

## INTRODUCTION TO THE SYMPOSIUM ON THE BIDEN ADMINISTRATION AND THE INTERNATIONAL LEGAL ORDER

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The 2020 U.S. presidential election came at a time of eroding legitimacy and efficacy for international law and institutions. Developments such as populism and nativism, a decline of democratic institutions, and attacks on international organizations have contributed to this erosion. The Trump administration was both a symptom and an accelerator of these trends. The Biden administration now faces significant challenges if it is to engage effectively with the international legal order and address the many problems confronting the United States and the world. This symposium analyzes how the Biden administration can and should work toward rebuilding and recalibrating international law and institutions. It focuses on seven critical issues: climate change; global health; trade; election interference; racial justice; human rights; and migration. This introductory essay provides a thematic overview of the challenges posed and the solutions proposed across these policy areas.

### *Challenges and Opportunities*

Prior to the Trump administration, many scholars wrote of a “liberal international order” led by the United States. The political scientist John Ikenberry referred to it as a “liberal hegemonic order,” in light of the central role that U.S. power played.<sup>1</sup> That phrase combined a realist conception of international politics in its use of the term “hegemony,” with an institutionalist conception in its focus on law and liberalism, in which the hegemon binds itself to the rules it creates. But there was obvious tension in combining “liberalism” and “hegemony,” and it is questionable how “liberal” the order actually was. As Oliver Stuenkel wrote from the vantage point of Brazil and the “periphery,” many countries “consented” to that order following considerable coercion, and the United States always was better able to flout or bend the rules—and strategically use ambiguities and exceptions within them—without the consequences suffered by others.<sup>2</sup> Thus, in providing leadership, the Biden administration will need to work closely with others and avoid projecting a sense of arrogance and hypocrisy.

The Biden administration neither can, nor should, work just to return to the international legal order that existed before the Trump administration’s attacks. It needs to work to “recalibrate” that legal order in light of the new context. In doing so, the administration faces three major challenges. First, and most importantly, it faces a world in which the United States is no longer the hegemonic “hyperpower.” Economic power has shifted toward Asia, and in particular, toward an increasingly authoritarian China. Between 2000 and 2018, China’s share of global GDP increased from less than 4 percent to about 16 percent. During that same period, the U.S. share of global GDP decreased from about 31 percent to about 24 percent.<sup>3</sup> The bungled U.S. response to the COVID-19 pandemic has further contributed to these shifts.

Second, the Biden administration has to rebuild alliances that have suffered over the last four years. President Trump weakened alliances with democracies in Europe and favored right-wing parties aiming to undercut the European Union. He went so far as to call the European Union the United States’ “biggest foe globally right

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<sup>1</sup> JOHN IKENBERRY, *LIBERAL LEVIATHAN: THE ORIGINS, CRISIS, AND TRANSFORMATION OF THE AMERICAN SYSTEM* (2011).

<sup>2</sup> OLIVER STUENKEL, *POST-WESTERN WORLD: HOW EMERGING POWERS ARE REMAKING GLOBAL ORDER* 3, 182 (2016).

<sup>3</sup> *Percent of World GDP: Country Rankings*, THEGLOBAL ECONOMY.COM (2018).

now,” naming the EU ahead of Russia and China.<sup>4</sup> As a result, U.S. allies increasingly question whether they can trust the United States to abide by its commitments. In a 2020 survey, only 16 percent of Spanish respondents, 11 percent of French respondents, and 10 percent of German respondents said they could trust President Trump “to do the right thing regarding world affairs,” which is less than Russia’s Putin and China’s Xi.<sup>5</sup> Although many countries will be relieved to work with the new administration, it still faces a challenge in restoring trust in the United States, given the demonstrated willingness of over seventy-four million Americans to vote for a nativist president with an anti-democratic bent, raising concern that a Trump-type agenda could return in four years.

Third, the Biden administration faces severe domestic constraints. Economic inequality has reached levels not seen since the 1930s. The country faces a severe recession catalyzed by the pandemic. And a highly partisan Republican Party will likely attempt to undercut most of the administration’s initiatives. In this context, President Biden needs to address a series of pressing domestic problems—including racial injustice, voter suppression, inequality, and the pandemic—to ensure a base of domestic support for his international policies. For example, many leaders within the Democratic Party are concerned that the liberalization of international trade and investment law has contributed to growing inequality and the erosion of working-class support for Democratic candidates. President Biden needs to respond to this concern with new policy initiatives if he hopes to revitalize and sustain domestic support for a rules-based multilateral trading system.

Although the destructiveness of the Trump administration presented an unprecedented challenge to international law and institutions, it also provides opportunities for renewal and change. We believe that international law and institutions have provided numerous benefits, but that, in the economic realm, they also contributed to the domestic challenges that the Biden administration now faces. The Trump presidency exposed problems in the prevailing system of international law and institutions, thereby helping to focus attention on key aspects of the international legal order that are in need of rebuilding and recalibrating. The remainder of this essay presents an agenda for “building back better” that weaves together common themes from this symposium’s subject-specific essays.

### *Get the U.S. Domestic House in Order*

In his victory speech after the election, President Biden declared that “we lead not by the example of our power, but by the power of our example.”<sup>6</sup> The United States’ soft power depends on its normative authority. The Biden administration needs to address pressing domestic problems that undercut its projection of such authority if it wants to project normative leadership on the global stage.

The essays in the symposium develop this theme, in part, by advocating the repudiation of many of the Trump administration’s domestic policies and practices. Jaya Ramji-Nogales maintains that President Biden should repudiate several Trump policies, including the Muslim ban and family separations, that violate the terms of the Refugee Convention.<sup>7</sup> Judith Goldstein contends that Biden should eliminate the tariffs that President Trump imposed on allies in violation of international trade law.<sup>8</sup> Sarah Cleveland urges the Biden administration to “reverse and revoke” several of President Trump’s human rights policies, while stressing that “U.S. credibility and leadership on human rights starts at home.”<sup>9</sup>

<sup>4</sup> Andrew Roth et al., *Trump Calls European Union a ‘Foe’—Ahead of Russia and China*, *GUARDIAN* (July 15, 2018).

<sup>5</sup> Richard Wike et al., *US Image Plummets Internationally as Most Say Country Has Handled Coronavirus Badly*, *PEW RES. CTR.* (Sept. 15, 2020).

<sup>6</sup> Matt Stevens, *Read Joe Biden’s President-Elect Acceptance Speech: Full Transcript*, *N.Y. TIMES* (Nov. 9, 2020).

<sup>7</sup> Jaya Ramji-Nogales, *Cultivating Normative Authority: The Biden Administration, Migration, and the International Legal Order*, 115 *AJIL UNBOUND* 46 (2021).

<sup>8</sup> Judith Goldstein, *A New Era for Trade?*, 115 *AJIL UNBOUND* 52 (2021).

<sup>9</sup> Sarah H. Cleveland, *A Human Rights Agenda for the Biden Administration*, 115 *AJIL UNBOUND* 57 (2021).

The essays, however, also suggest that action on the domestic front must go beyond a mere reversal of Trump administration policies. H. Timothy Lovelace, Jr. contends that “improving the racial order at home might be a viable way to advance anti-racism abroad.”<sup>10</sup> He recommends a set of domestic anti-racism policies in areas such as police misconduct, health care, and voting rights. Jens David Ohlin calls for a new set of domestic measures to protect American democracy from foreign election interference.<sup>11</sup> Lawrence Gostin, Eric Friedman, and Sarah Wetter urge President Biden to “work with governors and tribal leaders to implement a sound national plan” to control COVID-19 in the United States.<sup>12</sup> Finally, Daniel Bodansky underscores that, in pushing for stronger action to reduce emissions, “how much the Biden administration is able to accomplish internationally will depend, to a significant degree, on how much it is able to do domestically.”<sup>13</sup> Only by pursuing justice and enhancing policy competence at home can the United States bolster its normative authority internationally.

### *Rhetoric Matters*

In the modern information age, “discourse power” is a key factor in international relations. The Chinese Communist Party, for example, understands discourse power as the capability to utilize communications media “to influence global values, governance, and even day-to-day discussions on the world stage.”<sup>14</sup> Although President Biden faces a number of domestic constraints, he retains a largely unfettered power to speak for the nation to support particular values in global governance.

The essays suggest that President Biden can use this power to advance liberal and social democratic values internationally. Ohlin contends that the United States can help shape global norms supporting democracy by stating unambiguously that foreign election interference violates international law. Cleveland urges President Biden to “make the protection of human rights . . . a central pillar of U.S. foreign policy.” Ramji-Nogales stresses that the Biden administration should “shift the national discourse” on migration by emphasizing “the concept of human mobility, which encompasses not only the ability to migrate but also the ability to remain in one’s country of origin in dignified conditions.” Similarly, Bodansky notes that the Biden administration must soon announce a new nationally determined contribution under the Paris Agreement, and that this announcement will help set the tone for more ambitious multilateral efforts to mitigate climate change.

U.S. human rights policy has traditionally emphasized civil and political rights, while giving short shrift to economic and social rights. Several essays encourage the Biden administration to embrace a more positive attitude towards the latter. Lovelace urges President Biden to embrace the vision of Martin Luther King, Jr., who promoted the adoption of an “Economic and Social Bill of Rights.” Gostin et al. encourage President Biden to promote “a rights-based global health architecture, which would enhance equity and accountability and elevate the voices and priorities of marginalized populations.” Focusing more on substance than rhetoric, Goldstein contends that President Biden should “reinvigorate the Trade Adjustment Assistance (TAA) programs” and expand other initiatives designed to provide economic support for workers, including through a “politically salient ‘industrial policy.’”<sup>15</sup>

<sup>10</sup> H. Timothy Lovelace Jr., *“To Restore the Soul of America”: How Domestic Anti-Racism Might Fuel Global Anti-Racism*, 115 AJIL UNBOUND 63 (2021).

<sup>11</sup> Jens David Ohlin, *A Roadmap for Fighting Election Interference*, 115 AJIL UNBOUND 69 (2021).

<sup>12</sup> Lawrence O. Gostin et al., *How the Biden Administration Can Reinvigorate Global Health Security, Institutions, and Governance*, 115 AJIL UNBOUND 74 (2021).

<sup>13</sup> Daniel Bodansky, *Climate Change: Reversing the Past and Advancing the Future*, 115 AJIL UNBOUND 80 (2021).

<sup>14</sup> Elsa Kania, *The Right to Speak: Discourse Power and Chinese Power*, CTR. FOR ADVANCED CHINA RES. (Nov. 27, 2018).

<sup>15</sup> Cf. Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 ILL. L. REV. 1.

*Reengage with International Law and Institutions*

The Trump administration withdrew from the Paris Agreement, the World Health Organization (WHO), and the Human Rights Council. It neutered the dispute settlement process at the World Trade Organization (WTO) and blocked consensus over the selection of the organization's Director General. When introducing the key members of his foreign policy team, President Biden declared that "America is back." His announcement manifests a recognition that international institutions can help promote not only U.S. interests, but also liberal, social democratic values, when the United States engages constructively with those institutions, rather than simply walking away.

The essays in the symposium include numerous practical recommendations for positive engagement on this front. To highlight just a few examples, Bodansky urges the Biden administration to push for stronger climate action internationally both inside and outside the Paris Agreement, at both the global and regional levels, including through the G20, the WTO, the International Maritime Organization, and the Arctic Council. Gostin and his co-authors encourage President Biden to build "cooperation among countries around a global COVID-19 strategy led by the WHO," "empower the WHO through reforms to the 2005 International Health Regulations," and "dedicate at least 2 percent of COVID-19 spending to global humanitarian assistance" to improve public health and well-being. Goldstein urges the Biden administration to rebuild "automatic, binding WTO dispute settlement" and "endorse rule reforms that would strengthen" multilateralism in light of new challenges posed by China's economic model.

The essays on human rights, racial justice, and migration also include numerous recommendations for reengaging with international law and institutions. Cleveland encourages the Biden administration to cooperate with the International Criminal Court, "re-join the UN Human Rights Council," and reengage with human rights treaty bodies by nominating highly qualified experts, securing their election, "submitting overdue U.S. reports," and supporting "ongoing efforts to strengthen and modernize" the treaty body system. Lovelace urges the Biden administration to "support the Human Rights Council's efforts to investigate police violence against Africans, people of African descent, and protesters." Ramji-Nogales argues that "an effective approach to human mobility requires serious regional engagement with Central America, Mexico, and Canada." She urges President Biden to "work with regional partners to develop a comprehensive plan that coordinates all types of migration and enables migrants to travel safely to the United States," such as through a "regional refugee processing system."

*Balance Cooperation and Confrontation*

A strategic approach to international law and institutions necessarily requires a mix of cooperation and confrontation. Striking the right balance between the two is tricky. With respect to the issues addressed in this symposium: election interference is an area where confrontation is necessary; climate change, health law, and migration are areas where greater cooperation is needed; and trade and human rights are areas requiring a mix of both.

The Trump administration did little to confront Russia over election interference, referring to the problem as a "hoax." Ohlin recommends several confrontational measures that the Biden administration should take to address the problem, such as imposing economic sanctions on foreign actors that engage in election interference; issuing more indictments against individuals, including those who are beyond the reach of U.S. criminal process; and enacting new legislation to criminalize solicitation of foreign interference.

Recognizing the need for a mix of cooperation and confrontation in the U.S.-China relationship, Goldstein says that President Biden "should not be overly hasty on removing Chinese tariffs." Instead, the

administration should work with allies and use the prospect of removing tariffs as a bargaining chip to elicit concessions from China in a bilateral or multilateral trade deal. In the human rights area, Cleveland supports the Trump administration's imposition of sanctions in response to China's Uighur detention camps. However, as she notes, an effective approach to Chinese human rights violations requires closer cooperation with other countries.

The essays on climate change, health law, and migration all recommend a range of cooperative measures to address global problems. Bodansky (on climate) and Gostin et al. (on health law) focus on global cooperation. In contrast, Ramji-Nogales contends that, when it comes to migration, "the future is regional." Thus, in the aggregate, the essays highlight the fact that—even in areas where the need for cooperation prevails over the need for confrontation—the Biden administration must decide whether to focus its efforts on global, regional, plurilateral, or bilateral cooperation.

### *Rethink Alliances*

Under traditional international law, alliances were understood as agreements between and among states. However, in the modern era, the range of actors who influence international relations includes international organizations, NGOs, and large, private corporations. Several of the essays in this symposium recommend informal "alliances" with non-state entities to pursue common objectives.

The essays on human rights and racial justice emphasize the value of collaborating with civil society and human rights organizations. The essays on trade, migration, climate change, and health law highlight the need to cooperate with the international organizations that are key actors in those policy areas. Ohlin notes the need for cooperation with private social media companies to combat election interference. Similarly, Bodansky stresses the importance of the private sector, subnational governments, and environmental groups in addressing the threat of climate change. Gostin et al.'s essay on health law advocates revitalizing and expanding the Global Health Security Agenda, which "convenes partner countries, international organizations, NGOs, and private sector companies to build and independently evaluate national health system capacities."

During the Cold War, the Soviet Union was the United States' major adversary and NATO was its most important alliance for confronting the Soviet threat. Today, China is the nation's most formidable rival, but there is no ready-made alliance for confronting China. The United States, Japan, India, and Australia have developed an informal group known as "the Quad" for this purpose, but more could be done. China is a much more formidable economic competitor than the Soviet Union ever was. One goal of the Trans-Pacific Partnership (TPP) was to create an informal alliance to counter China's economic influence. Goldstein observes that a Biden administration effort to revive the TPP would face significant domestic obstacles, but she thinks President Biden might have "more freedom on this than expected."

President Biden has called for a "global Summit for Democracy" that "will bring together the world's democracies" to defend against authoritarianism.<sup>16</sup> Similarly, Ohlin suggests that the United States "should work cooperatively with allies to combat election interference using multilateral initiatives." This approach could ultimately lead to a new Alliance for Democracy to protect democracies from resurgent authoritarianism.<sup>17</sup>

<sup>16</sup> [Joe Biden Delivers Foreign Policy Address in New York City](#) (July 11, 2019).

<sup>17</sup> See David L. Sloss, *Information Warfare and Democratic Decay*, in TYRANTS ON TWITTER: PROTECTING DEMOCRACIES FROM CHINESE AND RUSSIAN INFORMATION WARFARE (forthcoming).

*Conclusion*

The essays in this symposium offer concrete proposals that the United States can pursue to recalibrate and reinvigorate international law and institutions in ways adapted to the present context. The President can implement some measures on his own authority, but others will require congressional action. The United States can take some steps unilaterally, but bilateral, regional, and multilateral cooperation will be necessary to make meaningful progress in solving the critical problems that this symposium addresses. The Biden administration will need to work cooperatively with U.S. allies, asserting U.S. leadership without being a bully. Its success will require combinations of innovation and resilience, boldness and humility.