was established in 1945 as "the principal judicial organ of the United Nations"[38]. The ICJ possessed an organic Statute that was almost a carbon copy of the PCIJ Statute.[39] It occupied the same courtrooms in The Hague and it performed most of the same functions in the international arena.[40] According to Shaw, The ICJ, in essence "is a continuation of the Permanent Court, with virtually the same statute and jurisdiction and with a continuing line of cases, no distinction being made between those decided by the PCIJ and those by the ICJ".[41] At that time, the United States automatically became a party to the Statute of the International Court of Justice[42]. It also became one of the original countries to accept the

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[31]See Morrison, supra, note 14.

[32]See Statute of the Permanent Court of International Justice, Dec. 16, 1920, art. 36, 6 L.N.T.S. 390,403; see also the Statute of the Permanent Court of International Justice (amended by Protocol of Sept. 14, 1929 at http:/www/artel.net.az/GRUPUleagjus.htm Accessed 12/18/2017.

[33]This acceptance was subject to a condition of reciprocity. Statute of the Permanent Court of International Justice, supra. note 18. See also, Morrison, supra, note 14.

[34]See Morrison, supra, note 14.

[35]Other American Judges included John Bassett Moore and Manley O. Hudson. S. Rosenne, Documents of the International Court of Justice 431(1979).

[36]For all practical purposes, The Permanent Court ceased regular functioning in 1939.It was formally dissolved in April of 1946, when the new International Court of Justice began to operate. See S. Rosenne, *The World Court: What It Is and How It Works* 15 (4th ed.1989)

[37]Ibid; see also Morrison, supra, note 14.

[38]See Charter of the United Nations, Chapter XIV, Article 92.

[39]See Statute of The International Court Of Justice (ICJ).

[40]See Morrison, supra, note 14.

[41]Shaw, supra note 25, p. 960.

[42] See U.N. Charter, supra, note 27, Article 93.

compulsory jurisdiction of the International Court of Justice over a whole range of dispute[43]. Indeed, for nearly forty years, the United States continued to accept that compulsory jurisdiction with a limitation known as the Connally Reservation, which stipulates that matters within the domestic jurisdiction 'as determined by' that particular state are automatically excluded from the purview of the Court.[44] In other words an exception for cases that were within the domestic jurisdiction of the United States[45]. During that period the United States became one of the International Court's most frequent litigants.[46] This showed a strong commitment to international adjudication. Moreover it should be noted -that the United States has always taken its responsibilities in the field of arbitration seriously.[47]

iv) **International Tribunal of the Law of the Sea.**

The United States, in the late seventies, played a prominent role in the negotiations leading to the adoption of the United Nations Convention on The Law of the Sea, 1982 (UNCLOS).[48] The Convention established the International Tribunal for the Law of the Sea (ITLOS) as an independent judicial body to adjudicate disputes arising out of the interpretation and application of the Convention.[49]The ITLOS is a permanent Court with jurisdiction over all questions arising under the UNCLOS. It is headquartered in Hamburg, Germany, and functions towards realizing its objective "to be a user-friendly, cost-effective, and efficient institution." State parties generally have consented to compulsory jurisdiction of disputes. The United States delegation was headed by Ambassador Elliot Richardson.[50] During the course of the negotiations, the United States was committed to binding dispute settlement on the Law of the Sea Convention, largely to protect what it considered to be its economic and military interests in maritime matters.[51]However, even at that time, the United States refused to sign the treaty.[52] The United States, along with other industrialized states, took issue with aspects of the treaty (Part XI) which dealt with deep seabed resources beyond national jurisdiction.[53]At the behest of the United States, negotiations continued and resulted in the *Agreement relating*

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[43] See Sands, supra, note 21.

[44] Shaw, supra note 25, p. 981 (discussing the reservation known as the 'Connally amendment')

[45]See Pomerance, supra, note 18, p.222.

[46] The United States appeared as a formal party in seven cases. In addition, it filed seven additional applications against Soviet bloc States that were dismissed for want of jurisdiction. It also participated extensively in the advisory opinion work of the court.

[47] See Sands, supra, note 21.

[48] Ben Cardin, 'The South China Sea is the Reason the United States must Ratify UNCLOS' Tea Leaf Nation, July 13, 2016 at http://foreignpolicy.com/2016/07/13/the -south-china-sea-is-the-reaso... Assessed 10/02/2018

[49] see ITLOS, General information-Overview-International Tribunal for the Law of the Sea at http:lwww.itlos.org.general_informationloverview/itlos_ en.shtml Accessed 30/08/2017.

[50]See Sands, supra, note 21.

[51]Ibid.; The United States has not yet ratified the Law of the Sea Convention, and remains one of the very few countries not to have done so.

[52] Roncevert Ganan Almond, 'U.S Ratification of the Law of the Sea Convention: Measuring the raison d'Etat in the Trump era', The Diplomat, May 24, 2017 at https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-s... Assessed 09/02/2018

[53] Ibid

to implementationof Part XI of the Convention (1994 Agreement) , completed in New York in 1994.

Following the completion of the 1994 Agreement, President Bill Clinton transmitted the Convention and the 1994 Agreement to the Senate for advice and consent. On November 16, 1994, UNCLOS entered into force, but without accession by the United States. The 1994 Agreement entered into force on July 28, 1996, also without the United States. As a result the United States remains off the lists of 168 state parties to UNCLOS, a list which includes all other major maritime powers such as Russia and China.[54] In practice, the United States accepted and complied with nearly all the treaty's provisions. For example, on March 10, 1983, President Ronald Reagan issued the United States Oceans Policy statement, supported by National Security Decision Directive 83, which documents the U.S. view that UNCLOS reflects customary international law and fulfils US interest in "a comprehensive legal framework relating to competing uses of the world's oceans."[55] Successive U.S. administrations have relied upon Reagan's precedent to legitimize and guide the Freedom of Navigation (FON) program in global hot spots like the recent Freedom of navigation operations embarked upon by the US warship in the South and East China seas.[56]

Therefore, even though U.S invokes UNCLOS to assert the freedom of navigation and challenge excessive maritime claims. The US has no seat at the table in protecting US rights and claims within the UNCLOS institutional framework.[57] As a non-party, the United States has no voice in UNCLOS bodies such as the International Tribunal for the Law of the Sea (ITLOS) and remains on the outside looking in as the international community moves forward in defining the legal landscape affecting over 70 percent of the world's surface.[58] This is regrettable.

v) **Dispute settlement body of the World Trade Organisation (WTO).**

The United States, also, played a leading role in the establishment of the binding dispute settlement mechanisms under the World Trade Organization. The rules and procedure of the Dispute Settlement Body (DSB) was adopted in 1994 and came into force in 1995.[59] The WTO dispute settlement is both compulsory and binding. Member States have no choice but to submit to it and must accept the consequences of the WTO's

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[54] For a chronological list of ratifications of, accessions and successions to the Conventions and the related Agreements, See www.un.org/depts/los/reference-files/chronological_list_of_ratifications.html. Assessed 20/02/2018

[55] See National Security Decision Directive, Regan Administration- NSDD 83- US Oceans Policy, Law of the Sea and Exclusive Economic Zone at http://Fas.org/irp/of/docs/nsdd/index.html accessed 20/02/2018

[56] Ankit Panda, "South China Sea: US Destroyer conducts freedom of Navigation Operations near Scarborough Shoal", January 21, 2018, The Diplomat" at https://thediplomat.com/2018/01/south-china-sea-us-destroyer-conducts-freedom-of-navigation-oper... Accessed 20/02/2018.

[57] Roncevert Ganan Almond, supra note 48, p. 2. (Stating that the United States engaged in an unequal bargain: adhering to the terms of UNCLOS without enjoying the benefit of shaping the treaty's rules or institutions.)

[58] Ibid.

[59] See Susan Essennan and Robert Howse, 'The WTO on Trial' Foreign Affairs, January/February 2003 at http:www.foreignaffairs.org/20001 0 1 faessay 1 0228/susan-essermnan-robert-howse/the-wto-on Accessed 18/4/2017.

ruling.[60] These new procedures were politically problematic for the United States. Hence, President Bill Clinton was only able to obtain approval through fast track negotiations on the basis of an understanding that a panel of United States Federal judges would be convened to review decisions of the WTOs dispute settlement body, where the U.S. lost a stated number of cases.[61] It should be noted that the DSB has been operating under the permanent threat of United States withdrawal.[62] The Dispute Settlement Body is now dealing with some of the most important cases in the international arena.[63]

vi) **International Criminal Court (ICC)**

The Statute of the International Criminal Court established the International Criminal Court in July, 1998, following a five week conference in Rome. The ICC has jurisdiction to try persons charged with war crimes, crimes against humanity and genocide.[64] The United States (along with Libya, Iraq, China, and Israel) objected to the adoption of the ICC Statute[65]. While the US was the driving force behind the establishment of the Nuremberg Tribunals and The International Criminal Tribunal for the Former Yugoslavia (ICTY), it is now leading the campaign against the International Criminal Court (ICC), a court which the US had supported early on.[66] The reasons for the U.S. objection will be discussed later.

1.3 The US Defiance to International Adjudication

The relationship of the United States with international adjudication is very complex. Sometimes the United States supports the establishment of international tribunals and courts and at other times she rejects them. Over the years the relationship of the United States with the international tribunals and courts has been declining. Inspite of this fact, the United States has overall, played an extremely constructive and positive role in the area of international adjudication of disputes between States. The United States played a very prominent role in the drafting of the Hague Convention of 1899 that created the Permanent Court of Arbitration and became a party to its successor 1907 Convention.[67] Although it was not a member of the League of Nations, the United States had judges at the Permanent Court of International Justice who played very active roles in the establishment of that body, including its rules and procedure.[68]

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[60]Ibid.

[61]See Sands, supra, note 21.

[62]See Simma, supra, note 4.

[63]Shaw, supra note 25;

[64]See United Nations, Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. United States (along with Libya, Iraq, China, and Israel) objected to the adoption of the ICC Statute42. The reasons for the U.S objection will be discussed later.

[65]See John R. Bolton, The United States and The International Criminal Court (remarks to the Federalist Society, Washington, D.C.)Nov. 14, 2002. at http:www.state.govltlus/rm/15158.html. Accessed 12/16/2017 A/CONF.183/9,37 I.L.M.999.

[66]Andreas L. Paulus, "From Neglect to Defiance?The United States and International Adjudication" (2004) EJIL Vol. 15 No 4, 787.

[67] See Contracting Parties, Permanent Court of Arbitration at https://pca-cpa.org/en/about/introduction/contracting-parties/ accessed 15/01/2018

[68]The PCN was open to the United States by reason of its mention in the Annex to the Covenant of the

When the ICJ was established in 1945, the U.S. was at the forefront of the parties to the Statute of the ICJ. In the words of Andreas Paulus, "In the early years of the ICJ constitute the highest level of US engagement with the 'principal judicial organ of the United Nations'[69]. When the Court was in crisis in the 1970's, the US went out of its way to propose sweeping changes for its revitalization.[70] Until 1979 US acceptance was never seriously tested, neither internationally nor domestically. When the US itself became the focus of the Court,[71] this positive attitude changed considerably. Thus, between 1945 and 1985, the United States was one of the main supporters of International Adjudication. As recently as 1979, the United States turned to the ICJ to secure the release of the hostages in Iran, and obtained from the International Court an Order of provisional measures calling for the release of the hostages.[72]However, in the 1980's, the US turned from a supporter to a sceptic of international adjudication. As stated above, the U.S. participated actively in the negotiations leading to the adoption of the UNCLOS in 1982.

1.3.1 *Nicaragua v The United States*

The turning point came in the early 1980's when Nicaragua brought proceedings to the International Court of Justice to challenge United States funding of the Contras and military and paramilitary activities in and around Nicaragua. [73] The ICJ granted an interim Order rejecting the U.S Government's request for termination of the proceedings and also for removal of that complaint from the list of the court's cases. The ICJ, later, held that it had jurisdiction, in terms of Article 36(2) and (5) of the Court Statute and also in terms of the U.S.- Nicaragua Treaty of friendship, Commerce, and Navigation of 1956, to hear the merits of the Nicaraguan complaint against the U.S.[74] Following this ruling, the United States declined to participate any further in the proceedings and announced that it would reconsider the U.S. acceptance of the Compulsory Jurisdiction of the

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League of Nations, to which it never became a party. See generally Sands, supra, note 21.

[69] Paulus, supra note 66; See also Article 92 of the United Nations Charter.

[70] Ibid; See also Digest of the United States Practice in International Law, 1976, at 650-651, proposing inter alia withdrawing the Connally amendment on domestic jurisdiction and allowing the United Nations to appear before the Court. The Department also proposed allowing national courts to request advisory opinions.

[71] The early cases involving the US were either rejected because of lack of jurisdiction or could be regarded as a draw, such as Rights of Nationals of the United States of America in Morocco (France v United States of America), ICJ Reports (1952) at 176 (Aug. 27).

[72]See U.S. v Iran (request for provisional measures) , 1979, ICJ 7, reprinted in 19 I.L.M. 139; See also 18 I.L.M. 1464.; See also 1980 ICJ Rep. 3.

[73]Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Provisional Measures, Order of 10 May, 1984, ICJ Reports 1984, p. 169

[74]Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, Judgement, ICJ Reports 1984,392.

court.[75] Thus after forty years of accepting the compulsory jurisdiction of the court, the United States abandoned that approach.[76]

1.3.2. Angel Breard's Case

In 1992, Angel Francisco Breard, a Paraguayan national, was convicted of raping and murdering a woman in Arlington, Virginia.[77] During his trial, he initially denied that he had been involved in the acts of violence, even in the face of incontrovertible evidence that he had carried out the crime. Eventually he pleaded guilty and made a full confession. He was sentenced to death. It was not until after the sentence of death had been imposed that he discovered that he had been entitled-upon arrest and subsequent thereto- to have access to a consular official from Paraguay. No such access was provided.

The United States and Paraguay are parties to the 1963 Vienna Convention on Consular Relations[78]. Article 36(1) provides that in the event that a foreign national is arrested, he is entitled to have access to a consular official of his country and he is entitled to be told of that right to have such access. Angel Breard was never informed of this right .This convention has been widely ratified, by well over 100 states, including the United States and Paraguay, and most of its provisions are generally considered to reflect customary international law.

Breard brought further proceedings in the United States before State and federal courts alleging, among others things, that he had never been informed of his right to contact the Paraguayan Consul. This was the first time Breard raised this claim. The district court although concerned with Virginia's refusal to abide by the Vienna Convention, found that Breard had procedurally defaulted his claim by not raising it in State court. The Court of Appeals for the Fourth Circuit affirmed. He then appealed to the United States Supreme Court in April 1998.

While Breard's appeal was pending, Paraguay brought proceedings before the International Court of Justice seeking a provisional measures order to stay the execution of Breard pending a determination on the merits by the International Court and the extent of the right established by Article 36(1). Paraguay also joined the application, which Breard brought to the United States Supreme Court in its own right as a sovereign state. This was the first time the ICJ had a death row case, and it galvanized the court into acting expeditiously and decisively. The ICJ unanimously indicated a provisional measure to the effect that the United States should refrain from executing Breard pending

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[75]Statement of Department of State on U.S. Withdrawal from Nicaragua Proceedings, 18 January 1985", American Journal of International Law, vol. 79, (1985), p.438,p. 441; International Legal Materials, vol. 24 (1985),p.246.

[76] Adam Liptak, "U.S. says it has Withdrawn From Judicial Body", The New York Times, March 10, 2005 at www.nytimes.com/2005/03/10/politics/us-says-it-has-withdrawn-from-world-judicial-bodyhtml. Assessed 27/02/2018.

[77]See Breard v. Commonwealth, 248 Va., 68, 445 S.E. 2d 670(1994), cert denied, 513 U.S. 971 (1994); see also Curtis A. Bradley, "Breard, Our Dualist Constitution, and the Internationalist Conception", 51 Stan. L. Rev. 529,532-38(1999)

[78]See the Vienna and Consular Relations, April 24, 1963,21 U.S.T. 77, 596 U.N.T.S. 261

the final disposition of the case. The ICJ's order was simple, unambiguous and did not indicate any view as to the legality or otherwise of the death penalty.[79]

Armed with the Order of the ICJ, Breard and Paraguay went to the US. Supreme Court in the hope that the US. Supreme Court might give effect to the provisional measures order of the ICJ.The United States Secretary of State, Madeline Albright, wrote to the Governor of Virginia, informing him of the ICJ's provisional measures and requesting that the State not execute Breard until the ICJ had addressed the merits. At the same time, the United States Supreme Court invited the United States Department of Justice to submit a brief to the Court expressing the views of the Department on the matter.

The Department of Justice led by the US Solicitor General, appeared before the Court and argued that no account should be taken of the provisional measures order and there was nothing in the US Law, which required the Supreme Court to impose a stay of execution when faced with a provisional measures order of this type[80]. Both the United States Supreme Court and the Governor of Virginia refused to stay the execution. Virginia authorities executed Angel Francisco Breard on April 14, 1998.[81]

1.3.3 The LaGrand's Case

The LaGrand's case also illustrates the failure of the United States to comply with the decisions of the International Court of Justice. In that case, Karl and Walter LaGrand, German citizens, were sentenced to death for fatally stabbing a bank manager during an attempted robbery.[82] Following their arrest in 1982, the Arizona authorities failed to contact the German Embassy, as required by the Vienna Convention on Consular Relations. The German Cosulate became aware of the case a decade later, in 1992 and were informed by the LaGrands, who had learnt of their rights from other sources. By that stage, the LaGrands were precluded because of the doctrine of "procedural default" In the United States Law from challenging their convictions and sentences by claiming that their rights under the Vienna Convention had been violated. Karl LaGrand was executed on 24thFebruary, 1999.[83]

On March 2, 1999 the day before the scheduled date of execution of Walter LaGrand, Germany brought proceedings against the United States before the International Court of Justice requesting provisional measures on the grounds that the US violated the rights of Germany and two of its citizens when it denied The LaGrands access to their consulate in accordance with the provisions of the Vienna Convention and Consular Relations,1963. The ICJ issued an order indicating provisional measures

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[79]See Sands, supra, note 21

[80]See Breard, 248 Va. at 73.

[81]See Kelly Trainer, The Vienna Convention on Consular Relations in the United States Courts, 13 Transnat'l Law. 227 (2000); See generally, sands, supra, note 21.

[82]See *State v LaGrand (Karl)* 152 Ariz. 483, 483, 484, 733 p.2d. , 1066, 1067 (1987); See also *State v LaGrand (Walter)* 153 Ariz. 21, 734 p.2d. 563 (1987)

[83]See International Justice: LaGrand Case (*Germany v United States of America*) Summary of Courts Holding, ICJ, June 27, 2001 at http:/ www.globalpolicy.org/wldcourtJicj/2001lgerman.htm. Assessed 27/02/2018

stating, inter alia, that the United States should take all measures at its disposal to ensure that Walter LaGrand was not executed pending a final decision of the Court. Germany, invoking the original jurisdiction of the United Sates Supreme Court, filed motions in the United States Supreme Court for preliminary injunction against the US and the governor of Arizona to enforce the order of the ICJ. In a 7-1 decision, the US. Supreme Court denied leave and on the same day, Walter LaGrand was executed.[84]

Despite the execution of the LaGrands, Germany pressed on with the case. The ICJ examined the objections of the United States to its jurisdiction and to the admissibility of Germany's submissions and held that it had jurisdiction to hear the merits of the case. With regard to the alleged violation by the United Sates of the Court's order of March 3, 1999, indicating provisional measures, the Court held that such orders do have a binding effect.[85] The Court observed that the United States Supreme Court appeared to have accepted the view of the United Sates Solicitor-General's office that, "an order of the International Court of Justice indicating provisional measures is not binding"[86].The Court further noted the failure of the Governor of Arizona to give effect to the order and the U.S. Supreme Court's rejection of Germany's application for a stay of execution pending determination of the case by the ICJ. The Court, further, held that where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required in order to consider the question of remedies.[87]

1.4 Refusal to Support the International Criminal Court

The United States opposition to international adjudicative tribunals came up again in 1998, in Rome during the five week negotiations that culminated in the adoption of the Statute of the International Criminal Court.[88] The United States along with a few other nations, including China, Iraq, Iran, Israel, and Libya, refused to support the International Criminal Court statute.[89] The United States opposed the establishment of the ICC for a number of reasons:

Firstly, the United States was concerned about the extent of the jurisdiction of the ICC. The United States expressed no reservations with three of the four grounds for jurisdiction, which are set out in Article 5 of the Statute. They are limited to the most serious crimes of concern to the international community as a whole: genocide, crimes

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[84]See Article 41 of the ICJ Statute

[85]See Sompong Sucharitkul, Recent Developments in International and Comparative Law and Feasible Alternatives to the Use of Force in Contemporary International Law (2003) The Sompong Sucharitkul Center for Advanced International Legal Studies, 5. At https//digitalcommons.law.ggu/intlegal/5. Accessed 05/03/2018

[86] See LaGrand (*Germany v United States of America*) Overview of the Case at www.icj-cij.org/en/case/104 Accessed 20/02/2018

[87] Shaw, supra note 25, p. 972.

[88]See ICC Statute, supra, note 41.

[89] Remigius Chibueze, "United States Objection to the International Criminal Court: A Paradox of 'Operation Enduring Freedom' ", Annual Survey of International & Comparative Law, Vol. IX Spring 2003, p.21; Ruth Wedgwood, Harold K. Jacobson & Monroe Leigh, "The United States and the Statute of Rome," 95 *American Journal of International Law* 124 (2001).

against humanity, war crimes and finally the crime of aggression.[90] The crime of aggression in Article 5 of the ICC Statute raised serious concerns for the U.S. The United States was afraid that the prosecutor of the ICC might come after the President of the United Sates for crimes of aggression if the United States initiates military aggression against another sovereign State. This fear is misplaced since the ICC has not yet defined the word "aggression". The Statute, however provides that the Court cannot exercise jurisdiction until the statute is amended to define aggression and establish the conditions.[91] Such amendment "shall be consistent with the relevant provisions of the Charter of the United Nations."[92] Article 5(2) of the Statute is intended to ensure that the Statute's definition of aggression does not depart from Security Council duties under Article VII of the UN Charter. As such, jurisdiction will not apply until there is a clear definition of aggression established by amendment of the Statute. Since such an amendment cannot take effect without ratification by seven-eighths of the parties the Statute and will not cover nationals of states not ratifying, there is no prospect of a charge of aggression being laid against a United States national in the absence of United States ratification of the amendment.[93]Nevertheless, there are several checks and balances built into the Statute by other states negotiating it to stop frivolous and vexatious cases being brought into the criminal court.

Secondly, the United States was concerned with the manner in which cases could be initiated in the ICC. There are three ways in which cases can be initiated[94]. First, a state party will be able to refer a case to the prosecutor for initiation. Second, the United Nations Security Council will be able to refer a case to the prosecutor. Third, the prosecutor on his or her own initiative will be able to institute proceedings. It was this third aspect with which the United States was apparently unhappy, concerned about the idea that the United Nations Security Council would not be able ultimately to stop the prosecutor from bringing a frivolous and vexatious case against the United States. This concern is also misplaced. The prosecutor, in order to initiate proceedings, will require authorization from the pre-trial Chambers of Judges. It is this pre-trial chamber of judges that determines whether or not there is a legitimate case to be brought.[95] The decision of the pre-trial panel is subject to appeal.[96] Moreover, Under Article 16 of the ICC Statute, the UN Security Council may by unanimous vote delay a prosecution for twelve months if it believes the ICC would interfere with the Council's efforts to further international peace and security. Article 16, further allows the UN Security Council to renew the request on the same grounds. In other words, The UN Security Council may perpetually intervene to suspend a case before the ICC at every twelve month interval on same grounds because Article 16 does not limit the number of times the UN Security Council

[90] See Sands, supra note 21.
[91] See Article 5(1) of the ICC Statute.
[92] Ibid., Article 5(2).
[93] Ibid, Article 121 (4) and (5).
[94] Ibid, article 13 and 15.
[95] Ibid, Article 15(4).
[96] Ibid, Article 18 (4).

may request the suspension of a case for security reasons.[97] This provision was a result of a compromise suggestion by Singapore to placate the United States.[98] Therefore, as one of the permanent members of the United Nations Security Council, the US stands in a better position to use this provision to perpetually forestall the prosecution of a case concerning its nationals. Furthermore, as will be discussed later in this paper, the jurisdiction of the ICC is "complimentary" to domestic proceedings.

Thirdly, the United States was concerned that the jurisdiction of the ICC was too broad since it will in certain circumstances extend to jurisdiction over nationals of non-state parties to the Statute. The U. S. was also afraid that its military personnel would be subject to the ICC jurisdiction even if the US is not a party. This again is misplaced in that Article 17 of the ICC Statute provides that the ICC will have a subsidiary role to that of national jurisdictions. In other words, cases will be inadmissible where they have been investigated by the State having jurisdiction and a decision has been taken to either prosecute or not to prosecute or alternatively a decision has been taken to prosecute and there has either been a conviction or an acquittal. In those circumstances, the ICC will not have jurisdiction. This is known as the principle of complementarity which confers primacy on domestic courts over the ICC.

Although, the idea that a US. serviceman would be prosecuted by the ICC is remote, it cannot be excluded altogether. The ICC has jurisdiction over individuals, not states, for crimes listed in Article 5 of the Statute. If a US serviceman is subject to the Court's jurisdiction for committing any of the crimes contained in Article 5, why should the ICC not try him? It should be noted that the United States opposition to the ICC, which increased dramatically in 2000, is in stark contrast to the strong support for the court by United States closest allies.[99] In an unprecedented move on 6th May, 2002, the United States effectively withdrew its signature from the treaty. Since then, the United States have embarked on a comprehensive campaign to undermine the ICC.[100]

Fortunately, the International Criminal Court is now a reality. The ICC was inaugurated in Hague on 11th March, 2003 with the election of 18 judges. On 21st April, 2003, Mr Moreno Ocampo was unanimously elected as the first Chief Prosecutor of the ICC.[101]

1.5 The US and WTO Dispute Settlement

In light of its reluctant attitude towards international adjudication since 1980's, The US acceptance of the WTO dispute settlement system appears all the more remarkable. Two important considerations may account for this development:

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[97] Ibid., Article 16; See also Chibueze, supra note 89, p. 38.

[98] John Washburn, "The International Criminal Court arrives – The U.S. Position: Status and Prospects," 25 FORDHAM INT'L L.J. 893, 878 (2002).

[99] See Human Rights Watch: The United States and the International Criminal Court at http:/www.hrw.org/campaigns/icc/us.htm. Accessed 04/01/2018.

[100] Ibid: See also Ahmed Isau, "The International Criminal Court (ICC): Jurisdiction and Basis, (2015) Nnamdi Azikiwe University Journal of International Law and Jurisprudence, Vol. 6, p. 48-9.

[101] See U.N. News Centre: Countries meeting at U.N. Elect First prosecutor for International Criminal Court at http:/www.un.org/apps/news/story.asp? NewsID= 6806&Cr=icc&Crl = Assessed 23/01/2018.

Although the US position as a political superpower is uncontested, it must share hegemony on trade issues with Europe, Japan, and increasingly East Asia and the emerging great powers of China, India and Brazil.[102] Evidence of this power sharing is provided by the failure of the WTO Cancun Ministerial Conference, in which developing countries rejected both the US-EU's agricultural policies and the inclusion of social rights and environmental issues in the WTO agenda.[103] For all its shortcomings, international adjudication appears to be the most reliable and stabilizing mechanism to solve trade disputes. The realization that the US has more to lose than gain by disrespecting WTO rulings may have played a role in US compliance so far. Thus the US does not only appear as respondent, but very often as complainant before the DSB often driven by private interest within the US.[104]

However, the US is currently involved in a dispute with the WTO over the routine appointment of new judges to hear international disputes. According to Roberto Azevedo, WTO Director –General,

> "The US move to block the filling of two vacancies on the seven-member appellate body was causing a crisis for the body's most important function. The dispute settlement system is... one of the most important pillars of the organization. If we compromise this pillar, we will be compromising the system as a whole. There is no doubt about that."[105]

This dispute has fed into concerns over the US President Donald Trump and his scepticism about multilateral institutions such as the WTO, which he criticized during the Presidential campaign and has continued to criticize in office. Most recently, in a speech to the United Nations General Assembly, President Trump stated:

> "For too long, the American people were told that mammoth multilateral trade deals, unaccountable international tribunals, and powerful global bureaucracies were the best way to promote their

[102] Paulus, supra note 66, p. 793.

[103] See Ministerial Statement and the press conference by Chairperson Luis Ernesto Derbez, 14 September, 2003. in Day 5: Conference ends without consensus, http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm. accessed 04/02/2018

[104] The US has had 115 cases as complainant, 134 cases as respondent and 142 cases as third party before DSB.

See member information- United States and the WTO at http://www.wto.org/english/thewto-e/countries-e/usa-e htm Accessed 20/02/2018

[105] Shawn Donnan, "WTO Chief warns of risks to trade peace", at http://www.ft.com/content/34591930-a532-11e7-9e4f-7f5e6a7e98a2 Accessed 15/02/2018

success. But as those promises flowed, millions of jobs vanished and thousands of factories disappeared."[106]

Thus the feeling in the WTO is that the US is laying the groundwork for bigger attack on the WTO dispute system.[107] For instance, the US has raised procedural objections to the appointment of new appellate judges, arguing that departing members of the body should not be allowed to keep working on cases still ongoing when their four-year term finishes. Similarly, the US has raised concerns in the past, including under the Obama administration about what it sees as judicial activism by the appellate body. Thus Robert Lighthizer, the US trade representative has signalled US enthusiasm for reforming a dispute-resolution system that he argues has not always acted in US interests.[108]

Why does the US implement WTO rulings far more willingly than the results of ICJ proceedings? The answer appears both easy and difficult. Easy, because the threat of real sanctions suffered by domestic constituents provides enough material incentives for compliance, in particular when domestic pressure groups weigh in; and difficult, because trade is far more controversial and politically charged at home than, say, the treatment of aliens by the judicial system.[109]

1.5.1 Impact of United States actions

Therefore, in its foreign policies, contemporary United States appears to be going a different route than much of the world, even its former close allies in Europe.[110] The consequence is that the judges of the ICJ now reflect predominantly the views of states with whom the United States often disagrees. Perhaps this reflects success in the prescription for the Court made by Richard Falk in his 1986 book, *Reviving the World Court.*[111] Falk argued for the Court to turn away from what he viewed as Anglo-American and West European ways of thinking, and move more toward reflecting the viewpoints associated with non-Western legal traditions (including, at that time, Marxist outlooks on law). Arguably, this is now what has happened, which has strengthened the Court's position among most states of the world, but seriously alienated the United States.[112]

On the refusal to support the ICC, the United States along with Iraq and China decided to pull out of the treaty that set up the ICC. Since then, the United States has

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[106] Andrew Buncomble, "Donald Trump's explosive UN Speech: Read it in Full", The Independent,Tuesday, 19 September, 2017, at www.independent.co.uk/news/world/americas/us-politics/trump-un-speech-read-in-full-transcript-north- Accessed 02/03/2018.

[107] Ana Swanson, "Once the WTO's Biggest Supporter, US is its Biggest Skeptic", Business Day, at https://www.nytimes.com/2017/12/10/business/wto-united-states-trade.html Accessed 02/03/2018.

[108] Ibid

[109] Paulus, supra note 66, p. 794.

[110] See Cesare P.R. Romano, (ed.) *The Sword and the Scales: The United States and International Courts and Tribunals*, (New York; Cambridge University Press; 2009) p. 97-98.

[111] Richard Falk, *Reviving the World Court (Charlottesville*; University Press of Virginia; 1986)p. 120.

[112] Romano, supra note 110.

worked diplomatically to undermine the Courts authority. It has advocated against it with weaker, developing world allies and has approached a number of countries to seek an agreement not to surrender or transfer U.S. nationals to the ICC.[113] Those that do not sign are threatened with being cut from aid. According to Singer,[114]"this concern has been greatly overblown and is more reflective of a general unfounded suspicion of international institutions among a minority in the US. In short, international Law is about capturing and punishing evil leaders who would otherwise get away, not about railroading soldiers doing their duties".

Thus the U.S opposition to the creation of the ICC, which has the potential to deter for example the recruitment of child soldiers and to prosecute war crimes, is a short-sighted policy.[115]Most importantly it runs counter to the strategic goals that US foreign policy has held for much of the last century. The United States sought to build international institutions as a means of extending global justice, peace and stability.[116] More recently, it has sought to tear them down.[117] By hindering the establishment of the ICC that would consider crimes against humanity the United States only further undermines international efforts to provide special protection to children and other oppressed people.[118] Therefore, the absence of the world's only superpower weakens the influence of the ICC.

On the UNCLOS, every year that goes by without US joining the Convention results in deepening US submission to Ocean laws and practices determined by foreign governments without U.S. input. The U.S. Navy and Ocean industries operate every day in a maritime environment that is increasingly dominated by foreign decision-making. In almost any other context, the US Senate would be outraged at subjecting Americans to foreign controls without US input.[119]

Given that US has not ratified the UNCLOS, the US may not participate in dispute resolution mechanisms, including an arbitral tribunal under the UNCLOS like the one formed to rule on the Philippines' case against China's nine-dash line claim.[120] The U.S. request to send a delegation to observe the hearing in that case at The Hague was denied because it is not a party to the Convention. As a non-party to UNCLOS, the US may not nominate its nationals to serve as members of the Law of the Sea Tribunal and the Commission on the Limits of the ContinentalShelf, both of which provide the

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[113] These agreements have been called various things, from the *"Article 98"* agreement (referring to the Article in the Rome Statute that seems to contain such provisions), to "impunity agreements", "bilateral agreements" or "bilateral impunity agreements" (BIAs). See Anup Shah, "United States and the ICC", at http://www.Globalissues.org/Geopolitics/icc/us.asp?p=1 Assessed 01/03/2018.

[114]P.W. Singer, *Children at War* (New York; Pantheon Books; 2005) p.152.

[115] See Chibueze, supra note 89.

[116] Philippe J. Sands, "The Future of International Adjudication", 14 Conn. J. Int'l L. 1, 4

[117] See Anup Shah, supra note 109.

[118] Madubuike-Ekwe, N.J, Contemporary International Law and The Participation of Children in Armed Conflicts" (Unpublished) SJD Dissertation submitted to School of Law, Golden Gate University, San Francisco, 2007, p. 209.

[119] See Senator Lugar, "Committee Statement of Senator Lugar before the Foreign Relations Committee" on Wednesday, May 23, 2012.

[120] See The South China Sea Arbitration, supra note 27.

platform to defend territorial claims and discuss freedom of navigation[121] According to Senator Lugar:

> In addition, the Convention's Commission on the limits of the Continental shelf will soon begin making decisions on the claims to the continental shelf areas that could impact the United States own claims to the area and resources of our broad continental margin. Russia is already making excessive claims in the arctic. Unless we are party to the Convention, we will not be able to protect our national interest in these discussions.[122]

Therefore, whether the US ratifies the UNCLOS or not will not make it to 'evaporate into the Ocean mists.'[123] Multi-lateral responsibilities under the UNCLOS cannot be avoided if the US stays out of the Convention. Unlike some treaties, such as the Kyoto Agreement and the Comprehensive Test Ban Treaty, where the US non-participation renders the treaty irrelevant or inoperable, the Law of the Sea will continue to form the basis of maritime law regardless of whether the US is a party.[124] International decisions related to national claims on continental shelves beyond 200 miles from the shore, resource exploitation in the open, navigation rights, and other matters will be made in the context of the treaty whether the US join or not.[125]

1.6 Conclusion

What explains the shift in the US attitude to international adjudication from supporter to skepticism, if not repudiation? One explanations may be the unique position of the US as the sole superpower in the international system. As such, the US seems to be able to afford to both go it alone and demand of other states to implement global democratic values. Thus from this perspective, insistence on international law is an indication of weakness. This is supported by the argument that young US had to rely much more strongly on international law than today's superpower.[126] However, this does not explain why the US, after the Second World War, created the very institutions it now seems to repudiate.

Another reason is the ever larger intrusion of international decisions in domestic affairs. International adjudication is regarded as acceptable if strictly limited to inter-state affairs (except in matters regarding the use of force, which the superpower reserves for itself without judicial control). But the very moment when international adjudication gets out of this box, as in decisions regarding individual and

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[121] Bonnie S. Glaser, "Why the U.S. Should Ratify the Law of the Sea Treaty", The Newsletter, July 13, 2016 at https://www.thecipherbrief.com/column_article/why-the-u-s-should-r... Accessed 01/03/2018

[122] Richard G. Lugar, "The Law of the Sea Convention: The Case for Senate Action", Brookings, Tuesday May 4, 2004 at https://www.brookings.edu/on-the-record/the-law-of-the-sea-conven... Accessed 01/03/2018.

[123] Ibid.

[124] Ibid.

[125] Ibid.

[126] Paulus, supra note 66, p.810

human rights, it seems less acceptable to subject one's own decisions to international control and supervision. However, due to the overwhelming interest of the US business in world trade, trade matters seem to be the great exception.

Another explanation refers to the unique democratic experience of the US, which is hostile to foreign judges, even to those in Washington D.C.[127] By their nature, international institutions are not under the same democratic constraints as elected local judges in the US. Populist democracy and a strong regionalism seem not to be compatible with the transfer of broad powers to unelected international judicial institutions, be it the ICJ, the WTO dispute settlement body, or the ICC.

Only a strong countervailing domestic interests such as the business interest in favor of trade can balance the tendency away from international adjudication. For example, recently, the Senate Foreign Relations Committee unanimously recommended ratification of the United Nations Convention on the Law of The Sea (UNCLOS)[128] supported by business, environmentalists and the US Navy. A ratification would be the first instance of the assumption of new obligations of binding arbitration and adjudication in years. One of the arguments advanced was the upcoming review of the Convention and the need to have a seat at the table. Another was the possibility of using military force for securing most of the interest at stake.[129] And yet, the difficulty of the ratification campaign in the full senate shows that international adjudication is seen, at best, as a shortcoming that needs to be narrowly confined, rather than an asset to be used to the mutual benefit of the parties. Therefore, domestic constituencies for free trade or the freedom of the high Seas may well induce the US to participate in international agreements providing for mandatory dispute settlement- but in the absence of such constituencies, participation will be avoided as far as possible.

It is unfortunate that the US attitude toward international adjudication seems to drift away from a global legal federalism, from transferring to the world the insistence on a government by laws rather than (mostly) men.[130] But at a time when many problems affecting the world, including the US, cannot be solved at a national level, from global warming to the fight against terrorism, at a time when the US regards the worldwide promotion of democracy as the core of its foreign policy, and when American business spreads all over the world, one of the biggest concerns of the American electorate is the outsourcing of jobs overseas, the judicial integration of the US in the international legal community is a condition for American influence in it.

Given the benefits of establishing accountability and ending impunity of war criminals the United States would do well to reconsider its abandonment of international legal institutions. This will not only help ensure punishment of those who

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[127] A.M. Weisburd,' International Courts and American Courts' 21 Michigan JIL (2000) 877, at 973

[128] See Richard Lugar, Senate Foreign Relations Committee advances Law of the Sea Treaty available at http://lugar.senate.gov/pressapp/record.cfm?id=218386 Assessed 10/02/2018.

[129] See Testimony of John Norton Moore before the Senate Foreign Relations Committee, 14 October, 2003 at 9-10.

[130] In that vein, see Simma, supra note 4.

commit crimes against humanity but also return the United States to its noble, decade long tradition of leading international institutions rather than undercutting them because of the fear of a few conspiracy theorist.