

A BRIEF CRITICISM OF THE UNITED STATES’
STRATEGIC ACTIONS IN
THREE PENDING I.C.J. CASES

SABINA VENEZIANO*

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I. INTRODUCTION

The United States is a reluctant participant in the International Court of Justice (I.C.J.). The United States’ responses to unfavorable I.C.J. rulings have included withdrawing from the treaty in question, withdrawing from the compulsory jurisdiction of the I.C.J., and ignoring the I.C.J. judgments through

* Sabina Veneziano is an LL.M. student at New York University School of Law and will graduate in May 2019. She received her J.D. from Georgetown University Law Center in May 2018. She has participated in the Center for Transnational Legal Studies in London, pursuing emerging issues of transnational law. Her main interests include public international law, the domestic implementation of international law, and the historic and legal aspects of the American Founding. She would like to thank the *N.Y.U. Journal of International Law & Politics* for their help and guidance during the publication process.

noncompliance. Most recently, in response to three current cases before the I.C.J., the United States chose to withdraw from the treaties before the ruling on the merits of the cases. The purpose of this comment is to critique the United States' reaction to these three cases and illustrate why this tactical move may have dire consequences and should have been approached differently—by waiting for the three cases to fully be decided by the I.C.J.

II. CURRENT I.C.J. CASES

The United States is currently a defendant in three pending I.C.J. cases. In two of the cases, Iran is suing the United States for alleged violations of a 1955 Friendship Treaty; and in the third case, Palestine is suing the United States regarding the latter's choice to relocate the U.S. embassy in Israel from Tel Aviv to Jerusalem, which Palestine views as a violation of the Vienna Convention on Diplomatic Relations. This section gives a brief overview of these cases.

A. *Certain Iranian Assets*—Iran v. United States

In April 2016, the United States Supreme Court decided in *Bank of Markazi v. Peterson* that Iranian assets held in Bank Markazi in the United States could be used to satisfy terrorism judgments obtained by plaintiffs against Iran.¹ The Court made this decision over Iran's objection that it was entitled to foreign sovereign immunity. Thus, in June 2016, Iran sued the United States in the I.C.J. for violations of a 1955 Treaty of Amity, Economic Relations, and Consular Rights.²

Iran argued that the U.S. Supreme Court ruling infringed on Iran's ability to "to exercise their rights to control and enjoy their property," including Iranian property inside the United States.³ Iran also alleged other violations of the 1955 Friendship Treaty, including its lack of access to American courts and an infringement on the freedom of commerce be-

1. *See* *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016).

2. *See* *Certain Iranian Assets (Iran v. U.S.)*, Application Instituting Proceedings (June 14, 2016), <https://www.icj-cij.org/files/case-related/164/164-20160614-APP-01-00-EN.pdf>. For the treaty text, see Treaty of Amity, Economic Relations, and Consular Rights, Iran-U.S., Aug. 15, 1955, 8 U.S.T. 899 [hereinafter 1955 Friendship Treaty].

3. *Iran v. U.S.*, Application Instituting Proceedings, at 4.

tween Iran and the United States.⁴ The United States, in turn, argued that the claims brought by Iran fell outside the 1955 Friendship Treaty. They also argued that the I.C.J. exercising jurisdiction over the case would be an abuse of the I.C.J.'s jurisdiction, as under the 1955 Friendship Treaty jurisdiction was “predicated upon, and was designed to govern, normal and ongoing commercial and consular relations between the United States and Iran—a state of affairs that has not existed for nearly four decades.”⁵ Oral arguments before the I.C.J. ran from October 8 to October 12 of 2018. On February 13, 2019, the I.C.J. ruled that it had jurisdiction to move forward with the case.⁶

B. *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights—
Iran vs. United States*

In 2018, Iran filed a second suit in the I.C.J. for violations of the same 1955 Friendship Treaty.⁷ This suit arose from the Trump Administration's termination of the Joint Comprehensive Plan of Action⁸ and subsequent re-imposition of sanctions on Iran.⁹ Iran alleged that these sanctions violated many provisions of the 1955 Friendship Treaty, including “prohibition of discriminatory measures with regard to the ability of importers or exporters to obtain marine insurance,” and the “freedom of commerce.”¹⁰ The United States argued that the I.C.J. lacked jurisdiction over the case, contending that the 1955 Friendship Treaty was merely a pretext designed to provide the I.C.J.

4. *Id.* at 6.

5. Certain Iranian Assets (Iran v. U.S.), Preliminary Objections, ¶ 1.9 (May 1, 2017), <https://www.icj-cij.org/files/case-related/164/164-20170501-WRI-01-00-EN.pdf>.

6. Certain Iranian Assets (Iran v. U.S.), Preliminary Objections, ¶ 126 (Feb 13, 2019), <https://www.icj-cij.org/files/case-related/164/164-20190213-JUD-01-00-EN.pdf>.

7. *See* Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Request for the Indication of Provisional Measures, ¶ 1 (Oct. 3, 2018), <https://www.icj-cij.org/files/case-related/175/175-20181003-ORD-01-00-EN.pdf>.

8. The Joint Comprehensive Plan of Action is referred to herein as the Iran Deal.

9. Iran v. U.S., Request for the Indication of Provisional Measures, ¶¶ 17–23.

10. *Id.* ¶ 31.

with jurisdiction over the United States' controversial termination of the Iran Deal—which in fact did not confer jurisdiction to the I.C.J.¹¹

On October 4, 2018, the International Court of Justice issued provisional measures ordering the United States to remove the sanctions that suppressed humanitarian aid to Iran, including medical supplies, food, and civil aviation safety.¹² Secretary of State Pompeo, however, insisted that the sanctions on Iran contained exemptions for humanitarian aid and aviation safety.¹³ Further, he stated that the U.S. government would work with the Department of Treasury to ensure that humanitarian aid to and related transactions with Iran would continue.¹⁴

C. Palestine v. United States

In September 2018, Palestine sued the United States over the United States' choice to move the American embassy in Israel from Tel Aviv to Jerusalem, which was announced by the United States on December 6, 2017.¹⁵ Palestine cited a number of United Nations General Assembly resolutions and Security Council Resolutions that purportedly assured that Jerusalem would maintain its special status and warned against changing its status.¹⁶ Security Council Resolution 478, passed in 1980 and subsequently reaffirmed in 2016, called for all states who established “diplomatic missions” in Jerusalem to withdraw them.¹⁷ Prior to the United States' decision, all states had complied with this resolution.

11. *Id.* ¶¶ 34–35.

12. *Id.* ¶¶ 91–94, 98.

13. Saeed Kamali Dehghan & Julian Borger, *International Court of Justice Orders US to Lift New Iran Sanctions*, *GUARDIAN* (Oct. 3, 2018), <https://www.theguardian.com/world/2018/oct/03/international-court-of-justice-orders-us-to-lift-new-iran-sanctions>.

14. Natasha Turak, *US Rejects International Court of Justice Ruling on Iran, Continuing Its Isolationist Charge*, *CNBC* (Oct. 5, 2018), <https://www.cnbc.com/2018/10/05/us-rejects-international-court-of-justice-ruling-on-iran-continuing-its-isolationist-charge.html>.

15. Relocation of the United States Embassy to Jerusalem (Palestine v. U.S.), Application for Instituting Proceedings, ¶ 3 (Sept. 28, 2018), <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf>.

16. *Id.* ¶¶ 3–13.

17. *Id.* ¶¶ 14–20.

After the United States announced that it would move its embassy to Jerusalem, the Security Council attempted to pass¹⁸ and the General Assembly passed resolutions declaring such a move to be null and void and irreconcilable with previous resolutions.¹⁹ In March of 2018, Palestine signed onto the Optional Protocol for the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes.²⁰ Palestine then sued the United States in September 2018, stating that the I.C.J. had jurisdiction under Article I of the Optional Protocol.²¹ Palestine contended that the United States violated several provisions of the Vienna Convention on Diplomatic Relations (VCDR) by moving its embassy in Israel to Jerusalem.²² Palestine asked the I.C.J. to rule that the United States is in breach of the VCDR, that the United States withdraw its embassy from Jerusalem, and that the United States take steps to ensure it would not take any future measures that would violate the VCDR.²³ The I.C.J. announced the filing time-limits on November 15, 2018.²⁴ The case is currently in progress.

III. AFTERMATH

After the I.C.J. ruled against the United States in the Order for Provisional Measures in the 2018 case brought by Iran, the United States announced its decision to withdraw from the 1955 Friendship Treaty with Iran and the Optional Protocol. In response to the withdrawal from the 1955 Friendship

18. The United States has veto power in the Security Council and thus vetoed this resolution from being adopted. *See id.* ¶ 22.

19. *Id.* ¶ 23.

20. Optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning the Compulsory Settlement of Disputes, Apr. 18, 1961, 500 U.N.T.S. 241 [hereinafter Optional Protocol].

21. Palestine v. U.S., Application for Instituting Proceedings, ¶¶ 25–29. “Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.” *Id.* ¶ 31.

22. *Id.* ¶¶ 36–50.

23. *Id.* ¶¶ 51–53.

24. Relocation of the United States Embassy to Jerusalem (Palestine v. U.S.), Order Fixing Time-Limits (Nov. 15, 2018), <https://www.icj-cij.org/files/case-related/176/176-20181115-ORD-01-00-EN.pdf>.

Treaty, Secretary of State Mike Pompeo said, “[w]e [the United States] ought to have pulled out of it decades ago . . . [the termination was] 39 years overdue. . . . This marked a useful point for us to demonstrate the absolute absurdity of the Treaty of Amity between the United States and the Islamic Republic.”²⁵ Also, United States National Security Advisor John Bolton announced on October 3, 2018 that the United States would withdraw from the Optional Protocol, one of the reasons being that it does not recognize Palestinian statehood.²⁶ On October 12, 2018, the U.N. Secretary-General received the United States government’s notice of withdrawal from the Optional Protocol.²⁷ Bolton further announced that the United States would be reviewing all international agreements by which the United States has submitted to I.C.J. jurisdiction. .²⁸ However, because these cases were brought before the United States withdrew from the treaties, the suits will proceed.

25. Carol Morello, *U.S. Terminates 1955 Treaty with Iran, Calling It an ‘Absolute Absurdity,’* WASH. POST (Oct. 3, 2015), https://www.washingtonpost.com/world/national-security/us-terminates-1955-treaty-with-iran-calling-it-an-absolute-absurdity/2018/10/03/839b39a6-3bcf-42b1-a2d5-04bfe1c5f660_story.html?utm_term=.856c7a3a50b0.

26. The State of Palestine is not listed as a recognized state by the United States. See *Independent States in the World*, U.S. DEP’T STATE (Mar. 27, 2019), <https://www.state.gov/s/inr/rls/4250.htm>.

27. See Optional Protocol, *supra* note 20. On October 12, 2018, the Secretary-General received a communication from the United States which stated the latter’s withdrawal from the Optional Protocol. It reads: “the Government of the United States of America [refers] to the Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes, done at Vienna on April 18, 1961. This letter constitutes notification by the United States of America that it hereby withdraws from the aforesaid Protocol. As a consequence of this withdrawal, the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol.” *Privileges and Immunities, Diplomatic and Consular Relations, Etc*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-5&chapter=3&clang=_en (last visited Apr. 12, 2019).

28. Nicole Gaouette & Jamie Crawford, *US Blasts International Court on Iran Ruling, Pulls Out of 1955 Treaty*, CNN (Oct. 20, 2018), <https://www.cnn.com/2018/10/03/politics/pompeo-icj-iran-ruling/index.html>.

IV. OBSERVATIONS IN THE AFTERMATH

A. *The United States' Actions Defeat the Purpose of the International Court of Justice*

The United States' withdrawal from the two treaties after the unfavorable provisional measures ruling undermines the fundamental purpose of the I.C.J. Article 33 of the United Nations Charter evidences the purpose of the International Court of Justice. It states that “[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”²⁹ Article 92 establishes the International Court of Justice as the “principle judicial organ of the United Nations.”³⁰

The establishment of the I.C.J. was not the beginning, but rather the continuation of an historical attempt to mitigate conflicts between states by providing means of arbitration, and later adjudication, of disputes in a peaceful manner so that states would not resort to wars and violence.³¹ In 1943, after a conference between China, the Soviet Union, the United Kingdom, and the United States, those states released a joint declaration maintaining the need “of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving States, and open to membership by all such States, large and small, for the maintenance of international peace and security.”³²

Thus, the purpose of the I.C.J. is resolving disputes between states so they do not resort to military confrontation. However, if the constant rebuke of I.C.J. rulings by the United States, one of the strongest states both politically and economically, continues, then other states will start to question their need to comply with I.C.J. rulings. They might start to believe that if one state does not respect the I.C.J., then there is no

29. U.N. Charter art. 33.

30. *Id.* art. 92.

31. For a history of international arbitration and adjudication tribunals, see *History*, INT'L COURT JUST., <http://www.icj-cij.org/en/history> (last visited Apr. 12, 2019).

32. *Id.*

reason for the others to do so. If states do not comply with I.C.J. judgments, then the purpose of having an international tribunal will be rendered futile because states will not abide by its judgments.

B. *A Complex History: United States & the I.C.J.*

The United States has a history of hostility toward the I.C.J.'s unfavorable rulings against it and has maintained a practice of withdrawing from the relevant treaty or jurisdiction of the I.C.J. in response to its rulings. The following section presents examples of this behavior.³³

1. *Nicaragua v. United States of America*

In 1986, Nicaragua filed suit in the I.C.J. against the United States, alleging that the United States "recruit[ed], train[ed], arm[ed], equip[ed], finance[ed], supply[ed] and otherwise encourage[ed], support[ed], aid[ed], and direct[ed] military and paramilitary actions in and against Nicaragua."³⁴ Nicaragua alleged and the I.C.J. agreed that these actions were in violation of the 1956 Treaty of Friendship, Commerce, and Navigation between the United States and Nicaragua.³⁵ After this decision, the United States withdrew from the compulsory jurisdiction of the I.C.J.³⁶

2. *The Consular Relations Cases*

In 1998, Paraguay sued the United States in the I.C.J.³⁷ for the United States' failure to notify Breard, a Paraguayan national arrested for and convicted of attempted rape and mur-

33. The purpose of this list is not to analyze or make any observations on the merits of the United States' actions regarding these cases or comment on the legal aspects of these cases. The purpose is only to illustrate examples of when the United States rebuked the authority of the International Court of Justice.

34. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 15(a) (June 27).

35. *Id.* ¶¶ 277-280.

36. Adam Liptak, *U.S. Says it has Withdrawn From World Judicial Body*, N.Y. TIMES (Mar. 10, 2005), <http://www.nytimes.com/2005/03/10/politics/us-says-it-has-withdrawn-from-world-judicial-body.html>.

37. Vienna Convention on Consular Relations (Para. v. U.S.), Order, 1998 I.C.J. 266 (Apr. 9).

der,³⁸ of his right to consular notification.³⁹ Breard appealed his conviction to the United States Supreme Court, but the Court rejected his request for a stay of execution while his I.C.J. case was being processed and deliberated.⁴⁰ On April 9, 1998, the I.C.J. insisted the United States not allow Breard's execution because the lack of consular notification was "a clear and undisputed violation of the Vienna Convention."⁴¹ However, Breard was executed in Virginia in April 1998,⁴² in another example of the United States flouting the jurisdiction of the I.C.J.

Also, in March 1999, Germany filed suit in the I.C.J. against the United States for failure of the latter to inform two German nationals—Walter and Karl LaGrand—of their consular notification rights under the same convention as Breard.⁴³ The United States countered that the LaGrand brothers could not bring an Article 36 claim due to procedural default rules.⁴⁴ After Walter LaGrand was convicted of murder in the first degree, attempted murder in the first degree, attempted armed robbery, and two counts of kidnapping, the I.C.J. again issued an order insisting that he not be executed until the I.C.J. could render its decision.⁴⁵ The United States did not comply.⁴⁶ The I.C.J. did, however, issue a decision against the United States in 2001, finding that it violated the LaGrand brothers' right to consular notification.⁴⁷

38. *Breard v. Greene*, 523 U.S. 371, 373 (1998).

39. *See* Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

40. *See Breard*, 523 U.S. at 374–378.

41. David Stout, *Clemency Denied, Paraguayan is Executed*, N.Y. TIMES (Apr. 15, 1998), <https://www.nytimes.com/1998/04/15/us/clemency-denied-paraguayan-is-executed.html>. *See also* Pieter Bekker & Keith Highet, *International Court of Justice Orders United States to Stay Execution of Paraguayan National in Virginia*, AM. SOC'Y INT'L L. (Apr. 4, 1998), <https://www.asil.org/insights/volume/3/issue/4/international-court-justice-orders-united-states-stay-execution-paraguayan>.

42. Stout, *supra* note 41.

43. *See* LaGrand Case (Ger. v. U.S.), Judgment, 2001 I.C.J. 466 (June 27).

44. *Id.* ¶ 23.

45. *Id.* ¶ 32.

46. *Id.* ¶¶ 33–34. Note: Karl LaGrand was executed February 1999, before the Germany filed suit in the I.C.J. *Id.* ¶ 28.

47. *Id.* ¶ 77.

Additionally, Mexico filed suit in the I.C.J. alleging that the United States violated the consular rights of fifty-one Mexican nationals by not informing them of their Article 36 right to contact the Mexican consulate after arrest.⁴⁸ The I.C.J. again ruled that the United States violated the Vienna Convention on Consular Relations by not informing these fifty-one Mexican nationals of their right to consular notification.⁴⁹ After this I.C.J. decision, the United States withdrew from the Optional Protocol to the Vienna Convention on Consular Relations, which had given the I.C.J. jurisdiction to hear any disputes raised under the Vienna Convention on Consular Relations against the United States.⁵⁰ A spokeswoman from the United States Department of State, Darla Jordan, asserted the United States would fulfil its international law obligations, but clarified that the country wanted to “[protect] against future International Court of Justice judgments that might similarly interfere in ways [it] did not anticipate when [it] joined the protocol.”⁵¹

C. *Present Implications*

Presently, the United States is not rebuking a decision of the I.C.J., but rather the jurisdiction of the I.C.J. itself, as the United States does not feel that the three current disputes—the two Iran cases and the Palestine case—fall under its purview. The United States’ withdrawals from the relevant treaties in these cases, however, were premature. These current cases are fundamentally different than the ones highlighted above because the present cases affect the credibility and reliability of the United States during the treaty making process. Treaties are “binding agreements among nations;”⁵² the doctrine of *pacta sunt servanda* requires that treaties be adhered to by the states party to them.⁵³ That being said, treaties often do provide for termination by one or both of the parties. The United

48. *See Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 12 (Mar. 31).

49. *Id.* ¶ 106.

50. Liptack, *supra* note 36.

51. *Id.*

52. CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* xxv (6th ed. 2017).

53. Sylvanus A. Tiewul, *The Fisheries Jurisdiction Cases (1973) and the Ghost of Rebus Sic Stantibus*, 6 N.Y.U. J. INT’L L. & POL. 455, 463 (1973).

States was legally permitted under international law to terminate the 1955 Friendship Treaty with Iran. The 1955 Friendship Treaty with Iran provides for termination following one year's written notice by the terminating party, with which the United States complied.⁵⁴ Further, the United States gave proper notice to the Optional Protocol that it was withdrawing its consent to submit to the I.C.J. jurisdiction for conflicts involving the VCDR.⁵⁵ However, there are serious implications for premature termination and useful lessons to be learned, as the United States did not have to act precisely the way it did. The next section explains these implications.

1. *Termination of the 1955 Friendship Treaty*

The foreign policy of the United States towards Iran is undeniably clear. The states have not had diplomatic ties since 1979 and their hostile relations have continued for almost forty years. It is arguable that the two current cases between Iran, the 2018 alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights case and the 2016 Certain Iranian Assets case, were preventable.

In the Bank Markazi Case, Iran argued that the attachment of the terrorism judgments to the Iranian assets violated the 1955 Friendship Treaty.⁵⁶ While the Court of Appeals did not agree with Iran's view of the treaty's application to the Bank Markazi case, Iran still included this argument in its brief to the Supreme Court.⁵⁷ Accordingly, the United States was on notice that Iran still considered the 1955 Friendship Treaty valid and considered the United States' actions to be in violation of it. The United States could have prevented this case in the I.C.J. by terminating the 1955 Friendship Treaty via the termination clause before or after the ruling in the Supreme

54. Nick Wadhams & Toluse Olorunnipa, *U.S. Abandons Two Legal Accords After Iranian, Palestine Cases*, BLOOMBERG (Oct. 3, 2018), <https://www.bloomberg.com/news/articles/2018-10-03/u-s-quits-1955-iran-friendship-treaty-in-purely-symbolic-rebuke>. See also 1955 Friendship Treaty, *supra* note 2, at XX-III(2)-(3).

55. See *Privileges and Immunities*, *supra* note 27.

56. Brief for Petitioner, *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016) (No. 14-770), 2015 WL 7294865.

57. *Id.* at 16, n.2.

Court case. However, it did not.⁵⁸ Furthermore, after President Trump terminated the Iran Deal and informed of the reimposition of sanctions on Iran,⁵⁹ the United States should have foreseen Iran's continued reliance on the 1955 Friendship Treaty and the I.C.J. since it already brought the 2016 case.

However, once the suits were brought, the United States followed the procedure laid out in the treaty for terminating the agreement in order to avoid being subjected to any further liability. The termination also reflects that the agreement was made under different circumstances and based on a different relationship between the United States and Iran than exist between the two countries today. The timing of the termination was, however, inopportune because it occurred on the same day the I.C.J. released the unfavorable provisional measures ruling. The United States seemed to be rebuking the I.C.J. rather than just targeting the validity of the 1955 Treaty based on the view that the treaty was no longer reasonable based on the United States' current foreign policy toward Iran. The United States should have either waited to terminate the treaty or announced the termination in such a way that the treaty alone would be denounced, rather than denouncing the I.C.J. itself.

For example, Secretary of State Pompeo stated that the United States was "disappointed that the court [I.C.J.] failed to recognize that it ha[d] no jurisdiction to issue any order relating to [the] sanctions measures with the United States."⁶⁰ The I.C.J. held in its order for provisional measures that the decision "in no way prejudices the question of the jurisdiction of

58. As the Supreme Court decision was released in 2016 when President Obama was still in office, and due to his Administration's stance on re-developing a positive relationship with Iran and also the Iran Nuclear Deal, which was already in place, even if this option of treaty withdrawal was discussed—which it probably was—the action would not be taken, despite the looming possibility of a suit in the I.C.J.

59. See Mark Landler, *Trump Abandons Iran Nuclear Deal He Long Scorned*, N.Y. TIMES (May 8, 2018), <https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html>. See also *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Request for the Indication of Provisional Measures*, ¶ 14 (Oct. 3, 2018), <https://www.icj-cij.org/files/case-related/175/175-20181003-ORD-01-00-EN.pdf>

60. Morello, *supra* note 25.

the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits.”⁶¹ The I.C.J. did not rule on the jurisdiction of the court to hear the merits of the case. It only found *prima facie* jurisdiction to hear the application for provisional measures. Provisional measures can be requested by any party to an I.C.J. case under Article 41 of the I.C.J. Statute and Article 73 of the Rules of the Court.⁶² Its purpose is to preserve a state’s rights while the case progresses before the I.C.J.⁶³ Thus, the United States is still free to argue against the I.C.J.’s jurisdiction and against the merits of Iran’s claims.

2. *Withdrawal from the Optional Protocol*

The I.C.J. claimed it would first resolve the question of jurisdiction in the Palestine case. Therefore, the United States should not have terminated the Optional Protocol before the I.C.J. decided the merits of the Palestine case, as the United States had legitimate arguments it could have made to refute jurisdiction. For Palestine to bring the case in the I.C.J., the I.C.J. would first need to determine whether Palestine is indeed a state.⁶⁴ If Palestine is not considered a state, then the case cannot move forward in the I.C.J.⁶⁵

While 139 countries recognize Palestine as a state, the United States does not.⁶⁶ In fact, after Palestine acceded to the VCDR on May 13, 2014, Jennifer G. Newstead, Legal Advisor of the United States Department of State, informed the I.C.J. that the United States sent a communication to the U.N. Secretary-General asserting that the United States does not consider itself to have any “treaty relationship” with Palestine

61. Iran v. U.S., Request for the Indication of Provisional Measures, ¶ 101.

62. See Statute of the International Court of Justice art. 41 [hereinafter I.C.J. Statute]. See also *Rules of the Court*, INT’L CT. JUST., <https://www.icj-cij.org/en/rules> (last visited Apr. 12, 2019).

63. LaGrand Case (Ger. v. U.S.), Judgment, 2001 I.C.J. 466, ¶ 102 (June 27).

64. Victor Kattan, *Haaretz Publishes My Take on Palestine v United States of America* (Oct. 5, 2018), <http://victorkattan.com/work/haaretz-publishes-my-take-on-palestine-v-united-states-of-america/>.

65. I.C.J. Statute, *supra* note 62, art. 34.

66. Kattan, *supra* note 64.

under the VCDR.⁶⁷ The United States transmitted a similar message in May 2018 when Palestine joined the Optional Protocol.⁶⁸ The United States also notified Palestine of these communications.⁶⁹ Additionally, the United States could have also made the argument that every state has the right to recognize other states, and although the I.C.J. may consider Palestine a state, there is still a question of whether a state can be sued by another state if the former does not recognize the latter *as a state*.⁷⁰

Accordingly, the United States should have waited for the I.C.J.'s ruling in order to determine whether the drastic measure of withdrawing from the Optional Protocol was necessary.

There were better avenues available to the United States aside from withdrawing from the Optional Protocol. This treaty provides the I.C.J. jurisdiction if a dispute arises between the states party to it under the VCDR. The treaty provides that “[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.”⁷¹

The United States itself relied on this this Optional Protocol to sue Iran in the I.C.J. during the Iranian Hostage Crisis in 1979.⁷² In that instance, Iranian students stormed the American embassy in Tehran and held fifty-two Americans hostage for 444 days.⁷³ The I.C.J. found in favor of the United States and held that Iran violated various treaties, including the Vienna Convention on Diplomatic Relations.⁷⁴ There, the I.C.J. held that:

67. Relocation of the United States Embassy to Jerusalem (Palestine v. U.S.), Order (Nov. 15, 2018), <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf>.

68. *Id.*

69. Relocation of the United States Embassy to Jerusalem, 2 (Palestine v. U.S.), Order Fixing Time-Limits (Nov. 15, 2018), <https://www.icj-cij.org/files/case-related/176/176-20181115-ORD-01-00-EN.pdf>.

70. The viability of this argument is beyond the scope of this comment.

71. Optional Protocol, *supra* note 20, art. 1.

72. United States Diplomatic and Consular Staff in Tehran (Iran v. U.S.), Judgment, 1980 I.C.J. 3, ¶ 67 (May 24).

73. Amit K. Chhabra, *How to Really Engage Iran: A Proposal*, 14 CHI.-KENT J. INT'L & COMP. LAW 1, 4 (2013).

74. Iran v. U.S., 1980 I.C.J. ¶ 95.

[T]here is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose; and whereas the obligations thus assumed, notably those for assuring the personal safety of diplomats and their freedom from prosecution, are essential, unqualified, and inherent in their representative character and their diplomatic function⁷⁵

Now that the United States is not party to the Optional Protocol, if a situation similar to the Iranian Hostage Crisis—or any violation of the VCDR that harms the United States—occurs, the United States will not be able to seek a remedy in the I.C.J. This inability might then lead to the use of other less favorable strategies to make the violating state comply with its obligations. Thus, withdrawing from the Optional Protocol made the United States susceptible to serious risk when perhaps it could have achieved the same result in the Palestine case by simply arguing against jurisdiction. Then, the United States would still be protected against future violations of the VCDR because it would still be a party to the Optional Protocol.

V. CONCLUSION

In conclusion, the United States took rash, unnecessary action in response to both Iran cases and the Palestine case. Treaties are agreements that set a state's obligations and rights toward other states in certain areas of the law. The I.C.J. exists to solve disputes regarding these treaties for states that submit to its jurisdiction over the case or treaty. The United States should be more diligent in how it allows itself to be subjected not just to the I.C.J., but also to the other treaties by which it has promised to abide. When the treaty is no longer reasonable or viable, the United States needs to take swift and clear action so that all states party to the agreement can understand their obligations. Further, the United States should have

75. United States Diplomatic and Consular Staff in Tehran (Iran v. U.S.), Request for the Indication of Provisional Measures, ¶ 38 (Dec. 15, 1979), <https://www.icj-cij.org/files/case-related/64/064-19791215-ORD-01-00-EN.pdf>.

waited for the I.C.J. to render its decision on Palestine's status as a state and the merits of the dispute. Complete withdrawal was not necessary or beneficial, as the Optional Protocol has significant importance—including that it protects a state's foreign embassies and diplomats. There were other avenues for the United States to take rather than rebuking the I.C.J., which has an important role in the international community of resolving disputes between states peacefully.