

International Law in the Post-Human Rights Era

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Abstract

International law is in a period of transition. After World War II, but especially since the 1980s, human rights expanded to almost every corner of international law. In doing so, they changed core features of international law itself, including the definition of sovereignty and the sources of international legal rules. But what has been called the “age of human rights” is over, at least for now. Whether measured in terms of the increasing number of authoritarian governments, the decline in international human rights enforcement architecture such as the Responsibility to Protect and the Alien Tort Statute, the growing power of China and Russia over the content of international law, or the rising of nationalism and populism, international human rights law is in retreat.

The decline offers an opportunity to consider how human rights changed, or purported to change, international law and how international law as a whole can be made more effective in a post-human rights era. This Article is the first to argue that international human rights law as a whole—whatever its much disputed benefits for human rights themselves—appears to have expanded and changed international law in ways that have made it weaker, less likely to generate compliance, and more likely to produce interstate friction and conflict. The debate around international law and human rights should be reframed to consider these costs and to evaluate whether international law, including the work of the United Nations, should focus on a stronger, more limited core of international legal norms that protects international peace and security, not human rights. Human rights could be advanced through domestic and regional legal systems, through the development of non-binding international norms, and through iterative processes of international reporting and monitoring—a model not unlike the Paris Climate Agreement.

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Introduction

During the past half-century, human rights have become central to international law. Substantive international human rights law expanded from a small core of initial protections after World War II to today’s vast domain reaching from foreign direct investment to climate change. With this proliferation of norms came other, more fundamental changes. The meaning of sovereignty purportedly shifted to focus on the individual. The sources of international law changed so that international law now includes as “law” many norms, especially human rights norms, that are routinely violated. This Article argues that even as substantive human rights obligations continue to proliferate, the more fundamental transformations of international law through human rights have not fully taken hold and have proven costly to international law as a whole. Applications of a variety of interdisciplinary

tools, from empirical measures of the causes of war to domestic social psychology, suggest that human rights-related changes to both sovereignty and to the doctrine of sources tended to undermine interstate relations and the “territorial peace,” and to make it harder to generate compliance with many norms of international law. These costs point to the conclusion that efforts to transform international law around human rights should be abandoned in favor of the development of a stronger core of international law dedicated to protecting international peace and security rather than human rights. At a minimum, the debate around human rights and international law should be reframed to consider the costs of human rights to international law as a whole.

The transformation of sovereignty and international law through human rights has stalled across several fronts, as described in Part I of this Article. The conceptual reorientation of sovereignty to focus on the individual or on humanity writ large provided—or was hoped to provide—the basis for doctrinal innovations in international law to allow for the coercive enforcement of international human rights law through foreign domestic courts, secession, and the use of force. Institutionally, the United Nations became increasingly focused on the enforcement of international human rights. The conceptual, doctrinal, and institutional aspects of the human rights enforcement architecture are all fading, however. Conceptually, traditional sovereignty is resurgent. Institutionally, the United Nations’ human rights enforcement mechanisms appear to be largely ineffective despite decades of reform efforts, although here the trajectory may be more stagnation than decline. Doctrinally, innovations such as universal jurisdiction have encountered growing resistance and backlash. More broadly, human rights themselves appear to be in global decline.

The flagging efforts to transform international law and institutions around human rights raise an additional issue addressed in Part I: the costs of that transformation for international law. Methods of enforcing human rights through international law as a whole have the apparent effect of undermining the peaceful and friendly interaction of states, which is part (although not all) of what explains the failed efforts at transformation.¹ Key doctrinal innovations in international law, such as a lack of foreign state immunity in human rights cases, universal jurisdiction, a human right to democracy, remedial secession, and the responsibility to protect, all arose out of the human rights transformation of sovereignty. These enforcement doctrines were never widely adopted, were often applied politically, became associated with Western efforts to project power instead of universal values, and

1. This Article assumes that interstate cooperation is one objective of international law. *But cf.* Monica Hakimi, *The Work of International Law*, 58 HARV. INT’L L.J. 1, 5 (2017) (arguing that conflict is not necessarily a problem for international law to overcome). It also assumes that interstate cooperation, interstate peace, and compliance with international law provide benefits to human kind. Barriers to interstate cooperation and to compliance with international law, as well as war itself, thus impose what this Article terms “costs” on human kind.

undermined interstate cooperation. There may also have been a parallel institutional development: human rights enforcement may have contributed to polarization within the United Nations and made it less effective overall. Some of the doctrinal developments also undermine the territorial security provided by international law, which may threaten what political scientists term the “territorial peace.”

Human rights did bring transformative changes to another core feature of international law: the doctrine of sources. As Part II of this Article describes, the effort to protect as many human rights as possible through law led to an expansion of the two primary sources of international law—treaties and custom. The fruits of this labor seem clear. From military intervention to gentrification and the Greek debt crisis, every international legal issue today is an international human rights issue.²

In practice, changes to the doctrine of sources have also meant, however, that human rights norms are deemed part of binding international law notwithstanding widespread violations and nonconforming behavior. Violations of international human rights law have become rampant, ranging from failures to comply with administrative reporting requirements to gross violations of human dignity. Again, there is a parallel development in the United Nations. The United Nations Security Council expanded its mandate to include redressing and preventing human rights violations, yet such violations continue to occur with alarming regularity. Others have questioned whether these developments are good for human rights, but their impact international law as a whole has gone unexamined.³ Models of state and individual behavior, from rational choice theories, constructivism,

2. See Saki Knafo, *Is Gentrification a Human-Rights Violation?*, ATLANTIC (Sept. 2, 2015), <https://www.theatlantic.com/business/archive/2015/09/gentrification-brooklyn-human-rights-violation/402460/> [<https://perma.cc/T9QN-Y8LK>]; Juan Pablo Bohoslavsky, *Greek Crisis: Human Rights Should Not Stop at Doors of International Institutions, Says UN Expert*, U.N. HUM. RTS. (June 2, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16032> [<https://perma.cc/22GL-CQCB>].

3. Other scholars have discussed the expansionist project of international human rights law, but generally without focusing on the potential effects on international law as a whole. See, e.g., Jean d’Aspremont, *Expansionism and the Sources of International Human Rights Law*, 2016 ISR. Y.B. ON HUM. RTS. 223, 227–28 (describing the expansionist effect of international human rights law on the doctrine of sources and the paradoxes that this creates for international human rights law); Makau Mutua, *Is the Age of Human Rights Over?*, in THE ROUTLEDGE COMPANION TO LITERATURE AND HUMAN RIGHTS 450, 451 (Sophia A. McClennen & Alexandra S. Moore eds., 2015) (“Creeds and ideologies that overpromise—and inevitably underperform—are destined to suffer public fatigue. Human rights is one such ideology.”); Jacob Mchangama & Guglielmo Verdirame, *The Danger of Human Rights Proliferation: When Defending Liberty, Less Is More*, FOREIGN AFF. (July 24, 2013), <https://www.foreignaffairs.com/articles/europe/2013-07-24/danger-human-rights-proliferation> [<https://perma.cc/S3Y8-KHP7>] (arguing that the expansion of international human rights law has diluted the value of human rights). *But cf.* Harlan Grant Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 92 IOWA L. REV. 65, 67 (2007) (noting that the expansion of human rights to include norms which are routinely violated provides “powerful fodder for those who believe that international law is meaningless”).

organizational sociology, and social psychology, all show that widespread violations of some international legal rules likely make it more difficult to enforce others. We might call this a “broken windows” theory of international law.

The present decline of international human rights law—however broad and durable it may be—accordingly presents an opportunity to reframe the normative debate about human rights and international law, as discussed in Part III. That extensive and inconclusive debate has focused almost entirely on whether international law is an effective way to promote human rights. The broken windows problem, the effect of human rights enforcement on interstate relations, the empirical work on the “territorial peace,” and problems with polarization and credibility all demonstrate, however, that human rights impose costs on the international legal *system*. Just as human rights may benefit from being part of an international legal system, this Article illustrates that the system itself may be weakened through the inclusion of human rights. Those costs suggest that international law should become focused on a core set of stronger, more effective norms that promote international peace and security, not human rights. They also suggest that we should explore with more creativity and vigor ways to advance human rights that do not rely upon the coercive enforcement of binding international law; proposals for doing so can draw on the important work of human rights scholars who have focused on domestic processes and institutions and their relationship to international norms.

This Article can reframe the debate around international law and human rights, but it will not resolve it. The benefits of international human rights law for human rights are themselves contested, an issue that this Article discusses, but does not seek to resolve. A second important variable not fully explored in this Article is the extent to which human rights can today, thanks in part to the success of the international human rights movement, be enforced through domestic and regional law, and soft international commitments. This Article does not purport to resolve those issues; it endeavors instead to show that the debate about human rights should expand to consider the relationship between human rights and international law as a whole.

To begin, a few clarifications about terminology: “International human rights law” refers in this Article to international law governing the relationship between states and their own citizens; excluded are regional human rights instruments and most of international criminal law, although both fields see related developments,⁴ and both are noted at various places in the Article.

4. Regional human rights systems and international criminal law are also undergoing some level of backlash and decline. See, e.g., Mikael Rask Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and*

The terms “decline” and the “post-human rights era,” do not mean we are at the end of human rights obligations themselves (indeed, they are multiplying), but instead that we have seen the end of an era: what Makau Mutua has termed the “age of human rights” or what Louis Henkin called the “Age of Rights” in international law.⁵ Temporal baselines vary slightly from section to section, but for the most part the decline is measured from a baseline period in the late 1990s. In most of the doctrinal areas described here, decline began in the middle or end of the first decade of the twenty-first century.⁶ In some sections stasis is a more accurate term than decline, and to some extent the transformations themselves were more aspirational than on-the-ground realities, so that perhaps the golden age was never so golden. Nor do the terms “decline” and “post-human rights era” preclude the possibility that international human rights enforcement is gaining ground in discrete areas, or that it will someday have a second golden age so that the process is really a dialectic, not heyday and crash. Nevertheless, contemporary political events and decades-long stasis and decline in enforcement architecture have come together to produce an especially difficult period for international human rights law. The Article focuses on the primary international legal enforcement mechanisms for human rights and on the United Nations because they are important to human rights, to international law, and to the claim that sovereignty has been transformed.

Finally, this Article is about the costs of human rights to international law as a whole. Its purpose is to advance our overall understanding of how best to strengthen international law while at the same time ensuring that people everywhere enjoy lives of dignity and well-being. It builds on the work of human rights scholars who have repeatedly questioned the

Backlash, 79 LAW & CONTEMP. PROBS., no. 1, 2016, at 167–68, 170; Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1119 (2015); Alexandra Huneus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493, 494 (2011); Somini Sengupta, *As 3 African Nations Vow to Exit, International Court Faces Its Own Trial*, N.Y. TIMES (Oct. 26, 2016), <https://www.nytimes.com/2016/10/27/world/africa/africa-international-criminal-court.html> [https://perma.cc/BBJ5-ZEBC]. *But cf.* Karen J. Alter et al., *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice*, 107 AM. J. INT'L L. 737, 738 (2013). This Article discusses universal jurisdiction, which is one aspect of international criminal law, because there is no clear line between civil and criminal remedies in the universal-jurisdiction case law. See Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 153 (2006).

5. Makau Mutua, *Is the Age of Human Rights Over?*, in ROUTLEDGE COMPANION TO LITERATURE AND HUMAN RIGHTS 450–58 (Sophia A. McClennen & Alexandra Schultheis Moore eds., 2016); see generally LOUIS HENKIN, *THE AGE OF RIGHTS* (1990).

6. Other scholars have asked whether there is a present “decline” in the “international rule of law,” a term that describes changes in international law that accelerated during the 1990s and are based in part on a “liberal human rights vision.” Heike Krieger & Georg Nolte, *The International Rule of Law—Rise or Decline?—Points of Departure* 8–9, 13 (KFG Working Paper Series, No. 1, 2016), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2866940 [https://perma.cc/PAC7-YVXD].

effectiveness of various international enforcement mechanisms⁷ and on scholarship analyzing how domestic politics and institutions, as well as iterative engagement with international institutions, contribute to the development and efficacy of human rights norms.⁸ This Article provides additional reasons, beyond human rights themselves, to explore means other than binding international law through which human rights might be realized. Other authors have called for creativity and for the development of new frameworks to advance the cause of human rights⁹—this Article provides additional impetus for doing so.

I. International Human Rights: Costs to Peace and Friendly Relations

Human rights are often viewed as a foremost achievement of modern international law.¹⁰ The protection and promotion of human rights are central to much of the work of the United Nations today, a striking expansion from both the interwar League of Nations and the immediate post-World War II period.¹¹ Human rights are even said to have transformed international law itself. International law was once understood as a discrete set of rules derived from consent of sovereign states and designed to facilitate their peaceful interaction.¹² Today, by contrast, sovereignty and international law purportedly derive their legitimacy from individuals.¹³

7. See, e.g., *infra* text at notes 14–17, 185–90, 214–25.

8. See, e.g., Cosette D. Creamer & Beth A. Simmons, *Do Self-Reporting Regimes Matter?: Evidence from the Convention Against Torture* 14–15 (Bos. Univ. Sch. of Law, Working Paper No. 15–55, 2016), http://scholar.harvard.edu/files/cosettecreamers/files/creamerssimmons_catselfreporting_feb2016.pdf [<https://perma.cc/4BXH-AX8M>]; Gráinne de Búrca, *Human Rights Experimentalism*, 111 AM. J. INT'L L. 277, 299–304 (2017); Katerina Linos & Tom Pegrum, *What Works in Human Rights Institutions?*, 112 AM. J. INT'L L. (forthcoming 2017).

9. See, e.g., Samuel Moyn, *Beyond the Human Rights Measurement Controversy*, L. & CONTEMP. PROBS. (forthcoming 2018); Philip Alston, *Human Rights in the Populist Era*, JUSTSECURITY (Oct. 18, 2017), <https://www.justsecurity.org/46049/human-rights-populist-era/> [<https://perma.cc/XJ4U-K8QH>].

10. See James Crawford & Marti Koskeniemi, *Introduction to THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 1, 16 (James Crawford & Marti Koskeniemi eds., 2012); STEVE RATNER, *THE THIN JUSTICE OF INTERNATIONAL LAW* 177–78 (2015).

11. See STEVEN L.B. JENSEN, *THE MAKING OF INTERNATIONAL HUMAN RIGHTS: THE 1960S, DECOLONIZATION AND THE RECONSTRUCTION OF GLOBAL VALUES* 5–8, 37–47 (2016).

12. See, e.g., Olivier Barsalou, *The Cold War and the Rise of an American Conception of Human Rights, 1945–8*, in *REVISITING THE ORIGINS OF HUMAN RIGHTS* 362, 364–65 (Pamela Slotte & Miia Halme-Tuomisaari eds., 2015); Krieger & Nolte, *supra* note 6, at 8; Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 419 (1983).

13. E.g., Harold Hongju Koh, *Humanitarian Intervention: Time for Better Law*, 111 AJIL UNBOUND 287, 288 (2017) (arguing in the context of humanitarian intervention that international law should “serve human purposes—including the protection of human rights, not just the territorial sovereignty of states”); RUTI TEITEL, *HUMANITY’S LAW* 8–11 (2011) (arguing that the “state-centered” vision of international law is being transformed by “a normative order that is grounded in the protection of humanity”); BRAD R. ROTH, *SOVEREIGN EQUALITY AND MORAL DISAGREEMENT* 91 (2011) (noting that “modern” sovereignty is often understood as circumscribed by human rights); Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT'L L. 513, 514 (2009) (arguing

Despite its ubiquity and its many successes, international human rights law is under growing attack. To begin, scholars question, with what appears to be increasing force and from a variety of perspectives, how effective international law actually is at safeguarding individual human rights;¹⁴ new analyses have thrown into question the historical pedigree often claimed for international human rights law, including its “glorious, triumphalist” narrative;¹⁵ and questions persist about the Western, imperial “civilizing mission” of the human rights movement.¹⁶ A new study shows how the pursuit of human rights and other aspects of liberal internationalism undermined U.N. peacekeeping efforts.¹⁷

Second, according to many experts, human rights conditions are also in global decline. In the past decade, internationally protected civil and political rights have suffered a downturn as measured by a number of states experiencing a decline in rights protection.¹⁸ The number of countries in

that “the normative status of sovereignty is derived from humanity,” that “humanity is the A and Ω of sovereignty,” and that “sovereignty remains foundational only in a historical or ontological sense”); W. Michael Reisman, Editorial Comments, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866, 876 (1990) (finding that it is no longer a “*per se*” violation of state sovereignty when some states make “externally motivated actions” to remove an “unpopular government,” but requiring an inquiry into the actions’ underlying motives); Kofi A. Annan, *Two Concepts of Sovereignty*, ECONOMIST (Sept. 16, 1999), <http://www.economist.com/node/324795> [<https://perma.cc/G8YA-L5Y5>] (“States are now widely understood to be instruments at the service of their peoples, and not vice versa.”); *see also* JEAN L. COHEN, GLOBALIZATION AND SOVEREIGNTY: RETHINKING LEGALITY, LEGITIMACY, AND CONSTITUTIONALISM 2–4 (2012) (summarizing the claim that the international legal order is no longer based upon the sovereign equality of states and state consent, but instead upon human dignity).

14. *E.g.*, SURYA P. SUBEDI, THE EFFECTIVENESS OF THE UN HUMAN RIGHTS SYSTEM: REFORM AND THE JUDICIALISATION OF HUMAN RIGHTS (2017); ROSA FREEDMAN, FAILING TO PROTECT: THE UN AND THE POLITICISATION OF HUMAN RIGHTS (2015) [hereinafter FREEDMAN, FAILING TO PROTECT]; STEPHEN HOPGOOD, THE ENDTIMES OF HUMAN RIGHTS ix (2013); ERIC POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW (2014); *see also* de Búrca, *supra* note 8 at 279 (describing academic scholarship harshly critical of international human rights, some of it by scholars who are “‘insiders’ to the human rights system.”). Earlier work in this vein includes Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002), and Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

15. CHRISTOPHER N. J. ROBERTS, THE CONTENTIOUS HISTORY OF THE INTERNATIONAL BILL OF HUMAN RIGHTS 9 (2015); SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 5–7 (2010).

16. Mutua, *supra* note 5, at 455; *see also* Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201 (2000).

17. EMILY PADDON RHOADS, TAKING SIDES IN PEACEKEEPING: IMPARTIALITY AND THE FUTURE OF THE UNITED NATIONS 2–3 (2016).

18. *See, e.g.*, AMNESTY INT’L, AMNESTY INTERNATIONAL REPORT 2016/17: THE STATE OF THE WORLD’S HUMAN RIGHTS 12–13 (2017), <https://www.amnesty.org/download/Documents/POL1048002017ENGLISH.PDF> [<https://perma.cc/B4X2-89LP>] (describing 2016 as “a year of unrelenting misery and fear” and as witness to “the idea of human dignity and equality, the very notion of a human family, coming under vigorous and relentless assault”); FREEDOM HOUSE, 2017, at 1 (2017) [hereinafter FREEDOM IN THE WORLD 2017], <https://freedomhouse>

which human rights are at “extreme risk” has increased from twenty in 2008 to thirty-five in 2015.¹⁹ Although harder to measure because most economic and social rights are framed in relative terms,²⁰ it appears that these kinds of rights have also suffered a setback.²¹ Empirical measures of human rights are generally contested, in part because an apparent decline might be due to better reporting and monitoring.²² It is clear, however, that a wide variety of observers report a recent and serious rise in human rights violations in many of the world’s powerful and/or regionally important countries such as China, Russia, India, Turkey, Poland, Hungary, Venezuela, Egypt, and Philippines.²³ In these countries, power is increasingly centralized around a

.org/sites/default/files/FH_FIW_2017_Report_Final.pdf [https://perma.cc/X75N-FYS7] (describing 2016 as “the 11th consecutive year in which declines outnumbered improvements”); Kenneth Roth, *The Dangerous Rise of Populism: Global Attacks on Human Rights Values* (“[T]oday a new generation of populists is turning [human rights] protection on its head.”), in HUMAN RIGHTS WATCH: WORLD REPORT 2016, at 1 (2017), https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf [https://perma.cc/9HVR-H3BX]; see also John Kerry, *Preface* to U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2015), <https://www.state.gov/j/drl/rls/hrrpt/2015humanrightsreport/index.htm#wrapper> [https://perma.cc/M49Y-CQPD] (emphasizing that the abuses of human rights originated from “governments crack[ing] down on the fundamental freedoms” and observing an “accelerating trend by both state and nonstate actors to close the space for civil society”).

19. *Human Rights Risk Atlas 2015*, VERISK MAPLECROFT (Dec. 3, 2014), <https://maplecroft.com/portfolio/new-analysis/2014/12/03/human-rights-deteriorating-most-ukraine-thailand-turkey-due-state-repression-civil-unrest-maplecroft-human-rights-risk-atlas/> [https://perma.cc/D6C9-38DX].

20. See, e.g., International Covenant on Economic, Social and Cultural Rights, art. 2, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (requiring state parties to “take steps” to “progressively” achieve the realization of individuals’ social and economic rights).

21. See *Rights in Crisis*, CTR. ECON. & SOC. RTS., <http://www.cesr.org/rights-crisis> [https://perma.cc/RM9Y-2BMM] (reporting on governments’ failure to protect people’s social and economic rights during serious economic crises).

22. Compare FREEDOM IN THE WORLD 2017, *supra* note 18 with MARK GIBNEY ET AL., THE POLITICAL TERROR SCALE 1976–2015 (2016), <http://www.politicalterroryscale.org> [https://perma.cc/EMV8-8TK5] (using different measurement systems). See also Christopher J. Fariss, *Respect for Human Rights Has Improved over Time: Modeling the Changing Standard of Accountability*, 108 AM. POL. SCI. REV. 297 (2014) (arguing that changes in how agencies interpret human rights reports may mask improvements in human rights outcomes); Christopher J. Fariss, *The Changing Standard of Accountability and the Positive Relationship Between Human Rights Treaty Ratification and Compliance*, BRIT. J. POL. SCI., July 2017, at 1, 28 (finding a robust positive relationship between improving levels of respect for human rights and ratification of human rights treaties when the changing standard of accountability is taken into consideration). *But cf.* Adam S. Chilton & Eric A. Posner, *The Influence of History on States’ Compliance with Human Rights Obligations*, 56 Va. J. Int’ L. 211 (2016) (arguing that historical institutions, events, and conditions, not the ratification of human rights treaties, may explain improvements in human rights practices).

23. See HUMAN RIGHTS WATCH: WORLD REPORT 2016, at 466–77 (2016), https://www.hrw.org/sites/default/files/world_report_download/wr2016_web.pdf [https://perma.cc/9FG7-K8S3]; Steven A. Cook, *How Erdogan Made Turkey Authoritarian Again*, ATLANTIC (July 21, 2016), <https://www.theatlantic.com/international/archive/2016/07/how-erdogan-made-turkey-authoritarian-again/492374/> [https://perma.cc/UT8U-KMQC]; Muhammad Mansour, *Why Sisi Fears Egypt’s Liberals: Behind the Recent Crackdown on Civil Society*, FOREIGN AFF. (May 18, 2016), <https://www.foreignaffairs.com/articles/egypt/2016-05-18/why-sisi-fears-egypts->

strong leader who tolerates little dissent.²⁴ Moreover, populist leaders recently elected in Britain and the United States are openly critical of international human rights norms.²⁵ Citizens of mature democracies are becoming less satisfied with their form of government.²⁶ Whether generally termed an “authoritarian resurgence,” or “the coming illiberal order”—the trend appears clear.²⁷ As Philip Alston puts it: “[t]he world as we in the human rights movement have known it in the recent years is no longer.”²⁸

There is a third way of considering the general state of human rights and of international human rights law in particular: the decline of what one might term the “architecture” for the international legal enforcement of human rights. That enforcement architecture is built conceptually upon the redefinition of sovereignty as based upon a responsibility towards individuals and their universally acknowledged human rights. This conceptual foundation provided the basis for doctrinal innovations in international law designed to facilitate the coercive enforcement of a variety of human rights

liberals [<https://perma.cc/3SWL-LYHJ>]; Kati Marton, *Hungary's Authoritarian Descent*, N.Y. TIMES (Nov. 3, 2014), <https://www.nytimes.com/2014/11/04/opinion/hungarys-authoritarian-descent.html?mcubz=1> [<https://perma.cc/BP4H-3FD6>]; Andrew J. Nathan, *Who is Xi?*, N.Y. REV. BOOKS (May 12, 2016), <https://www.nybooks.com/articles/2016/05/12/who-is-xi/> [<https://perma.cc/7HDV-24XS>]; *Philippines President Rodrigo Duterte Says He 'Doesn't Give a S*** About Human Rights' as 3,500 Killed in War on Drugs*, INDEPENDENT (Oct. 17, 2016), <https://www.independent.co.uk/news/world/asia/philippines-president-rodrigo-duterte-doesnt-give-a-s-about-human-rights-war-on-drugs-civilians-a7365156.html> [<https://perma.cc/KSL5-4XZY>]; Orville Schell, *Crackdown in China: Worse and Worse*, N.Y. REV. BOOKS (Apr. 21, 2016), <http://www.nybooks.com/articles/2016/04/21/crackdown-in-china-worse-and-worse/> [<https://perma.cc/TC9D-YNGM>]; Francisco Toro, *It's Official: Venezuela Is a Full-Blown Dictatorship*, WASH. POST (Oct. 21, 2016), https://www.washingtonpost.com/news/global-opinions/wp/2016/10/21/its-official-venezuela-is-a-dictatorship/?utm_term=.60fc6acef963 [<https://perma.cc/WBN6-WMED>].

24. See, e.g., Javier Corrales, *Autocratic Legalism in Venezuela*, J. DEMOCRACY, Apr. 2015, at 37, 37–38; Abbas Milani, *Iran's Paradoxical Regime*, J. DEMOCRACY, Apr. 2015, at 52, 52; Lilia Shevtsova, *Forward to the Past in Russia*, J. DEMOCRACY, Apr. 2015, at 22, 23; Frederic Wehrey, *Saudi Arabia's Anxious Autocrats*, J. DEMOCRACY, Apr. 2015, at 71, 71–72; see also sources cited *supra* note 23.

25. See Anushka Asthana & Rowena Mason, *UK Must Leave European Convention on Human Rights, Says Theresa May*, GUARDIAN (Apr. 25, 2015), <https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum> [<https://perma.cc/FXK2-GV4X>]; Jonathan Swan, *Trump Calls for "Hell of a Lot Worse than Waterboarding"*, HILL (Feb. 6, 2016), <http://thehill.com/blogs/ballot-box/gop-primaries/268530-trump-calls-for-hell-of-a-lot-worse-than-waterboarding> [<https://perma.cc/NG7T-F78N>]; Daniel White, *Read Donald Trump's Ohio Speech on Immigration and Terrorism*, TIME (Aug. 15, 2016), <http://time.com/4453110/donald-trump-national-security-immigration-terrorism-speech/> [<https://perma.cc/4XFV-SPXY>].

26. Roberto Stefan Foa & Yascha Mounk, *The Democratic Disconnect*, J. DEMOCRACY, July 2016, at 5, 5.

27. Michael J. Boyle, *The Coming Illiberal Order*, SURVIVAL: GLOBAL POL. & STRATEGY, Apr.–May 2016, at 35, 36–39; see also Larry Diamond, *Facing Up to the Democratic Recession*, J. DEMOCRACY, Jan. 2015, at 141, 147 (describing the erosion of democracy that has occurred around the world with the rise of abusive rulers).

28. Alston, *supra* note 9.

norms through foreign domestic courts, secession, and the use of force. Institutionally, all branches of the United Nations became increasingly focused on the enforcement of human rights law as central to their mission, including the Security Council, which is nominally charged instead with the protection of international peace and security.

The doctrinal and institutional aspects of the human rights enforcement architecture have entered a period of setbacks and retrenchment, which is the focus of the rest of Part I. More important than the specifics of each doctrine, or the possibility that one or more may see a resurgence (or never had a heyday at all), is the broader pattern and the views of states as a whole. This Part shows that states lack a serious commitment to the enforcement of human rights as international law—such enforcement has often been perceived as selective and political and has imposed costs on the peaceful interaction of states.

A. *Doctrinal Innovations and Their Costs*

The human rights-driven transformation of international law and sovereignty has generated specific doctrinal changes—including limitations on state immunity, universal jurisdiction, the right to democracy, the right to remedial secession, and humanitarian intervention/Responsibility to Protect (R2P).²⁹ These innovations limit the protections afforded to sovereigns by doctrines such as immunity, jurisdiction, the sovereign equality of states, and prohibitions on the use of force. The changes are based on the conceptual redefinition of sovereignty (or of international law itself) as legitimate only to the extent it reflects popular choice and to the extent it protects and promotes individual human rights. The traditional understanding of sovereignty, by contrast, affords all sovereign states exclusive control over their territory and includes the “principles of sovereign immunity, domestic jurisdiction, and nonintervention.”³⁰ The move from the traditional to the human rights-based understanding of sovereignty is described in different ways using different terminology, and it is often seen as part of a broader diminution in the significance of the nation-state itself in both international law and politics.³¹ Whatever the terminology and however sweeping the

29. The human rights-related changes to public international law go beyond those explored here. Others include the development of *jus cogens* norms and *erga omnes* obligations, the growth of international criminal law, changes in the law of war, and an increase in non-consensual international legal norms. For a detailed discussion, see THEODORE MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* 1–209, 247–301 (2006). These changes fall outside this Article’s focus on international human rights enforcement mechanisms and on the doctrine of sources. *Jus cogens* norms are addressed briefly in the text at notes 43–45.

30. Jean L. Cohen, *Whose Sovereignty? Empire Versus International Law*, *ETHICS & INT’L AFF.*, Dec. 2004, at 1, 7.

31. See, e.g., Martti Koskenniemi, *What Use for Sovereignty Today*, 1 *ASIAN J. INT’L L.* 61, 62–65 (2011); Helen Stacy, *Relational Sovereignty*, 55 *STAN. L. REV.* 2029, 2040–42 (2003).

global changes, all acknowledge the shift in sovereignty and international law towards the individual and the protection of people.³²

The five doctrinal innovations, which were advanced with most enthusiasm in a period from the early 1990s to the mid-2000s, are all experiencing decline or stasis. They all also appear to harm interstate relations—or at least states say that they do. A right to remedial secession, for example, would permit oppressed groups who are the victims of extreme human rights abuses to use violence and break apart from the state to which they belong. The cost to international peace is part of the doctrine itself. In other respects, however, the doctrines generate indirect costs for international relations, such as problems with selective enforcement or the diminution of the principle of sovereign equality of states. These problems increase the potential for international friction and thus increase the possibility of instability or even military conflict, as illustrated by the actual efforts to implement all five doctrinal innovations.

1. Immunity.—Immunity is a long-standing, classic doctrine of public international law based on “the sovereign equality of states” and described as “one of the clearest examples of the ‘statist’ nature of international law.”³³ Beginning in the late 1990s, immunity appeared to be of declining application in cases alleging violations of international human rights law. A reversal of course began in early 2010, and today it seems well-established that immunity applies in human rights cases just as it does in other litigation against foreign states or their officials.

International law provides several kinds of immunity to states and the individuals who work on their behalf. The most important, at least in terms of economic impact, is the immunity states themselves enjoy from suit in foreign domestic courts, a form of immunity that also extends to some individual government officials.³⁴ State immunity has exceptions, including one for litigation related to a state’s commercial activity.³⁵ The purpose of state immunity is to ensure the peaceful coexistence of states and to minimize

32. Louis Henkin, *That “S” Word: Sovereignty, and Globalization, and Human Rights, et Cetera*, 68 *FORDHAM L. REV.* 1, 8 (1999); Krieger & Nolte, *supra* note 6, at 13; *see also* MERON, *supra* note 29, at 5 (noting that, since the 19th century, the international law of war has increasingly embodied humanitarian constraints).

33. Menno Kamminga, *Final Report on the Impact of International Human Rights Law on General International Law*, in *THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW* 1, 14 (Menno T. Kamminga & Martin Scheinin eds., 2009); *see also* TEITEL, *supra* note 13, at 38–39; Paul Christoph Bornkamm, *State Immunity Against Claims Arising from War Crimes: The Judgment of the International Court of Justice in Jurisdictional Immunities of the State*, 13 *GER. L.J.* 773, 779–82 (2012).

34. Chanaka Wickremasinghe, *Immunities Enjoyed by Officials of States and International Organizations*, in *INTERNATIONAL LAW* 388, 388–89 (Malcolm D. Evans ed., 2003).

35. *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 453 (AM. LAW INST. 1986).

interstate friction. As a leading scholar and judge put the point: “[t]here is no more important way to avoid conflict than by providing clear norms as to which state can exercise authority over whom, and in what circumstances.”³⁶

Scholars and activists have long argued that state immunity should not apply in suits or prosecutions alleging human rights violations.³⁷ At the state-to-state level, efforts to develop such an exception never gained much traction.³⁸ But around the turn of the twenty-first century, developments in a handful of domestic and regional courts appeared to support the claim that an exception was in the making. Most prominently, the House of Lords denied immunity to Augusto Pinochet, the former dictator of Chile.³⁹ The decision cleared the way for the extradition of Pinochet to Spain for trial on criminal charges of torture committed during his rule, although the U.K. government ultimately refused to send him to Spain for health reasons.⁴⁰ The Law Lords offered a variety of rationales for their ruling, including some which would apply broadly to claims of human rights violations against states.⁴¹ Shortly thereafter, the European Court of Human Rights held in a nine-to-eight decision that international law afforded Kuwait immunity from a suit in English courts alleging torture.⁴² But the dissenters, and many scholars, reasoned that because torture violates *jus cogens* norms, a state which allegedly committed torture “cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions.”⁴³

Cases from Italy and Greece pointed in the same direction, at least initially. The most significant, *Ferrini v. Germany*,⁴⁴ denied immunity to

36. ROSALYN HIGGINS, PROBLEMS AND PROCESSES: INTERNATIONAL LAW AND HOW WE USE IT 56 (1994); see also Wickremasinghe, *supra* note 34, at 389 (summarizing the underlying rationale for sovereign immunity as facilitating “processes of communication between States on which international relations and cooperation rely”).

37. See, e.g., Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Prinz v. Federal Republic of Germany*, 16 MICH. J. INT’L L. 403, 406, 419–25 (1995) (arguing for an exception to foreign sovereign immunity in the United States in cases alleging “torture, genocide, or enslavement”).

38. See, e.g., Lorna McGregor, *State Immunity and Jus Cogens*, 55 INT’L & COMP. L.Q. 437, 441–43 (2006) (highlighting the reluctance of Canadian and British courts to allow exceptions to sovereign immunity even in cases of *jus cogens* violations).

39. Reg. v. Bow St. Metro. Stipendiary Magistrate, *Ex parte Pinochet Ugarte* (No. 3) [2000] 1 AC (HL) 147 (appeal taken from Eng.) [hereinafter *Ex parte Pinochet*]. For a detailed discussion of this case, see generally Ingrid Wuerth, *Pinochet’s Legacy Reassessed*, 106 AM. J. INT’L L. 731 (2012).

40. Wuerth, *supra* note 39, at 735–36.

41. *Ex parte Pinochet*, *supra* note 39, at 112 (joint dissenting opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto, and Vajić).

42. *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79.

43. *Id.* at 30.

44. *Ferrini v. Fed. Republic of Ger.*, Cass., sez. plen., 11 marzo 2004, n. 5044, 87 RIVISTA DI DIRITTO INTERNAZIONALE [RDI] 539 (2004) (It.) (reported by Andrea Bianchi at 99 AM. J. INT’L L. 242 (2005)).

Germany in a civil case alleging forced labor during World War II.⁴⁵ In response, Germany sued Italy before the International Court of Justice alleging that the Italian judgments violated customary international law.⁴⁶ The ICJ held for Germany. Its decision focused in part on the purpose and values served by state immunity, including the “sovereign equality of States, . . . one of the fundamental principles of the international legal order.”⁴⁷ On the heels of the *Germany v. Italy* decision, the European Court of Human Rights held in *Jones v. United Kingdom*⁴⁸ that customary international law afforded immunity to an individual Saudi official who allegedly committed torture and who was sued in a civil suit in the U.K.⁴⁹

As international law stands today, immunity applies in suits alleging human rights violations as it does in other cases. The reversal of momentum is due in part to interstate friction caused by domestic court cases against foreign individuals accused of human rights violations.⁵⁰ There continues to be a significant constituency seeking to limit immunity in human rights cases,⁵¹ national court decisions in Italy have found the *Germany v. Italy* decision inconsistent with the Italian legal order,⁵² and a South African court recently concluded that sitting heads of state could be prosecuted in South Africa for some crimes, although such prosecutions would violate customary international law.⁵³ The issue has certainly not gone away. But as a “fundamental principle of the international legal order,” designed to facilitate

45. *Id.*; see also *Prefecture of Victoria v. Fed. Republic of Ger., Areios Pagos [A.P.]* [Supreme Court] 11/2000 (Greece) (reported by Maria Gavouneli & Ilias Bantekas at 95 AM. J. INT’L L. 1998 (2001)) (denying Germany’s sovereign immunity defense in a human rights case).

46. See generally *Jurisdictional Immunities of the State* (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99 (Feb. 3).

47. *Id.* at 123, ¶ 57.

48. *Jones v. United Kingdom*, 2014-I Eur. Ct. H.R. 1.

49. See *id.* at 68.

50. See U.N. Secretariat, *Immunity of State Officials from Foreign Criminal Jurisdiction*, Memorandum by the Secretariat, ¶ 150 n.419, Int’l Law Comm’n, U.N. Doc. A/CN.4/596 (Mar. 31, 2008); see also *Belgium Scales Back Its War Crimes Law Under U.S. Pressure*, N.Y. TIMES (Aug. 2, 2003), <http://www.nytimes.com/2003/08/02/world/belgium-scales-back-its-war-crimes-law-under-us-pressure.html?mcubz=1> [<https://perma.cc/U33D-J2R7>].

51. See, e.g., Harold Hongju Koh, *Foreign Official Immunity After Samantar: A United States Government Perspective*, 44 VAND. J. TRANSNAT’L L. 1141, 1151 (2011) (“ . . . [O]fficial immunity law will need to take into account the human rights revolution.”).

52. *Simoncioni v. Repubblica Federale di Germania*, Corte cost., 22 ottobre 2014, n.238, Gazzetta Ufficiale [G.U.] (ser. Spec.) n.45, 29 ottobre 2014, I, 1, http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf [<https://perma.cc/9SW4-LV9T>] (reported by Riccardo Pavoni at 109 AM. J. INT’L L. 400 (2015)). For a detailed discussion of this case, see Note, *Constitutional Courts and International Law: Revisiting the Transatlantic Divide*, 129 HARV. L. REV. 1362, 1371–72 (2016).

53. See *Minister of Justice and Constitutional Dev. v. S. African Litig. Ctr.* 2016 (4) BCLR 487 (SCA) at 507 para. 49, 522 para. 84–85, 528–29 para. 103 (S. Afr.) (holding that the South African law that implemented the Rome Statute did not provide head-of-state immunity to those charged with international crimes under the statute).

the peaceful coexistence of states, the international law of immunity is of ongoing significance.⁵⁴

2. *Universal Jurisdiction.*—Universal jurisdiction was another doctrinal facet of the changing definition of sovereignty.⁵⁵ It, too, began to decline about a decade ago and today appears to be in a period of stasis at best.⁵⁶ Universal jurisdiction allows any state to exercise prescriptive jurisdiction and apply its laws, even if there is no traditional basis (such as territory or nationality) for doing so.⁵⁷ Universal jurisdiction seemed like a promising way to ensure the prosecution of, and civil remedies against, many individuals who violated basic human rights norms such as torture and genocide.⁵⁸ In practice, however, the doctrine has—like other methods of enforcing international human rights—been applied selectively based on political calculations, leading to international friction.

Universal jurisdiction cases that go forward are generally those brought against defendants from weak, poor states or states that have been vilified by the world community as a whole—the former Yugoslavia and Rwanda serve as examples.⁵⁹ In many universal jurisdiction cases, the executive branch (including prosecutors) of the forum state plays an important role in case selection or has the power to veto cases altogether.⁶⁰ It often exercises its discretion to have cases dismissed when the defendant is from a powerful

54. *Ger. v. It.*, 2012 I.C.J. at 123; *see also* ROTH, *supra* note 13, at 221–24 (arguing that nullification of immunity and the exercise of extraterritorial jurisdiction have the potential to erode the international legal order).

55. *See, e.g.*, TEITEL, *supra* note 13, at 58–61; *see also* Carly Nyst, *Solidarity in a Disaggregated World: Universal Jurisdiction and the Evolution of Sovereignty*, J. INT'L L. & INT'L REL., Fall 2012, at 36, 38–39, 47 (surveying the history of the universal jurisdiction doctrine and exploring its role within the larger debate on the changing conception of sovereignty).

56. *See, e.g.*, Mark Ellis, Exec. Dir., Int'l Bar Ass'n, *The Decline of Universal Jurisdiction—Is It Reversible?*, Remarks at the 10th Annual Ruth Steinkraus-Cohen International Law Lecture 5, 8 (Feb. 22, 2012), http://www.unawestminster.org.uk/pdf/grot12_mark_ellis_lecture.pdf [<https://perma.cc/YT92-CNRE>] (“As much of the international community promotes universal jurisdiction, state practice is limiting the scope and use of it.”).

57. Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEXAS L. REV. 785, 788 (1988).

58. *See id.* at 788, 828–29, 837 (tracing the rise of the universal jurisdiction doctrine as a tool “to combat egregious offenses that states universally have condemned”).

59. *See* Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1, 3, 8–9 (2011) (collecting universal jurisdiction cases and finding that three-quarters of all defendants tried have been Rwandans, former Yugoslavs, or Nazis); *cf.* TRIAL INT'L ET AL., UNIVERSAL JURISDICTION ANNUAL REVIEW 2016: MAKE WAY FOR JUSTICE 49–51, 69 (2017) (reporting that seven out of twenty pending universal jurisdiction cases, including those under investigation, involved conduct in Iraq or Syria).

60. *See* Langer, *supra* note 59, at 11–12 (examining German legislation); *id.* at 15–16 (examining English and Welsh statutes); *cf. id.* at 19–20 (comparing discretion afforded to the investigating judges under French criminal law).

country or the case would otherwise impose foreign policy costs on the forum state.⁶¹

A survey of universal jurisdiction cases against Chinese nationals, for example, shows numerous potential cases arising out of severe human rights violations in Tibet and against the Falun Gong.⁶² In case after case, however, prosecutors dismissed the claims or, failing that, legislatures passed new laws to ensure that Chinese defendants would not stand trial.⁶³ German litigation against Donald Rumsfeld on allegations of torture has similarly gone nowhere, again because of the intervention or control of German government officials.⁶⁴ Litigation in Spain against U.S. officials for conduct in Guantanamo has fared no better.⁶⁵

The disproportionate focus on African defendants led to complaints from individual African countries and from the African Union.⁶⁶ The Assembly of the African Union noted that the “abuse” of universal jurisdiction could “endanger [i]nternational law, order and security” and declared that “[t]he political nature and abuse of the principle of universal jurisdiction by judges from some non-African States against African leaders, particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these States.”⁶⁷ Putting aside whether these criticisms are valid, the point here is that, as with other doctrinal innovations, the selective application of universal jurisdiction has led to political friction and the doctrine itself is in apparent retreat.⁶⁸

International human rights litigation in the United States followed a similar course. The Second Circuit’s 1980 decision in *Filartiga v. Pena-Irala*⁶⁹ opened the door for a wide range of human rights cases to go forward

61. *Id.* at 5–6.

62. Eric L. Hwang, *China: The Growth of a New Superpower and the Extinction of Universal Jurisdiction*, WIS. INT’L L.J. 334, 344–46, 348 (2014).

63. See, e.g., Stewart M. Patrick, *Spain’s Welcome Retreat on Universal Jurisdiction*, COUNCIL ON FOREIGN REL. (Feb. 14, 2014), <http://blogs.cfr.org/patrick/2014/02/14/spains-welcome-retreat-on-universal-jurisdiction/> [<https://perma.cc/KDB3-PF82>]; cf. Hwang, *supra* note 62, at 348–49, 353 (describing the hesitation to exercise universal jurisdiction over Chinese defendants).

64. See Katherine Gallagher, *Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture*, 7 J. INT’L CRIM. JUST. 1087, 1104–06 (2009).

65. Charles Chernor Jalloh, *Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction*, 21 CRIM. L.F. 1, 56 (2010).

66. Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After Kiobel*, 64 DUKE L.J. 1023, 1043 (2015).

67. Karinne Coombs, *Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations?*, 43 GEO. WASH. INT’L L. REV. 419, 442 (2011) (quoting African Union, *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*, ¶ 5 (i)–(ii), Assembly/AU/Dec.199 (XI) (July 2008)).

68. See Patrick, *supra* note 63 (noting that Spain’s Parliament voted to curb its judges’ authority to exercise universal jurisdiction). See generally ROTH, *supra* note 13, at 271.

69. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

under the Alien Tort Statute (ATS). The ATS became the primary vehicle for expansive human rights litigation in the United States.⁷⁰ It also attracted worldwide attention and generated a cottage industry of litigators and scholars.⁷¹ Jurisdictionally, the extraterritorial application of the statute was said to rest on universal civil jurisdiction.⁷² But the Supreme Court substantially curtailed ATS litigation in *Kiobel v. Royal Dutch Petroleum Co.*, which applied the presumption against extraterritorial application of statutes to the ATS.⁷³ The Court justified its decision in part by noting that if the ATS provides a “cause of action for conduct occurring in the territory of another sovereign,” it could result in “diplomatic strife.”⁷⁴ In support, the Court cited to “[r]ecent experience” in the form of lower court ATS litigations, which drew objections from Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom.⁷⁵

The European countries that had been at the forefront of the universal jurisdiction movement have since amended their statutes to limit the doctrine’s application, and it appears that the universal jurisdiction complaints have decreased so that the doctrine is on the decline.⁷⁶ On the other hand, universal jurisdiction may be reinvigorated through European cases against Syrians accused of torture and other crimes during that country’s brutal civil war.⁷⁷ Even if successful, however, such prosecutions are likely to fuel, not quell, complaints that universal jurisdiction is applied selectively.

3. *Right to Democracy.*—A third doctrinal change brought by human rights was a purported right to democracy. This doctrine, too, was designed to make inroads in the protections afforded to sovereigns by international law. After a heyday in the immediate post-Cold War period, the purported

70. See generally Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT’L L. 601 (2013).

71. *Id.*

72. Donovan & Roberts, *supra* note 4, at 146–49, 153–54.

73. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 108 (2013).

74. *Id.* at 124.

75. *Id.* (citing *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 77–78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)); see also Young, *supra* note 66, at 1042–43.

76. Cf. Máximo Langer, *Universal Jurisdiction Is Not Disappearing: The Shift from ‘Global Enforcer’ to ‘No Safe Haven’ Universal Jurisdiction*, 13 J. INT’L CRIM. JUST. 245, 248–49 (2015) (arguing that the number of universal jurisdiction complaints has not substantially decreased in recent years).

77. See Christian Wenaweser & James Cockayne, *Justice for Syria?: The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice*, 15 J. INT’L CRIM. JUST. 211, 219 (2017); TRIAL INT’L LET AL., *supra* note 59.

right to democracy was largely abandoned by the first decade of the new century.

The breakup of the Soviet Union generated enthusiasm for democratic governance around the world.⁷⁸ Election-monitoring institutions and initiatives grew quickly in countries from Namibia to Nicaragua to Cambodia and Bulgaria.⁷⁹ The ouster of democratically elected Jean-Bertrand Aristide resulted in unprecedented condemnation by the Organization of American States and the U.N. General Assembly, both of which suggested that governmental authority is only legitimate to the extent it is a function of popular sovereignty in the form of democracy.⁸⁰ A series of other events unfolded over the decades that followed, including the restoration of Aristide to power through the use of force authorized by the U.N. Security Council,⁸¹ which made clear a growing connection between political legitimacy and democratic governance. The support of “democratic institutions” and “democracy promotion”⁸² became an important mission of the United Nations and other regional and international organizations.⁸³

A wave of scholarly enthusiasm for the emerging right to democratic governance ensued, especially among U.S. scholars.⁸⁴ Based in part on international and state practice, the right also found support in regional treaty regimes, the International Covenant on Civil and Political Rights (which affords individuals a right to vote), and Article 21 of the Universal Declaration of Human Rights.⁸⁵ Article 21 protects the right of individuals to participate in “periodic and genuine elections,” which express the will of the

78. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46–47 (1992) [hereinafter Franck, *The Emerging Right*]; cf. Reisman, *supra* note 13, at 860–61; see also Thomas M. Franck, *Legitimacy and the Democratic Entitlement*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 25, 36–40 (Gregory H. Fox & Brad R. Roth eds., 2000) [hereinafter DEMOCRATIC GOVERNANCE] (chronicling an increase in democratic entitlement through U.N. initiatives during the 1990s after the fall of communism). The events of the early 1990s augmented earlier efforts to ensure democratic governance. *Id.*

79. Franck, *The Emerging Right*, *supra* note 78, at 55, 70–74.

80. *Id.* at 47.

81. S.C. Res. 940, ¶¶ 5, 17 (July 31, 1994).

82. Jean d'Aspremont, *The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks*, 22 EUR. J. INT'L L. 549, 554, 563 (2011) (citing, *inter alia*, Geoffrey Marston, *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, 62 BRIT. Y.B. INT'L L. 559, 559–60 (1991)) (describing the period from 1989 to 2010).

83. See Susan Marks, *What Has Become of the Emerging Right to Democratic Governance?*, 22 EUR. J. INT'L L. 507, 516; Amichai Magen, *The Democratic Entitlement in an Era of Democratic Recession*, 4 CAMBRIDGE J. INT'L & COMP. L. 368, 375–76 (2015).

84. *E.g.*, Reisman, *supra* note 13; Magen, *supra* note 83, at 374–75; Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 60–74 (1992); see also B. BAUER, *DER VÖLKERRECHTLICHE ANSPRUCH AUF DEMOKRATIE* (1998).

85. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.T.S. 171 [hereinafter ICCPR]; G.A. Res. 217 (III) A, art. 21, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter Universal Declaration]. For further discussion, see Franck, *The Emerging Right*, *supra* note 78.

people and further provides that “[t]he will of the people shall be the basis for the authority of government.”⁸⁶ Thus, states’ legitimate claim to the protections of “sovereignty” on the international level arguably became dependent upon an internal democratic legal order.⁸⁷ Understanding legitimate sovereign authority as necessarily based upon a democratic order led many to conclude that military and other intervention in foreign states is not prohibited by international law when used to restore or create democracy.⁸⁸ The costs to international peace and security are clear. To be sure, scholars offered prudential reasons for states to be cautious when using “intrusive political, economic, and military measures” to “implement democratization in a recalcitrant State,” but such measures could “now be included on the menu of lawful options.”⁸⁹

Today, however, international practice—and even academic scholarship—has for some time retreated from the position that international law requires states to have a “democratic origin.”⁹⁰ The retreat can be attributed to several factors. Like universal jurisdiction and human rights exceptions to immunity, a right to democracy caused interstate friction. African nations protested the emphasis on democracy in the European Union’s trade and development policy.⁹¹ China’s (and to some extent Russia’s) rise in power has also weakened the right to democracy, as China has rejected any purported requirement of international law that it or other states have a government that is democratic in origin.⁹² More generally, democracy is in a worldwide decline.⁹³ Academics and other critics have increasingly questioned the purported benefits of democratic governance, especially the claim that it leads to peace, the protection of other human rights, and economic prosperity.⁹⁴ Finally, the promotion of and purported

86. Universal Declaration, *supra* note 85.

87. Reisman, *supra* note 13, at 869–70. *But see* Samantha Besson, *Sovereignty, International Law and Democracy*, 22 EUR. J. INT’L L. 373, 376–82 (2011).

88. Gregory H. Fox & Brad R. Roth, *The Spread of Liberal Democracy*, in DEMOCRATIC GOVERNANCE, *supra* note 78, at 10–13. Some writers viewed the right to democracy as part of a right to internal self-determination. *See* Jean d’Aspremont, *1989–2010: The Rise and Fall of Democratic Governance in International Law*, in 3 SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 61, 66 n.36 (James Crawford & Sarah Nouwen eds., 2012).

89. DEMOCRATIC GOVERNANCE, *supra* note 78, at 12. *But see generally* Michael Byers & Simon Chesterman, “*You, the People*”: *Pro-Democratic Intervention in International Law*, in DEMOCRATIC GOVERNANCE, *supra* note 78 (arguing that unilateral armed intervention to support or restore democracy remains prohibited by international law).

90. *See* d’Aspremont, *supra* note 82, at 70; *see also* Thomas Carothers, *The Backlash Against Democracy Promotion*, 85 FOREIGN AFF., Mar.–Apr. 2006, at 55 (2006).

91. Päivi Leino, *European Universalism?—The EU and Human Rights Conditionality*, 24 Y.B. EUR. L. 329, 338–40 (2005).

92. *See* d’Aspremont, *supra* note 82, at 72.

93. *See* Magen, *supra* note 83, at 378–81.

94. *See, e.g.*, Marks, *supra* note 83, at 519, 523.

right to democracy has been used selectively to advance other foreign policy agendas of Western countries, especially the United States.⁹⁵

4. *Remedial Secession*.—International human rights led to a fourth purported doctrinal change in international law: the emergence of a right to “remedial secession.” Like the others, this doctrine experienced a surge in academic enthusiasm in the 1990s based on some indicia of state practice. Contemporary arguments about secession are closely linked to the “self-determination” of “peoples,” a right protected by the U.N. Charter,⁹⁶ by the International Covenant on Civil and Political Rights,⁹⁷ by the International Covenant on Economic, Social and Cultural Rights,⁹⁸ and by a variety of other human rights instruments.⁹⁹ That there is a right to self-determination for peoples subjected to colonial rule is now well-settled.¹⁰⁰ The right to self-determination may also afford “peoples”—that is, groups united by some combination of race, ethnicity, territorial affiliation, language, and religion—a right to political representation within their state.¹⁰¹ If the state does not afford peoples *internal* self-determination, the state is arguably not fully sovereign, giving rise to a right of unilateral external secession or “remedial” secession.¹⁰² As Ruti Teitel puts it, the “values of stability of statehood” that had been “settled since the postwar period—entrenched in the UN Charter, and so on—are now in play with other values, such as those of the protection

95. *See id.* at 521–23.

96. U.N. Charter art. 43, ¶ 1.

97. ICCPR, *supra* note 85, art. 1.

98. ICESCR, *supra* note 20, art. 1.

99. U.N. Charter art. 1, ¶ 2, art. 55; International Covenant on Civil and Political Rights, art. 1, ¶ 1, *adopted* Dec. 19, 1966, 999 U.N.T.S. 14668; International Covenant on Economic, Social and Cultural Rights, art. 1, ¶ 1, *adopted* Dec. 16, 1966, 993 U.N.T.S. 14531; G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970) [hereinafter Friendly Relations Declaration]; G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960) [hereinafter Declaration on Granting of Independence].

100. *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403, ¶ 79 (July 22). A series of ICJ decisions have addressed the right of self-determination in the colonial context. *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 88; East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. Rep. 90, ¶ 29; Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 13, ¶¶ 54–59; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, ¶¶ 52–53.

101. *E.g.*, ICCPR, *supra* note 85, art. 1; *see also* DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 237–43 (2002) (describing self-determination as including peoples’ rights to “participate in the . . . decision-making process” of the state).

102. ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION 357–400 (2004).

of persons and peoples, e.g., self-determination as a remedy for oppression.”¹⁰³

Teitel’s argument is part of an important strand of philosophical work on international law and its relationship to human rights.¹⁰⁴ The right to remedial self-determination follows from the beginning premise that sovereignty and international law are only legitimate to the extent they represent and protect the individual; here, the individual’s rights and well-being are reflected in a group-based or collective right to self-determination.

The difficulty with an international right to violent or “remedial” secession is that it threatens to increase armed conflicts and war, and to encourage the break-up of states into ever-smaller units. Descriptions of a right to remedial secession implicitly recognize these dangers by limiting it to situations in which peoples in question have suffered “extreme abuses” as in Teitel’s formulation of the argument. In one sense, it is difficult to see the basis for such a limitation. To the extent that a state has inflicted “very bad” (but not “extreme”) human rights abuses, the state is not acting as a legitimate sovereign, so that there is no sovereignty-based principle upon which to limit peoples’ right to violent secession. Yet the articulation of the right appears to include a concern about the values that undergird a state-based system: stability and limits on the use of force.

Philosophers have taken various approaches to this question. Some, for example, defend a moral right to secession but limit it by what is feasible in the international legal order.¹⁰⁵ Others, like Allan Buchanan, explicitly argue that a legal right to secede is “inherently institutional” and can only be defined with reference to its harmony “with the other main elements of a morally defensible international legal system”—including those aspects of the international legal order which discourage armed conflict.¹⁰⁶ Again, this formulation of the right underscores the significance of the state-based international legal order, even when a state is violating the human rights of peoples within its territory.

103. TEITEL, *supra* note 13, at 194; *see also* Christian Walter & Antje von Ungern-Sternberg, *Introduction to SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW* 1, 6 (Christian Walter et al. eds., 2014).

104. *See, e.g.*, BUCHANAN, *supra* note 102, at 353; Daniel Philpott, *In Defense of Self-Determination*, 105 *ETHICS* 352 (1995); *see also* Alan Patten, *Democratic Secession from a Multinational State*, 112 *ETHICS* 55, 563–64 (2002).

105. BUCHANAN, *supra* note 102, at 345–46 (noting the work of other scholars); *see also* Stefan Oeter, *The Role of Recognition and Non-Recognition with Regard to Secession*, in *SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW*, 45, 60 (“[R]emedial secession is a tool for genuine cases of extreme emergency where the very survival of specific population groups is at stake.”).

106. BUCHANAN, *supra* note 102, at 345–47.

Turning to contemporary international law, it is widely (but not universally) accepted that there is no “right” to remedial secession,¹⁰⁷ despite the push by many theorists and human rights activists, especially after the Cold War ended.¹⁰⁸ Secession is closely linked to recognition. Recognition is the formal acknowledgement that a particular entity possesses the qualifications for statehood or that a particular regime is the effective government of a state.¹⁰⁹ Recognition is generally followed by the establishment of diplomatic relations, the possibility of acceptance into international organizations, and other indicia of statehood.¹¹⁰ Secessionist movements have recognition as their goal because it is an essential bridge to statehood.

International recognition practice shows there is a very strong norm against unilateral secession in general.¹¹¹ Indeed, states almost always refuse to recognize secessionist groups as new states if their home states do not recognize them, even if the secession enjoys long-term military success.¹¹² The norm against secession is so strong that even in the twenty-nine post-World War II cases—not limited to cases of remedial secession—in which a secessionist movement opposed by its home state was able to both gain control of territory and govern a population for at least two years, only three (Bangladesh, Eritrea, and South Sudan) were fully successful, meaning that their statehood was eventually recognized by their home state. An additional three (Kosovo, Taiwan, and Palestine) have been recognized by more than ten members of the United Nations, but not by the state from which they seek to secede; none are members of the United Nations. The remaining twenty-

107. See, e.g., Walter & von Ungern-Sternberg, *supra* note 103, at 3; Christopher J. Borgen, *Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea*, 91 INT’L L. STUD. 216, 229–34 (2015); Jure Vidmar, *International Legal Responses to Kosovo’s Declaration of Independence*, 42 VAND. J. TRANSNAT’L L. 779, 816 (2009); cf. MILENA STERIO, THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW 134 (2013) (“[A]n argument can be advanced that international law tolerates a limited right of secession for peoples whose rights to internal self-determination have been egregiously disrespected.”).

108. See, e.g., Lawrence M. Frankel, *International Law of Secession: New Rules for a New Era*, 14 HOUS. J. INT’L L. 521, 526 (1992); see also BUCHANAN, *supra* note 102, at 397–98 (acknowledging that the right to secession he defended in 2004 was narrower than the one he defended in 1991; the later work reflects a greater appreciation of the limited institutional capacities of international law).

109. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 cmt. a (AM. LAW INST. 1986).

110. See MIKULAS FABRY, RECOGNIZING STATES: INTERNATIONAL SOCIETY AND THE ESTABLISHMENT OF NEW STATES SINCE 1776, at 7 (2010).

111. *Id.* at 165–66, 179; see also Tanisha M. Fazal & Ryan D. Griffiths, *Membership Has Its Privileges: The Changing Benefits of Statehood*, 16 INT’L STUD. REV. 76, 97 (2014); Borgen, *supra* note 107, at 229.

112. See JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 415–18 (2d ed. 2006); FABRY, *supra* note 110, at 13.

three “states” have been recognized by fewer than ten other states, or were reabsorbed into their home states.¹¹³

Some of both the successful and the unsuccessful states involved claims of remedial secession, but there is widespread disagreement as to which situations present legitimate claims to remedial secession and which do not. Even in the cases that arguably provide the strongest support for remedial secession—Kosovo and South Sudan—the basis for secession is not clear and success in terms of recognition is best explained by power politics.¹¹⁴ And although claims of human rights abuses directed at the group that seeks secession might improve their political arguments for recognition, international law does not require other states to accord recognition on this (or any other) basis.¹¹⁵

Despite the claim that human rights have displaced or transformed sovereignty as the basis of the international legal order and the arguments for a legal right to remedial secession which flows from that claim, international law and practice have not followed.

5. *Humanitarian Intervention & Responsibility to Protect.*—The claim that international human rights have transformed state sovereignty led to an explicit call for the use of force by the international community to prevent widespread human rights violations. This fifth doctrinal change goes under the heading of “humanitarian intervention” or (with somewhat different content) the “Responsibility to Protect” (R2P). Both are explicitly premised on a reorientation of sovereignty in favor of human rights couched as either the right of other states to intervene or as the responsibility of sovereigns to protect individual rights. Both have been diminished by the unsuccessful R2P

113. Kristy Buzard et al., *Unrecognized States: A Theory of Self-Determination and Foreign Influence*, 33 J.L. ECON. & ORG. 578, 582 (2017). Palestine and Taiwan arguably do not involve secession at all. See Winston P. Nagan & Aitza M. Haddad, *Recognition of Palestinian Statehood: A Clarification of the Interests of the Concerned Parties*, 40 GA. J. INT'L & COMP. L. 341, 377 (2012); CRAWFORD, *supra* note 112, at 206–21, 434.

114. See Milena Sterio, *Secession: A Proposal for a New Legal Framework*, GERM. Y.B. INT'L L. (forthcoming 2017) (describing uncertainty around remedial secession in the cases of Kosovo and Nagorno-Karabakh); Oeter, *supra* note 105, at 59–60 (arguing that Kosovo did not meet the criteria for remedial secession); STERIO, *supra* note 107, at 136 (arguing that Chechnya had a better claim to remedial secession than Kosovo); *id.* at 151–52 (arguing that claims by South Ossetia and Abkhazia to remedial secession were comparable to those of Kosovo); *id.* at 167 (arguing that South Sudan's claim for remedial secession is problematic and that the legally stronger argument would rest on a claim of delayed decolonization). With respect to Eritrea, see Gregory Fox, *Eritrea, in SELF-DETERMINATION AND SECESSION*, *supra* note 103, at 288–89, who argues that there are several legal bases for Eritrea's secession, including remedial secession, but the question of whether “the level of Ethiopian oppression was sufficiently egregious to trigger the right” to remedial secession is impossible to answer.

115. Jure Vidmar, *Remedial Secession in International Law: Theory and (Lack of) Practice*, 6 ST. ANTONY'S INT'L REV., May 2010, at 37, 51.

intervention in Libya and subsequent failure of the international community to respond effectively to the crisis in Syria.

The global failure to prevent war in Bosnia during the collapse of Yugoslavia and to prevent a horrific genocide in Rwanda during the 1990s led practitioners and scholars to look for new ways to improve the international response to such atrocities.¹¹⁶ Then during the spring of 1999, human rights abuses escalated in the Serbian province of Kosovo.¹¹⁷ Haunted by the events in Bosnia and in Rwanda, many state officials believed that it was morally unconscionable to watch the human rights situation deteriorate in Kosovo without responding.¹¹⁸ The U.N. Security Council was unable to act because Russia, with its permanent member's veto, was a longtime ally of Serbia.¹¹⁹ Russia argued that the unrest in Kosovo was a domestic issue, not one that justified international intervention.¹²⁰ These events led to an extensive debate about the wisdom and the legality of humanitarian intervention that lacked either the U.N. Security Council authorization or the consent of the territorial state.¹²¹

In the end, NATO launched a bombing campaign in Serbia, which NATO described partly in humanitarian terms. Some scholars have defended humanitarian intervention on the grounds that the protection and enforcement of human rights is “the ultimate justification of the existence of states.”¹²² States that violate human rights are accordingly not protected by sovereignty from external military intervention.¹²³

116. Monica Hakimi, *Toward a Legal Theory on the Responsibility to Protect*, 39 YALE J. INT'L L. 247, 251–54 (2014).

117. See Mark Weisburd, *International Law and the Problem of Evil*, 34 VAND. J. TRANSNAT'L L. 225, 231–33 (2001) for a discussion of the factual background.

118. See *Law, Morality and the Use of Force*, NORTH ATLANTIC TREATY ORG., http://www.nato.int/cps/en/natohq/opinions_18418.htm?selectedLocale=en#top [<https://perma.cc/NQ42-VYAQ>]; Press Release, Security Council, NATO Action Against Serbian Military Targets Prompts Divergent Views as Security Council Holds Urgent Meeting on Situation in Kosovo, U.N. Press Release SC/6657 (Mar. 24, 1999).

119. See Abraham D. Sofaer, *International Law and Kosovo*, 36 STAN. J. INT'L L. 1, 2 n.7 (2000).

120. *Why Russia Opposes Intervention in Kosovo*, BBC NEWS (Oct. 13, 1998), <http://news.bbc.co.uk/2/hi/europe/111585.stm> [<https://perma.cc/SMN3-96XJ>]; see also Vladimir Putin, President of Russ., Address (Mar. 18, 2014), <http://en.kremlin.ru/events/president/news/20603> [<https://perma.cc/9R33-SXXC>] (comparing the Crimea dispute to Kosovo and arguing that violations of domestic legislation are not equivalent to a violation of international law).

121. See Adam Roberts, *The So-Called 'Right' of Humanitarian Intervention*, 3 Y.B. INT'L HUMANITARIAN L. 3, 3 (2000); Simon Chesterman, *Legality Versus Legitimacy: Humanitarian Intervention, the Security Council, and the Rule of Law*, 33 SECURITY DIALOGUE 293, 294 (2002).

122. FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 16 (3d ed. 2005).

123. See Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 5 WM. & MARY L. REV. 1743, 1764 (2000) (“[W]hen another state intervenes to protect human rights . . . it is not violating a principle of sovereignty. Rather, it is liberating a principle of sovereignty.”); Koh, *supra* note 13, at 288 (arguing in favor of humanitarian intervention in part because international law should serve human purposes, including human rights); Kimberley N.

The Kosovo intervention had major ramifications. After the bombing campaign, the United Nations authorized a peacekeeping force in Kosovo. With the strong support of Western European countries and the United States, Kosovo declared its independence from Serbia in 2008.¹²⁴ Serbia and its allies, especially Russia, strongly condemned the declaration of independence and continue today to refuse to recognize Kosovo.¹²⁵ Russian officials in turn used the Kosovo precedent to support Russia's use of force in both Georgia and Ukraine.¹²⁶ Crimea, which was part of Ukraine, is today Russian. Russian justification for its actions against Georgia and Ukraine made repeated and clear references to precedent set by NATO in Kosovo.

The events in Kosovo were not just directly destabilizing in terms of international peace and security, but they also led to the formation of an independent commission (the International Commission on Intervention and State Sovereignty or ICISS), which published a report entitled "The Responsibility to Protect."¹²⁷ The United States and NATO had not explicitly defended the Kosovo intervention as consistent with international law, although the United Kingdom and Belgium did make an explicitly legal argument in favor of "humanitarian intervention."¹²⁸ The ICISS report made a comprehensive defense of R2P, built on (but slightly different from) humanitarian intervention.

The ICISS Report declared that states have a responsibility to protect not only their own citizens, but also those of foreign countries, from massive human rights violations.¹²⁹ It lists as one of the foundations of R2P the "specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and

Trapp, *Unauthorized Military Interventions for the Public Good: A Response to Harold Koh*, AJIL UNBOUND, Oct. 2017, at 292, 292–93 (arguing that state sovereignty should not "shield a state so as to provide it with the (legal and physical) space within which to violate individual rights to life and physical integrity").

124. See James Summers, *Kosovo*, in SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW, *supra* note 103, at 236–44.

125. *Id.* at 235.

126. For Russia's position in the independence of South Ossetia and Abkhazia, see *id.* at 235–36 (citing *Statement by the Ministry of Foreign Affairs of the Russian Federation*, ORG. SECURITY CO-OPERATION EUR. (Aug. 28, 2008), <http://www.osce.org/pc/33166?download=true> [<https://perma.cc/UG8D-W5XV>]); for Russia's reference to Kosovo in supporting Ukraine's secession, see David Herszenhorn, *Crimea Votes to Secede from Ukraine as Russian Troops Keep Watch*, N.Y. TIMES (Mar. 16, 2014), <https://www.nytimes.com/2014/03/17/world/europe/crimea-ukraine-secession-vote-referendum.html> [<https://perma.cc/8V38-ACBB>].

127. GARETH J. EVANS ET AL., THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001) [hereinafter ICISS REPORT].

128. Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971, 977–80 (2016).

129. ICISS REPORT, *supra* note 127, at 5, 81.

national law.”¹³⁰ Unlike humanitarian intervention, R2P focuses on the responsibility of sovereigns rather than their rights.¹³¹ Like humanitarian intervention, however, the ICISS report supported the unilateral use of force by states to prevent widespread human rights atrocities if the U.N. Security Council is unable to act.¹³² The U.N. Secretary General subsequently endorsed R2P, but U.N. Member States did not accept that there was either a right or a duty to intervene militarily in humanitarian crises without the approval of the U.N. Security Council.¹³³

The R2P principle initially appeared to receive a major boost from the 2011 Libya intervention. The U.N. Security Council authorized the use of force in Libya¹³⁴ in part because the Libyan government “forfeited” its “responsibility to protect Libyan citizens, implicitly inviting the United Nations to act”¹³⁵ for humanitarian purposes, namely to protect the population from grave human rights violations.¹³⁶ Libya was the first time that the Security Council approved the use of force as an application of the R2P doctrine.¹³⁷ By all assessments, the Libya intervention started out well. As President Obama put it: “So we actually executed this plan as well as I could have expected: We got a UN mandate, we built a coalition, it cost us \$1 billion—which, when it comes to military operations, is very cheap. We averted large-scale civilian casualties, we prevented what almost surely would have been a prolonged and bloody civil conflict.”¹³⁸

But today, Libya, a “key test of [the R2P] principle,”¹³⁹ is widely recognized as a failure. First, Libya itself is now in effect a failing state, with no central government, warring factions, and mounting civilian casualties.¹⁴⁰ It is not at all clear that the Libyan intervention improved the lives or the

130. *Id.* at xi.

131. *Id.* at 16–17.

132. *Id.* at 54–55.

133. G.A. Res. 60/1, ¶ 30, 2005 World Summit Outcome (Sept. 16, 2005) (accepting state responsibility to “protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity,” which entails the prevention of such crimes “through appropriate and necessary means”).

134. See S.C. Res. 1973, ¶ 4 (Mar. 17, 2011) (authorizing member states to “take all necessary measures . . . to protect civilians and civilian populated areas” in Libya).

135. See Koh, *supra* note 128, at 982.

136. President Obama explained the U.S. action in Libya in terms of human rights. President Barack Obama, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011).

137. MICHAEL M. DOYLE, *THE QUESTION OF INTERVENTION: JOHN STUART MILL AND THE RESPONSIBILITY TO PROTECT* 127–28 (2015).

138. Jeffrey Goldberg, *The Obama Doctrine*, ATLANTIC (Apr. 2016), <https://www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525/> [<https://perma.cc/5ZJB-52EG>].

139. Alex J. Bellamy & Paul D. Williams, *Libya, in* THE UN SECURITY COUNCIL IN THE TWENTY-FIRST CENTURY 699, 700 (Sebastian von Einsiedel et al. eds., 2016).

140. Alan J. Kuperman, *Obama’s Libya Debacle: How a Well-Meaning Intervention Ended in Failure*, 94 FOREIGN AFF., Jan.–Feb. 2015, at 66, 66–72.

human rights protection of Libyans in the medium-term.¹⁴¹ Second, Libya has become a haven for terrorists and ISIS, a situation that has forced the United States to use airstrikes within Libya.¹⁴² In that sense, the intervention has led to greater regional unrest, as the ISIS terrorists in Libya threaten other countries.¹⁴³ Third, the Libyan intervention launched a contentious debate about the selective use of force and about regime change as an aspect of R2P.¹⁴⁴ Past support of the Gadhafi regime by Western countries despite the regime's dismal record on human rights, along with other factors, led to questions about political and economic motives for the intervention.¹⁴⁵ Finally, the application of the R2P doctrine in Libya appears to be partly responsible for the decisions by Russia and China to block any U.N. Security Council resolution on the use of force for humanitarian purposes in Syria.¹⁴⁶ Syrian protestors and rebels waited for the U.N. Security Council to authorize the use of force—and to save them and their country—but that support never came.¹⁴⁷ The tragic humanitarian crisis and horrific violations of international law in Syria have undercut the R2P doctrine.¹⁴⁸

More recently, however, in April, 2017, President Trump launched missile strikes in response to Syria's use of chemical weapons, which drew

141. President Obama calls Libya a “mess,” but Jeffrey Goldberg writes that, “*Mess* is the president’s diplomatic term; privately, he calls Libya a ‘shit show.’” Goldberg, *supra* note 138; see also Seamus Milne, *If the Libyan War Was About Saving Lives, It Was a Catastrophic Failure*, GUARDIAN (Oct. 26, 2011), <https://www.theguardian.com/commentisfree/2011/oct/26/libya-war-saving-lives-catastrophic-failure> [<https://perma.cc/F3BJ-TM3S>] (discussing the increase in “mass abduction and detention, beating and routine torture, killings and atrocities,” and civilian “massacres” that have occurred after the Libya intervention).

142. See Goldberg, *supra* note 138 (“[Libya has] subsequently become an ISIS haven—one that [the United States] has already targeted with air strikes.”).

143. *Id.*; see also Kuperman, *supra* note 140, at 72 (arguing that “[a]nother unintended consequence of the Libya intervention has been to amplify the threat of terrorism from [Libya] and surrounding countries”).

144. See, e.g., Amy Baker Benjamin, *To Wreck a State: The New International Crime*, 19 NEW CRIM. L. REV. 208, 223 (2016) (proposing a new crime in international law that prevents states from using humanitarian concern as a pretext for invading or attacking another state).

145. See *id.* at 230–31 (arguing that potential motivations for Libyan regime change include gaining control of Libya’s oil, protecting the status of the French Franc and French influence in Africa, and providing a boost to international banks by destroying Libya’s civilian infrastructure).

146. See Salman Shaikh & Amanda Roberts, *Syria*, in THE UN SECURITY COUNCIL IN THE 21ST CENTURY, *supra* note 139, at 717, 719; Koh, *supra* note 128, at 998; *Russia and China Veto UN Resolution Against Syrian Regime*, GUARDIAN (Oct. 4, 2011), <https://www.theguardian.com/world/2011/oct/05/russia-china-veto-syria-resolution> [<https://perma.cc/JQV8-8EDY>].

147. Ian Black & Peter Walker, *Syrian Protestors Demand Action to Halt Killings by Bashar al-Assad Regime*, GUARDIAN (Aug. 1, 2011), <https://www.theguardian.com/world/2011/aug/01/syria-demands-action-assad-killings> [<https://perma.cc/nN32V-TNHR>].

148. See Tom Esslemont, *As Syrian Deaths Mount, World’s “Responsibility to Protect” Takes a Hit: Experts*, REUTERS (Oct. 24, 2016), <https://www.reuters.com/article/us-mideast-crisis-syria-law/as-syrian-deaths-mount-worlds-responsibility-to-protect-takes-a-hit-experts-idUSKCN12O2S3> [<https://perma.cc/NXA2-S3UC>] (discussing the limited success of R2P, which is described as a “high moral aspiration” that has “floundered” on the complex realities of warfare today, especially in the Syrian conflict).

significant support from other states—in the form of both explicit approval and lack of condemnation.¹⁴⁹ Most important, perhaps, was China’s decision not to condemn the strikes as a violation of international law.¹⁵⁰ These events provide some support for R2P, although the U.S. government has not defended its actions in those terms. Russia’s condemnation of the strikes illustrate the difficulties of implementing R2P to the mutual satisfaction of countries with different strategic objectives.¹⁵¹

6. *Conclusion.*—Before leaving the five doctrinal innovations analyzed in this section, let us consider two overarching counterarguments. First, these five doctrines are not at the core of international human rights. In one sense this counterargument is correct. The core substantive human rights commitments that are made by and/or are binding upon states are set out in treaty instruments and in customary international law, not in the doctrines addressed in this section, which generally go to enforcement. Even if the five doctrines are of declining significance, they could be abandoned without changing substantive international human rights obligations. Enforcement is nevertheless, however, a core issue of international human rights law. In a sense, enforcement is the key challenge of international human rights law; if methods of enforcement are stripped away, then the promise of international human rights law has gone unfulfilled. As well, these doctrinal innovations are not “merely” about enforcement. Taken together, they are important components of the claim that sovereignty and international law have been reframed to have individual human rights and welfare at their core.¹⁵² To abandon these doctrinal innovations is to gut much of the core of the purported transformation of sovereignty and international law, although other aspects of that transformation, including international criminal law, are not addressed here.

A second counterargument is that the international peace and security costs associated with these doctrinal innovations have not actually been so great, with the possible exceptions of humanitarian intervention, unilateral

149. See Madison Park, *Who’s with the US on Syria Strike and Who Isn’t*, CNN (Apr. 9, 2017), <http://edition.cnn.com/2017/04/07/world/syria-us-strike-world-reaction/index.html> [https://perma.cc/4ZYL-6NX8].

150. See *Foreign Ministry Spokesperson Hua Chunying’s Regular Press Conference on April 7, 2017*, MINISTRY FOREIGN AFF. CHINA (Apr. 7, 2017), http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1452149.shtml [https://perma.cc/7VE3-HRZH].

151. *Briefing by Foreign Ministry Spokesperson Maria Zakharova, Moscow, April 12, 2017*, MINISTRY FOREIGN AFF. RUSS. (Apr. 12, 2017), http://www.mid.ru/en/web/guest/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2725573#9 [https://perma.cc/LT7M-S5V6].

152. See, e.g., TEITEL, *supra* note 13, at 8–11; William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT’L L.J. 129, 183 (2000); Peters, *supra* note 13, at 514.

secession in Kosovo, and the use of R2P in Libya. Moreover, even if states say that a particular doctrine undermines peace and security, that statement may be insincere and may instead mask a self-serving preference not to enforce human rights through international law.

Even assuming that these objections are correct, the descriptive point remains: the limited (and apparently dwindling) state support for these doctrines suggests the purported transformation of international law around human rights is on questionable footing. As well, to the extent that the costs of the doctrines have been low, that may be because these enforcement measures have been used so infrequently. Like the low levels of funding for the U.N. treaty bodies, discussed below, these doctrines have either been too costly or not nearly costly enough. If states were serious about a reorientation of international law around human rights, the foregoing doctrines would be employed far more often, reducing the problem of selective enforcement, but with potentially far higher costs.

B. *Costs to the “Territorial Peace”*

Political scientists provide another way to consider the costs of the human rights-related doctrinal innovations in international law. Empirical scholarship has linked peace with an absence of territorial conflict: a “territorial peace.” Some of the doctrines described above undermine the ways in which international law tends to generate territorial security.

The occurrence of interstate war and overall mortality in war sharply decreased after 1815 and again after 1945.¹⁵³ Scholars do not fully agree on the reason for this decline, but the empirical evidence suggests that a decline in armed disputes may be caused by the “democratic peace” or the “territorial peace.” The first, discussed in greater detail in Part III, posits that democracies are less likely to have conflicts with each other than they are with nondemocracies.¹⁵⁴ The second posits that war has declined because there has been a reduction in conflict over territory.¹⁵⁵ The democratic peace

153. Azar Gat, *Is War Declining—and Why?*, 50 J. PEACE RES. 149, 152 (2012); see also STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* 249–50 (2011) (describing the many categories of war which have not happened since 1945, including wars with nuclear weapons, battlefield combat between superpowers, and interstate wars between major developed countries).

154. DAVID SOBEK, *THE CAUSES OF WAR* 84–85 (2009); Johann Park & Patrick James, *Democracy, Territory, and Armed Conflict, 1919–1995*, 11 FOREIGN POL’Y ANALYSIS 85, 86 (2015). The democratic peace is sometimes attributed to the structural aspects of democracy such as elections, which allow voters to punish the leaders and the political parties that take a country into war. See David Lektzian & Mark Souva, *A Comparative Theory Test of Democratic Peace Arguments, 1946–2000*, 46 J. PEACE RES. 17, 32 (2009).

155. For a literature review of territorial peace theory, see John A. Vasquez & Emily E. Barrett, *Peace as the Absence of Militarized Conflict: Comparing the Democratic and Territorial Peace*, 2 J. TERRITORIAL & MAR. STUD., Winter/Spring 2015, at 5–8.

literature is long-standing and well-established; territory is the “rising star” among explanations of the interstate-conflict processes.¹⁵⁶

Numerous empirical studies show that territorial disputes are a leading cause of war and that their absence is a significant predictor of peace. Since 1815, territorial disputes have had a higher probability of leading to war than any other kind of dispute.¹⁵⁷ Moreover, for wars between 1816–1997, territorial wars were the most prevalent form of war.¹⁵⁸ Another study of wars from 1648 through 2007 concluded that “[t]erritory has consistently constituted the issue over which states have most frequently gone to war, and this is true by a wide margin.”¹⁵⁹ States able to resolve their territorial disputes¹⁶⁰ thus eliminate a significant cause of war. Territorial disputes in relationships between states dropped dramatically after 1945, providing one explanation for the decrease in interstate wars.¹⁶¹ Additional studies have also concluded that the absence of territorial claims is associated with fewer militarized interstate disputes (MIDs), a measure that includes war, as well as military displays and threats of war.¹⁶² The effect of territorial disputes on war and peace is felt in an additional way: eliminating territorial conflict apparently not only eliminates a war-generating issue, but it may also reduce hostility around *other* issues.¹⁶³ The association between the absence of territorial claims and peace is referred to as the “territorial peace.”¹⁶⁴

Why are territorial disputes apparently so detrimental to peace? Perhaps removing territorial disputes allows states to shrink their militaries, reducing the perception that they are threatening.¹⁶⁵ Another possibility: researchers posit that MIDs are more likely to result from territorial claims that are imbued with intangible values like ethnic worth than they are from territorial claims without intangible values.¹⁶⁶ Perhaps settling territorial claims with high intangible values has more “spill-over” effect than the settlement of

156. Park & James, *supra* note 154, at 86.

157. Vasquez & Barrett, *supra* note 155, at 6 (citing multiple studies, e.g., JOHN A. VASQUEZ, *THE WAR PUZZLE* (1993) and Paul R. Hensel, *Charting a Course to Conflict: Territorial Issues and Interstate Conflict, 1816–1992*, 15 *CONFLICT MGMT. & PEACE SCI.*, at 43–73 (1996)).

158. See John A. Vasquez & Brandon Valeriano, *Classification of Interstate Wars*, 72 *J. POL.* 292, 300 (2010).

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

160. For a discussion of what counts as a “territorial dispute,” see *id.* at 79–80. Although studies vary some in how they define that term, it generally does not include peaceful boundary management or maritime disputes (unless they are accompanied by dispute over land). *Id.* at 80.

161. *Id.* at 93 tbl.4.4.

162. See *id.* at 91–92 (analyzing MIDs and showing that “the raw frequency of territorial disputes, as well as their percentage relative to other issues[,] . . . has declined in the post-World War II era”).

163. Vasquez & Barrett, *supra* note 155, at 6.

164. GOERTZ ET AL., *supra* note 159, at 82.

165. *Id.* at 101 (citation omitted).

166. Vasquez & Barrett, *supra* note 155, at 9.

other kinds of claims because they tend to be especially inflammatory, making all other issues more intractable.

Whatever the reasons, the foregoing analysis has important implications for international law. Legal rules and institutions that reduce conflict over territory appear likely to reduce military conflicts. And they are likely to do so with greater positive effect than legal rules and institutions that reduce political or economic disagreements between states. International legal rules designed to reduce conflict over territory and borders include: Article 2(4) of the U.N. Charter and other international legal rules that prohibit the use of force to acquire territory; the doctrine of *uti possidetis*, which provides that newly formed states keep the territorial borders they had before decolonization or their previous internal borders; and the lack of a right to violent secession.

Not only are these legal rules partially designed to reduce territorial conflict, but we now also have a body of empirical evidence that suggests they have been successful. Territorial conquests, for example, declined during the twentieth century as the international rule limiting the use of force hardened.¹⁶⁷ The conclusion of the Kellogg–Briand Pact in 1928 arguably precipitated the decline in conquests;¹⁶⁸ in any event, prohibition on the use of force for territorial conquest was strengthened in the U.N. Charter and became a cornerstone of the post-World War II international legal order.¹⁶⁹ Second, the *uti possidetis* norm appears to have reduced territorial conflict.¹⁷⁰ Third, violent secessions have decreased during the twentieth century.¹⁷¹

The reorientation of the international legal system toward individual human rights and away from state sovereignty threatens to undermine all three of these doctrines. The focus on human rights may also threaten to undermine the ability of the U.N. Security Council to resolve territorial disputes peaceably. As described above, humanitarian intervention, Responsibility to Protect, a right to democracy, and a right to violent secession all weaken Article 2(4) of the U.N. Charter. The *uti possidetis* doctrine is challenged to the extent it violates the rights of people who are rendered a potentially oppressed minority in the new state.¹⁷² The “territorial

167. See TANISHA M. FAZAL, *STATE DEATH: THE POLITICS AND GEOGRAPHY OF CONQUEST, OCCUPATION, AND ANNEXATION* 169–228 (2007); GOERTZ ET AL., *supra* note 159, at 112–17; Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force*, 55 INT’L ORG. 215 (2001).

168. OONA HATHAWAY & SCOTT SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* 309–35 (2017).

169. U.N. Charter art. 2, ¶4.

170. David B. Carter & H. E. Goemans, *The Making of the Territorial Order: New Borders and the Emergence of Interstate Conflict*, 65 INT’L ORG. 275, 275–76 (2011).

171. GOERTZ ET AL., *supra* note 159, at 126–28.

172. See, e.g., Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Border of New States*, 90 AM. J. INT’L L. 590, 612 (1996). *Uti possidetis* is also challenged as potentially increasing the number of territorial disputes (rather than reducing them) because it may lead groups of people

peace” literature suggests that to the extent human rights-related doctrines render borders less secure and the ownership of territory less certain, there may be significant costs to international peace and security.

Using military force in the humanitarian intervention and R2P contexts, or to install democracy or effectuate violent secession, is not the same as using force for territorial acquisition. Arguably, using force in these human rights-promoting contexts does not destabilize borders, even if the use of force for territorial acquisition *does* lead to conflict about borders. But our actual experience with recent uses of force does not bear out this argument. Consider Kosovo—one of the key examples in the arguments that sovereignty and international law have been reconceptualized.¹⁷³ Although the intervention violated Article 2(4) of the U.N. Charter, the use of force by NATO was not intended as territorial acquisition. Its purpose was, instead, to prevent mass atrocities and human rights violations.¹⁷⁴ Nor was territorial acquisition the direct effect of the intervention: NATO countries did not claim the territory of Kosovo for themselves.

The intervention and subsequent secession by Kosovo from Serbia did nonetheless destabilize borders. The precedent set by the Western states with respect to Kosovo, which later seceded from Serbia and became a Western ally, became the legal basis for Russia’s intervention in Georgia and in Crimea, Ukraine, ostensibly at the request of newly seceded regimes. The newly contested border between Ukraine and Russia has, in turn, generated broader tensions between Russia, the United States, and NATO.¹⁷⁵ The empirical data tells us that this is the kind of conflict—about borders and territory—most likely to escalate into a militarized dispute.

unhappy with the borders to make territorial claims, perhaps through the use of force. Empirical work does not appear to support this argument. See Carter & Goemans, *supra* note 170, at 304.

173. As another example, the U.S. invasion of Iraq, designed in part to remedy human rights violations and to promote democracy, has arguably failed to do either and has also destabilized the Iraqi border with Turkey and with the quasi- or pseudo-states of ISIS and Kurdistan. See Metin Gurcan, *Turkey Sticks Its Neck Out Again, This Time in Iraq*, AL-MONITOR (Dec. 7, 2015), <https://www.al-monitor.com/pulse/originals/2015/12/turkey-iraq-becomes-third-largest-army.html> [<https://perma.cc/TAY3-W25L>].

174. Press Release, North Atlantic Treaty Organization [NATO], *The Situation in and Around Kosovo*, Statement Issued at the Extraordinary Ministerial Meeting of the North Atlantic Council, NATO Press Communique M-NAC-1 (99)51, ¶ 2 (Apr. 12, 1999) (“[NATO] condemns these appalling violations of human rights and the indiscriminate use of force by the Yugoslav government. These extreme and criminally irresponsible policies . . . have made necessary and justify the military action by NATO.”).

175. Bruce Blair, *Could U.S.–Russia Tensions Go Nuclear?*, POLITICO (Nov. 17, 2015), <http://www.politico.eu/article/could-u-s-russia-tensions-go-nuclear/> [<https://perma.cc/W6M4-R5EA>]; Jeremy Diamond & Greg Botelho, *U.S.–Russia Military Tit for Tat Raises Fears of Greater Conflict*, CNN (June 19, 2015), <http://www.cnn.com/2015/06/17/politics/russia-us-military-threats-rise-ukraine/> [<https://perma.cc/M2SX-C5MG>]; *Relations with Russia*, NORTH ATLANTIC TREATY ORG. (June 16, 2017), http://www.nato.int/cps/en/natolive/topics_50090.htm# [<https://perma.cc/CH75-NJ3T>].

Note that there are many potential reasons for the decrease in armed conflict in the post-World War II period and before, many of which are not closely tied to international law.¹⁷⁶ Nevertheless, the strength of the association between territorial disputes and war in the empirical literature suggests that if international law can reduce—or contribute to a reduction in—conflict over territory, it will contribute to a reduction in armed conflict, whatever the mixture of factors which may have contributed to peace historically or which may do so in the future.

C. *The United Nations and Polarization Costs*

The United Nations, too, has been changed by human rights in ways that appear to impose costs on international cooperation and international law. The United Nations and the treaty that created it, the U.N. Charter, are the cornerstones of the post-World War II international order.¹⁷⁷ Developments in the United Nations over the past several decades appear in some respects to parallel the developments in the doctrinal enforcement mechanisms discussed above: the enforcement of international human rights law through the United Nations is widely perceived as ineffective and selective, leading to polarization and a lack of credibility that may hamper the overall work of the United Nations. The trajectory is a bit different, however. The U.N. human rights bodies did not experience the same turn-of-the-century heyday, although there was a spurt of optimism around the reform of the Human Rights Council in 2006. Here, the story is mostly one of stasis. It is also important to note again that measuring the effectiveness of international human rights law and institutions is generally difficult and contested.

The purposes of the United Nations are “[t]o maintain international peace and security,” and “[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms”¹⁷⁸ This choice of language subordinates the promotion and encouragement of respect for human rights to the achievement of international cooperation and to the maintenance of peace and security,¹⁷⁹ a choice underscored by the placement of the responsibility for human rights with the Economic and Social Council of the U.N. (ECOSOC), an “organ in

176. See, e.g., Gat, *supra* note 153, at 2–8 (discussing many possibilities such as economic growth, commercial interdependence, social attitude changes, and nuclear deterrence); Pinker, *supra* note 153, at 189–288 (discussing many possibilities including the value placed on human life, nuclear weapons, democracy, and international organizations).

177. ICISS REPORT, *supra* note 127, at 52.

178. U.N. Charter art. 1, ¶¶ 1, 3.

179. Martti Koskenniemi, *The Police in the Temple: Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT’L L. 325, 336–37 (1995).

decline almost from the start.”¹⁸⁰ The language also does not necessarily mean human rights are or should be protected by or as *international law*. Indeed, contemporary observers understood that the Charter envisioned “voluntary cooperation” on human rights as coordinated and facilitated by the General Assembly and the ECOSOC.¹⁸¹ Human rights are protected by domestic law and constitutions, regional organizations, and moral or religious beliefs and values. In all of these forms, human rights can be “promoted” and “encouraged” through international cooperation and international institutions without international *legal* protection.

When the U.N. Charter was drafted and adopted, few—if any—human rights were protected by international law, so it is largely in this broader sense that the purposes of the United Nations include the promotion and encouragement of respect for human rights. The United Nations itself was intended, at least by the Allied leaders who planned and created it, as a security framework that would balance great powers against one another and thereby promote international peace and security as well as ensure the sovereign equality of all nations.¹⁸²

Perhaps it is unsurprising, then, that the United Nations’ track record in some aspects of protecting human rights has been poor. Although the United Nations served as the institutional forum for the negotiation and conclusion of many multilateral human rights agreements,¹⁸³ the mechanisms of international legal enforcement of human rights have not been a clear success for human rights themselves. Moreover, efforts by the United Nations to enforce human rights, especially international human rights law, appear to have detracted from international cooperation as a whole by contributing to the organization’s loss of credibility, as discussed in subpart II(C), and by contributing to polarization, as discussed below.

1. Human Rights Council.—The unfortunate failure of the Human Rights Commission, its dismantling by the United Nations in 2006, and its reincarnation as the Human Rights Council¹⁸⁴ illustrate some of the difficulties of the U.N.’s efforts to enforce human rights through international

180. Daphna Shraga, *The Security Council and Human Rights—from Discretion to Promote to Obligation to Protect*, in *SECURING HUMAN RIGHTS?: ACHIEVEMENTS AND CHALLENGES OF THE UN SECURITY COUNCIL* 8, 9–10 (Bardo Fassbender ed., 2011).

181. Bardo Fassbender, *Introduction to SECURING HUMAN RIGHTS?: ACHIEVEMENTS AND CHALLENGES OF THE UN SECURITY COUNCIL*, *supra* note 180, at 1, 2.

182. Koskenniemi, *supra* note 179, at 335; *see also* C. L. Lim, *The Great Power Balance, the United Nations and What the Framers Intended: In Partial Response to Hans Köchler*, 6 *CHINESE J. INT’L L.* 307, 309–14 (2007).

183. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); World Conference on Human Rights, Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23 (June 25, 1993).

184. G.A. Res. 60/251, ¶ 1 (Mar. 15, 2006).

law. The Human Rights Commission was created in 1946.¹⁸⁵ Its loss of legitimacy and the reasons it was shuttered are generally summarized in these terms:

The Commission was notoriously impotent, farcical even. Countries with egregious human rights records, from Libya to Sudan, managed to become Commission members, affording them a platform to deflect criticism, obstruct meaningful action against flagrant atrocities, and, to the chagrin of the United States, disproportionately bash Israel. The Commission's work often pitted the West against non-Western countries, which tended to vote in blocs along the lines of the Organization for Islamic Cooperation (OIC) and the Non-Aligned Movement (NAM). By the time it was shuttered in 2006, the Commission was discredited and disgraced.¹⁸⁶

Early reports on the Council suggest that its work is also dominated by regional and political bloc voting, including a disproportionate focus on Israel. As Professor Rosa Freedman describes:

Despite warnings about selectivity, bias, double standards, and loss of credibility, from the outset Council discussions were dominated by states seeking to vilify Israel and to keep the spotlight on that region. A large number of OIC states were able to express, and use their votes to achieve, collective positions. The OIC sought to retain focus on the OPT as part of national and regional foreign policies including political, religious, cultural, and regional ties with the Palestinians and with affected neighbouring states. OIC states also used the situation to divert attention away from other gross and systemic violations within the Middle East or within influential OIC Council members such as Pakistan, Algeria, and Egypt.¹⁸⁷

As a result, the Human Rights Council, like the Human Rights Commission before it, is of questionable value, despite its new tools such as Universal Periodic Review, which requires all states to appear before the Council to report on human rights in their country.¹⁸⁸ To be sure, it is possible

185. *United Nations Commission on Human Rights*, U.N. OFF. HIGH COMMISSIONER, <http://www.ohchr.org/EN/HRBodies/CHR/Pages/CommissionOnHumanRights.aspx> [https://perma.cc/F2NR-N74U].

186. Daniel Chardell, *Gaining Ground at the UN Human Rights Council*, COUNCIL ON FOREIGN REL. (Oct. 3, 2014), <http://blogs.cfr.org/patrick/2014/10/03/gaining-ground-at-the-un-human-rights-council/> [https://perma.cc/K88C-U4CH].

187. Rosa Freedman, *The United Nations Human Rights Council: More of the Same?*, 31 WIS. INT'L L.J. 208, 226 (2013) [hereinafter Freedman, *More of the Same?*]; see also SUBEDI, *supra* note 14 at 129–39.

188. Vincent Chetail, *The Human Rights Council and the Challenges of the United Nations System on Human Rights: Towards a Cultural Revolution?*, in INTERNATIONAL LAW AND THE QUEST FOR ITS IMPLEMENTATION 222–23 (Laurence Boisson de Chazourmes & Marcelo Kohen eds., 2010).

that the Council's work is improving,¹⁸⁹ or that it has a positive overall impact on human rights in indirect ways, for example by increasing the effectiveness of other enforcement mechanisms such as domestic courts and regional courts and tribunals. Both points highlight the difficulty in measuring human rights outcomes and underscore the need for caution in proposing solutions.

The questionable efficacy of the U.N.'s human rights work does mean, however, that at a minimum we should take seriously the potential costs of that work to the other objectives of the United Nations. The Human Rights Commission and Council may have had a negative effect on the work of the United Nations as a whole. First, as human rights have become more central to the work of the United Nations, the failures of the Commission and Council may become more closely tied to the success—or not—of the entire institution.¹⁹⁰ These “credibility costs” are discussed below in subpart II(C). Second, divisions within the Human Rights Commission and Council, as well as human rights issues generally, appear to contribute to regional and political divisions among states, which hinder the work of the General Assembly and the Security Council on a wide variety of issues. These divisions are referred to in this Article as “polarization.”¹⁹¹

The work of the U.N. General Assembly is, according to many observers, undercut by polarization.¹⁹² The Cold War politics within the General Assembly—which often prevented it from acting constructively—illustrate the point historically.¹⁹³ Even in the period after 1990, U.N. General Assembly voting has been dominated by a divide between the West and non-Western countries. Indeed, in the years 1990–2011, “[m]ore than 90 percent of every single vote casted (‘yes’ or ‘no’) can be classified correctly by the placement of states on one single dimension”: the West and the rest.¹⁹⁴

189. See Alston, *supra* note 9 (noting that “the Human Rights Council has been ‘operating in a way that is surprisingly balanced in the last few years, especially if the issue of Israel and the occupied Palestinian territories is put to one side,’” but also noting that China, Russia, and growing populism are likely to change this dynamic).

190. See *The Shame of the United Nations*, N.Y. TIMES (Feb. 26, 2006), <http://www.nytimes.com/2006/02/26/opinion/the-shame-of-the-united-nations.html> [https://perma.cc/8HUS-ZEB6]; George W. Bush, President of the U.S., Address at the UN High-Level Plenary Meeting (Sept. 14, 2005) (transcript available at <https://2001-2009.state.gov/p/io/rls/rm/53111.htm> [https://perma.cc/N8JZ-645V]).

191. See Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1349 (2016) (defining “polarization” in terms of group political cohesion and bloc voting). A related problem is that of “politicization,” sometimes defined as deliberation or decision-making based on political objectives unrelated to the issue being debated or decided. See Freedman, *More of the Same?*, *supra* note 187, at 210–11 for a discussion of politicization in the human rights context.

192. See, e.g., LINDA FASULO, AN INSIDER'S GUIDE TO THE UN 88–90 (3d ed. 2015).

193. See Frederick H. Gareau, *Cold-War Cleavages as Seen from the United Nations General Assembly: 1947–1967*, 32 J. POL. 929, 931–32 (1970); Amy L. Sayward, *International Institutions*, in THE OXFORD HANDBOOK OF THE COLD WAR 384–85 (Richard H. Immerman & Petra Goedde eds., 2013).

194. Nicolas Burmester & Michael Jankowski, *Comparing Regional Organizations in the United Nations General Assembly—Is There a Shift to Regionalism?* 13 (Mar. 26, 2014)

General Assembly votes on human rights resolutions have had a significant role in generating the polarization found in General Assembly voting patterns. One analysis finds, for example, that human rights resolutions within the General Assembly have a very high “discrimination parameter,” meaning they “weigh heavily” in the conflict between liberal and nonliberal states.¹⁹⁵ That study showed human rights votes with a higher discrimination parameter than colonialism, economic issues, disarmament, Middle East, and nuclear issues.¹⁹⁶ To be clear, this data does not show that removing human rights from the U.N. agenda would improve cooperation in other areas;¹⁹⁷ it shows only that voting on human rights plays a large role in the measures of polarization within the U.N.

A connection between bloc voting and the U.N.’s human rights agenda is also suggested by the data on voting within the Human Rights Council (HRC). A study focusing just on human rights has found that in both the General Assembly and the HRC, “China, Russia and developing countries pass regular resolutions undercutting Western human rights agendas.”¹⁹⁸ Other studies found greater polarization in the HRC than in the Commission¹⁹⁹ and that measures proposed by Cuba (one of the most frequent proposers) “strongly polarize the member states of the UNHRC in their voting.”²⁰⁰

Polarization leads to several problems, including lengthy procedural discussions and many repetitive resolutions.²⁰¹ More importantly, however, the voting blocs impede the ability of the General Assembly to make meaningful progress on other issues.²⁰² For example, Russia’s use of force to

(unpublished Paper Presented at the 55th Annual Convention of the International Studies Association), https://pure.au.dk/ws/files/81269013/Burmester_Jankowski_ISA_2014.pdf [<https://perma.cc/QV2R-BRQE>]; see also Erik Voeten, *Data and Analyses of Voting in the United Nations General Assembly*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ORGANIZATION 54, 60–61 (2013) (providing statistical analysis of the “West–Rest” divide).

195. Michael A. Bailey, Anton Strezhnev & Erik Voeten, *Estimating Dynamic State Preferences from United Nations Voting Data*, 61 J. CONFLICT RESOL. 430, 444 (2017).

196. *Id.* For more discussion of states’ voting patterns on human rights resolutions, see generally Bernhard Boockmann & Axel Dreher, *Do Human Rights Offenders Oppose Human Rights Resolutions in the United Nations?*, 146 PUB. CHOICE 443 (2011).

197. Cf. JOSEPH E. SCHWARTZBERG, TRANSFORMING THE UNITED NATIONS SYSTEM: DESIGNS FOR A WORKABLE WORLD 26–27 (2013) (suggesting that almost all human rights issues be taken off the U.N. General Assembly agenda).

198. Richard Gowan, *Who is Winning on Human Rights at the UN?*, EUR. COUNCIL ON FOREIGN REL. (Sept. 24, 2012), http://www.ecfr.eu/article/commentary_who_is_winning_on_human_rights_at_the_un [<https://perma.cc/C9CA-SDEK>].

199. Simon Hug, *Dealing with Human Rights in International Organizations*, 15 J. HUM. RTS. 21, 22 (2016).

200. Simon Hug & Richard Lukás, *Preferences or Blocs? Voting in the United Nations Human Rights Council*, 9 REV. INT’L ORG. 83, 103 (2014).

201. Freedman, *More of the Same?*, *supra* note 187, at 216.

202. See FREEDMAN, FAILING TO PROTECT, *supra* note 14, at 20–21 (2014); see also FASULO, *supra* note 192, at 88; ARYEH NEIER, THE INTERNATIONAL HUMAN RIGHTS MOVEMENT: A

annex Crimea was a violation of international law that undermines peace and security in Eastern Europe. Yet when the U.N. General Assembly voted to condemn Russia's actions, a large number of countries abstained, showing that "many countries see this as a struggle between power blocs rather than as a fundamental question of international order and do not accept the West's self-identification as the guardian of liberal order."²⁰³

The polarization costs of international human rights also appear to effect the work of the U.N. Security Council. As described above, the Security Council was not originally intended to address human rights issues. The structure of the Security Council is ill-suited to that task. As Martii Koskeniemi puts the point, the Security Council safeguards security as the "technician of peace," but when it comes to human rights, "[i]ts composition, procedures and practices are completely indefensible,"²⁰⁴ in part because it is controlled by the "Great Powers"—the five veto-wielding permanent members (the P-5).²⁰⁵ Decisions about human rights enforcement are especially prone to the perception of selection bias and to the perception that human rights serve as a "smokescreen for intervention or regime change,"²⁰⁶ in part because human rights violations are so widespread and yet go largely unaddressed. These perceptions (or realities) exacerbate the "West v. rest" divide. Human rights also are likely to be issues for which the Security Council has difficulty reaching principled agreement, in part because Russia and China hold different views about human rights enforcement than do the other members of the P-5.²⁰⁷

2. *U.N. Treaty Bodies.*—Each of the ten core human rights treaties establishes a U.N. human rights body. Although they differ in some particulars, especially in their competence to investigate or visit countries under their mandate, the human rights treaty bodies share many features and tasks. Members of the treaty bodies are not states themselves (distinguishing these bodies from the HRC) but are instead independent human rights experts who are nominated and elected by the state parties. State parties are required to submit periodic reports to the treaty bodies, which then review the states'

HISTORY 110–12 (2012); THOMAS G. WEISS, WHAT'S WRONG WITH THE UNITED NATIONS AND HOW TO FIX IT 53 (2d ed. 2012).

203. Piotr Buras et al., *Ten Global Consequences of the Ukraine Crisis*, EUR. COUNCIL ON FOREIGN REL. (June 16, 2014), http://www.ecfr.eu/article/commentary_ten_global_consequences_of_ukraine272 [https://perma.cc/SP5T-YU3L].

204. Koskeniemi, *supra* note 179, at 344.

205. *Id.* at 338.

206. U.N., SCOR, 66th Sess., 6531st mtg. at 11, U.N. Doc. S/PV.6531 (May 10, 2011); *see also* RHOADS, *supra* note 17, at 2 (describing a shift at the U.N. towards "[t]he realization, promotion, and protection of human rights," which has "translated into forms of international engagement that are less consensual and more compulsory and coercive, justified by upholding human rights").

207. *See infra* subpart III(C).

domestic legislation and policies and make recommendations to the states on how to better comply with their obligations under the treaty. Treaty bodies sometimes issue general comments on how to best interpret the treaties that they are charged with enforcing. None of the decisions, recommendations, comments, or other output of any treaty body is binding on any state.²⁰⁸

The primary goal of the treaty bodies is to promote compliance with the substantive obligations of the human rights treaties for which they are responsible. Their main tools are the reporting and monitoring requirements, coupled with the recommendations made by the treaty bodies and dialogue with the state parties which results from this process.²⁰⁹ The written and oral presentation of data and viewpoints that are part of this process can clarify to states what the treaty requires, and it may motivate and assist states to achieve greater compliance.

Measuring the effectiveness of the treaty bodies (and the treaties themselves) is notoriously difficult.²¹⁰ It is hard to assess compliance with the substantive norms of the treaties, and it is even more difficult to determine whether changes in norm compliance are caused by the treaty and its monitoring body, as opposed to other factors.²¹¹ Also, the treaty monitoring bodies could make other enforcement mechanisms, such as domestic and regional legal regimes, more successful. However, what data is available suggests the treaty monitoring bodies are not especially effective. In 2010 and 2011, only 16% of the reports due to the treaty bodies were submitted on time.²¹² Under some treaties, such as the Convention Against Torture, around 20% of state parties have never submitted a report, and for the Convention on the Rights of Persons with Disabilities and some other treaties, the figure is even higher.²¹³ There was a relative decrease in reporting compliance between 2000 and 2012.²¹⁴

The low level of reporting has a positive side. The treaty bodies lack the resources to adequately evaluate even the reports they do receive so that there

208. See Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT'L L. 905, 907–08 (2009). For a detailed introduction, see HELLEN KELLER & GEIR ULFSTEIN, UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 1–2 (2012).

209. See Mechlem, *supra* note 208, at 907; Office of the High Commissioner for Human Rights, *Report on the Second Consultation of States on Treaty Body Strengthening*, ¶ 9 (Feb. 7–8, 2012); Navanethem Pillay, *Rep. of U.N. High Commissioner for Human Rights on Strengthening the Human Rights Treaty Body System*, at 12, U.N. Doc. A/66/86 (June 26, 2012); G.A. Res. 68/268, ¶ 2 (Apr. 21, 2014).

210. See Adam Chilton & Dustin Tingley, *Why the Study of International Law Needs Experiments*, 52 COLUM. J. TRANSNAT'L L. 173, 175–76 (2013); Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225, 239 (2012).

211. See Shany, *supra* note 210, at 239.

212. Pillay, *supra* note 209, at 9.

213. *Id.* at 22.

214. *Id.*

is already a growing backlog of reports awaiting consideration.²¹⁵ The time lag between submission and consideration is costly because the drafters of the reports may no longer be available when the report is considered, undermining the potential for constructive dialogue on compliance.²¹⁶ Scholars are generally skeptical about the effectiveness of the treaty monitoring bodies,²¹⁷ although perhaps there is reason for some optimism in countries with a strong civil society that engages with monitoring bodies on an ongoing basis.²¹⁸

The questionable effectiveness of the treaty bodies may also be inferred from the repeated efforts to reform the system in order to improve their work.²¹⁹ The most recent reform effort began in 2009, when the U.N. High Commissioner for Human Rights began a review of treaty monitoring bodies designed to make them more effective as a whole.²²⁰ Professor Yuval Shany evaluated the reform proposals and concluded that the report “refus[ed] to acknowledge the ‘elephant in the room’—namely, what appears to be a conscious decision by a significant number of state-parties to maintain the treaty bodies under permanent conditions of under-effectiveness.”²²¹ He continues:

The fact that many states-parties have opposed, by and large, past attempts to seriously explore such fundamental changes suggests, however, that they do not wish to strengthen the treaty body system. The unhappy situation of the UN treaty bodies may thus be explained in large part by a tension between a superficial commitment by many state-parties to the goal of human rights promotion and a *realpolitik* aversion to actual treaty implementation.²²²

215. See Pillay, *supra* note 209, at 23.

216. JASPER KROMMENDIJK, THE DOMESTIC IMPACT AND EFFECTIVENESS OF THE PROCESS OF STATE REPORTING UNDER UN HUMAN RIGHTS TREATIES IN THE NETHERLANDS, NEW ZEALAND, AND FINLAND: PAPER-PUSHING OR POLICY PROMPTING? 14 (2014).

217. See, e.g., *id.* at 9–24; SUBEDI, *supra* note 14 at 88–94; EMLIE HAFNER-BURTON, MAKING HUMAN RIGHTS A REALITY 86–115 (2013); Christof Heyns & Frank Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 23 HUM. R.Q. 483, 488, 511 (2001).

218. See Creamer & Simmons, *supra* note 8, at 12 (finding participation in the review process by a treaty monitoring body may provide an opening for constructive engagement and “small” but “incremental” improvement in human rights protections).

219. See Philip Alston, *Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System*, transmitted by the Secretary-General to the Comm’n on Human Rights, ¶ 98, UN Doc. E/CN.4/1997/74 (Mar. 27, 1997); U.N. High Comm’r for Human Rights, *The OHCHR Plan of Action: Protection and Empowerment*, ¶¶ 145–50 (May 2005), <http://www2.ohchr.org/english/planaction.pdf> [https://perma.cc/U89E-ZDKA].

220. Pillay, *supra* note 209, at 9.

221. Yuval Shany, *The Effectiveness of the Human Rights Committee and the Treaty Body Reform*, in DER STAAT IM RECHT: FESTSCHRIFT FÜR ECKART KLEIN ZUM 70 (Marten Breuer et al. eds., 2013).

222. *Id.*; see also COURTNEY HILLEBRECHT, DOMESTIC POLITICS AND INTERNATIONAL HUMAN RIGHTS TRIBUNALS: THE PROBLEM OF COMPLIANCE 140–41 (2014); KROMMENDIJK, *supra* note 216, at 12; SUBEDI, *supra* note 14, at 226–29, 255–56.

That is the key point. States are not committed enough to the international legal enforcement of human rights norms to establish a successful system. This unwillingness helps explain why human rights are understood in political terms. Most states lack a true commitment to the meaningful enforcement of human rights norms as international law. Instead, they are willing to enforce if doing so aligns with or furthers their other political interests, which leads to selective enforcement. Yet the language and the aspiration of international human rights law is of *universal* rights and obligations.²²³

If efforts to enforce human rights through the United Nations have no costs on the other work of the United Nations or on international law as a whole, then perhaps their apparently limited impact on human rights is of little moment. But, as this section has argued, the selective enforcement and other problems with human rights may make the other work of the United Nations less successful. Those potential costs are not part of the contemporary debate about human rights and international law, but they should be.

D. Conclusion

Human rights, and especially their transformation of sovereignty and their enforcement through international law, are in a period of stasis and decline. One potential objection is that any such decline is temporary or cyclical. After all, states remain bound by substantive human rights treaties and the customary international law protecting human rights. In a few years, the international legal enforcement of human rights could be back on an upswing. Maybe. But several factors suggest that the decline is longer-term, including the relative decline in Western economic and political power, broader global trends towards populism, and the selective and half-hearted efforts by Western countries to promote human rights through international law. Human rights themselves may, let us hope, improve over time, and the drive and motivation to secure human rights will certainly continue, but neither means that international human rights law should or must be the preferred vehicle for doing so.

A second potential objection is that there is no decline because there was no heyday: states never took the international legal enforcement of human rights law seriously, even if activists did. As the doctrinal discussions above illustrate, however, state practice in many areas changed around the turn of the century, even if those doctrines were never fully implemented and their on-the-ground effectiveness is contested.

223. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

II. Human Rights and the Cost of Expansion

Human rights have not just purportedly transformed sovereignty and the work of the United Nations; they have also changed what international lawyers call the “doctrine of sources” as part of what one scholar has termed the “expansionist project” of international human rights law.²²⁴ The resulting changes to the two primary sources of international law—treaties and custom—have successfully ensured that a wide range of human rights norms are legally protected by international law. But this elasticity in the doctrine of sources has come at the price of widespread non- and under-compliance with international human rights law. There has been a parallel development in the U.N. Security Council. The work of the Security Council has expanded to include international human rights, perhaps leading to diminished credibility and effectiveness.

This Part considers whether greater non- and under-compliance with human rights norms makes international law as a whole less credible and less effective. Other authors have suggested this possibility, but with little supporting analysis.²²⁵ This Part applies the most important theories of why states comply with international law, including rational choice, constructivism, and organizational sociology. They, along with studies of social psychology and domestic law, all suggest that widespread noncompliance with human rights will make the rest of international law less effective and more costly to enforce. In other words, for *whatever* reason(s) international law is able to generate compliance, that compliance is more difficult to secure in the context of greater overall noncompliance. Analogizing to criminal law, we might call this a “broken windows” theory of international law. If it is correct, a decline in international human rights law might ultimately result in benefits to international law as a whole, but only if international law does not continue to shoulder the burden of enforcing human rights as legally binding norms.

A. *Expanded Sources*

International human rights law has expanded the two traditional sources of international law: treaties and custom. Both sources have been stretched to ensure that a broad array of human rights is governed by international law.

224. D’Aspremont, *supra* note 3, at 224; *see also* Cohen, *supra* note 3, at 65 (noting that human rights (along with other forces) have changed the sources of international law).

225. *See, e.g.*, Cohen, *supra* note 3, at 67 (“For some, the patterns of noncompliance are proof that international law is ‘law’ in name only.”); Carlos M. Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT’L L. 927, 958 (2005) (contending that an international human rights regime, without an enforcement mechanism, would trivialize international law); *cf.* KROMMENDIJK, *supra* note 216, at 43 (noting that state compliance depends on qualities and legitimacy of international norms).

1. *Treaties*.—Treaty law has changed in order to accommodate international human rights instruments. Treaty law now permits reservations to multilateral agreements without the consent of all contracting states (unless the treaty provides otherwise), a change that has allowed states, in effect, to undermine or even vitiate their consent to a treaty through far-reaching reservations.²²⁶ Based on an analogy to contracts, international law traditionally required that, in order to be valid, a reservation must receive the consent of all contracting parties to a treaty.²²⁷ This rule changed during the middle of the twentieth century, initially in order to accommodate reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.²²⁸ The International Court of Justice was asked whether states which filed reservations to the Genocide Convention could nonetheless be parties to that Convention.²²⁹ The Court's opinions abandoned the unanimity rule in a 7-to-5 vote, with the majority emphasizing that the Genocide Convention was "adopted for a purely humanitarian and civilizing purpose."²³⁰ In this kind of convention, "the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention."²³¹ The object and purpose of the Convention accordingly implied that as many states as possible should participate, so reservations should be permitted as long as they did not "sacrifice the very object of the Convention."²³²

The general approach of the International Court of Justice was eventually adopted by the International Law Commission in the draft articles of the Vienna Convention on the Law of Treaties (VCLT), but only after two Special Rapporteurs sought to preserve the unanimity rule.²³³ As finally drafted, the VCLT rules apply not just to human rights agreements but to all treaties.²³⁴ Some treaties prohibit reservations, but many do not, and states

226. FRANK HORN, RESERVATIONS AND INTERPRETATIVE DECLARATIONS TO MULTILATERAL TREATIES 156 (1988) ("A reservation resembles a breach in that it also constitutes a derogation from an obligation. The derogation is however a legitimate one.").

227. *Id.* at 22–23.

228. *Id.* at 17, 21.

229. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15 (May 28).

230. *Id.* at 23.

231. *Id.*

232. *Id.* at 24.

233. See HORN, *supra* note 226, at 20–21 (documenting the change of the unanimity rule after discussions at the 5th session of the U.N. General Assembly and the ICJ decision, while notifying that Special Rapporteurs Lauterpacht and Fitzmaurice insisted on maintaining the unanimity rule); see also SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945–1986, at 424–36 (1989) (surveying discussions of reservation rules before the International Law Commission and U.N. General Assembly).

234. Vienna Convention on the Law of Treaties, arts. 19–21, May 23, 1969, 1155 U.N.T.S. 331.

have made significant reservations to treaties governing a diverse set of topics from whaling to private international law.²³⁵ Reservations to all of the treaties (human rights or otherwise) can be seen as a direct byproduct of the controversial change to treaty law in order to accommodate international human rights lawmaking.

It is true that the VCLT only sets default rules. States can and do contract out of those rules through specific treaty language, such as language that prohibits reservations entirely. The default language remains significant, however, as the example of the International Convention on the Regulation of Whaling (Whaling Convention) demonstrates. When the Whaling Convention came into force, the old unanimity rule applied, pursuant to which Denmark's proposed reservation was rejected.²³⁶ Denmark abandoned its reservation and became a party.²³⁷ Since the new default rule has become part of customary international law, states have made a variety of reservations to the Whaling Convention, including Iceland, which made a reservation to its basic terms and yet ultimately became a party despite the opposition of many states.²³⁸ It is also true that the ability to use reservations may induce some states to become parties to treaties, encouraging broader participation, as the International Court of Justice reasoned in the language quoted above.²³⁹ Whatever advantages there are to reservations, however, they may also be costly to international law as a whole.

Reservations to human rights treaties are generally more common than reservations to other kinds of treaties.²⁴⁰ States have also made especially far-reaching reservations to human rights treaties. Some parties to the Convention for Elimination of Discrimination against Women, for example,

235. See, e.g., United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41 (India reservation at 2753 U.N.T.S. 412); Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243 (Ireland reservation at 2213 U.N.T.S. 122); Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261; Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 15 (although the Convention includes no explicit language on reservations, reservations have been made, Turkey reservation at 70 U.N.T.S. 266); see also Alexander Gillespie, *Iceland's Reservation at the International Whaling Commission*, 14 EUR. J. INT'L L. 977, 977–78 (2003) (chronicling Iceland's three attempts to modify its reservation for readmission to the International Whaling Commission); Ulrich G. Schroeter, *Reservations and the CISG: The Borderland of Uniform International Sales Law and Treaty Law After Thirty-Five Years*, 41 BROOK. J. INT'L L. 203, 206–07 (2015) (discussing the reservations made in the 1980 United Nations Convention on Contracts for the International Sale of Goods).

236. Gillespie, *supra* note 235, at 982.

237. *Id.* at 981–82.

238. *Id.* at 977–78. There was also a dispute about whether the International Whaling Commission had the competence to determine the validity of the reservation. *Id.* at 993–96.

239. See also Edward T. Swaine, *Reserving*, 31 YALE J. INT'L L. 307, 331–40 (2006) (defending a default rule favoring reservations because reservations may increase treaty depth and because they yield valuable information).

240. Eric Neumayer, *Qualified Ratification: Explaining Reservations to International Human Rights Treaties*, 36 J. LEGAL STUD. 397, 397–98 (2007).

have made sweeping reservations to its substantive terms. Saudi Arabia included a general reservation to the Convention that provides: “In case of contradiction between any term of the Convention and the norms of Islamic [sic] law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.”²⁴¹ Saudi Arabia has a truly dismal record on the rights of women and did not, to name just one example, permit women to drive cars until very recently.²⁴²

Wide-ranging and sometimes crippling reservations to human rights treaties have led treaty-monitoring bodies to declare such reservations invalid and also that invalid reservations are severable so that the treaty remains in force, but absent the reservation.²⁴³ Although this practice by treaty-monitoring bodies is controversial,²⁴⁴ if accepted it would permit human rights treaties to govern conduct which the contracting state intended to exclude from the treaty entirely. That conduct is likely to violate the treaty—otherwise there is little reason to make the reservation in the first place—leading to even more conduct that is inconsistent with the terms of the treaty.

When a state engages in conduct that would be prohibited by a treaty but for that state’s reservation, the state is formally compliant with the treaty (so long as the reservation is permissible), but the conduct is “non-conforming”—because it does not correspond to the terms of the treaty. The practice of reservations, designed to encourage widespread ratification of human rights treaties, has thus resulted in widespread nonconformity with and violations of the terms of treaties, especially (but not exclusively) human rights treaties.

2. *Custom.*—The rules governing customary international law have also become more flexible so as to incorporate human rights into international law. Today, customary international law norms can be generated based on what states say, even if their actual conduct does not conform to the norm.²⁴⁵

241. See Linda M. Keller, *The Convention on the Elimination of Discrimination Against Women: Evolution and (Non)implementation Worldwide*, 27 T. JEFFERSON L. REV. 35, 39 (2004) (quoting Saudi Arabia’s reservation made at 2121 U.N.T.S. 342).

242. Ben Hubbard, *Saudi Arabia Agrees to Let Women Drive*, N.Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/world/middleeast/saudi-arabia-women-drive.html> [https://perma.cc/M8AD-J559].

243. Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT’L L. 531, 531 (2002). These changes in how human rights treaties are interpreted and applied are apparently leading to changes in treaty law as a whole. See generally Marko Milanovic & Linos-Alexander Sicilianos, *Reservations to Treaties: An Introduction*, 24 EUR. J. INT’L L. 1055 (2013).

244. Goodman, *supra* note 243, at 531.

245. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 186 (June 27); Jan Wouters & Cedric Ryngaert, *Impact on the Process of the Formation of Customary International Law*, in THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW, *supra* note 33, at 111, 111–31; Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 758 (2001).

This change means that customary international law corresponds less to the actual conduct of states, which in turn means there will be more violations at the point in time when the norm crystalizes into customary international law.

For example, customary international law prohibits torture.²⁴⁶ The primary sources relied upon to demonstrate the customary international prohibition on torture include the following: U.N. General Assembly resolutions condemning torture; the prohibition on torture found in domestic constitutions; states' universal condemnation of torture; and treaties such as the Geneva Conventions, the International Covenant on Civil and Political Rights, and the Convention Against Torture. The prohibition on torture is even a *jus cogens* norm of international law, meaning that it is understood as absolute and nonderogable.²⁴⁷ Torture itself is "a direct attack on the core of the dignity and integrity of human beings."²⁴⁸ Yet torture is widely practiced—even if it is also widely denounced as violating international law. A well-placed observer recently concluded "torture is practiced in more than 90 percent of all countries and constitutes a widespread practice in more than 50 percent of all countries."²⁴⁹ As another example, customary international law is said to include a right to food, or at least a right to be free from hunger.²⁵⁰ Yet many people around the world are not free from hunger and many governments fail to remedy or are complicit in the scarcity of food in their countries.²⁵¹

Like changes to the law of treaties, change in the rules governing the formation of customary international law is justified on the grounds that it permits the widespread adoption of international human rights law, which is considered a valuable step forward despite the violations it accepts.²⁵² The elements needed to show the formation of custom are in general contested, and the actual content of customary international law tends to be vague so that the application of customary norms to particular facts is frequently contested.²⁵³ As well, basing custom on state declarations rather than on their actions is an issue that extends beyond human rights. Nevertheless, human rights have unmistakably pushed customary international law towards what

246. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702(d) (AM. L. INST. 1987).

247. Manfred Nowak, *What's in a Name? The Prohibitions on Torture and Ill Treatment Today*, in THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW 307, 307 (Conor Gearty & Costas Douzinas eds., 2012).

248. *Id.*

249. *Id.*

250. See Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. TRANSNAT'L L. 691, 705 (2006).

251. See SIMONE HUTTER, STARVATION AS A WEAPON: DOMESTIC POLICIES OF DELIBERATE STARVATION AS A MEANS TO AN END UNDER INTERNATIONAL LAW 2–3 (2015).

252. See Roberts, *supra* note 245, at 764–65.

253. Larry R. Helfer & Ingrid Wuerth, *Customary International Law: An Instrument Choice Perspective*, 37 MICH. J. INT'L L. 563, 576 (2016).

some call a “tremendous implementation gap.”²⁵⁴ As one observer puts it, international human rights got “sidetracked off into an international arena of pious declarations and unenforceable agreements.”²⁵⁵ These problems have generally been considered, if at all, only in terms of their costs for international human rights itself. But various theories of compliance with international law suggest that widespread noncompliance with international human rights law will tend to make the enforcement of other international law more difficult and costly.

B. A “Broken Windows” Effect?

Changes in the doctrine of sources to accommodate human rights have made international law more elastic; it now permits the adoption of norms despite greater noncompliance and more nonconforming behavior. And beyond the changes to the formal sources of international law, there are other widespread violations of international human rights law, such as a failure to abide by even those treaty norms to which no reservation was made. Such failures extend even to ministerial tasks, such as filing required reports to treaty-monitoring bodies.²⁵⁶ There is a parallel development in the mandate of the U.N. Security Council, which has grown to include many human rights issues that the Council cannot remedy or prevent.

These changes to international law may encourage noncompliance with other international legal norms, not just those governing human rights. The intuition here is an imperfect analogy to the “broken windows” theory of crime prevention: widespread violations of human rights law may be a symbol of unaccountability,²⁵⁷ a signal that “no one cares” about violations of international law and that “no one is in charge.”²⁵⁸ Accountability is a central concern of public international law. The system lacks a centralized enforcement mechanism, and as a result, compliance and effectiveness pose important—some would say fundamental—challenges to the relevance of

254. Nowak, *supra* note 247, at 307.

255. Conor Gearty, *Spoils for Which Victor? Human Rights Within the Democratic State*, in THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW, *supra* note 247, at 214. As with treaties, the change to the rules of the formation of custom are not limited to the customary international law of human rights, instead they are changes to customary international law generally. See, e.g., Geoffrey R. Watson, *The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in Prosecutor v. Tadic*, 36 VA. J. INT’L L. 687, 708–09 (describing a customary norm of international humanitarian law). See Arnold N. Pronto, “Human-Rightism” and the Development of General International Law, 20 LEIDEN J. INT’L L. 753 (2007), for a discussion of the significant influence of human rights norms and imperatives over the development of general international law.

256. See *supra* text accompanying notes 214–16.

257. George L. Kelling & James Q. Wilson, *Broken Windows: the Police and Neighborhood Safety*, THE ATLANTIC (March 1982).

258. Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 303, 305–06 (1998).

public international law.²⁵⁹ In this context, behavior that signals a lack of accountability may be especially damaging to the enforcement and deterrence of international law writ large. To some extent, this intuition has already been voiced within the human rights discourse.²⁶⁰

The domestic broken windows theory argues that “mere” “disorder” or “victimless” crimes lead to more serious violations of the law.²⁶¹ Human rights violations are not victimless and can impose significant costs to human lives and dignity. As well, the broken windows theory of domestic law enforcement may depend upon and itself create certain subjects or categories of people, such as the “honest” versus the “disorderly,” upon which social influences operate differently.²⁶² Although the analogy is thus imperfect—and despite great controversy over the domestic broken windows theory and its relationship to domestic policing²⁶³—the question remains: if states are in widespread violation of, or noncompliance with, international human rights law, are they (and other states) more likely to violate *other* norms of international law? Models of state compliance with international law—rational choice, constructivism, the sociology of international organizations—answer this question affirmatively,²⁶⁴ and so do empirical studies of social psychology and domestic law.

259. See, e.g., Harlan Grant Cohen, *Can International Law Work? A Constructivist Expansion*, 27 BERKELEY J. INT'L L. 636, 641 (2009) (book review); JEFFREY L. DUNOFF & MARK A. POLLACK, *International Law and International Relations: Introducing an Interdisciplinary Dialogue*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 3, 5–21 (2013) [hereinafter INTERDISCIPLINARY PERSPECTIVES].

260. NEIER, *supra* note 202, at 259; Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 609 (1984); see also *supra* note 231 and accompanying text.

261. See generally George L. Kelling & William J. Bratton, *Declining Crime Rates: Insiders' Views of the New York City Story*, 88 J. CRIM. L. & CRIMINOLOGY 1217 (1998) (applying the broken windows theory to police common, victimless, and minor offenses).

262. Harcourt, *supra* note 258, at 297.

263. See, e.g., Sam Roberts, *Author of “Broken Windows” Policing Defends His Theory*, N.Y. TIMES (Aug. 10, 2014), <https://www.nytimes.com/2014/08/11/nyregion/author-of-broken-windows-policing-defends-his-theory.html?mcubz=3> [<https://perma.cc/4PBN-J63R>].

264. Some rational choice scholars argue that international law does little to change state behavior and that what appears as compliance is usually coercion or coincidence of interest. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 108–18 (2005). That work is not directly relevant to this section, which argues that the reasons to think that international law *does* generate compliance also suggest that widespread non- or underenforcement of some international law will make compliance with other international law more difficult to secure. Some liberal international relations scholarship is also not directly relevant. Generally, liberal theorists do not take the state as a unitary actor, and they view compliance as at least partially a function of domestic processes. See Andrew Moravcsik, *Liberal Theories of International Law*, in INTERDISCIPLINARY PERSPECTIVES, *supra* note 259, at 83, 84. Beth Simmons, for example, argues that international human rights treaties can be effective because the commitment to the treaty empowers domestic political groups or parts of the state. BETH SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 125–29 (2009). Her work is limited, however, to compliance with international human rights treaties and does not discuss compliance generally. Similarly, Harold Koh describes a transnational process that leads states to incorporate

1. Rational Choice.—Rational choice theories of state behavior support the broken windows analogy. They assume that states are rational and self-interested.²⁶⁵ They take state preferences as exogenous and fixed, and they assume states have “no innate preference for complying with international law.”²⁶⁶ Scholars have focused on several mechanisms that states use to enforce their international commitments, including reputation, retaliation, and reciprocity.²⁶⁷ Beginning with reputation, widespread violations of international human rights norms by states mean that, as a whole, states will have a poorer reputation for compliance and that the (many) noncomplying states themselves will have a poorer reputation for compliance. These two drops in reputation—one in states’ overall reputation for noncompliance and one in the reputation of particular noncomplying states—should produce two effects.

First, rational choice scholars argue that, on the margin, states with little reputation for compliance may decide it is “too costly to build a good reputation.”²⁶⁸ A diminished reputation for compliance by many states as a result of widespread violations of international human rights norms means that more states have an overall reputation of noncompliance. As a result, overall noncompliance with international law will increase because more states will simply give up on compliance.

Second, and more importantly, if states as a whole tend to expect noncompliance from each other, the costs of entering into treaties or developing norms of customary international law become higher for all states. A baseline reputation of noncompliance among states generally means that states will have to do more in a treaty agreement to generate trustworthy commitments (such as monitoring noncompliance), making some agreements not worth the time or effort.²⁶⁹ Similarly, if entities tasked with

international norms to become internalized through domestic law and domestic actors. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2651–58 (1997). Koh uses human rights as his main example but leaves open the question of how the relevant issue networks and epistemic communities form and whether they are influenced by developments in other areas of international law. In a more recent article, Koh suggests that his theory of compliance is drawn from the work of Tom Tyler. Koh, *supra* note 128, at 973 n.2. Tyler’s work is discussed *infra* at text accompanying notes 307–12.

265. ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 17 (2008).

266. *Id.*

267. *Id.* at 33–34; ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* 10, 115–27 (2006); Rachel Brewster, *Reputation in International Relations and International Law Theory, in INTERDISCIPLINARY PERSPECTIVES*, *supra* note 259, at 524, 533.

268. Andrew T. Guzman, *Reputation and International Law*, 34 *GA. J. INT’L & COMP. L.* 379, 382 (2006).

269. See ANDREW H. KYDD, *TRUST AND MISTRUST IN INTERNATIONAL RELATIONS* 26, 119 (2005); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 *CALIF. L. REV.* 1823, 1849 (2002).

formal enforcement—such as the treaty monitoring bodies discussed in the next section—fail to ensure compliance, states may be deterred from making additional international commitments,²⁷⁰ while the possibility of formal enforcement may at the same time make informal enforcement by the parties less likely.²⁷¹

Rational choice scholars also argue that retaliation and reciprocity generate compliance with international law.²⁷² These mechanisms, too, are undermined by widespread violations of international human rights law. First, as mentioned above, a widespread belief that states do not comply with international obligations makes it more difficult to generate trustworthy commitments, even if those commitments might be enforced through retaliation or reciprocity rather than directly through reputation. Second, states benefit from having a reputation for using reciprocity or retaliatory sanctions, which can be costly to impose. A state contemplating a violation of its international legal obligations might be deterred from doing so if the state (or states) that would be aggrieved by the breach has (or have) a general reputation for imposing sanctions.²⁷³ The widespread under- and noncompliance with international human rights law can lead states to believe there is general unwillingness to impose retaliatory sanctions for violations of international law.

Building on rational choice models, behavioral law and economics scholars hypothesize that states' willingness to engage in retaliation is partly a function of their perception of fairness and bias.²⁷⁴ If correct, this suggests another problem with widespread violations of international human rights law: the view that international human rights law is selectively enforced. If only some states are "punished" for human rights violations, the result may be perceptions of bias and unfairness in the international legal system as a whole. Those perceptions may, in turn, make states generally less willing to impose sanctions on other states, in particular those which they perceive as receiving unfair treatment in the human rights context. One possible example of this dynamic is some states' reluctance to condemn Russia's annexation of Crimea, which observers attribute in part to non-Western states' "conviction that the West enjoys an unjustified position of privilege in the international system."²⁷⁵

270. SCOTT & STEPHAN, *supra* note 267, at 178–79, 181.

271. *Id.* at 26–27, 84–109.

272. GUZMAN, *supra* note 265, at 33–34.

273. *Id.* at 47–48; SCOTT & STEPHAN, *supra* note 267, at 115–17.

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

275. See Buras et al., *supra* note 203.

One objection to the arguments advanced in this section is that states' reputations may be compartmentalized and issue-specific.²⁷⁶ If so, widespread violations of international human rights agreements will not create reputational losses to individual states or to states as a whole in other issue areas such as trade or security. Similarly, making a reservation might signal to other states that the reserving state is especially compliant, because rather than simply violating the treaty, the state instead made the reservation and became under- rather than noncompliant.²⁷⁷ But significant reservations may instead lead to less regard for international legal rules as a whole by signaling that states get to pick and choose their commitments or that their consent to the treaty is not genuine,²⁷⁸ thereby decreasing general reputations for compliance. In any event, in the context of retaliatory sanctions for human rights violations, there is no reason to assume that states imposing such sanctions do not see their general reputational capital for imposing sanctions grow as a result.²⁷⁹ In the end, these are empirical questions to which there is no definitive answer. But if reputation does not cross into other issue areas, then it is not "an important cause of compliance with a wide range of agreements."²⁸⁰ Most rational choice and human rights scholars thus assume or argue that reputation is not entirely issue-specific.²⁸¹

2. *Constructivism.*—Constructivist theories of state behavior also support the broken window analogy and suggest that widespread violations of human rights norms will result in reduced effectiveness for the rest of international law. Constructivist accounts of international relations focus on the social construction of identity.²⁸² Under this view, international norms, including international legal norms, have a constitutive function in that they

276. See George W. Downs & Michael Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. 95, 109–10 (2002); van Aaken, *supra* note 274, at 476–77.

277. Swaine, *supra* note 239, at 338.

278. Ineke Boerfijn, *Impact on the Law on Treaty Reservations*, in THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW, *supra* note 33, at 63, 65; see Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1641 (2005) (noting that reservations may signal that a state is uncooperative, even if compliant); see also Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L.J. 231, 263–64 (2009) (describing arguments about the impact of treaty reservations on state reputation).

279. See GUZMAN, *supra* note 265, at 46–47 (citing President Clinton's statement that the United States has "an interest in standing up against the principle of ethnic cleansing" as an example of an effort to bolster the reputational capital of the United States).

280. Brewster, *supra* note 278, at 261.

281. *E.g., id.*; GUZMAN, *supra* note 265, at 100–11 ("[I]t is likely that states have different reputations in different issue areas, but these reputations are related to one another."); SCOTT & STEPHAN, *supra* note 267, at 118 ("Reputations survive particular treaties and similar arrangements.").

282. Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345, 358 (1998).

help create the desires and preferences of states.²⁸³ Thus, ideas and beliefs (not just material interests), which are formed through interaction and communication, help determine how states behave, including their compliance with international law.²⁸⁴

Drawing on the work of legal philosopher Lon Fuller, influential constructivist scholars Jutta Brunnée and Stephen Toope argue that international legal obligations arise from communities of practice which have shared understandings and which generate norms with specific characteristics of legality.²⁸⁵ These characteristics of legality include generality, consistency, and alignment between legal norms and the actions of officials.²⁸⁶ A community of practice, grounded in shared understanding, that generates and maintains such norms results in a “practice of legality.”²⁸⁷ It is not the formal characteristics of instruments and norms that give rise to legal obligation, but instead this practice of legality.²⁸⁸

A communities-of-practice analysis suggests that states’ obvious non- and under-compliance with legal norms inhibits the development of a meaningful community of practice with shared values. Indeed, Brunnée and Toope question whether the prohibition on torture qualifies as a norm of international law at all because of the misalignment between the norm and actual official conduct.²⁸⁹ They reason that “a widespread failure to uphold the law as formally enunciated leads to a sense of hypocrisy which undermines fidelity to law.”²⁹⁰ Their account is telling. In a horizontal, decentralized legal system, whether it relies on reputation or on shared normative values, widespread “violations” may be especially costly, for they suggest that states do not care about their reputations for compliance or that the shared normative values are not so shared after all.

3. *Organizational Sociology*.—Theories of state behavior based on organizational sociology support the broken windows thesis by suggesting that systematic violations of international human rights law will result in lower compliance with other international law. This work, too, could be characterized as constructivist, but it focuses on a different process of social

283. *See id.* (giving a constructivist reading of international law as an account of “legal relations,” “patterns of interactive behavior,” and “particularizing society’s universal purposes”).

284. *See* Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384, 385 (1994).

285. JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT* 53–54 (2010). Brunnée & Toope compare their work to that of other constructivists. *Id.* at 52–65.

286. *Id.* at 6.

287. *Id.* at 46–52, 65–77, 350–52.

288. *Id.* at 46–52, 100.

289. *Id.* at 250–68.

290. *Id.* at 232.

interaction to form state preferences: acculturation.²⁹¹ A state's or individual's identification with a group can lead to cognitive and social pressures to conform to the group's behavior. Here, the mechanisms of influence on state behavior are social expectations and cultural identity, not necessarily acceptance of the legitimacy of the norm. Organizational sociology predicts acculturation will shape the formal structure of institutions, which are embedded in wider institutional environments, but that convergence across institutions (called isomorphism) may not actually result in functional changes and results. States appear to behave in just this way in the global community: there is remarkable isomorphism in structural organization and policy commitments at the global level, but this convergence is decoupled from any significant changes within states themselves.²⁹² Or, put more succinctly, the sociology of organizations predicts "cross-national isomorphism irrespective of local circumstance," which is precisely what the data shows.²⁹³

The acculturation model of state behavior suggests widespread noncompliance with human rights norms will lead to noncompliance with other international legal obligations. Pervasive noncompliance means the "global scripts as members of world society"²⁹⁴ does not include actual compliance with international norms but instead mere commitment to them. The name organizational sociologists give this dynamic is "decoupling."²⁹⁵ Decoupling appears itself to be a global script for behavior. That is, both the prosocial pressures applied by groups and the psychological benefits of conforming to group norms operate on the global level to push states toward making international commitments, but not to successfully implement those commitments.²⁹⁶ This particular global script may have special purchase in international human rights law, but it also operates in other contexts: environmental policy, education curricula, and militarization.²⁹⁷ Ryan Goodman and Derek Jinks present decoupling in positive terms because it facilitates the global adoption of human rights norms.²⁹⁸ Other scholars have challenged whether acculturation is normatively defensible in large part

291. RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* 41 (2013) [hereinafter GOODMAN & JINKS, *SOCIALIZING STATES*]; Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621, 626 (2004) [hereinafter Goodman & Jinks, *How to Influence States*].

292. Goodman & Jinks, *How to Influence States*, *supra* note 291, at 646–49.

293. *See id.* at 647–55 (surveying empirical studies).

294. *Id.*

295. *Id.* at 649.

296. *Id.* at 643.

297. *Id.* at 648; *see also* Ryan Goodman & Derek Jinks, *Incomplete Internationalization and Compliance with Human Rights Law: A Rejoinder to Roda Mushkat*, 20 *EUR. J. INT'L L.* 443, 444 (2009).

298. *See* Goodman & Jinks, *How to Influence States*, *supra* note 291, at 670.

because decoupling simply accepts widespread violations of international law.²⁹⁹

Two specific aspects of the acculturation model suggest that widespread non- and under-compliance with human rights law will lead to noncompliance with international law as a whole. First, Goodman and Jinks argue that there is a *world polity* with *global* scripts of behavior and *global* cultural models pursuant to which states are “defined” and “legitimated.”³⁰⁰ The claim of worldwide scripts and worldwide cultural norms undercuts the possibility that widespread noncompliance with and violation of international human rights norms have an isolated impact only on human rights norms and only within a specified human rights community. Second, the evidence of decoupling suggests there are already powerful, global behavioral scripts pursuant to which states ignore problems with on-the-ground enforcement of and compliance with international norms.³⁰¹ Expansive human rights norms that accept widespread noncompliance may have initially generated what has now become a global script. Even if not, they may have made a powerful contribution to an existing, global nonchalance about violations of international law.

4. *Social Psychology*.—Research from social psychology also suggests the broken windows analogy is correct. Social psychologists writing on domestic legal systems have developed a causal theory of legitimacy and measured its impact on actual compliance rates.³⁰² In this work, “value-based” legitimacy is defined as an individual’s sense of obligation and willingness to obey, as measured by questions about whether individuals feel

299. See, e.g., José E. Alvarez, *Do States Socialize?*, 54 DUKE L.J. 961, 971 (2005); Harold Hongju Koh, *Internalization Through Socialization*, 54 DUKE L.J. 975, 978–81 (2005). But cf. GOODMAN & JINKS, *SOCIALIZING STATES*, *supra* note 291, at 135–65 (defending the normative value of acculturation).

300. Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1756–57 (2003).

301. Goodman and Jinks argue that decoupling is evidence of acculturation but that acculturation can occur without decoupling, that decoupling is not necessarily inconsistent with deep reform, and that even decoupling that initially hinders compliance may eventually lead to the progression of more meaningful change over time. GOODMAN & JINKS, *SOCIALIZING STATES*, *supra* note 291, at 135–65. Their account nevertheless presents evidence of widespread decoupling and describes a model of state behavior pursuant to which states are socialized to conform their behavior at the international level without actually complying with the legal norm through their behavior domestically.

302. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 3–5, 19–39 (Princeton Univ. Press 2006); Margaret Levi et al., *The Reasons for Compliance with Law*, in UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS 70, 70–71 (Ryan Goodman et al. eds., 2012). The international legal theorist Thomas Franck also argued that the “legitimacy” of international law generates compliance. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 3, 25–26 (1990). Franck did not, however, offer any well-developed causal mechanism to explain why legitimacy causes compliance.

obligated to obey the law.³⁰³ This kind of legitimacy is linked to actual compliance with the law (“behavioral legitimacy”), as measured by precinct-level police data and self-reporting from respondents.³⁰⁴ The factors that tend to generate “value-based” legitimacy include “trustworthiness in government,” which depends on the government’s general ability to solve problems and to enforce laws.³⁰⁵ The perception of widespread noncompliance with the law is correlated with a lower trustworthiness in government,³⁰⁶ and accordingly with lower legitimacy and compliance. The general result is supported by data from both the United States and Africa.³⁰⁷

States are obviously not individuals, and the determinants of individual behavior are not necessarily those of state behavior.³⁰⁸ Decisions about state behavior are, however, made by individuals or groups of individuals. Moreover, empirical evidence suggests states’ decision-making about treaty commitments is susceptible to some of the same cognitive biases that impair individual decision-making, including salience effects, status-quo bias, and peer effects.³⁰⁹ Along the same lines, the acculturation research described above argues that “[s]tate socialization” is empirically measurable and that it is a process explained by the “beliefs, conduct, and social relations of individuals.”³¹⁰ Research on social psychology and domestic law shows that the propensity of individuals to comply with law is an indirect function of their belief that the government is good at solving problems and good at enforcing laws. Noncompliance with law undermines both beliefs. If we can extrapolate from individual to state behavior, this research from social psychology suggests the perception of widespread noncompliance with international law across issue areas will tend to undermine people’s sense of obligation and willingness to obey.

C. *Expanded Mandate: Credibility and the United Nations*

International human rights law has also expanded the work of the U.N. Security Council. The Security Council is charged with maintaining international peace and security, and it has the power to impose coercive

303. Levi et al., *supra* note 302, at 70–72, 74–75, 82.

304. *Id.* at 82–83, 89.

305. *Id.* at 73, 76–77.

306. *Id.* at 73.

307. *Id.* at 89–90.

308. See van Aaken, *supra* note 274, at 441–49 (discussing the relationship between individual and state behavior and its implications for both rational choice and behavioral law and economics analysis).

309. See Jean Galbraith, *Treaty Options: Towards a Behavioral Understanding of Treaty Design*, 53 VA. J. INT’L L. 309, 349–55 (2013); see also van Aaken, *supra* note 274, at 449–80 (describing insights from behavioral law and economics research about individuals that help to explain the behavior of states).

310. See GOODMAN & JINKS, *SOCIALIZING STATES*, *supra* note 291, at 41.

measures including the use of force.³¹¹ Its functions were originally viewed as separate from those of the General Assembly, and it was the General Assembly that had the responsibility to promote voluntary respect for human rights through its supervision of the Economic and Social Council.³¹² Until the end of the Cold War, the Security Council played “a negligible role in the protection of human rights,” but since then it has shown a “greater readiness to invoke human rights provisions”³¹³—at least sometimes.

Even before the end of the Cold War, the U.N. Security Council condemned the “illegal” and “racist minority” in Southern Rhodesia and eventually imposed mandatory sanctions based on human rights violations by Southern Rhodesia.³¹⁴ But the Security Council expanded its powers in the decades since the end of the Cold War by adopting a broad definition of what constitutes a threat to international peace and security.³¹⁵ Humanitarian crises and refugee flows, repression of civilian populations, serious human rights violations, impunity for violation of international humanitarian law, and the overthrow of a democratically elected regime have all warranted action under Chapter VII, at least in the view of the Security Council itself.³¹⁶ In some of these situations, the cross-border effects of human rights violations were clear, so that the link to international (rather than internal) peace and security was straightforward.³¹⁷ In other situations, the link between the two was more tenuous.³¹⁸ The Security Council’s increased activity in the field of human rights has gone so far that some have said “[b]y

311. U.N. Charter arts. 39, 41–42.

312. See *supra* text accompanying note 182; see also Vera Gowlland-Debbas, *The Security Council and Human Rights—from Discretion to Promote to Obligation to Protect in SECURING HUMAN RIGHTS?: ACHIEVEMENTS AND CHALLENGES OF THE UN SECURITY COUNCIL*, *supra* note 180, at 36–37.

313. Bertrand G. Ramcharan, *Norms and Machinery*, in *THE OXFORD HANDBOOK ON THE UNITED NATIONS* 439, 454 (Thomas G. Weiss & Sam Davis eds., 2007).

314. S.C. Res. 455, ¶ 4 (Nov. 23, 1979); S.C. Res. 246 (Mar. 14, 1968); S.C. Res. 245, ¶ 2 (Jan. 25, 1968).

315. Gowlland-Debbas, *supra* note 312, at 38–39; Fen O. Hampson & Christopher K. Penny, *Human Security*, in *THE OXFORD HANDBOOK ON THE UNITED NATIONS*, *supra* note 313, at 539, 554; Shraga, *supra* note 180, at 11–13.

316. Koskenniemi, *supra* note 179, at 341–42; Shraga, *supra* note 180, at 12–13.

317. The harms to international peace and security are clear when the humanitarian crises involve serious flows of refugees. See, e.g., S.C. Res. 794 (Dec. 3, 1992) (addressing armed conflict in Somalia); S.C. Res. 827 (May 25, 1993) (establishing the International Criminal Tribunal for the Former Yugoslavia); S.C. Res. 1244 (June 10, 1999) (addressing the grave humanitarian situation in Kosovo).

318. See Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 VA. J. INT’L L. 355, 365–66, 366 n.55 (2012) (listing cases where the Security Council found a threat to international peace and security relying on the significant “magnitude of the human tragedy” in domestic conflicts). The decisions of the U.N. Security Council as to the scope of its own powers are controlling, at least as a practical matter.

the end of the 20th century” the Security Council was “at the centre of the human rights protection system.”³¹⁹

Broadening the Council’s tasks to include the protection of human rights expanded the room for failure in performing those tasks, potentially resulting in costs to the organization’s credibility. Failure to act or to follow through on a broad set of promises, implicit or explicit, makes the Security Council look ineffective and weak. The Council will thus, as one scholar put it, “have to face up to the consequences of its inability to make reality of its inflated promises.”³²⁰ A broader mandate also has the potential to further increase the perception of bias and selectivity,³²¹ which may lead to polarization and diminished effectiveness of the United Nations as a whole.³²² The change in U.N. Security Council-authorized peacekeeping serves as an example. As peacekeeping mandates expanded over the past two decades to focus on human rights and the protection of civilians, its work has been viewed as more political, less impartial, and in many respects, less successful.³²³

Credibility and polarization costs have also resulted from the U.N. Security Council’s response to Libya and its subsequent failure to act in Syria. Russia and China abstained from (but did not veto) Security Council Resolution 1973, which authorized the use of force in Libya to protect civilians from the imminent threat of massive human rights violations.³²⁴ Whether that Resolution is best read to have authorized the use of air strikes to facilitate the rebel ousting of Qaddafi (in addition to merely protecting civilians) is disputed.³²⁵ But it is clear that Russia and China became skeptical

319. Shraga, *supra* note 180, at 13.

320. Koskeniemi, *supra* note 179, at 346; *see also* SUBEDI, *supra* note 14 at 27–28; JEAN-MARIE GUÉHENNO, *THE FOG OF PEACE: A MEMOIR OF INTERNATIONAL PEACEKEEPING IN THE 21ST CENTURY* 305 (2015). To be sure, there are other aspects of the United Nation’s human rights work which also undermine the credibility and effectiveness of the organization as whole, including human rights violations resulting from the actions of the Security Council, the oil-for-food scandal, sexual abuse and gross misconduct by U.N. peacekeepers, and the tragic cholera epidemic in Haiti. *See, e.g.*, Jonathan M. Katz, *In the Time of Cholera*, *FOREIGN POL’Y* (Jan. 10, 2013), <http://foreignpolicy.com/2013/01/10/in-t/he-time-of-cholera> [<https://perma.cc/3MMQ-TRPK>].

321. *See* Payandeh, *supra* note 318, at 398 (“As the Security Council becomes more active, its selective course of action becomes ever more apparent. And with the increasing awareness of this selectivity the international community’s acceptance of the Security Council practice might decline significantly.”); *see also* Joanna Weschler, *Acting on Human Rights* (arguing that the Security Council is a “political body” and is likely to be guided by “national interests”), *in* *THE UN SECURITY COUNCIL IN THE 21ST CENTURY*, *supra* note 139, at 259, 273.

322. *See supra* subpart I(C).

323. *See* RHOADS, *supra* note 17, at 64–80, 172–91.

324. Press Release, 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 Release SC/10200 (Mar. 17, 2011) [hereinafter Security Council Press Release 2011].

325. Payandeh, *supra* note 318, at 383–86.

of the Resolution and its use to assist in the ousting of Qaddafi.³²⁶ The regime change aspect of the intervention appeared to many countries as the use of human rights and humanitarian issues as a smokescreen for the removal of Qaddafi, a result explicitly desired by the West.³²⁷ As one writer puts it, the use of force in Libya has “fueled speculations as to which other countries are also likely candidates for intervention” by Western countries.³²⁸ Cooperation between Russia and Western countries on other issues became more difficult. These are polarization costs.

The United Nations’ actions with respect to Libya also led to credibility costs. As the intervention in Libya proceeded, the Syrian government used increasingly violent measures to quell domestic unrest.³²⁹ The conflict spiraled into a civil war, killing hundreds of thousands of people.³³⁰ The Syrian rebels have hoped for years for a U.N. Security Council resolution authorizing the use of force to assist them, yet the Council has taken no meaningful action.³³¹ The broader mandate of the Security Council over mass atrocities and other human rights violations leads to a loss of credibility when the Council is hamstrung by political differences and accordingly cannot act in response to massive atrocities in violation of human rights law.³³²

326. See, e.g., *Foreign Minister Yang Jiechi Meets with the Libya Government Envoy* (外交部长杨洁篪8日会见来访的利比亚政府特使), TODAY’S CHINA (June 8, 2011), http://www.gov.cn/jrzq/2011-06/08/content_1879973.htm [<https://perma.cc/5V39-VTC9>] (declaring China’s desire for a prompt cease-fire and respect for the sovereignty of Libya and the right to self-determination of the Libyan people) (translation available upon request); Nabi Abdullaev, *Lavrov Eases Libya Stance, but NATO Rift Stays*, MOSCOW TIMES (Apr. 28, 2011), <http://oldmt.vedomosti.ru/news/article/tmt/435194.html> [<http://perma.cc/VYU5-WLMU>] (stating Russia’s view that the Resolution did not sanction regime change in Libya).

327. See, e.g., Security Council Press Release 2011, *supra* note 324 (reporting that the German Ambassador intended the Security Council to send a message to Colonel Qaddafi that “their time is over [and] they must relinquish power immediately”); see generally U.N. SCOR, 66th Sess., 6531st mtg. at 11, 17–18, 20, 34, U.N. Doc. S/PV.6531 (May 10, 2011) (noting that representatives of Brazil, South Africa, China, and Nicaragua voiced concern that the protection of civilians could be used as a smokescreen for intervention or regime change).

328. See Payandeh, *supra* note 318, at 397.

329. HUMAN RIGHTS WATCH: WORLD REPORT 2012, at 624–31 (2012).

330. *Id.* at 624.

331. See Press Release, Security Council, Security Council Fails to Adopt Resolution Condemning Chemical Weapons Use in Syria, Following Veto by Russian Federation, U.N. Press Release SC/12791 (Apr. 12, 2017); Press Release, Security Council, Security Council Fails to Adopt Two Draft Resolutions on Syria Despite Appeals for Action Preventing Impending Humanitarian Catastrophe in Aleppo, U.N. Press Release SC/12545 (Oct. 8, 2016); see also *supra* note 147.

332. See SUBEDI, *supra* note 14, at 22–28; Einsiedel et al., *Conclusion: The Security Council and a World in Crisis*, in THE UN SECURITY COUNCIL IN THE 21ST CENTURY, *supra* note 139, at 827, 870; 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=.ac089fd96769 [<https://perma.cc/UZ2L-N6BM>]; cf. Ganesh Sitaraman, *Credibility and War Powers*, 27 HARV. L. REV. F. 123, 123 (2014) (arguing in the context of war powers that past inaction does not necessarily result in a lack of credibility).

D. Conclusion

As international human rights law expanded the doctrine of sources and the work of the United Nations to include an ever-growing set of legal prohibitions and demands, there has been little discussion of what impact this growth may have on the rest of international law. Yet the most important and relevant theories of compliance and effectiveness in international law, from rational choice to constructivist, posit that widespread noncompliance with human rights norms will make cooperation and compliance more difficult and costly in other areas.³³³

III. Reframing the Debate: A Post-Human Rights Agenda for International Law

International human rights law, as described above, imposes costs on international law as a whole. This Part considers a range of possible responses. It suggests that international law and the United Nations should not double down on the decaying human rights enforcement architecture, but should instead turn to developing a strong core of sovereignty-protecting international legal norms devoted to protecting international peace and cooperation. Doing so may promote international cooperation and protect the territorial peace. It would also reduce broken window costs by relaxing the claim that human rights must be enforced as binding international law and by focusing on a smaller set of more vigorously enforced norms. The benefits of such an approach depend in part, however, on the unresolved debate about whether and how international law effectively advances human rights. The arguments proffered here are accordingly tentative and are not intended to be dispositive.

A. Protecting the “Territorial Peace”

International law might, for a variety of reasons described in Parts I and II, be best used not to secure a broad set of poorly enforced human rights but instead to promote territorial stability. Doing so might in turn help secure the territorial peace. There are several important potential counterarguments, including that the literature on the “territorial peace” only discusses *interstate* conflicts, not civil wars and other internal or cross-border conflicts, and so the relationship between international law and peace is not fully understood. That is true, and more empirical work on the causes of noninterstate armed conflict would be helpful, but in any event interstate conflict remains an important potential threat which international law may help diminish.

333. This Part does not address the potential benefits of noncompliance. See Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 YALE J. INT’L L. 189, 193 (2006) (defending noncompliance based on its role in developing new norms and enforcing current law). See generally Timothy Meyer, *Shifting Sands: Power, Uncertainty and the Form of International Law*, 27 EUR. J. INT’L L. 161 (2016) (explaining that states use noncompliance as a renegotiation strategy).

A second counterargument is that the “democratic peace” suggests that in order to promote peace international law should promote human rights.³³⁴ If international human rights law makes countries more “democratic” as that term is defined in the empirical literature, it may promote interstate peace. One problem with this argument is that democratic countries are apparently more peaceful only in their relations with other democracies, but not with nondemocratic countries.³³⁵ Still, if all countries were democracies, the data suggests the world would be more peaceful. To this extent, promoting democracy also promotes peace. A more intractable difficulty, however, is the weak relationship between human rights and “democracy” as defined in the democratic peace literature.

A “democracy” as defined by democratic peace literature is not the same as a human rights-respecting regime. The empirical measures of democracy used in the democratic peace literature are provided by the “Polity IV” database.³³⁶ The Polity IV dataset users’ manual explains that “democracy” has three elements: the ability of citizens to express effective policy preferences, institutional constraints on executive power, and civil liberties.³³⁷ But the Polity IV database only includes information on the first two elements—not on civil liberties, which would have the clearest relationship to human rights. A human right to democracy, as discussed above in section I(A)(3), would have a close relationship to the “democracy” of the “democratic peace.” Intervention (military or otherwise) to ensure a democratic form of government would thus appear to have long-term peace benefits—if the intervenors succeed in their mission. But military interventions to promote democracy have a dismal track record, from the ongoing failures in Libya and Iraq to those in Haiti.³³⁸

There is also evidence that for pairs of states that both respect human rights, military conflict with each other is less likely, even controlling for democracy. The “human rights” peace has not been tested as extensively as either the territorial or the democratic peace. One study shows, however, that pairs of countries that protect physical integrity rights (torture, political imprisonment, extrajudicial killing, and disappearance) and empowerment rights (freedom of speech, assembly and association, worker rights, freedom

334. See *supra* note 151 and accompanying text.

335. SOBEK, *supra* note 154, at 51, 84–85; see also POSNER, *supra* note 14, at 126.

336. See, e.g., Johann Park, *Forward to the Future? The Democratic Peace After the Cold War*, 30 CONFLICT MGMT. & PEACE SCI. 178, 182 (2013) (describing studies that use Polity IV); Douglas M. Gibler, *Bordering on Peace: Democracy, Territorial Issues, and Conflict*, 51 INT’L STUD. Q. 509, 521 (2007) (using Polity IV); see also David Sobek et al., *The Human Rights Peace: How the Respect for Human Rights at Home Leads to Peace Abroad*, 68 J. POL. 519, 519 (2006) (noting the difference between human rights and democracy scores on the Polity scale).

337. MONTY G. MARSHALL ET AL., POLITY IV PROJECT (POLITICAL REGIME CHARACTERISTICS AND TRANSITIONS, 1800-2015): DATASET USERS’ MANUAL 14 (2016).

338. See Philippe R. Girard, *Peacekeeping, Politics, and the 1994 US Intervention in Haiti*, 24 J. CONFLICT STUD., no. 1, 2004, at 20, 31–34.

of religion, and political participation) are less likely to engage in military conflict with each other, whether or not they are democratic.³³⁹ This study has some anomalies—it does not appear to show democratic peace, for example.³⁴⁰ Another study has shown that there is also an “abusers’ peace”—states with the worst human rights records are “relatively more peaceful with similarly abusive states.”³⁴¹

There is, however, an additional problem with the claim that international human rights law has helped create either the democratic or the human rights peace. Even if *human rights* are correlated with peace between some pairs of states, the extent to which *international human rights law* generated or sustained those human rights would be difficult to measure in most situations. The protection of human rights is provided for in an overlapping set of regional human rights systems as well as domestic statutory and constitutional law, in addition to binding and nonbinding international legal instruments. The same is not true of international law, which limits conflicts over territory. The basis of that system—indeed a key basis for post-World War II international law—is the prohibition on the use of force against the territorial integrity of another state, which is not an issue meaningfully regulated by domestic law or by regional court systems.

B. *Refocusing the Work of the United Nations*

A second response would be for the principal organs of the United Nations to narrow and focus their work, so as to reduce credibility and polarization costs, thereby improving the organization’s overall effectiveness and reputation. Since the end of the Cold War human rights have become an important aspect of the United Nations’ overall mission. Even the U.N. bodies explicitly tasked only with human rights are, however, generally unable to make clear progress.³⁴² Moreover, human rights appear to be divisive, leading to polarization and lack of progress on other substantive issues.³⁴³ And the enlarged mandate to include human rights has also generated credibility costs for the United Nations as whole, and the Security Council in particular.³⁴⁴

To reduce or eliminate these problems, the United Nations might forgo efforts to develop or enforce international human rights law. To be sure, it may be difficult to distinguish the promotion of human rights generally from

339. Sobek et al., *supra* note 336, at 519–25; cf. Mary Caprioli & Peter F. Trumbore, *Human Rights Rogues in Interstate Disputes, 1980–2001*, 43 J. PEACE RES. 131 (2006).

340. Sobek et al., *supra* note 336, at 525. The authors hypothesize that the democratic peace was really just a “Cold War peace.” A recent study suggests otherwise. See Park, *supra* note 336.

341. Timothy M. Peterson & Leah Graham, *Shared Human Rights Norms and Military Conflict*, 55 J. CONFLICT RES. 248, 249 (2011).

342. See *supra* subpart I(C).

343. See *supra* subpart I(C).

344. See *supra* subpart II(C).

the application of international human rights law. To solve the broken windows problem, the focus should be on *legal* norms which go unenforced. The distinction is less significant, however, when it comes to credibility costs, polarization, and lack of cooperation which could result from the promotion of human rights generally, not just from its enforcement through law. Separating out legal and nonlegal enforcement mechanisms is also difficult. Even if human rights are not enforced through international law, their enforcement through domestic law and in other ways might be enhanced by having them included in major human rights treaties. Thus, this Part proposes leaving the treaties in place but acknowledging that their commitments are soft and refocusing the work of the United Nations away from human rights and their legal enforcement.

Disbanding the treaty bodies and the Human Rights Council may not be possible under current human rights treaties, but those bodies could, for example, focus less of their attention on human rights as an international *legal* obligation, reducing the broken windows problems associated with legal norms that are widely violated. The idea would be to take the potential positive effects of iterative engagement with these bodies without the claim that each human rights commitment is a binding legal obligation.

The Paris Agreement on climate is structured in this way. The Agreement itself is binding, as are the reporting requirements, but states select their own nationally determined contributions to reducing greenhouse gasses, which they then “aim” to achieve.³⁴⁵ Research suggests that the iterative process of reviewing and reporting on human rights before an international body improves human rights practices.³⁴⁶ The “Paris Model” would preserve and enhance these processes, while acknowledging that not all countries are going to meet all human rights obligations at the same pace. The Paris Agreement itself was structured to convince as many states as possible to join.³⁴⁷ Human rights agreements have a different problem: countries join the agreements, but the challenge lies in enforcement. Yet the Paris Agreements’ benefits in terms of “transparency and accountability” might provide on-the-ground benefits for efforts to improve human rights, even if the legal character of the obligations themselves have changed. The Paris Agreement was designed in part to “drive deeper roots into the domestic policy making processes that will be so key to the success of the kinds of legal, social, and economic transformations that will be necessary to achieve

345. Multinational Agreement on Climate Change, art. 4, *opened for signature* Apr. 22, 2016, T.I.A.S. No. 16-1104 (entered in force Nov. 4, 2016) [hereinafter Paris Agreement].

346. Creamer & Simmons, *supra* note 8; de Búrca, *supra* note 8.

347. JACOB WERKSMAN, INTERNATIONAL LEGAL CHARACTER OF THE PARIS AGREEMENT 7 (Feb. 9, 2016), http://www.law.ed.ac.uk/other_areas_of_interest/events/event_documents/BrodiesLectureontheLegalCharacteroftheParisAgreementFinalBICCLEdinburgh.pdf [https://perma.cc/TJT4-Z8X7].

the Agreement's ambitious goals."³⁴⁸ Exactly the same kinds of transformation are necessary to the protection and promotion of human rights.

The U.N. General Assembly and Security Council could focus their attention on the many pressing issues other than human rights—either their legal enforcement or their promotion more generally—to avoid credibility and polarization costs. Efforts to protect human rights through other institutions and mechanisms could be redoubled. The result might be a more credible, less polarized United Nations, and a more effective protection of human rights.

Other proposals to reform the United Nations are consistent with the foregoing in important ways. In order to increase the General Assembly's declining prestige, for example, others have suggested that it needs to have greater authority over a circumscribed, more limited agenda—one that includes few, if any, human rights issues.³⁴⁹ Similarly, many view the human rights work of the specialized U.N. bodies as politicized and arbitrary; going so far as to argue that it “has sullied the UN's reputation, cast doubt on its legitimacy,” and “led to diminished national support and popular support” for the organization as a whole.³⁵⁰ The author suggests doubling down on human rights enforcement, an option addressed below.³⁵¹ Even if the proposed solution is different, however, the problems with the current system provide important common ground.

Consider how reform along the lines proposed here would improve the work of the United Nations Security Council. As an initial matter, note that the Security Council is well-positioned to play a vital role in global affairs. Although critics have charged that the composition of the Security Council no longer represents the distribution of global power, in fact the five permanent members of the Council still reflect a large share of global economic and military power, based on their percentage of global GDP,³⁵² on

348. *Id.*

349. See, e.g., SCHWARTZBERG, *supra* note 197, at 26–27 (2013); see also G.A. Res. 68/307 (Sept. 10, 2014) (emphasizing “the need to further enhance the role, authority, effectiveness and efficiency of the General Assembly”); U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶¶ 158–64, annex ¶ 8, U.N. Doc. A/59/2005 (Mar. 21, 2005) (noting that the General Assembly's agenda is too broad and should be focused on issues like migration and terrorism).

350. SCHWARTZBERG, *supra* note 197, at 114–15, 124.

351. See *infra* text accompanying notes 385–93.

352. In 1950, the P-5 share of global GDP was 52%. In 2009, it was 38%, and it rose to 41% in 2014. See Bart M. J. Szewczyk, *Variable Multipolarity and U.N. Security Council Reform*, 53 HARV. INT'L L.J. 450, 459 tbl.3, 460 tbl.4 (2012); see also *GDP as Share of World GDP at PPP by Country*, WORLD BANK, <https://data.worldbank.org/indicator/NY.GDP.MKTP.PP.CD?end=2014&locations=CN-US-GB-FR-RU-1W&start=2009&view=chart> [https://perma.cc/86WP-NBWJ].

GDP per capita of P-5 countries as compared to other countries,³⁵³ on military spending,³⁵⁴ and on the share of the world's military personnel.³⁵⁵ What *has* changed substantially in the recent past is Russia's willingness to use force, especially in the Middle East, increasing the significance of P-5 military power.³⁵⁶ Today, the road to solving global problems runs right through China, Russia, the United States, and Europe (represented in the P-5 by France and the U.K.).

These geopolitical facts create an opportunity for the Security Council to act as an important forum for international legal cooperation. But the opportunity is generated in part by the global rise in power of Russia and China, countries which have made increasingly clear in the last few years—by deed and word—that they disagree with the Western human rights agenda.³⁵⁷ If the Security Council becomes more active and more effective, it will probably not be around a common aim of providing strong and effective protections for human rights.

Instead, common ground lies in the core purpose of the Security Council itself: ensuring international peace and security.³⁵⁸ Failure to appreciate this point with respect to Syria is part of what led to the eventual marginalization of both the United States and the Security Council in belated efforts to broker a ceasefire in 2016. The Obama administration's focus on removing Bashar al-Assad from power, in part because of his poor human rights record, generated conflict with Russia and stymied Security Council efforts to

353. In 2010, the average GDP per capita, PPP, of the P-5 was 30,072. The world average was 12,828. In 2015 the numbers were 35,221 and 15,546 respectively. *GDP Per Capita, PPP (Current International \$)*, WORLD BANK, <https://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD?end=2015&locations=CN-US-RU-GB-FR-1W&start=2010> [<https://perma.cc/MVX4-EW2J>].

354. The P-5 share of global military spending was 59% in 2015. See Sam Perlo-Freeman et al., *SIPRI Fact Sheet: Trends in World Military Expenditure, 2015*, STOCKHOLM INT'L PEACE RES. INST., Apr. 2016, at 2, <https://www.sipri.org/sites/default/files/EMBARGO%20FS1604%20Millex%202015.pdf> [<https://perma.cc/3TSQ-SBLP>]. It was 61% in 2010 and 78% in 1950. See Szewczyk, *supra* note 352.

355. The only indicator that declined significantly is military personnel: the P-5 had 22% of the world's military personnel in 2014, 26% in 2010, and 63% in 1950. See Szewczyk, *supra* note 352; *Armed Forces Personnel, Total*, WORLD BANK, <https://data.worldbank.org/indicator/MS.MIL.TOTL.P1?end=2014&locations=FR-CN-US-RU-GB-1W&start=2010> [<https://perma.cc/R5MA-8XTM>].

356. See Itamar Rabinovich, *The Russian-U.S. Relationship in the Middle East: A Five-Year Projection*, CARNEGIE ENDOWMENT INT'L PEACE (Apr. 5, 2016), <http://carnegieendowment.org/2016/04/05/russian-u.s.-relationship-in-middle-east-five-year-projection-pub-63243> [<https://perma.cc/C87S-6QW2>].

357. HUMAN RIGHTS WATCH: WORLD REPORT 2016, *supra* note 18, at 476; see *Relations with Russia*, *supra* note 175; *Russia and China Veto UN Resolution Against Syrian Regime*, *supra* note 146.

358. See Bruce Jones, *The Security Council and Changing Distribution of Power* (arguing for strengthening the Security Council's role in maintaining state integrity), in *THE UN SECURITY COUNCIL IN THE 21ST CENTURY*, *supra* note 139, at 793, 798.

resolve the conflict.³⁵⁹ The U.S.-led agenda of ousting Qaddafi, in part for human rights reasons, angered Russia and China, ultimately impeding U.N. Security Council action in Syria.³⁶⁰ Of course, in both situations, the United States also had strategic reasons to favor regime change,³⁶¹ but that fact only strengthens the view that human rights norms are selectively enforced to serve other interests.

Critics argue that the Security Council's biggest post-Cold War failures have been those of omission: failures to act in Bosnia, Rwanda, Kosovo, and now Syria.³⁶² Indeed, the failure to act is the problem that R2P was supposed to solve, so it seems counterintuitive to argue that by abandoning humanitarian-based intervention, the Security Council will become more effective and relevant. However, these criticisms of the Security Council overlook its success at maintaining a great powers peace and peace among nation states more generally, risks which are sometimes discounted.³⁶³ But as Robert Kagan recently argued, interstate territorial conflict is a real danger: the decline of U.S. power, the growth of Chinese and Russian power, and territorial ambitions of these two powers which aim to shake up the existing global order, is a recipe for large-scale armed conflict.³⁶⁴ International law that diminishes such risks remains vitally important today, as it has since the U.N. Charter was drafted.

C. *Human Rights: Is International Law Necessary?*

An alternative response to the decline in human rights and the costs of human rights to the rest of international law would be to enforce—or at least take seriously the enforcement of—international human rights law.

359. See, e.g., Shaik & Roberts, *supra* note 146, at 723–25, 733; Jason Ukman & Liz Sly, *Obama: Syrian President Assad Must Step Down*, WASH. POST (Aug. 18, 2011), https://www.washingtonpost.com/blogs/checkpoint-washington/post/obama-syrian-president-assad-must-stepdown/2011/08/18/gIQAM75UNJ_blog.html?utm_term=.6e4e60573757 [<https://perma.cc/AG3T-LATT>]; Macon Phillips, *President Obama: “The Future of Syria Must Be Determined by Its People, but President Bashar al-Assad Is Standing in Their Way”*, WHITE HOUSE BLOG (Aug. 18, 2011), <https://www.whitehouse.gov/blog/2011/08/18/president-obama-future-syria-must-be-determined-its-people-president-bashar-al-assad> [<https://perma.cc/3FGS-4BQ5>]; Steven Mufson, *“Assad Must Go”: These Three Little Words Are Huge Obstacles for Obama on Syria*, WASH. POST (Oct. 19, 2015), https://www.washingtonpost.com/business/economy/assad-must-go-these-three-little-words-present-a-huge-obstacle-for-obama-on-syria/2015/10/19/6a76baba-71ec-11e5-9cbb-790369643cf9_story.html?utm_term=.849f34ba1c4e [<https://perma.cc/WRH6-YZ7B>].

360. See *supra* text accompanying notes 147, 335.

361. See Christopher Fermor, *NATO's Decision to Intervene in Libya (2011): Realist Principles or Humanitarian Norms?*, 8 J. POL. & INT'L STUD., no. 2, 2012, at 323.

362. See Szewczyk, *supra* note 352, at 454.

363. *Id.*

364. Robert Kagan, *Backing into World War III*, FOREIGN POL'Y (Feb. 6, 2017), <https://foreignpolicy.com/2017/02/06/backing-into-world-war-iii-russia-china-trump-obama/> [<https://perma.cc/W4JS-FZ7F>]; see also GRAHAM ALLISON, *DESTINED FOR WAR: CAN AMERICA AND CHINA ESCAPE THUCYDIDES'S TRAP?* (2017) (describing risk of conflict with China).

Enforcing “binding” international human rights law would solve the broken windows problem. It would make the United Nations more credible, reduce polarization, and arguably merits whatever expenditures necessary, assuming that human rights themselves would improve. But there is disagreement about the effectiveness of international law in protecting human rights. And serious efforts at enforcing human rights through international law are politically infeasible.

Empirical scholarship on the effectiveness of international human rights law has focused primarily on treaty ratification, an easily measured variable. There is very little work, by contrast, on whether the doctrinal innovations to enforce human rights had a meaningful impact. The ratification of certain treaties has had modest positive effects on human rights practices of some countries, while ratification of others has not, and some studies even show a correlation between the ratification of certain human rights treaties and more human rights violations.³⁶⁵ A recent overview of the large body of relevant empirical work concludes, for example, that the Convention on the Elimination of Discrimination Against Women has shown the most impressive results, with small gains for women’s political rights and the education of girls in some countries.³⁶⁶ For other treaties, the correlation between ratification and improved human rights outcomes is weaker or even nonexistent.³⁶⁷

A consistent finding across issue areas and across studies is that positive effects of ratifying human rights treaties are correlated with particular domestic conditions within ratifying countries.³⁶⁸ Beth Simmons has developed this claim in the most detail.³⁶⁹ Ratification can influence domestic politics under certain circumstances by influencing elite agendas, providing

365. E.g., Daniel W. Hill Jr., *Estimating the Effects of Human Rights Treaties on State Behavior*, 72 J. POL. 1161, 1172 (2010) (finding that “the ratification of [the Convention Against Torture] is associated with worse torture practice than would be expected in the absence of ratification”).

366. Kevin L. Cope & Cosette D. Creamer, *Disaggregating the Human Rights Treaty Regime*, 56 VA. J. INT’L L. 459, 467–68 (citing Hill Jr., *supra* note 365; Yonantan Lupu, *The Information Power of Treaty Commitment: Using the Spatial Model to Address Selection Effects*, 57 AM. J. POL. SCI. 912 (2013)).

367. See Hathaway, *supra* note 14, at 1940; Hill Jr., *supra* note 365, at 1161, 1172; Cope & Creamer, *supra* note 366, at 467.

368. See, e.g., Wade M. Cole, *Mind the Gap: State Capacity and the Implementation of Human Rights Treaties*, 69 INT’L ORG. 405, 433–34 (2015) (showing a correlation between effective bureaucracies and improved rights protections after ratification of the International Covenant on Civil and Political Rights); see also Cope & Creamer, *supra* note 366, at 476–78 (summarizing a number of studies that suggest the post-ratification process within a state matters to its compliance with the treaty).

369. SIMMONS, *supra* note 264, at 125–48.

a focal point for national lawmaking, enabling litigation in national courts, and sparking mass political mobilization.³⁷⁰

The significance of domestic politics and law to the enforcement of international human rights law suggests that today—after human rights treaties have been widely ratified—human rights can perhaps be enforced just as well through domestic and transnational legal work as they can through international law. To consider this claim, note that the positive effects of treaty ratification on rights practices can be separated into two groups. First, there are the benefits conferred by ratification itself. For example, elites, policy makers, and domestic interest groups may be mobilized by the process of treaty ratification.³⁷¹ The ratification process itself might also create longer term effects by generating changes in domestic statutes, regulations, bureaucratic structure, and even civil society.³⁷² All of these benefits have already been conferred through the process of ratification. A new approach to enforcement and implementation of human rights treaties would have no effect, except perhaps on the few states which have not ratified human rights treaties.

Second, however, treaty ratification might generate positive human rights outcomes through the domestic legal and political effect of *ongoing* efforts to enforce the treaty as international law, as distinct from the benefits conferred by ratification itself. Far less work attempts to measure these second effects specifically, and the results are generally mixed.³⁷³ One forthcoming study measures the effect of both self-reporting to the Committee Against Torture and of the ensuing review process. Controlling for a wide variety of factors, it concludes with “moderate confidence” that some countries which go through the reporting and review process more than once have a small reduction in the incidence of torture.³⁷⁴ It also shows that the reporting and review process tends to be covered in the press in Latin

370. *Id.* at 138–39, 147; see also Yonatan Luptu, *Best Evidence: The Role of Information in Domestic Judicial Enforcement of International Human Rights Agreements*, 67 INT’L ORG. 469 (2013); Emilia Justyna Powell & Jeffrey K. Staton, *Domestic Judicial Institutions and Human Rights Treaty Violation*, 53 INT’L STUD. Q. 149 (2009).

371. See Cope & Creamer, *supra* note 366, at 475–77 (observing the attention that the negotiation and ratification process receives and recognizing that after a state’s ratification of an international treaty, these new regulations may take years to “diffuse into . . . local law and custom”).

372. *Id.*

373. One study uses the decision to accept a treaty’s individual and interstate complaint procedures as an independent variable and finds that it is associated with better rights practices, worse rights practices, or has no effect, depending on the treaty in question. Wade M. Cole, *Human Rights as Myth and Ceremony/Reevaluating the Effectiveness of Human Rights Treaties*, 117 AM. J. SOC. 1331, 1337–42, 1363 (2012).

374. Creamer & Simmons, *supra* note 8, at 15.

America, suggesting that the positive effect of the review process may take place through domestic political mobilization.³⁷⁵

Leaving aside the moderate confidence level in a modest effect, and assuming that the results would hold for other treaty regimes,³⁷⁶ it may be possible to achieve the measured effects even if human rights commitments were not characterized as legally binding *international* law. One way of maximizing benefits and minimizing costs might be to acknowledge that international human rights are—in some senses—soft international legal obligations, although they are often included in binding domestic law. Domestic enforcement mechanisms may be effective without ongoing enforcement through international law. In order to evaluate the possibility empirically, we would need to distinguish between the domestic pressures that result from binding international commitment and those that result from nonbinding international instruments. Some experimental work supports this conclusion by finding that soft international human rights norms have the same effect on people's perceptions as hard international law.³⁷⁷

Most substantive human rights obligations are today imposed by an overlapping set of instruments that includes nonbinding international norms like the Universal Declaration of Human Rights; treaty obligations; regional human rights agreements and tribunals; and domestic constitutions, statutes, and common law.³⁷⁸ Relaxing the claim that international human rights treaties and custom are formally enforceable as binding international law would accordingly leave open many enforcement options including “naming and shaming,” transnational human rights advocacy movements, soft or nonbinding norms, active civil society, iterative engagement with international review bodies, domestic enforcement procedures, diplomatic pressure, regional human rights enforcement, conditioning of development aid, and so on. We also know that some of the most important victories for worldwide human rights have been achieved through these methods, including the role of the nonbinding Helsinki Accords in bringing about the

375. *Id.* at 15–23.

376. *But cf.* Cope & Creamer, *supra* note 366, at 479 (showing that many results vary from treaty to treaty).

377. Geoffrey P. R. Wallace, *International Law and Public Attitudes Toward Torture: An Experimental Study*, 67 INT'L ORG. 105, 105, 127–29 (2013); *see also* Stephen Meili, *The Human Rights of Non-Citizens: Constitutionalized Treaty Law in Ecuador*, 31 GEO. IMMIGR. L.J. 347, 385 n.180 (2017) (describing the effect of the nonbinding Cartagena Declaration on domestic legal protections of noncitizens). *But cf.* Adam S. Chilton, *The Influence of International Human Rights Agreements on Public Opinion: An Experimental Study*, 15 CHI. J. INT'L L. 110, 127–28 (2014) (describing an experimental study on adults in the United States that showed less support for solitary confinement among those who were told that the practice violated international law).

378. *See generally* STEVEN R. RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (3d ed. 2009); FRANCISCO FORREST MARTIN ET AL., INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW: TREATIES, CASES, AND ANALYSIS (2005).

end of the Cold War.³⁷⁹ It is a great achievement of the human rights movement that so many human rights are protected in so many different, overlapping ways—direct enforcement of the global treaties may no longer be necessary.

Many readers will disagree with even the suggestion of turning away from the international legal enforcement of human rights. At a minimum, however, it work on human rights outcomes should be accompanied by more and better work on the costs of international human rights enforcement, including cooperation and broken windows costs. A striking feature of the scholarship on human rights is the assumption that human rights treaties and their enforcement regimes have no costs, except possibly to human rights themselves. Even very modest, statistically weak, or otherwise unclear gains in human rights protections are defensible if there are no costs. But as David Kennedy cautions: “[w]e should be on guard when someone seeks to recruit us to a project that only has upsides.”³⁸⁰

There is a second problem with doubling down on the enforcement of human rights through international law—it is not politically feasible. China, Russia, and what seems to be a growing number of other countries increasingly reject the enforcement of human rights through international law. Indeed, a largely unnoticed aspect of the shift towards a multipolar international order is an increasingly pointed conflict about international law generally and about human rights in particular.³⁸¹ A 2016 joint Chinese–Russian declaration on international law illustrates the point.³⁸² Unlike earlier declarations, the one from 2016 speaks not in terms of “universal” norms in international law, nor does it mention human rights.³⁸³ China and Russia also

379. See SARAH B. SNYDER, *HUMAN RIGHTS ACTIVISM AND THE END OF THE COLD WAR: A TRANSNATIONAL HISTORY OF THE HELSINKI NETWORK* 1–2 (2011); see generally Zachary Elkins et al., *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT’L L.J. 61 (2013) (finding that the nonbinding Universal Declaration of Human Rights played an important role in the spread of human rights into domestic constitutions).

380. David Kennedy, *The International Human Rights Regime: Still Part of the Problem*, in EXAMINING CRITICAL PERSPECTIVES ON HUMAN RIGHTS 19, 27 (Rob Dickinson et al. eds., 2012); see also David Kennedy, *International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 102 (2002).

381. See William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARV. INT’L L.J. 1, 4 (2015) (noting that few authors have considered “how changes in the distribution of power influence the processes and substance of international law”).

382. Ministry of Foreign Affairs of the Russ. Federation, *The Declaration of the Russian Federation and the People’s Republic of China on the Promotion of International Law* (June 25, 2016), http://www.mid.ru/en/foreign_policy/position_word_order/-/asset_publisher/6S4RuXfeYIKr/content/id/2331698 [https://perma.cc/6CN7-N3J8] [hereinafter Joint Declaration].

383. Cf. Communiqués, Ministry of Foreign Affairs of China, *Joint Statement of the People’s Republic of China and Russian Federation on Major International Issues* (May 23, 2008), http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t465821.shtml [https://perma.cc/6PBT-N7T5] (reiterating China and Russia’s respect for human rights); Communiqués, Ministry of Foreign Affairs of China, *China–Russia Joint Statement on 21st Century*

have a growing influence on the approach that many countries take to international law, including Brazil, India, and South Africa.³⁸⁴ Turkey illustrates the newfound power of China and Russia—and the centrality of human rights to their growing control over the content of international law. Turkey has become increasingly autocratic since the government thwarted a coup attempt in 2016.³⁸⁵ Human rights have long been a major stumbling block to Turkey’s admission to the European Union; in response to the post-coup human rights violations, Europe has threatened to end the (recently re-opened) process of admitting Turkey.³⁸⁶ Turkey, on the other hand, has explicitly threatened to join the Shanghai Cooperation Organization, a security and economic bloc led by China and Russia.³⁸⁷ Whatever the ultimate outcome of this particular dispute—and Turkey has a long history of violent conflict with Russia—the growing power of Russian and Chinese approaches to international law is clear.

Doubling down on the international legal protection of human rights is not feasible for other reasons. A serious enforcement effort might involve the doctrines described in Part I, except on a far broader scale than previous efforts. The true cost of human rights enforcement would involve potentially great costs to the friendly relations of states and even interstate peace. It could mean stepping up civil and criminal universal jurisdiction prosecutions and eliminating immunity even in cases involving U.S., Chinese, or Israeli defendants tried in foreign national courts. Taking seriously a right of secession as a meaningful tool to improve human rights would involve secessions from human rights-violating states, potentially including Russia, Turkey, China, and others. The high costs to interstate relations are clear. Unlike international human rights law, there is not an overlapping set of

World Order (中俄关于21世纪国际秩序的联合声明) (July 1, 2005), <http://www.mfa.gov.cn/chn/gxh/zlb/smgg/t201988.htm> [<https://perma.cc/4KFB-KDUA>] (emphasizing respect for the Universal Declaration of Human Rights and state sovereignty); Russian-Chinese Joint Declaration on a Multipolar World and the Establishment of a New International Order, in letter dated May 15, 1997 from the Permanent Representatives of China and the Russian Federation to the United Nations, Addressed to the Secretary-General, U.N. Doc. A/52/153-s/1997/384 (May 20, 1997) (mentioning and respecting “universally recognized principles of international law”).

384. Burke-White, *supra* note 381, at 2, 4, 7; *see also* GIDEON RACHMAN, *EASTERNIZATION: ASIA’S RISE AND AMERICA’S DECLINE FROM OBAMA TO TRUMP AND BEYOND* 14, 212–24 (2016).

385. Tim Arango & Ceylan Yeginsu, *Turkish President Returns to Istanbul in Sign Military Coup Is Faltering*, N.Y. TIMES (July 15, 2016), <http://www.nytimes.com/2016/07/16/world/europe/military-attempts-coup-in-turkey-prime-minister-says.html> [<https://perma.cc/MK29-SEAH>].

386. Rod Nordland & James Kanter, *Turkey and E.U. Near Breaking Point in Membership Talks*, N.Y. TIMES (Nov. 23, 2016), <https://www.nytimes.com/2016/11/23/world/europe/turkey-eu-membership-talks.html> [<https://perma.cc/BZ77-T3LM>].

387. Samuel Osborne, *Turkey Could Join Bloc with Russia and China Instead of EU, President Erdogan Says*, INDEPENDENT (Nov. 20, 2016), <http://www.independent.co.uk/news/world/europe/turkey-president-erdogan-eu-russia-china-a7428391.html> [<https://perma.cc/896F-TK65>].

international and domestic prohibitions on interstate war. Only international law can do that work.

IV. Conclusion

International human rights law, despite its many historical successes, is no longer in its golden age. The beneficiary may be international law as a whole. But the benefits will be fully realized only if those who create and shape international law consider carefully the dangers and opportunities that the decline presents. At a minimum, scholars should focus not only on the decades-old debate about international human rights law and human rights, but instead on international human rights law and international law as a system. As this Article has shown, empirical work and models drawn from political science, social psychology, and sociology all suggest that human rights have imposed costs on international law and on international peace and security. Examples bear out what the models predict.

Of particular significance, because the stakes involved are so high, is empirical work showing a strong correlation between territorial disputes and armed conflict. Some aspects of the human rights transformation of international law have undermined international legal norms and institutions designed to limit such conflicts. It is easy to think that large-scale interstate war is simply impossible under contemporary conditions, due to globalization, international economic ties, and the deadly weapons available. That same view was prominent just over a century ago, on the eve of World War I.³⁸⁸ The remarkable contribution that international law has apparently made to interstate peace may be *the* great success of post-World War II international law. It is well worth preserving today through vigorous and credible international institutions such as the United Nations and through international legal norms, which are as strong and robust as possible.

388. See, e.g., FLORIAN ILLIES, 1913: DER SOMMER DES JAHRHUNDERTS (2013) (discussing the work of Norman Angell, including his book *The Great Illusion*).