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International Human Rights Law: An Unexpected Threat to Peace

Ingrid Wuerth

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INTERNATIONAL HUMAN RIGHTS LAW: AN UNEXPECTED THREAT TO PEACE

INGRID WUERTH*

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It is a great honor to deliver this lecture in honor of the late Dean Robert F. Boden. I am grateful to all of you for attending. My topic tonight is international law and peace among nations. It may seem a poor fit for a lecture honoring Dean Boden. I did not know him, but I have read that Dean Boden was passionately dedicated to teaching law students about the actual day-to-day practice of law. He believed that law schools should be focused on that sort of professional training—not on policy questions or preparing students to be “architects of society,” as one of his successors characterized his views.¹

International law involves lots of policy. And some international law involves structuring or building a global society of sorts. Yet it also demands outstanding technical lawyers—the very ones that we train, you at Marquette and I at Vanderbilt. Beyond that, international law addresses many topics about which lawyers and other leaders in Milwaukee and Nashville should be educated, even passionate. Those include my topic tonight. So I think that Dean Boden would approve.

In all events, the importance of peace among nations is clear as we look back in history to the devastating losses of World Wars I and II and as we look forward and contemplate the possibility of nuclear conflict with Iran or North

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1. Howard B. Eisenberg, *Why We Honor Robert F. Boden*, 81 MARQ. L. REV. 1, 2 (1997).

Korea, or the possibility of a maritime war with China, or war with Russia in Ukraine and Eastern Europe. Many foreign policy experts size up the world today and conclude that the risk of a major interstate war is significant and growing.

One threat comes from what has been termed “Thucydides’s Trap,” named after the ancient Greek historian of the Peloponnesian War.² Thucydides argued that the rise of Athens and the fear this instilled in Sparta, the dominant power of the time, made war inevitable.³ And it has not been just Sparta and Athens. Looking over the past 500 years, scholar Graham Allison has argued that when a power rises quickly and threatens to displace a ruling power, the most likely outcome historically is war.⁴ The key variable is a rapid shift in the balance of power, generally measured by relative gross domestic product and military strength. Twelve of the 16 cases in which this occurred in the past 500 years ended violently.⁵

Today, this threat is posed by China, whose dramatic economic growth threatens to displace the dominant power: the United States. Indeed, on some economic measures, it has already done so.⁶ China is also making tremendous investments in its military, narrowing the gap between itself and the United States.⁷ History suggests that this pattern is a dangerous one.

Beyond the specifics of Thucydides’s Trap, both China and Russia are revisionist powers—meaning that they are unhappy with the global distribution of power and would like to restore regional dominance. Robert Kagan, of the Brookings Institution and formerly of the State Department, warns that we might be “[b]acking into World War III.”⁸ Some of the Chinese and Russian ambition is territorial—as in the East and South China Seas for the former and

2. GRAHAM ALLISON, *DESTINED FOR WAR: CAN AMERICA AND CHINA ESCAPE THUCYDIDES’S TRAP?*, 27–29 (2017).

3. *Id.* at 39–40.

4. *See generally id.*

5. *Id.* at 41.

6. *See GDP Based on PPP, Share of World*, INT’L MONETARY FUND, <http://www.imf.org/external/datamapper/PPPSH@WEO/USA/CHN> [<https://perma.cc/FP2G-ZSLY>] (last visited Dec. 17, 2017) (comparing the United States and China); *Real GDP Growth*, INT’L MONETARY FUND, http://www.imf.org/external/datamapper/NGDP_RPCH@WEO/USA/CHN [<https://perma.cc/4JKQ-98ST>] (last visited Dec. 17, 2017) (same).

7. *See* ERIC HEGINBOTHAM ET AL., *THE U.S.-CHINA MILITARY SCORECARD: FORCES, GEOGRAPHY, AND THE EVOLVING BALANCE OF POWER, 1996–2017*, at 21 (2015), https://www.rand.org/pubs/research_reports/RR392.html [<https://perma.cc/M5ML-XQMG>].

8. Robert Kagan, *Backing Into World War III*, FOREIGN POL’Y (Feb. 6, 2017), <http://foreignpolicy.com/2017/02/06/backing-into-world-war-iii-russia-china-trump-obama/> [<https://perma.cc/Z7EF-4MTM>].

in Ukraine and Eastern Europe for the latter.⁹ China and Russia both view themselves as victims of hegemonic power wielded by the West, in particular by legal power exercised through international law, sometimes in the form of unfair treaties—or, to use the term made popular in the Ottoman Empire, “capitulations.”¹⁰

Both China and Russia perceive the liberal post-war order in general, and the United States in particular, as thwarting their objectives. At the same time, Kagan argues, the United States and the West have a declining will and ability to maintain the dominant place that they have held in the international system since 1945.¹¹

Other foreign policy experts argue that, despite their differences, American liberals and conservatives shared three basic foreign policy principles in the post-World War II era: faith in democracy; belief that America’s security is enhanced by its broad and deep alliances around the world; and confidence that open trade brings global prosperity.¹² A retreat from these post-World War II values means that the risk of war grows, some have warned.¹³

But there is some good news: Despite these threats and even gathering storm clouds, today we continue to live in a period dubbed “The Long Peace”—meaning the post-World War II period in which there has been a dramatic

9. Jeremy Bender, *Russia’s New Military Doctrine Shows Putin’s Geopolitical Ambitions*, BUS INSIDER (Jan. 12, 2015, 1:38 PM), <http://www.businessinsider.com/russia-has-a-new-military-doctrine-2015-1> [<https://perma.cc/V6HK-VQNV>]; Ryan M. Scoville, *A Defense of Japanese Sovereignty Over the Senkaku/Diaoyu Islands*, 46 GEO. WASH. INT’L L. REV. 571, 572 (2014); see also JAMES D. J. BROWN, JAPAN, RUSSIA AND THEIR TERRITORIAL DISPUTE: THE NORTHERN DELUSION 53, 58–61, 64 (2016).

10. PHIL C.W. CHAN, CHINA, STATE SOVEREIGNTY AND INTERNATIONAL LEGAL ORDER 16 (2015); Lauri Mälksoo, *Russia and China Challenge the Western Hegemony in the Interpretation of International Law*, EJIL: TALK! (July 15, 2016), <https://www.ejiltalk.org/russia-and-china-challenge-the-western-hegemony-in-the-interpretation-of-international-law/#more-14441> [<https://perma.cc/U5C3-9U9G>]; TURAN KAYAOĞLU, LEGAL IMPERIALISM: SOVEREIGNTY AND EXTRATERRITORIALITY IN JAPAN, THE OTTOMAN EMPIRE, AND CHINA 155 (2010); see also NASIM SOUSA, THE CAPITULATORY REGIME OF TURKEY: ITS HISTORY, ORIGIN, AND NATURE, at ix–x (1933).

11. Kagan, *supra* note 8.

12. Jessica T. Mathews, *What Trump Is Throwing Out the Window*, N.Y. REV. OF BOOKS (Feb. 9, 2017), <http://www.nybooks.com/articles/2017/02/09/what-trump-is-throwing-out-the-window/> [<https://perma.cc/NVF5-5BTK>].

13. Fareed Zakaria, *FDR Started the Long Peace. Under Trump, it May be Coming to an End*, WASH. POST (Jan. 27, 2017), https://www.washingtonpost.com/opinions/global-opinions/fdr-started-the-long-peace-under-trump-it-may-be-coming-to-an-end/2017/01/26/2f0835e2-e402-11e6-ba11-63c4b4fb5a63_story.html?utm_term=.2f31e7f7af18 [<https://perma.cc/B6R4-55CF>].

reduction in armed conflict between nation-states, especially among great powers.¹⁴

During that same period—indeed, extending further back to the end of World War I—a central, overarching goal of international law has been the eradication of interstate war.¹⁵ The place or the role of international law in creating and sustaining the Long Peace is neither straightforward nor uncontested, but there are strong reasons to think that international law has helped generate that peace. Unfortunately, the features of international law most likely to have contributed to peace are today under threat, in part from unexpected quarters.

Here I wish to briefly describe the international law designed to limit interstate armed conflict. Then I will offer an evaluation of whether and how international law has been successful at preventing interstate armed conflict. My last (and longest) topic addresses current threats to peace that come from changes in international law.

I. PROHIBITION ON THE USE OF FORCE AND THE UNITED NATIONS CHARTER

Following the devastation of World War I, the Covenant of the League of Nations sought to prevent war by requiring member states to use a compulsory system of dispute resolution.¹⁶ But the covenant did not prohibit war outright. In fact, war was still permitted as a method of interstate dispute resolution, just as it had been for centuries.¹⁷

The Kellogg–Briand Pact of 1928 changed this. With this pact, or treaty, countries pledged that the “solution of all disputes” which might arise between them “shall never be sought except by pacific means.”¹⁸ That pact, which came about in large part because of the efforts of a visionary corporate lawyer from the Midwest named Salmon Levinson,¹⁹ was not an immediate success. Indeed, just a decade later, World War II began. And it was started by the very countries that had signed the Kellogg–Briand Pact.

14. See JOHN LEWIS GADDIS, *THE LONG PEACE: INQUIRIES INTO THE HISTORY OF THE COLD WAR* 245 (1987); STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* 251 (2011).

15. See STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* 5, 335 (2005).

16. Covenant of the League of Nations art. 12.

17. See *id.*; NEFF, *supra* note 15, at 3–5.

18. Kellogg–Briand Pact art. 2, Aug. 27, 1928, 46 Stat. 2343, 2346.

19. See, e.g., OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* 106–30 (2017).

So much for international law—for a while. As World War II raged, U.S. lawyers and diplomats worked again to end war for all time, now by drafting what would become the Charter of the United Nations.

The United Nations Charter has as its centerpiece a prohibition on the use of force: Article 2(4), which forbids the “threat or use of force against the territorial integrity or political independence of any state.”²⁰ The charter makes exceptions for self-defense and for uses of force authorized by the United Nations Security Council.²¹ The Security Council has the power to enforce the prohibition on the use of force through coercive measures, but the victors of World War II have the power to veto any such measures.²² Those countries are China, France, Russia, the United Kingdom, and the United States.²³ Unlike the failed League of Nations, the United Nations has near-universal membership.

Today the United Nations has an enormous agenda of worthy causes, from protecting human rights to combating diseases such as AIDS. It is easy to forget that at its inception, its core purpose was to prevent war. Those drafting the charter rejected, for example, language that would have made human rights obligations legally binding.²⁴

II. HAS IT WORKED?

So now for the second matter: Has it worked? As I have already said, we are today in a period that has been dubbed the Long Peace, meaning the post-World War II period in which there has been a dramatic reduction in armed conflict between nation-states, particularly in conflicts involving the world’s great powers.²⁵ But the precise role of *international law* in reducing interstate armed conflict is not clear. To begin with, there are questions about how international law is enforced—why, in other words, would it be effective? We will return to that point. Also, factors other than international law have unquestionably contributed to peace among nations; these likely include economic integration and development, the advent of nuclear weapons, and changing norms of human behavior.²⁶

20. U.N. Charter art. 2, ¶ 4.

21. U.N. Charter art. 51, art. 44.

22. U.N. Charter art. 27, ¶ 3.

23. U.N. Charter art. 23, ¶ 1.

24. See Bertrand G. Ramcharan, *Norms and Machinery*, in *THE OXFORD HANDBOOK ON THE UNITED NATIONS* 439, 441–42 (Thomas G. Weiss & Sam Daws eds., 2007).

25. See GADDIS, *supra* note 14, at 245; PINKER, *supra* note 14, at 189–294.

26. See PINKER, *supra* note 14.

We do know that during this long peaceful period, territorial *conquests*, now outlawed by international law, have been curtailed. One recent study, a book by Oona Hathaway and Scott Shapiro, argues that in the years before World War II, an average state could expect one conquest in a human life span. Since World War II, an average state can expect some kind of territorial conquest once or twice a millennium.²⁷ The period between 1928, when the Kellogg–Briand Pact took effect, and the end of World War II obviously involved lots of territorial conquests, suggesting that international law did not work.

In the end, however, most of those conquests were reversed. Why? The same study argues that the acquisition of territory by force violated international law after 1928, so that those conquests were not recognized by other nations and were eventually reversed, a pattern we do not see before 1928.²⁸ Note that if Hathaway and Shapiro are correct, a Midwestern corporate lawyer trained in law at Lake Forest College had the vision and determination to push through a treaty that had a transformative effect on world affairs.

Some are skeptical about the importance of 1928 and the Kellogg–Briand Pact, however, especially in light of the devastation of World War II that followed. It is clear that some forms of territorial conquests have declined since the late 1940s when the U.N. Charter came into effect, with its prohibition on the use of force.²⁹ But, as I have said, factors other than international law may have worked to generate peace among nations. Various empirical studies do show a relationship between international law and some aspects of territorial disputes,³⁰ although proving causation is, again, difficult.

27. HATHAWAY & SHAPIRO, *supra* note 19, at 314. *But see* Michael J. Glennon, *How Not to End War*, LAWFARE (Oct. 18, 2017, 7:30 AM), <https://www.lawfareblog.com/how-not-end-war> [<https://perma.cc/BWR8-6G5D>] (book review).

28. HATHAWAY & SHAPIRO, *supra* note 19, at 315.

29. *See* PINKER, *supra* note 14, at 251–52; TANISHA M. FAZAL, STATE DEATH: THE POLITICS AND GEOGRAPHY OF CONQUEST, OCCUPATION, AND ANNEXATION 169–228 (2007).

30. *See, e.g.*, Paul F. Diehl & David Bowden, *Law and Legitimacy in Territorial Changes*, 32 CONN. J. INT'L L. 49, 64–65, 69 (2016) (finding that under certain circumstances legal agreements involving territorial changes tended to lessen violent conflict and reduce ongoing territorial claims, especially in the period after 1945); Paul K. Huth et al., *Does International Law Promote the Peaceful Settlement of International Disputes? Evidence from the Study of Territorial Conflicts since 1945*, 105 AM. POL. SCI. REV. 415, 416 (2011) (finding, in a study of territorial disputes from 1945 to 2000, “strong support for our hypotheses regarding the pacifying effect of international law” with respect to territorial disputes, at least when the legal principles are clear and provide a clear advantage to one side). *But cf.* Paul R. Hensel et al., *Territorial Integrity Treaties and Armed Conflict Over Territory*, 26 CONFLICT MGMT. AND PEACE SCI. 120, 139–40 (2009) (finding that territorial integrity norms in treaties have not been as effective at reducing armed conflict as some have argued, but finding that treaties which impose a general obligation to respect territorial integrity are associated with a significant decrease in territorial conflict).

Let us approach the question from a different angle. Putting aside international law for a moment, what do we know about the causes of war? The empirical data make two things clear: (1) War is most likely to occur when countries have disagreements about territory, and (2) war is least likely to occur between democracies.³¹ These two findings are called the “territorial peace” and the “democratic peace,” respectively. I will focus on the former.

The territorial-peace literature tells us that if international law reduces conflict over territory, it should improve the likelihood of peace among nations. Indeed, reducing conflict over territory appears more likely to prevent armed conflict than does reducing economic or political conflict.³² This is an important finding: It means that to the extent international law is designed to limit territorial conflict, it is aiming at the correct target in terms of securing peace. And, as we have partly seen, international law has put in place a variety of mechanisms to reduce conflict over territory, including not just Article 2(4) of the U.N. Charter and the ban on conquests but also a host of treaties and doctrinal rules designed to preserve the sanctity of borders and institutions tasked with reducing conflict over them.

If these legal rules and institutions make territorial conflict more costly to states—which they unquestionably do, even if we do not know *how* costly—then at a minimum they reduce the incentives to engage in conflict over territory. This, in turn, is strongly correlated with peace. To be clear, this reasoning does not prove that international law has generated the Long Peace. Rather, it says that territorial conflict is strongly associated with military disputes; that international law is designed to reduce conflict over territory; and that, as those international norms generally solidified, some forms of territorial conflicts have in fact declined.

Against that backdrop, let’s turn now to our central topic: contemporary threats.

III. CONTEMPORARY THREATS

Although the data we have strongly suggest that the international legal system has contributed to the prevention of some kinds of armed conflict, today

31. DOUGLAS M. GIBLER, *THE TERRITORIAL PEACE: BORDERS, STATE DEVELOPMENT, AND INTERNATIONAL CONFLICT* 2–3 (2012); PAUL K. HUTH & TODD L. ALLEE, 82 *CAMBRIDGE STUDIES IN INT’L RELATIONS, THE DEMOCRATIC PEACE AND TERRITORIAL CONFLICT IN THE TWENTIETH CENTURY* 1 (2002).

32. GARY GOERTZ ET AL., *THE PUZZLE OF PEACE: THE EVOLUTION OF PEACE IN THE INTERNATIONAL SYSTEM* 82, 89 (2016).

peace among nations is under threat from both geopolitical and legal forces.³³ We have already discussed the geopolitical threats.

What of the threats that come from changes in the international legal system? Here you may expect me to explain how President Donald J. Trump has undermined international law. In fact, I don't think he has (yet at least), with one exception. My target is elsewhere, somewhere you are probably not expecting: human rights.

The post-World War II international legal order has been characterized by the Long Peace, but also by the rise of international human rights law, especially since the 1970s. Human rights have purported to transform international law, in part by changing the definition of "state sovereignty" to mean not merely effective control over territory but also the use of state power to protect and promote individual human rights.³⁴

The idea is powerful: States are not fully sovereign when they are violating human rights. Powerful, but with potentially deleterious effects for other international legal norms.

A. Relaxing International Law's Prohibition on the Use of Force

The transformation of state sovereignty to include respect for human rights led to an explicit call for the use of external force to prevent widespread human rights violations, sometimes called "humanitarian intervention" or (with slightly different content) the "responsibility to protect" (R2P).

The doctrine rose to prominence during and after the 1999 NATO bombing of Kosovo ordered by President Bill Clinton. The bombing was for humanitarian purposes—not, the United States said, for territorial conquest. The action violated Article 2(4) of the U.N. Charter but was defended by a few countries and by many individuals as legal on the ground that it served to protect and promote the human rights of Kosovar Albanians.³⁵

The U.N. Security Council was unable to act because Russia, with its permanent member's veto, was a longtime ally of Serbia, in which Kosovo was located. China and Russia argued that the unrest in Kosovo was a domestic issue, not one justifying international intervention.³⁶ These events led to an extensive debate about the wisdom and the legality of humanitarian intervention lacking either U.N. Security Council approval or the consent of the

33. See *supra* Part II.

34. See STEVEN R. RATNER, *THE THIN JUSTICE OF INTERNATIONAL LAW: A MORAL RECKONING OF THE LAW OF NATIONS* 126–27 (2015) (describing views).

35. See *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 628, 633–34 (Sean D. Murphy ed., 1999).

36. U.N. SCOR, 54th Sess., 3989th mtg. at 5, 9, U.N. Doc. S/PV.3989 (Mar. 26, 1999).

territorial state. Russia vehemently protested the NATO action, characterizing it as “a gross violation of the United Nations Charter and other basic norms of international law”³⁷—one illustrating that “[t]he virus of lawlessness is spreading to ever more spheres of international relations” and undermining the “capacity of the Security Council to defend the United Nations Charter.”³⁸ China condemned NATO’s intervention for exactly the same reasons.³⁹

The Kosovo intervention, however well-intentioned (and remember, from Russia’s perspective, it was not well-intentioned), has had destabilizing ramifications. The bombing campaign led eventually to Kosovo’s declaration of independence from Serbia in 2008. Not surprisingly, Serbia and its allies, especially Russia, condemned the declaration of independence and do not recognize Kosovo as a nation-state,⁴⁰ even today, meaning that Kosovo will not become a member of the United Nations any time soon.

1. Georgia and Crimea

Kosovo set a precedent for bypassing the U.N. Security Council and Article 2(4) of the U.N. Charter by one purportedly acting for humanitarian purposes. Despite its vehement disagreement with the Kosovo action, Russia eventually welcomed that precedent—citing it to justify Russia’s use of force in both Georgia and Ukraine. Crimea, which was once part of Ukraine, is today Russian.

Official Russian explanations for the actions against Georgia and Ukraine made clear references to precedent set by NATO in Kosovo. Russia said, in each case, that it was acting to protect a Russian minority from human rights violations at the hands of the Georgian and Ukrainian government.⁴¹ Note that many people in Russia and even in the West did not condemn this analogy.⁴² Although sanctions have been imposed on Russia in response to the annexation of Crimea, popular support for Putin’s handling of the situation in Ukraine

37. *Id.* at 5.

38. *Id.* at 5–6.

39. *Id.* at 9.

40. *Serbia, Russia Fury as Kosovo Independence Draws Near*, EURACTIV (Feb. 15, 2008), <https://www.euractiv.com/section/enlargement/news/serbia-russia-fury-as-kosovo-independence-draws-near/> [<https://perma.cc/P6L8-MZYF>].

41. See David M. Herszenhorn, *Crimea Votes to Secede from Ukraine as Russian Troops Keep Watch*, N.Y. TIMES, Mar. 17, 2014, at A8.

42. See, e.g., Jack Goldsmith, *The Precedential Value of the Kosovo Non-Precedent Precedent for Crimea*, LAWFARE (Mar. 17, 2014, 10:00 AM), <https://www.lawfareblog.com/precedential-value-kosovo-non-precedent-precedent-crimea> [<https://perma.cc/7VSS-CB2Q>].

remains very high among Russians.⁴³ To domestic audiences, Putin emphasized that Western countries' interventions in Kosovo and in Libya in 2011 were conducted under "the false pretense of a humanitarian intervention."⁴⁴ His emphasis on the international legal basis for Russian actions in Ukraine shows his belief that the action would be more popular at home, and therefore, less costly to his government and to Russia's interests, if it were viewed as consistent with international legal norms.

Today, the primary threat to peace with Russia is the increasingly militarized borders between NATO (or NATO-allied) countries and Russia—the area where thousands of NATO troops, the most since the end of the Cold War, are stationed.⁴⁵

In the context of Georgia and Ukraine, humanitarian intervention has thus helped generate conflict over territory by reducing the costs of intervention that can be termed "humanitarian." And the literature about the territorial peace tells us that territorial disputes have historically been most likely to lead to militarized conflict.

2. Syria

President Trump's airstrikes in Syria have further contributed to the erosion of Article 2(4) of the U.N. Charter. You will recall that in April 2017, acting without U.N. Security Council authorization, President Trump ordered airstrikes in response to Syria's use of chemical weapons—a deplorable and horrific act by Syria, to be sure. Unlike the bombing of Kosovo, the Syrian airstrikes were not the effort of a regional security organization such as NATO. They were not multilateral but unilateral.

Supporters of President Trump's actions from across the political spectrum—and there were many⁴⁶—defended the strikes as consistent with international law, arguing that Article 2(4) of the charter needs to be updated.

43. *Public Opinion in Russia: Russians' Attitudes on Economic and Domestic Issues*, AP-NORC, <http://www.apnorc.org/projects/Pages/HTML%20Reports/public-opinion-in-russia-russians-attitudes-on-the-economic-and-domestic-issues-issue-brief.aspx> [https://perma.cc/3GF8-6YXU] (last visited Mar. 16, 2018).

44. See Steven Lee Myers & Ellen Barry, *Putin Reclaims Crimea for Russia and Bitterly Denounces the West*, N.Y. TIMES, Mar. 19, 2014, at A1.

45. See Tom O'Connor, *U.S. Military Sends Troops to Russian Border, Officials Say They Want 'Peace, Not War' with Russia*, NEWSWEEK (Oct. 12, 2017, 3:40 PM), <http://www.newsweek.com/russia-us-broke-nato-peace-treaty-possible-military-response-683526> [https://perma.cc/4AQ6-M7YA].

46. See Perry Bacon Jr., *Most Senators Support Trump's Syria Airstrike*, FIVETHIRTYEIGHT (Apr. 7, 2017, 3:27 PM), <https://fivethirtyeight.com/features/a-clear-majority-of-senators-support-trumps-syria-airstrike/> [https://perma.cc/THW9-ER3C].

We need, according to this view, a more nuanced approach to the use of force under international law, one that is carefully calibrated to permit the use of force in response to humanitarian atrocities.⁴⁷

But we must be clear about the risks. Perhaps the degradation of the U.N. Charter-based limitations will weaken the international law prohibitions on the use of force, making regional or global conflict with China, North Korea, and Russia more likely. Today, the South China Sea is often cited as the world's leading conflict-prone area. And a border dispute between China and India continues to simmer.

China, in turn, was unusually and in fact alarmingly restrained in its comments about the Syrian airstrikes. Breaking from past practice, China did not directly criticize U.S. airstrikes in Syria as violating international law.⁴⁸ Why not? Perhaps China's territorial ambitions in the South China Sea mean that it has begun to see Article 2(4) as hindering its foreign-policy objectives.

Many in the West assume that we—meaning the West—can set the rules for the appropriate departures from Article 2(4). Russia has made clear in Eastern Europe that it will use those departures to its own ends. China may be next.

Recall that the theoretical basis for these actions is the transformation of sovereignty to include protection for human rights. China and Russia view that purported transformation as an illegitimate effort to deny them the full benefits of sovereignty—to change the rules of the game, if you will, to remake sovereignty in a way that favors Western political order.

Now for the second threat.

B. Sidelining and Weakening the U.N. Security Council

The use of force in Syria, Ukraine, and Kosovo, all in the name of human rights and humanitarian ambitions, also served to undermine the authority of the United Nations Security Council, as I have already mentioned, and as China and Russia have lamented.

Note, however, that the Security Council is a key forum for resolving other threats to interstate peace, such as Iran and North Korea. China, which is key to containing North Korea, highlights its constructive role in developing the U.N. Security Council resolutions designed to deter North Korean nuclear and

47. See Harold Hongju Koh, *Not Illegal: But Now the Hard Part Begins*, JUST SECURITY (Apr. 7, 2017), <https://www.justsecurity.org/39695/illegal-hard-part-begins/> [<https://perma.cc/EX7L-CXVC>].

48. See Julian Ku, *China's Surprising Refusal to Criticize the Legality of the U.S. Attack on Syria*, LAWFARE (Apr. 7, 2017, 7:44 PM), <https://lawfareblog.com/chinas-surprising-refusal-criticize-legality-us-attack-syria> [<https://perma.cc/B3MW-RFNT>].

missile programs.⁴⁹ After all, it is international law that provides the basis for imposing sanctions on North Korea to limit its nuclear ambitions in the first place. The United States returns to the Security Council when it wants to impose sanctions against North Korea. Undermining the U.N. Charter and weakening the U.N. Security Council in the context of human rights make it more difficult to achieve these other objectives.

In the case of Iran, too, the U.N. Security Council is important to realizing U.S. goals, and international law as a whole supports the U.S. policy objectives of preventing the acquisition of nuclear weapons by Iran. Sanctions imposed by the U.N. Security Council led to the 2015 Joint Comprehensive Plan of Action, which relaxed sanctions in return for Iranian concessions on its nuclear program.⁵⁰ Undermining the U.N. Security Council makes peace more difficult to achieve in this context as well.

The human-rights-based doctrine of humanitarian intervention allows states to sideline the U.N. Security Council, as we have seen. But there are other ways that human rights may have had deleterious effects on the U.N. Security Council. The Security Council's mandate has grown over the years to include more and more matters related to human rights. With that growth come two problems: heightened expectations that go unfulfilled ("credibility costs") and greater perceptions of selectivity and bias ("polarization costs").⁵¹

Let me focus on one example: Libya.

In the case of the 2011 airstrikes in Libya, the U.N. Security Council authorized the use of force to protect civilians from the threat of massive human rights violations. Russia and China abstained from (but did not veto) the relevant Security Council resolution.

Air strikes in Libya were ultimately used by NATO to help the Libyan rebels oust Qaddafi—again, in the name of human rights.⁵² The regime-change aspect of the intervention appeared to many countries to be the use of human rights and humanitarian issues as a smokescreen for the removal of Qaddafi, a

49. Wang Yi, Foreign Minister of the People's Republic of China, Address to the China Dev. Forum: Work Together to Build Partnerships and Pursue Peace and Development (Mar. 20, 2017).

50. See S.C. Res. 2231, ¶ 7 (July 20, 2015).

51. For a longer discussion of these costs see Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279, 311–19, 333–37 (2017).

52. President Obama said, "The dark shadow of tyranny has been lifted. And with this enormous promise, the Libyan people now have a great responsibility -- to build an inclusive and tolerant and democratic Libya that stands as the ultimate rebuke to Qaddafi's dictatorship." Remarks by President Obama on the Death of Muammar Qaddafi (Oct. 20, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/10/20/remarks-president-death-muammar-qaddafi> [<https://perma.cc/X8FZ-8NHE>].

result explicitly desired by the West.⁵³ As one writer put it, the use of force in Libya “fueled speculations as to which other countries are also likely candidates for intervention” by Western countries.⁵⁴

Cooperation between Russia and Western countries on other issues became more difficult. Consider this alarming example: When Russia effectively annexed Crimea, many nations in the United Nations General Assembly refused to condemn this obvious violation of international law. Why? They saw it as justified payback for the West’s selective enforcement of human rights law in Kosovo and even in Iraq—a war also justified in part based on human rights. This kind of response is consistent with the work of behavioral law and economics scholars who argue that states will be less willing to enforce international law if they perceive it as biased and unfair.⁵⁵ Beyond just Libya, human rights norms cover so many topics and are so widely unenforced that perceptions of bias abound.

The U.N.’s actions with respect to Libya also led to credibility costs. Note that at the same time as the intervention in Libya moved forward, the Syrian government was using increasingly violent measures to quell domestic unrest. The Syrian conflict escalated into a civil war, killing hundreds of thousands of people. But the Security Council was unable to take meaningful action. The expanded mandate of the Security Council over mass atrocities and other human rights violations creates a credibility problem when the council is hamstrung by political differences and, accordingly, cannot act in response to massive atrocities in violation of human rights law.⁵⁶

Let’s turn to the third threat.

C. *Human Rights: Making International Law Weaker?*

The problems that human rights have created for the U.N. Security Council are mirrored by problems that human rights have created for international law as whole. First, international human rights law has expanded the core of international law itself, just as it has expanded the mandate of the U.N. Security Council.

53. Meetings Coverage, Security Council, Security Council Approves ‘No-Fly Zone’ over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions, U.N. Press Releases SC/10200 (Mar. 17, 2011).

54. See Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 VA. J. INT’L L. 355, 397 (2012).

55. See Anne van Aaken, *Behavioral International Law and Economics*, 55 HARV. INT’L L.J. 421, 434–35 (2014).

56. Roland Paris, *Is it Possible to Meet the ‘Responsibility to Protect’?*, WASH. POST (Dec. 9, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/12/09/is-it-possible-to-meet-the-responsibility-to-protect/?utm_term=.2a00c8847820 [<https://perma.cc/8T2S-FTA3>].

The two primary sources of international legal obligations—treaties and custom—have become broader over the past several decades, so that more and more human rights are protected by binding international law.⁵⁷ The success of the effort is clear in one way: International law now regulates a vast array of human-rights-related conduct. Today there are 64 human-rights-related treaties, just counting those under the auspices of the United Nations and the Council of Europe; those agreements have 1,377 human rights provisions.⁵⁸

Not only are there lots of obligations, but they are often violated. One set of commentators sympathetic to international human rights law has quipped: “If human rights were a currency, its value would be in free fall.”⁵⁹ This may or may not be good for human rights, but the point I would like to make is a different one: It involves this expansion’s potential effect on international law *as a whole*.

Widespread violations of some legal norms may make it harder to enforce others. As an analogy, consider the “broken windows” theory of crime prevention, which posits that widespread violations of law, even mundane and apparently trivial legal rules, lead to other, potentially more-serious violations of law. Similarly, widespread violations of human rights law may signal that no one cares about violations of international law as a whole. Accountability is a fundamental concern of public international law because the system lacks a centralized enforcement mechanism.

Whatever the “broken windows” argument suggests about policing, behavior that signals a lack of accountability may be especially damaging to international law writ large. As Michael Glennon writes, “The effect of inefficacy is contagion: The entire legal system is discredited when prominent rules are flagrantly violated.”⁶⁰ It is not just that human rights law goes unenforced; enforcement is also inconsistent, leading to perceptions of bias and unfairness, which may, as I mentioned before, make countries less inclined to enforce or follow international law as a whole.

That points us back to one of the topics I raised at the beginning of the lecture: How can international law quell territorial conflict when international law lacks a centralized enforcement mechanism?

57. See Wuerth, *supra* note 51, at 320–25; Jean d’Aspremont, *Expansion and the Sources of International Human Rights Law*, in 46 ISRAEL YEARBOOK ON HUMAN RIGHTS 223, 227–28 (2016).

58. See Jacob Mchangama & Guglielmo Verdirame, *The Danger of Human Rights Proliferation*, FOREIGN AFF. (July 24, 2013), <https://www.foreignaffairs.com/articles/europe/2013-07-24/danger-human-rights-proliferation> [<https://perma.cc/MMD3-Q86T>].

59. *Id.*

60. Glennon, *supra* note 27.

International law works by making violations costly in some way for the violator. Those costs can be in the form of sanctions imposed by other countries; internalizations of the norm, which make the potential violator unwilling to act counter to it; disapproval from the domestic constituencies within the violating country; the withholding of benefits by other countries; or even actions by the United Nations Security Council, as when Iraq invaded Kuwait. But Security Council enforcement measures can be vetoed by any one of the five permanent members, making these measures of limited effectiveness.⁶¹ More important, generally, are the enforcement measures taken by individual states and the concern by *potential* lawbreakers that violating international law will lead to some kinds of costs. Two things are key to this system of compliance: reputations of states for compliance and reputations of states for punishing violators.

The point about human rights is this: States' *reputations* for compliance and for enforcing international law decrease as a whole when there are a large number of unenforced international legal obligations.

Finally, let us return to the other topic I raised at the beginning of the lecture. Recall my saying that democracies rarely go to war with each other. If international law tends to make states more democratic, then it would appear to contribute to peace among nations, at least based on what we know about the conditions under which war was likely in the past. This observation suggests that in order to secure peace among nations, international law should pursue human rights, because human rights protections are associated with democracies.

But "human rights" have only a weak relationship to "democracy" as defined in the political science literature. It turns out that "democracy" as measured by the democratic-peace literature is not the same as a human-rights-respecting regime. The term *democracy* has three components: the ability of citizens to express effective policy preferences, institutional constraints on executive power, and civil liberties.⁶² But the empirical studies showing the "democratic peace" do not measure civil liberties at all—so the vast majority of these 1,377 international legal protections for human rights are not necessarily associated with the democratic peace.

There is, however, an additional problem with the claim that international human rights law has helped create the democratic peace. Even if *human rights* are correlated with peace between some pairs of states, the extent to which

61. See Ingrid Wuerth, *Compliance*, in CONCEPTS FOR INTERNATIONAL LAW: CONTRIBUTIONS TO DISCIPLINARY THOUGHT (Jean d'Aspremont & Sahib Singh eds., forthcoming 2018).

62. MONTY G. MARSHALL & KEITH JAGGERS, POLITY IV PROJECT: POLITICAL REGIME CHARACTERISTICS AND TRANSITIONS, 1800–2002: DATASET USERS' MANUAL 13 (2002).

international human rights law generated or sustained those human rights is especially difficult to assess.

The protection of human rights is provided for in an overlapping set of domestic statutory and constitutional law around the world, as well as through binding and nonbinding international legal instruments and regional human rights instruments. The same is not true of international law that limits conflicts over territory. The cornerstone of that system—indeed, the cornerstone of post-World War II international law—is the prohibition on the use of force against the territorial integrity of another state. This is not an issue meaningfully regulated by domestic or soft international law.

That human rights are protected by many domestic and regional legal instruments means that it may be possible to safeguard human rights without using binding international law to do so. In other words, we can view the human rights movement as tremendously successful at embedding human rights into so many legal frameworks, even if we conclude that binding international law should today be used largely to serve other purposes. Some recent work on human-rights outcomes emphasizes the importance of iterative engagement with international bodies as well as the importance of domestic political conditions to securing human rights.⁶³ Note that neither of these conditions necessarily requires binding international legal norms to be successful.

IV. CONCLUSION

Even as the world faces global financial uncertainty, cyber-insecurity, terrorism, climate change, growing authoritarianism, and other risks, peace among nations remains of fundamental importance. Indeed, threats to peace—to say nothing of war itself—hinder our capacity to cooperate and make progress on all these other global issues.

How to ensure peace among nations? Based on what we know about the causes of war, it is likely that international law has contributed to what we call the Long Peace by outlawing territorial conquests and putting in place other rules that preserve territorial integrity and reduce conflict over borders. Today,

63. See, e.g., Cosette D. Creamer & Beth A. Simmons, *Do Self-Reporting Regimes Matter?: Evidence from the Convention Against Torture* 14–16 (Bos. Univ. Sch. of L., Working Paper No. 15-55, 2016) https://scholar.harvard.edu/files/cosettecreamers/files/creamersimmons_catselfreporting_feb2016.pdf [<https://perma.cc/7MXE-MBU9>]; Gráinne de Búrca, *Human Rights Experimentalism*, 111 AM. J. INT'L L. 277, 299–304 (2017); BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

peace among nations is under threat from the rise of China, an emboldened Russia, and the weakening of Western institutions and alliances.

But it is also under threat from an unexpected source: the rise of international human rights law. Human rights law has sought to transform sovereignty, to make state sovereignty conditional upon fulfilling states' obligations to their own people. That objective is laudable, of course, but it comes at a price. Weakening the territorial-based system of state sovereignty unsurprisingly generates territorial uncertainty. States are less secure in their borders if human rights can serve as the legal basis for armed attacks, regime change, or providing support to separatist movements within another country's territory.

Human rights also tear at the system of international law as a whole. By declaring a vast array of human rights to be protected through international law, the hope over the past several decades was to harness the power of law, the power of legal obligation to ensure that individual human rights are protected. Again, a laudable goal.

But international law is not a strong system of law; it depends upon decentralized enforcement, it depends upon reputations for compliance, and it depends upon the United Nations and the Security Council. These are not unlimited resources.

Human rights tear at the fabric of international law by designating as "law" many, many obligations that are not enforced and that states are not serious about enforcing—cheapening the currency of international law itself. They tear at the fabric because the enforcement of international human rights law is selective and political, leading to polarization and credibility costs. What is the overall impact on peace among nations? That's hard to measure.

But if international law is part of what has generated the Long Peace, making international law weaker and less effective is a step away from peace, not toward peace.

To create the conditions for peace among nations, international law should refocus on a core set of legal obligations designed to facilitate international cooperation and promote international peace and security.

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