Introduction
Preserving a Rules-Based International Order

This book grows out of the work of a study group convened by the American Branch of the International Law Association (ABILA). ABILA approved the formation of the study group in December 2018, with the title "Threats to a Rules-Based International Order and Possible Responses." Key assumptions that prompted formation of the study group were: 1) that we have reached a watershed moment in the evolution of the international system in which the rules-based international order confronts multiple threats that have the potential to undermine or seriously erode that order; and 2) that the United States should try to preserve a rules-based international order, if possible.

Although several members of the ABILA study group prefer the phrase "liberal international order," I believe that the phrase "rules-based international order" provides a better frame for the project. The phrase "liberal international order" is problematic because the meaning of the term "liberal" is contested and because the term "liberal" fails to capture key features of the current international legal order. One of the central goals of the international legal order—arguably the central goal—is to preserve peace and minimize the human suffering caused by armed conflict. That goal is neither liberal nor illiberal. Indeed, it is debatable whether liberal states have a better track record than illiberal states when it comes to compliance with international legal rules governing the use of force. Regardless, those rules are at the heart of the project to maintain a rules-based international order.

A normative commitment to free movement of people is a central pillar of liberal internationalist ideology. Even so, as Jaya Ramji-Nogales explains in her contribution to this volume,[1] the post-World War II international order has never codified that commitment in law. Thus, the current international legal order is illiberal insofar as it reinforces the sovereign power of states to close their borders to transnational migrants.

The two features of the current international legal order that are most closely associated with liberal values are international human rights law and international economic law. In both areas, current international rules expose a rift between competing versions of liberalism, which I call "humanitarian liberalism" and "free market liberalism." The Universal Declaration of Human Rights is based on the principle that economic/social rights and civil/political rights are indivisible; it therefore manifests a commitment to humanitarian liberalism. However, the United States, which has been the dominant power in the international system since World War II, has traditionally privileged civil and political rights over economic and social rights. The U.S. view of the hierarchical relationship between the two sets of rights is consistent with free market liberalism, but not humanitarian liberalism.

[1] *See* Jaya Ramji-Nogales, *Migration and International Legal Disorder* (Chapter 14).

James Gathii and Sergio Puig argue persuasively that domination of the global South by the global North is a key feature of the post-World War II international economic order.[2] The persistence of North-South inequality can be partially explained by the fact that international economic institutions have been guided largely by free market liberalism, not humanitarian liberalism. Moreover, as Richard Steinberg shows, after the end of the Cold War the United States deployed its hegemonic power in pursuit of what he calls economic "hyper-liberalism," which is an extreme form of free market liberalism.[3] Those hyper-liberal policies provoked substantial pushback, which is arguably contributing to the unraveling of the international legal order.

The preceding comments explain why the phrase "liberal international order" is problematic. In contrast, although no terminology is perfect, the phrase "rules-based international order" provides a more helpful frame for this project. Here, I contrast the idea of a rules-based order with a "sovereignty-based international order." The distinction between a rules-based order and a sovereignty-based order is not black and white. Even in an international order that is primarily sovereignty based, there are international legal rules that govern the behavior of states. Therefore, the distinction is best understood as a continuum with many shades of grey. Moreover, the distinction between rules-based and sovereignty-based can be applied to the international system as a whole, or to specific sub-fields within international law.

Bearing in mind these caveats, a rules-based order differs from a sovereignty-based order along three dimensions: the nature of international obligations, the degree to which states delegate authority to international institutions, and the degree to which rules are actually enforced.[4] In a sovereignty-based order, most international legal rules operate horizontally: states owe obligations to other states, not to private actors. Rules governing the initiation of use of force, the *jus ad bellum*, are horizontal rules.[5] In contrast, a rules-based international order includes numerous rules that

---

[2] *See* James T. Gathii and Sergio Puig, *The West and the Unraveling of the Economic World Order: Thoughts from a Global South Perspective* (Chapter 2).

[3] *See* Richard H. Steinberg, *The Rise and Decline of a Liberal International Order* (Chapter 1).

[4] My concept of rules-based versus sovereignty-based orders has some commonalities with the concept of "legalization" explained by Professor Abbott and his co-authors in their seminal article in International Organizations. *See* Kenneth W. Abbott et al, *The Concept of Legalization*, 54 INT'L ORG. 401 (2000). They define the term "legalization" as "a particular form of institutionalization characterized by three components: obligation, precision, and delegation." *Id.* at 401. Their concept of obligation focuses on the question whether a rule is legally binding, *id.* at 408-12, whereas mine focuses on the distinction between horizontal and vertical obligations. Their concept of delegation includes delegation of authority to actors other than international institutions, *id.* at 415-18, whereas I focus on delegation of authority to international institutions. They explicitly exclude questions about the effectiveness of enforcement from their concept of legalization. *See id.* at 402. In contrast, I claim that effective enforcement is a key distinguishing feature of a rules-based order.

[5] *See* Lauren Sukin and Allen S. Weiner, *War and Words: The International Use of Force in the United Nations Charter Era* (Chapter 5).

operate vertically: they create obligations that states owe to private parties.[6] The rules embodied in international human rights law and international investment law are primarily vertical rules. In the decades after World War II, the international system became more rules-based as states added more vertical legal rules, creating a thicker set of obligations that states owe to private parties.

Second, in a sovereignty-based order, states either do not create international institutions, or they delegate very limited authority to those institutions. In contrast, in a rules-based order, states delegate more robust authority to international institutions. Thus, after World War II, states gradually strengthened the rules-based international order by delegating authority to institutions like the United Nations Security Council (1945), the European Court of Human Rights (1959), the World Trade Organization (1995), and the International Criminal Court (2002).

Third, in a sovereignty-based order, enforcement of international rules is weak or non-existent. In contrast, in a rules-based order, enforcement of international legal rules is more effective. It bears emphasis that many vertical rules of international law are enforced, albeit imperfectly, without delegating authority to international institutions. For example, enforcement of international investment law relies primarily on investor-state arbitration;[7] enforcement of the *jus in bello* relies heavily on national military systems;[8] and states have created a fairly robust mechanism for enforcing antibribery rules by tacitly delegating enforcement authority to the United States and a handful of other powerful states.[9] More broadly, the term "enforcement," as used in this essay, includes both domestic and international enforcement mechanisms, and both judicial and non-judicial enforcement mechanisms.

Ultimately, in evaluating the degree to which a particular area of international law is rules based or sovereignty based, one must consider all three dimensions: the nature of vertical versus horizontal obligations; the degree to which states have delegated authority to international institutions; and the effectiveness of various enforcement mechanisms. Some areas of international law are "rules-based" in the sense that they create vertical obligations for states, and there are reasonably effective mechanisms for enforcing those rules, even though they do not delegate significant authority to international institutions. To reiterate, the distinction between rules-based and sovereignty-based orders is not black and white: it is a continuum with many shades of grey.

Although states have made significant gains in strengthening the rules-based international order over the past several decades, there has been significant backsliding towards a more sovereignty-based order since the turn of the century, especially in the areas of international human

---

[6] *See* David L. Sloss & Michael P. Van Alstine, *International Law in Domestic Courts*, *in* RESEARCH HANDBOOK ON THE POLITICS OF INTERNATIONAL LAW 79, 83-85 (Wayne Sandholtz & Christopher A. Whytock eds., 2017) (discussing horizontal and vertical obligations).

[7] *See* Jeremy Rabkin, *Strength in Obscurity: The Resilience of International Investment Law* (Chapter 10).

[8] *See* Laura A. Dickinson, *The* Jus in Bello *Under Strain: Diluted but not Disintegrating* (Chapter 6).

[9] *See* Paul B. Stephan, *Anti-Bribery Law* (Chapter 11).

rights law[10] and international trade law.[11] In his contribution to this volume, Tom Ginsburg considers the possibility that the rising power of China might steer the international order in a direction that is both more sovereignty-based and more illiberal.[12] As he explains, such changes are arguably already underway.

Even so, I remain hopeful that key features of the rules-based international order will endure. The several chapters in this book generally support the conclusion that the rules-based international order confronts significant challenges, but it is not unraveling—at least, not yet. Climate change is the biggest wild card in trying to predict the future. Maxine Burkett argues persuasively that climate change represents the single greatest threat to the future of a rules-based international order.[13] If the world's major powers—especially the United States and China—cooperate with each other to combat climate change, then other threats to the rules-based order should be manageable. If the world's major powers fail to address the climate crisis by 2040 or 2050, the other threats addressed in this volume may come to be seen as trivial in comparison.

The remainder of this Introduction is divided into three parts. Part I presents a brief history of the rules-based international order. It shows that—between 1945 and the first decade of the twenty-first century—the international system evolved from a primarily sovereignty-based order to a much more rules-based order. However, since about 2008 or 2010, we have witnessed significant backsliding towards a more sovereignty-based order, especially in the areas of international trade and international human rights law. Part II then briefly surveys the major, current threats to the rules-based international order. Finally, Part III outlines a potential strategy to mitigate those threats in the interest of preserving a rules-based international order that is consistent with liberal, humanitarian values.

I.
A Brief History of the Rules-Based International Order

In Chapter 1, Richard Steinberg divides the history of the post-World War II international order into three periods: 1945-1990, 1991-2008, and 2009-present.[14] As he admits, any line-drawing exercise that divides history into discrete periods is somewhat arbitrary. One problem with this periodization is that the 9/11 attacks—which had a substantial impact on the evolution of the international legal order—fall right in the middle of the second period. Even so, the division into discrete periods is analytically useful. These three periods correspond roughly to the Cold War; a post-Cold War period when the United States was the world's sole superpower; and a recent

[10] *See* Wayne Sandholtz, *Authoritarianism, International Human Rights, and Legal Change* (Chapter 12).
[11] *See* Kathleen Claussen, *The Experimental Evolution of Trade Law* (Chapter 9).
[12] *See* Tom Ginsburg, *The Future of Liberal Democracy in the International Legal Order* (Chapter 3).
[13] *See* Maxine Burkett, *Revolution or Collapse?: Climate Change and the International Legal Order* (Chapter 4).
[14] Steinberg, Chapter 1.

period characterized by declining U.S. power and rising Chinese power. For the purpose of this Introduction, I add a fourth period: the period before World War II, when the international order was largely sovereignty based, not rules based. It bears emphasis that the sovereignty-based order that existed before World War II reinforced the sovereign power of mostly European states; it excluded large portions of the globe occupied by dependent colonies that lacked sovereign powers.[15]

This book consists of fourteen chapters (plus this Introduction), eight of which address specific substantive areas of international law. Those eight chapters deal with: *jus ad bellum*,[16] *jus in bello*,[17] international trade law,[18] international investment law,[19] anti-bribery law,[20] human rights law,[21] international criminal law,[22] and international migration law.[23] (The *jus ad bellum* involves rules for the initiation of armed conflict. The *jus in bello* involves rules for conducting armed conflict after it has been initiated.) This section analyzes the evolution of a rules-based international order in those eight substantive areas, dividing the history into four periods. Table One summarizes the historical analysis. To reiterate, though, the distinction between rules-based and sovereignty-based orders is a continuum with many shades of grey. In Table One, the labels "rules-based" and "sovereignty-based" reflect a qualitative judgment about the location on that continuum of particular legal regimes during particular historical eras.

Table One:
Evolution of a Rules-Based International Order

	Before WW II	**1945-1990**	**1990-2008**	**2009-present**
Jus in bello	Rules-based	Rules-based	Rules-based	Stable
Jus ad bellum	Sov'ty-based	Rules-based	Rules-based	Backsliding ??
Int'l Trade Law	Sov'ty-based	Rules-based	Rules-based	Backsliding
Int'l Hum Rights	Sov'ty-based	Rules-based	Rules-based	Backsliding
Int'l Crim. Law	Sov'ty-based	Sov'ty-based	Rules-based	Stable
Investment Law	Sov'ty-based	Sov'ty-based	Rules-based	Stable
Bribery	Sov'ty-based	Sov'ty-based	Rules-based	Stable
Migration	Sov'ty-based	Sov'ty-based	Sov'ty-based	Sov'ty-based

[15] *See* Gathii and Puig, Chapter 2.
[16] Sukin and Weiner, Chapter 5.
[17] Dickinson, Chapter 6.
[18] Claussen, Chapter 9.
[19] Rabkin, Chapter 10.
[20] Stephan, Chapter 11.
[21] Sandholtz, Chapter 12.
[22] Leila N. Sadat, *The International Criminal Law of the Future* (Chapter 13).
[23] Ramji-Nogales, Chapter 14.

A. The International Legal Order Before World War II

Before World War II, international law established a rules-based order in only one of the eight substantive areas referenced above: the *jus in bello*, also known as "international humanitarian law," or IHL. IHL rules were first codified in the 1864 Geneva Convention, and later strengthened and expanded in agreements reached at the 1899 Hague Peace Conference, the 1907 Hague Peace Conference, and the 1929 Geneva Conference.[24] None of the IHL treaties concluded during this period created international institutions with significant enforcement powers; enforcement relied primarily on national militaries. Regardless, there were internationally agreed rules creating vertical obligations that states owed to individuals. Numerous states incorporated those obligations into national military law and enforced the rules against their own citizens.

Before World War II, the international order was generally sovereignty based, not rules based, in the other seven areas of substantive law covered in this volume. There were no internationally agreed rules governing bribery or migration. With respect to migration, states had the sovereign right to exclude any persons they chose to exclude, subject to modest restrictions in some bilateral treaties. Bribery was an accepted part of the transnational business environment. Bilateral treaties addressed topics related to international trade and investment law, but there were few globally or even regionally accepted norms governing international trade and investment, despite efforts by capital exporting states to persuade capital importing states to accept a legal rule requiring compensation for expropriation.[25] States began to lay a foundation for development of international criminal law by concluding bilateral extradition treaties, and by prohibiting both piracy and the slave trade, but there were few international rules obligating states to punish individuals for criminal conduct.[26] The International Labor Organization, created in 1919, began to sow the seeds for modern international human rights law, but international law imposed few restrictions on the power of sovereign states to abuse the human rights of their own citizens.

Some scholars have argued that the Kellogg-Briand Pact of 1928[27] created a rules-based order related to *jus ad bellum* before World War II.[28] Even if one accepts that view, which is disputed, it is undisputed that international law before 1928 imposed few meaningful constraints on the power of sovereign states to initiate armed conflicts whenever they determined that they

---

[24] *See* International Committee of the Red Cross, *Treaties, States Parties and Commentaries*, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesHistoricalByDate.xsp (visited Jan. 2, 2021).

[25] During this period, numerous decisions by international arbitral tribunals ordered states to compensate foreign investors for expropriation of property, but states in the global South challenged the asserted rules on expropriation. Moreover, in many cases, their agreement to submit claims to arbitration was coerced by an express or implied threat of military force. *See* Rabkin, Chapter 10.

[26] *See* Sadat, Chapter 13.

[27] Kellogg-Briand Pact, 46 Stat. 2343, TIAS No. 796 (1928) (providing that parties "renounce" war as a solution for any "disputes or conflicts of whatever nature or whatever origin they may be").

[28] *See* OONA A. HATHAWAY AND SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD (2017).

had good cause to do so. Thus, with respect to *jus ad bellum*, the international order was primarily sovereignty based, not rules based, until at least 1928, and arguably until adoption of the UN Charter in 1945.

B. The Cold War Era: 1945 to 1990

In the period after World War II, the international order moved much further along the spectrum from a sovereignty-based order towards a rules-based order. By the end of the Cold War, internationally agreed legal rules had established a rules-based order in four of the eight substantive areas covered in this volume: *jus ad bellum*, *jus in bello*, trade, and human rights. However, anti-bribery law, investment law, migration law and international criminal law remained primarily sovereignty based as of 1990.

Article 2(4) of the UN Charter codified a general prohibition on the use of force with only two exceptions: force is permitted in self-defense, or with Security Council authorization. The Charter also delegated substantial authority to a new international institution, the UN Security Council, and vested the Council with significant enforcement powers. In particular, Chapter VII of the Charter authorizes the Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression," and to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."[29] Although the Charter granted the Security Council robust enforcement powers, the Council rarely exercised those powers before 1990. Critics argue that the Article 2(4) prohibition on use of force is not "real law" because powerful states violate that prohibition at will.[30] However, in Chapter 5, Lauren Sukin and Allen Weiner present persuasive empirical evidence showing that the incidence of armed conflict has not increased significantly since 1945, and that states have generally felt the need to justify the use of force within the legal framework established by the Charter.[31]

During the Cold War, states strengthened the *jus in bello* by codifying detailed legal rules in six separate treaties: the four Geneva Conventions of 1949 and the two Additional Protocols of 1977.[32] As of 1990, approximately 160 states were parties to the 1949 Geneva Conventions; 96 states were parties to the first Additional Protocol, and 86 states were parties to the second Additional Protocol.[33] The International Committee of the Red Cross (ICRC) has an oversight role,

---

[29] U.N. Charter, arts. 39, 42.
[30] *See, e.g.*, Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539 (2002).
[31] Sukin and Weiner, Chapter 5.
[32] *See* Dickinson, Chapter 6.
[33] International Committee of the Red Cross, *State Parties to the Following International Humanitarian Law and Other Related Treaties as of 15-Dec-2020*, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesHistoricalByDate.xsp.

but states have not created an international institution with significant enforcement powers. Hence, enforcement continues to rely primarily on national militaries.

In October 1947, twenty-three states concluded the General Agreement on Tariffs and Trade (GATT), thereby creating the world's first, broad-based multilateral trading system founded on the liberal principle of free movement of goods.[34] During seven rounds of negotiations between 1949 and 1973, GATT members agreed to a series of progressively more stringent restrictions on tariff and non-tariff barriers to trade. By 1990, approximately one hundred states had joined the GATT system. Thus, GATT laid the foundation for a rules-based order for international trade. However, that order was not global in scope: China and Soviet bloc nations were excluded. Moreover, GATT did not create a robust institutional framework for oversight and enforcement. Disputes between states were submitted to panels for resolution, but decisions by GATT panels were binding only if approved by consensus of the Contracting Parties, and the losing party could block that consensus.

The UN General Assembly established the foundation for modern international human rights law when it adopted the Universal Declaration of Human Rights in 1948. Although the Declaration is non-binding, states have acknowledged that many of its provisions are now customary international law. By 1990, states had also adopted several multilateral human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention on Elimination of All Forms of Racial Discrimination (CERD), the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture (CAT), and the Convention on the Rights of the Child (CRC). The institutional framework for international human rights law included the UN Commission on Human Rights and several human rights treaty bodies. In Europe and Latin America, states supplemented these global treaties and institutions by adopting regional treaties and creating regional human rights courts with significant enforcement authority. The network of global and regional treaties and institutions created a rules-based order in the field of human rights. However, as Wayne Sandholtz notes, the basic institutional design relies primarily on domestic courts and other domestic institutions to enforce governmental compliance with human rights treaty obligations.[35] During the Cold War, the quality of domestic enforcement was generally quite good in liberal democracies, but quite poor in authoritarian states.

As of 1990, the international order in the areas of bribery, investment law, migration, and criminal law remained largely sovereignty based. The United States enacted the Foreign Corrupt Practices Act (FCPA) in 1977 to criminalize transnational bribery.[36] However, as of 1990, very

---

[34] General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187.
[35] *See* Sandholtz, Chapter 12.
[36] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, Tit. I, Dec. 19, 1977, 91 Stat. 1495, *codified as amended at* 15 U.S.C. §§ 78dd–1, 78dd–2, 78dd–3.

few other states had followed the U.S. lead and there were no international agreements proscribing the practice. States began to conclude bilateral investment treaties (BITs) as early as 1959. By 1988, states had concluded a total of 309 BITs,[37] which codified significant international law protections for foreign investors. However, as recently as the 1980s, many states continued to assert their sovereign right to expropriate property owned by foreign investors. A United Nations study conducted in the 1970s "identified 875 distinct acts of governmental taking of foreign property in sixty-two countries" between 1960 and 1974.[38]

States adopted the UN Convention Relating to the Status of Refugees in 1951; it codified a rule prohibiting states from expelling refugees to countries where they have reasonable grounds to fear persecution.[39] The 1967 Protocol on the Status of Refugees broadened the scope of protection for refugees.[40] But despite these important international law protections for refugees, the field of migration law remains primarily sovereignty based, not rules based, because international law does not obligate any state to admit refugees, and because the definition of "refugee" is so narrow that it excludes millions of migrants who desperately need protection.[41]

As of 1990, states had planted the seeds of a rules-based order in the field of international criminal law, but the international order at that time was still primarily sovereignty based. After World War II, the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East (in Tokyo) prosecuted German and Japanese defendants, respectively, for crimes against peace and war crimes. However, after the 1940s, there were no additional prosecutions before international criminal tribunals until the 1990s. The Genocide Convention, adopted in 1948, codified an international obligation to prevent and punish genocide. Similarly, the 1949 Geneva Conventions obligated states to punish individuals who commit "grave breaches." However, there are no recorded cases of genocide prosecutions during the Cold War period, and war crimes were generally treated as domestic matters requiring internal discipline by national militaries.[42]

C. The Post-Cold War Era: 1991 to 2008

Between 1991 and 2008, the fields of investment law, anti-bribery law, and international criminal law transitioned from sovereignty-based orders to rules-based orders. During the same period, states and international organizations strengthened enforcement of the rules-based orders

---

[37] Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain,* 46 HARV. INT'L. L. J. 67, 75 (2005).
[38] *Id.*
[39] Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.
[40] Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.
[41] *See* Ramji-Nogales, Chapter 14.
[42] For more on the history of international criminal law during this period, see Sadat, Chapter 13.

related to *jus ad bellum*, *jus in bello*, trade, and human rights. As of 2008, migration law was the only area of law covered in this survey that remained primarily sovereignty based.

Members of the Organization for Economic Cooperation and Development (OECD) adopted the OECD Bribery Convention in 1997.[43] The treaty entered into force in 1999; forty-four states are parties to the Convention. (The United Nations adopted the UN Convention Against Corruption in 2003;[44] it now has 187 parties.) The OECD Convention focuses on the relatively narrow problem of bribery, not the broader problem of corruption. The treaty targets individuals who pay bribes, not the government officials who receive them. The Convention does not create any new international institutions to combat bribery. Instead, it facilitates prosecution of individuals who commit transnational bribery offenses by removing traditional sovereignty-based barriers to extraterritorial regulation.[45] In the words of Paul Stephan, the Convention created "a remarkably robust regulatory regime with almost all of the action occurring at the national level."[46] The OECD Convention has been fairly successful because the United States and a small number of other countries actively prosecute crimes covered by the Convention, while other countries quietly acquiesce when their nationals are prosecuted.

As of 1990, states had concluded about 400 BITs. "By 2005, there were more than 2,000 BITs, a five-fold increase in the 15 years after 1990."[47] The proliferation of BITs manifested widespread acceptance of an international legal rule prohibiting sovereign states from expropriating private property owned by foreign investors. Capital exporting states had favored that rule for more than a century, but the rule failed to gain broad acceptance during the Cold War. In addition to banning expropriation, BITs include several other substantive protections for foreign investors. Most BITs also empower private investors to sue host states in arbitration proceedings, a process known as investor-state dispute settlement, or ISDS. ISDS existed on paper before 1990, but the number of ISDS proceedings exploded over the next two decades. The International Center for Settlement of Investment Disputes (ICSID) reported only seven ISDS cases registered between 1990 and 1994. In contrast, ICSID reported a total of 113 ISDS cases registered between 2000 and 2004.[48] By relying on ISDS as the primary enforcement mechanism for investor protection rules, states created a robust rules-based order in the field of international investment law without delegating substantial enforcement authority to any international institution.[49]

---

[43] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43, 2802 U.N.T.S. 225 (entered into force Feb. 15, 1999) [hereinafter OECD Convention].

[44] United Nations Convention Against Corruption, Oct. 31, 2003, S. Treaty Doc. No. 109-6, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005).

[45] *See* Stephan, Chapter 12.

[46] *Id.* at xx.

[47] Rabkin, Chapter 10, at xx.

[48] *See* ICSID, *Cases Database*, at https://icsid.worldbank.org/cases/case-database

[49] ICSID serves an important coordination function, but ICSID itself does not have significant enforcement powers.

During the post-Cold War era, the Security Council created the International Criminal Tribunal for Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994. Both tribunals prosecuted individuals for genocide, war crimes, and crimes against humanity.[50] Over the next 10-15 years, the international community established several other hybrid tribunals, including the Extraordinary Chambers in the Courts of Cambodia, the Supreme Iraqi Criminal Tribunal, the Special Court of Sierra Leone, and the Special Tribunal for Lebanon. Most importantly, states adopted the Rome Statute for the International Criminal Court (ICC), which entered into force in 2002.[51] By 2008, almost 120 states were parties to the Rome Statute. Creation of the ICC was a landmark achievement that established a rules-based order in the field of international criminal law. However, the effectiveness of that order is hampered by the fact that neither the United States nor China nor Russia has ratified the Rome Statute. Their non-participation is driven at least partly by sovereignty-based objections to the ICC.

For proponents of a rules-based international order, creation of the World Trade Organization (WTO) was clearly one of the signature accomplishments of the post-Cold War era. States adopted the Agreement Establishing the World Trade Organization in 1994;[52] the WTO came into existence on January 1, 1995. The GATT had previously established a rules-based order for international trade, but the WTO strengthened and broadened that order. In contrast to GATT, the WTO agreement created a permanent international institution staffed by international civil servants. The Dispute Settlement Understanding, an integral part of the WTO agreements, strengthened the international enforcement mechanism for resolving trade disputes, in part by creating a permanent appellate body to hear appeals from panel decisions.[53] The admission of China into the WTO in 2001 represented a significant expansion of the international trading system to include countries that were once deemed off limits. Whereas only about one hundred states were parties to the GATT agreements in 1990, the WTO had more than 150 member states as of 2008. Today, trade among WTO member states—all of which is governed by WTO rules—accounts for more than 95 percent of total world trade.[54]

The UN response to Iraq's 1990 invasion of Kuwait marked a significant turning point in the Security Council's role in enforcing the Charter's *jus ad bellum* regime. One day after the invasion, the Council adopted Resolution 660, declaring "a breach of international peace and security" and demanding Iraq's immediate and unconditional withdrawal from Kuwait.[55] A few months later, in Resolution 678, the Council authorized "Member States co-operating with the

---

[50] *See* Sadat, Chapter 14.
[51] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3.
[52] Agreement Establishing the World Trade Organization, April 15, 1994, 1867 U.N.T.S. 3.
[53] *See* Claussen, Chapter 9.
[54] *See* World Trade Organization, *Accession in Perspective*, https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c1s1p1_e.htm
[55] S.C. Res. 660 (Aug. 2, 1990).

Government of Kuwait . . . to use all necessary means to . . . restore international peace and security in the area."[56] Over the next thirteen years, the Council invoked its authority under Chapter VII of the Charter to authorize enforcement actions in Somalia (1992), the former Yugoslavia (1991-93), Rwanda (1994), Haiti (1994), Albania (1997), the Central African Republic (1997), East Timor (1999), Kosovo (1999), Afghanistan (2001), Liberia (2003), the Democratic Republic of Congo (2003); and Cote d'Ivoire (2003).[57] During this period, states and commentators expressed guarded optimism that the Security Council was finally fulfilling its primary mission under the UN Charter: to maintain international peace and security. That optimism faded after 2003, for reasons discussed in the next section.

The core *jus in bello* norms remained largely unchanged in the post-Cold War period, but creation of the ICC and other international criminal tribunals strengthened international enforcement of those norms. The ICTY and ICTR prosecuted hundreds of people for war crimes during this period. Decisions by those tribunals helped refine and clarify *jus in bello* norms, especially with respect to non-international armed conflicts. Still, the principle of complementarity codified in the Rome Statute reflects the expectation that national governments retain primary responsibility for prosecuting individuals who commit war crimes. After adoption of the Rome Statute, many states parties enacted new domestic legislation to clarify and enhance their authority to prosecute individuals who commit war crimes and other international crimes. The evidence is inconclusive, but some studies suggest that states began using their domestic legal systems to prosecute international crimes more aggressively during this period.[58]

The core human rights norms remained largely unchanged during this period, but there was modest institutional innovation at the international level. For example, the Organization of African Unity (OAU) created the African Court on Human and Peoples' Rights in 1998. The UN Commission on Human Rights created several new working groups and special rapporteurs during this period, and the Human Rights Council replaced the Commission in 2006. However, the global spread of democracy was arguably the most significant development related to human rights enforcement in the post-Cold War era. The number of democracies in the world increased from 57 countries in 1990 to 96 countries in 2008. During the same period, the number of liberal democracies increased from 28 to 43 countries.[59] Given that domestic courts and executive agencies are the institutions with primary responsibility for enforcing states' international human

---

[56] S.C. Res. 678 (Nov. 29, 1990).

[57] *See* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 289-300, 341-59 (4th ed. 2018).

[58] *See* Geoff Dancy and Florencia Montal, *Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions*, 111 AM. J. INT'L L. 689 (2017); Geoff Dancy and Kathryn Sikkink, *Ratification and Human Rights Prosecutions: Towards a Transnational Theory of Treaty Compliance*, 44 INT'L L. AND POLITICS 751 (2012).

[59] These figures are based on the v2x_regime variable in the Varieties of Democracy database. That variable divides countries into four groups: liberal democracies, electoral democracies, electoral autocracies, and closed autocracies. The database and codebook are available at https://www.v-dem.net/en/data/data-version-10/.

rights obligations, the spread of democracy generally, and liberal democracy in particular, strengthened enforcement of human rights norms, although the world's autocracies continued to violate those norms on a regular basis.

D. The End of U.S. Hegemony: 2009 to Present

In the past decade or so, blogs and scholarly journals have been filled with essays about the decline of the rules-based international order. However, if one focuses on the eight areas of law covered in this survey, the rules-based order appears to be in fairly good health. Robust enforcement continues in the areas of anti-bribery law and international investment law, albeit without any significant involvement from international institutions. (Indeed, the decision not to delegate substantial authority to international institutions may be one factor contributing to the success of those regimes.) The norms constituting the *jus in bello* regime remain essentially unchanged. Despite various factors that place strain on the *jus in bello*,[60] domestic enforcement by national militaries continues, supplemented occasionally by international prosecutions. Similarly, international criminal law continues on the same basic trajectory established in the aftermath of the Cold War. The International Criminal Court may not be thriving, but neither is it unraveling. International migration law remains primarily sovereignty based, but that has been true for the entire post-World War II period.[61] Thus, in five of the eight areas under review, there has not been any significant backsliding from a rules-based order towards a sovereignty-based order.

In contrast, there has been some backsliding towards a sovereignty-based order in the fields of trade, human rights, and *jus ad bellum*. Despite major changes in the global economy, states have not concluded any significant new trade agreements on a global basis since the founding of the WTO in 1995. As of this writing, negotiation of a Transatlantic Trade and Investment Partnership (T-TIP) has not yielded a final agreement, despite substantial efforts. The United States and eleven other countries finalized the text of a Trans-Pacific Partnership Agreement in 2016, but President Trump repudiated the agreement shortly after taking office.[62] President Trump also launched a major trade war with China, not to mention minor trade wars with key U.S. allies. Additionally, he effectively halted all appeals to the WTO Appellate Body by blocking all judicial appointments to that body.[63] President Biden will probably reverse some of the Trump administration actions that damaged the international trade regime. Nevertheless, most experts agree that the rules-based order in the field of trade law has grown weaker since 2016, and the future of the "trade rule of law" remains in doubt.[64]

---

[60] *See* Dickinson, Chapter 6.
[61] The growth of anti-migrant animus since about 2015 may pose a significant threat to the rules-based international order, as discussed in the next section.
[62] After the United States withdrew, the other TPP countries concluded an agreement without the U.S., calling it the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).
[63] *See* Claussen, Chapter 9.
[64] *See id.*

The core human rights norms remain essentially the same in 2021 as they were in 2008. Similarly, the international institutions related to human rights law remain largely unchanged. However, the total number of democracies in the world decreased from a peak of 98 countries in 2010 to a trough of 87 countries in 2019. Similarly, the number of liberal democracies declined from a peak of 45 countries in 2009 to a low point of 37 countries in 2019.[65] As Wayne Sandholtz demonstrates, the global decline of democracy between 2008 and 2020 adversely affected human rights enforcement at the domestic level.[66] Moreover, to reiterate, the basic institutional design of the international human rights regime relies primarily on domestic legal systems to enforce international human rights norms.

Backsliding in trade law can be traced to the global financial crisis in 2008-09, and progress on human rights arguably peaked in about 2009-10 (as measured by the number of democracies or liberal democracies in the world). In contrast, backsliding in the use of force regime began earlier. As noted in the previous section, the Security Council achieved a remarkable degree of consensus on use of force after the end of the Cold War. However, the invasion of Iraq in 2003 under the banner "Operation Iraqi Freedom" marked an important turning point in the Security Council's approach to use of force. The United States tried unsuccessfully to persuade other Council members to authorize use of force in Iraq. When that effort failed, the United States and its allies proceeded without express Security Council authorization, claiming that Operation Iraqi Freedom was implicitly authorized by prior Council resolutions. According to one leading scholar, the disingenuous claim of implied authorization had a significant impact on "subsequent Security Council decision-making . . . . When the Security Council wished to express its concern that North Korea and Iran were in violation of their non-proliferation obligations, the language it used . . . was designed deliberately to exclude any possible invocation of implied Security Council authorization."[67] More broadly, the perceived illegitimacy and failure of Operation Iraqi Freedom probably led to a much more cautious approach within the Security Council, and a greater willingness on the part of both China and Russia to wield their vetoes to block Chapter VII enforcement actions.[68] Thus, the era of robust Security Council enforcement actions under Chapter VII was very short-lived: from about 1990 to 2003. Even so, Lauren Sukin and Allen Weiner argue persuasively that "[t]he reports of the demise of the U.N. Charter's legal regime governing the use of force have been greatly exaggerated."[69]

---

[65] These figures are based on the v2x_regime variable in the Varieties of Democracy database. *See supra* note 59.

[66] *See* Sandholtz, Chapter 12.

[67] GRAY, *supra* note 57, at 383.

[68] Between 1990 and 2003, China and Russia exercised their veto powers a total of 4 times in 14 years. Between 2004 and 2020, they exercised their veto powers a total of 25 times in 17 years. *See* Security Council – Veto List, at https://research.un.org/en/docs/sc/quick. Some vetoes were unrelated to Chapter VII enforcement actions. Nevertheless, the frequency of vetoes gives some indication of the degree of consensus, or lack thereof, among the five permanent members.

[69] Sukin and Weiner, Chapter 5, at xx.

II.
Threats to the Rules-Based Order

In thinking about threats to the rules-based international order, it is helpful to begin by considering the broader goals of a rules-based order. This book assumes that those goals generally fit into three baskets: peace (Part II of the book); prosperity (Part III); and human rights (Part IV). Certain threats to the rules-based order relate primarily to one or two of those baskets. Other threats relate to all three.

Two chapters in this book address *new weapons technologies* that could potentially undermine the effectiveness of international rules designed to preserve peace and minimize the destructiveness of armed conflict. Chris Jenks contends that the development of autonomous weapons threatens to erode the effectiveness of the core prohibition on use of force in Article 2(4), but that such weapons are unlikely to have an adverse impact on the key humanitarian principles of the *jus in bello*.[70] Ido Kilovaty has a less sanguine view about the potential impact of cyber weapons. He argues that—in light of the development of new cyber technologies—we need to re-calibrate the key thresholds that distinguish prohibited "uses of force" from less violent acts, and that distinguish "armed conflict" from situations where IHL does not apply, in order to accomplish the main goals of the *jus ad bellum* and *jus in bello*.[71]

Richard Steinberg's contribution to this volume highlights the *dispersion of power* in the international system.[72] Many factors contribute to the dispersion of power. The number of sovereign states in the world has increased from about fifty states that signed the UN Charter in 1945 to almost two hundred states today. Numerous non-state actors—including large private corporations, terrorist groups, and transnational criminal enterprises—wield much greater power today than they did in 1950. For most of the period since WW II, the United States served as the "glue" that preserved order in the international system, but the Presidency of Donald Trump put the world on notice that the United States may no longer be willing or able to exert its power to preserve the rules-based international order. In short, the international order is fraying because the multiplicity of state and non-state actors is nudging the system towards chaos, and it is uncertain whether the United States (or any combination of states) has the will or capacity to preserve order in a highly decentralized system.

The dispersion of power could potentially weaken all three "baskets" of the rules-based order—peace, prosperity, and human rights—because international legal rules in all three areas

---

[70] Chris Jenks, *Autonomous Weapons* (Chapter 7). For an insightful analysis of current threats to the *jus in bello* regime, see Dickinson, Chapter 6.
[71] Ido Kilovaty, *Cyber Conflict and the Thresholds of War* (Chapter 8).
[72] *See* Steinberg, Chapter 1.

are difficult to enforce without a dominant hegemon that is willing and able to exert its power to maintain a rules-based order. Of course, when the United States was the world's dominant power, it did not always wield that power for benign purposes. However, from 1945 until the 2010s the United States exercised its power to enforce rules that served its perceived interests, and in doing so generally helped to promote and strengthen the rules-based order.

Two chapters address threats to the rules-based order associated with the *rise of China* as a major world power. Richard Steinberg contends that the rise of China is one of the key causal factors contributing to the decline of the liberal international order.[73] Similarly, Tom Ginsburg warns that the rise of China could push the international system away from a rules-based order in the direction of a more sovereignty-based order.[74] In my view, the growth of Chinese power will likely have a major impact on two areas of substantive law covered in this volume: international human rights and international trade law. Indeed, we have already seen shifts towards a more sovereignty-based order in those areas, and we could see further movement in that direction. Rising Chinese power also contributes to paralysis in the UN Security Council, which adversely affects the *jus ad bellum*. However, as of this writing, there is little evidence that rising Chinese power is undermining the effectiveness of the rules-based order related to the *jus in bello*, international investment law, anti-bribery law, or international criminal law. Moreover, Chinese power has no apparent adverse impact on international migration law, which, as previously noted, has remained primarily sovereignty based for the past 75 years.

Several chapters address threats to the rules-based order related to the ongoing phenomenon of *democratic decline*. As noted previously, both the number of liberal democracies and the total number of democratic countries has been declining since about 2009 or 2010. Jaya Ramji-Nogales notes that the rise of anti-migrant animus is a key factor contributing to democratic decline in many democratic (or formerly democratic) states.[75] In some cases, anti-migrant animus is a thinly disguised form of racial animus. James Gathii and Sergio Puig highlight the fact that economic inequality is also a key factor contributing to democratic decline.[76] Economic inequality perpetuates racial inequality because global wealth is concentrated in countries with a majority white population, whereas global poverty is concentrated in countries populated mostly by non-white people.

Wayne Sandholtz argues persuasively that ongoing democratic decline threatens the integrity of the international human rights regime.[77] Tom Ginsburg warns that continued democratic decline could nudge the entire international legal order towards a system of

[73] *See* Steinberg, Chapter 1.
[74] *See* Ginsburg, Chapter 3.
[75] *See* Ramji-Nogales, Chapter 14.
[76] *See* Gathii and Puig, Chapter 2.
[77] *See* Sandholtz, Chapter 12.

"authoritarian international law."[78] Although a system of authoritarian international law would be more sovereignty based, and less rules based, than the current system, it would still be more rules based than the international legal order before World War II.

Table Two
Summary of Major Threats

Underlying Causes	Key Threats	Potential Consequences
	Autonomous Weapons; Cyber Weapons	Could weaken or undermine both *jus in bello* and *jus ad bellum*
	Rise of China	Tends to weaken int'l human rights. Will likely contribute to fragmentation of int'l trade law.
Anti-migrant sentiment. Increased inequality within rich countries. Continued North-South inequality.	Democratic Decline	Tends to weaken or undermine int'l human rights.
Increasing # of states. Increased influence of non-state actors. Decline of U.S. power and leadership.	Dispersion of Power	Makes it more challenging to maintain and enforce a wide range of rules affecting peace, prosperity, and human rights.
	Climate Change	Could potentially threaten the entire rules-based international order.

The major threats I have discussed so far—new technologies, dispersion of power, the rise of China, democratic decline, inequality, and anti-migrant animus—may well weaken the rules-based international order, but they are unlikely to revolutionize that order, or drive us back to the type of sovereignty-based order that existed before 1945. The same cannot be said with respect to climate change. As Maxine Burkett warns us, "[g]iven the current state of the climate, the international legal order (ILO) must evolve simply to avoid collapse."[79] Climate change threatens to disrupt every aspect of the international legal order. Therefore, if we want to preserve a rules-based international order, and avoid a descent into the type of sovereignty-based order that existed before World War II, the world's major carbon emitters—especially the United States and China—will need to cooperate to combat climate change.

[78] *See* Ginsburg, Chapter 3.
[79] Burkett, Chapter 4, p. xx.

III
Responding to Those Threats

Until this point, this essay has been largely descriptive. Part III turns from description to prescription. I assume that there is a need for global cooperation to address global threats, like pandemics and climate change. I also assume that the United States and China will be powerful adversaries for the next several decades, and that China will use its power to nudge the system in the direction of a more sovereignty-based international order. Hence, the question arises: how can the United States and other liberal democracies best respond to the threats summarized in Part II, preserve a rules-based order that is consistent with liberal, humanitarian values,[80] and balance the reality of strategic competition with the need to cooperate with China in areas of common interests? In addressing this question, I speak only for myself, and not for the other contributing authors to this volume.

A. Dispersion of Power

The dispersion of power in the international system is a simple fact that must be accepted in the twenty-first century. Between 2000 and 2018, China's share of global GDP increased from about 3 percent to about 14 percent. During that same period, the U.S. share of global GDP decreased from about 26 percent to about 21 percent.[81] Moreover, as noted previously, the number of UN member states has increased dramatically since 1945.

In the post-Cold War era, the United States attempted to create a rules-based order that was both liberal and global. It pursued that agenda by expanding membership in the WTO to encompass almost all nations, by leveraging U.S. economic power to promote the so-called Washington Consensus, and by engaging in military adventurism based on a misguided attempt to use U.S. military power to spread democracy and human rights around the globe.[82] In the current geopolitical environment, it is no longer possible (if it ever was) to spread humanitarian liberalism on a global basis in the areas of international trade and human rights. The United Nations and the WTO will continue to serve important functions, but those organizations have so many member states with so many diverse interests that they are not likely to be effective instruments for promoting a humanitarian liberal agenda. Moreover, China exerts significant influence in both the WTO and the United Nations, and it will use that influence to resist such an agenda. Therefore, the dispersion of power in the international system means that future efforts to advance the goals

---

[80] For present purposes, the phrase "liberal, humanitarian values" encompasses a normative commitment to free trade and free markets, as well as a normative commitment to the values embodied in the Universal Declaration of Human Rights, including a commitment to racial equality and to the principle that economic and social rights are inseparable from civil and political rights.

[81] TheGlobalEconomy.com, *Percent of World GDP: Country Rankings*, https://www.theglobaleconomy.com/rankings/gdp_share/

[82] *See* Steinberg, Chapter 1.

of humanitarian liberalism in the international order are more likely to succeed if they focus on regional and plurilateral arrangements, not global institutions.

As Anne-Marie Slaughter has argued persuasively, a range of non-state actors play an increasingly important role in the modern world.[83] In the first quarter of 2021, Amazon produced total sales of about 108 billion dollars[84]—substantially more than the annual gross domestic product of Nepal, a country of 30 million people.[85] In 2019, the Bill and Melinda Gates Foundation distributed more than $5 billion in total direct grantee support.[86] In contrast, Japan, which is the third wealthiest country in the world, spent about $16 billion on official development assistance in 2020.[87]

Some non-state actors are making an important contribution to the task of preserving a rules-based order. Microsoft's advocacy for a "Digital Geneva Convention" is one excellent example.[88] However, other non-state actors—including terrorist organizations and transnational criminal enterprises—pose a significant threat to the rules-based order. To preserve and potentially strengthen a rules-based international order in the future, the United States will need to collaborate with private companies and charitable foundations whose goals align with liberal, humanitarian values. At the same time, we need to devise ways to combat terrorism and transnational crime without condoning lawless behavior by governments that is inconsistent with those values. More broadly, in thinking about strategies to preserve a rules-based international order, scholars and practitioners must acknowledge that sovereign states are no longer the only important actors in the international system. Accordingly, we need to re-conceive international law in a way that recognizes the important influence of a range of non-state actors.

B. New Weapons Technologies

During the Cold War, the United States and the Soviet Union cooperated to promote their common interest in combating the proliferation of nuclear weapons and other weapons of mass destruction (WMD), despite the generally adversarial nature of the U.S.-Soviet relationship. Similarly, in the twenty-first century, the United States must collaborate with China and Russia to counter the threat posed by new weapons technologies—including autonomous weapons and cyber

---

[83] *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

[84] Tugba Sabanoglu, *Amazon: Quarterly Net Revenue 2007-2021* (Apr. 30, 2021), https://www.statista.com/statistics/273963/quarterly-revenue-of-amazoncom/

[85] Nepal's GDP in 2017 was about $79 billion. CIA, THE WORLD FACTBOOK: NEPAL, https://www.cia.gov/the-world-factbook/countries/nepal/ (visited July 1, 2021).

[86] Bill and Melinda Gates Foundation, *2019 Annual Report*, https://www.gatesfoundation.org/about/financials/annual-reports/annual-report-2019

[87] *See* OECD.Stat, *Total Flows by Donor*, https://stats.oecd.org/Index.aspx?DataSetCode=TABLE1# (visited July 1, 2021).

[88] *See* Microsoft, *A Digital Geneva Convention to Protect Cyberspace*, https://www.microsoft.com/en-us/cybersecurity/content-hub/a-digital-geneva-convention-to-protect-cyberspace (visited July 1, 2021).

weapons—without allowing the ideological competition in areas like human rights to stymie needed cooperation in areas of common interests. The Cold War precedent provides grounds for guarded optimism that the United States and China will find ways to cooperate to promote their shared interests, while simultaneously competing as adversaries in other areas.

Consider, first, existing arms control regimes. The Nuclear Non-Proliferation Treaty[89] and the Chemical Weapons Convention[90] have achieved notable success in limiting the proliferation of nuclear and chemical weapons. Similarly, existing export control regimes like the Missile Technology Control Regime (MTCR)[91] have helped control the spread of ballistic missile technology and other weapons technologies. As of this writing, the evidence suggests that the rules-based order related to ballistic missiles and weapons of mass destruction is not unraveling. It is fair to assume that the United States, China, and Russia will continue to cooperate to maintain these existing regimes.

In contrast, new technologies like cyber weapons and autonomous weapons pose greater challenges. States created a Group of Government Experts (GGE) on lethal autonomous weapons in 2016-17, but the GGE has made little progress to date in negotiating agreed limitations on such weapons.[92] Progress in negotiating agreed rules governing the use of cyber weapons has been equally slow. In thinking about strategies to preserve a rules-based order in this area, it is helpful to distinguish between arms control and export controls. An arms control treaty would limit the capabilities of powerful states like the United States, China, and Russia. At present, none of the major world powers appears to have any significant interest in concluding a treaty that would limit its own military capabilities with respect to either cyber or autonomous weapons.

However, the world's major powers do have a shared interest in restricting the proliferation of cyber and autonomous weapons. These are areas where the world is divided between "haves" and "have nots." The "haves" share a common interest in preventing the spread of sophisticated weapons technology both to smaller states and to non-state actors. Hence, one could imagine the development of a new, multilateral export control regime, similar to the Nuclear Suppliers Group (NSG) dual-use guidelines[93] or the Missile Technology Control Regime (MCTR). Of course, the

---

[89] Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970) [hereinafter NPT].

[90] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 317 (entered into force Apr. 29, 1997) [hereinafter CWC].

[91] *See* Missile Technology Control Regime, *MTCR Guidelines and Equipment, Software and Technology Annex*, https://mtcr.info/mtcr-guidelines/ [hereinafter, MTCR guidelines].

[92] See United Nations Office for Disarmament Affairs, *Background on LAWS in the CCW*, https://www.un.org/disarmament/the-convention-on-certain-conventional-weapons/background-on-laws-in-the-ccw/ (visited July 1, 2021).

[93] *See* Nuclear Suppliers Group, *Guidelines for transfers of nuclear-related dual-use equipment, materials, software, and related technology*, INFCIRC/254, Part 2,

technical challenges to designing an effective export control regime are daunting. As Chris Jenks notes in his chapter for this volume, "what distinguishes an autonomous weapon is essentially lines of computer code."[94] The same point applies equally to cyber weapons. Since computer code can be transmitted almost instantaneously across national borders, traditional approaches to multilateral export control agreements—which tend to focus primarily on hardware,[95] not software—would have to be modified to address both cyber and autonomous weapons.

Even so, two factors suggest that the challenge of designing an effective export control regime for cyber and autonomous weapons is not insurmountable. First, the United States, Russia, and China all have a strong interest in restricting the spread of cyber and autonomous weapons to small states and non-state actors to preserve their military advantage—not in relation to each other, but in relation to less powerful actors. One should be hesitant to bet against the ability of powerful states to devise rules that advance their shared interests.

Second, technical knowledge is arguably the most important input in creating effective cyber weapons and/or autonomous weapons. The United States and other major powers have extensive experience regulating the diffusion of technical knowledge related to nuclear weapons, cryptography, and other sensitive technologies. Of course, no regime can completely halt the diffusion of knowledge. However, a set of controls designed to slow the diffusion of knowledge could help ensure that any weapons developed by small states or non-state actors would be largely ineffective against the relatively sophisticated defenses that the United States and other major powers are capable of deploying to defend themselves against cyber and autonomous weapons.

In sum, there are grounds to believe that the threat posed by cyber and autonomous weapons can be mitigated to some extent by a type of great power condominium that divides the world between "haves" and "have nots." A multilateral export control regime along these lines could potentially make an important contribution to the project of preserving a rules-based order related to the *jus in bello* and *jus ad bellum*.

C. Climate Change

Climate change, to reiterate, is the single greatest current threat to the rules-based international order. As Daniel Bodansky says, it "is the mother of all global commons problems. Solving it will require collective action by the entire international community to reduce and

---

https://www.nuclearsuppliersgroup.org/en/guidelines [hereinafter, NSG dual-use guidelines]. During my government service, I had a major hand in drafting an early version of the NSG dual-use guidelines.

[94] Jenks, Chapter 7, at xxx.

[95] Existing export control regimes do regulate software exports. *See, e.g.*, MTCR guidelines, *supra* note 91, NSG dual-use guidelines, *supra* note 93. However, existing regimes focus primarily on hardware, treating regulation of software as an adjunct. A different approach will probably be necessary to develop effective controls for cyber and autonomous weapons.

eventually phase out net greenhouse gas emissions."[96] A report prepared by scholars at Princeton University shows that the United States must overcome extraordinarily complex technical and political challenges to reach "net zero" carbon emissions by 2050.[97] For the international community to achieve net zero emissions by 2050 on a worldwide basis is an even more daunting challenge. It is beyond the scope of this essay to offer a detailed prescription for combatting climate change, but two general points bear emphasis.

First, according to Susan Biniaz, a former State Department lawyer who worked on several international environmental agreements, "[n]on-State entities have become more significant as climate actors, not just in the United States . . . but all over the world."[98] Key non-state entities include: international organizations, such as the International Maritime Organization (IMO);[99] sub-national governments, such as the government of California;[100] private companies that are making substantial investments in climate-friendly technology;[101] and a wide range of non-governmental organizations (NGOs) that continue to pressure governments to take more aggressive measures to combat climate change. Thus, climate change illustrates the broader point that a successful response to some of the most challenging threats to the rules-based international order (including global pandemics[102]) requires coordination among a broad range of state and non-state actors.

Second, a successful approach to combatting climate change clearly requires cooperation between the United States and China, the world's two largest carbon emitters (and the world's two largest economies). However, to remain faithful to its core values, the United States must confront China when China engages in behavior that is simply unacceptable, such as the forcible extinguishment of democracy in Hong Kong, and the persecution of almost one million Uighurs

---

[96] Daniel Bodansky, *Climate Change: Reversing the Past and Advancing the Future*, 115 AJIL UNBOUND 80, 80 (2021).

[97] *See* ERIC LARSON ET AL., NET-ZERO AMERICA: POTENTIAL PATHWAYS, INFRASTRUCTURE, AND IMPACTS (2020), https://netzeroamerica.princeton.edu/the-report. The phrase "net zero emissions" means that the amount of carbon introduced into the atmosphere by various carbon emitting technologies must be no more than the amount of carbon removed from the atmosphere by various techniques for carbon capture.

[98] Susan Biniaz, *"Multilateralism," The Climate Challenge and the (Greater Metropolitan) Paris Agreement*, WILSON CENTER (Sept. 30, 2020).

[99] *See* Tae-Hwan Joung et al., *The IMO Initial Strategy for Reducing Greenhouse Gas (GHG) Emissions, and its Follow-up Actions Towards 2050,* 4 J. INT'L MARITIME SAFETY, ENVT'L AFF. & SHIPPING 1 (2020).

[100] *See* David L. Sloss, *California's Climate Diplomacy and Dormant Preemption*, 56 WASHBURN L.J. 507 (2017).

[101] *See, e.g.*, Carly Anderson, *Carbon Capture: Part 1, An Introduction and a Look Ahead*, March 11, 2020, https://medium.com/prime-movers-lab/carbon-capture-part-i-147c0d64ca29.

[102] *See* Lawrence O. Gostin et al., *How the Biden Administration Can Reinvigorate Global Health Security, Institutions, and Governance*, 115 AJIL UNBOUND 74 (2021).

and other Muslims detained in facilities that resemble concentration camps.[103] Thus, to quote Dan Bodansky again, the United States "must balance leadership with humility" and it must "balance the use of cooperative and confrontational tools."[104] It will be an ongoing challenge for U.S. diplomats and political leaders to strike the right balance. Proponents of a rules-based international order must hope that they get it right. Our future depends on it.

D. The Rise of China and a New Cold War

The United States must prepare itself for long-term geopolitical competition with China. Many people fear the onset of a new Cold War. However, in my view, there are good reasons to welcome a Cold War with China. During the last Cold War, the United States made significant domestic reforms related to racial equality—including both landmark Supreme Court decisions and landmark civil rights legislation—driven in part by the geopolitical goal of persuading foreigners that the US system was better than the Soviet system.[105] Similarly, in the current geopolitical environment, the United States should pursue a foreign policy designed to persuade countries in the Global South that the US system is better than the Chinese system. To make that case persuasively, the United States will need to adopt progressive domestic reforms to promote racial equality, and to promote economic security and economic opportunity for those at the bottom of the economic ladder. Although proposals for such domestic reforms will undoubtedly encounter political resistance, the rhetoric of "a new Cold War with China" could be a useful rallying cry (as it was in the 1950s and 1960s) to help overcome political polarization at home and build bipartisan support for progressive domestic reforms.

For the United States to win the battle for hearts and minds in the Global South, we will need to compete more effectively with China in the information warfare domain. As I have argued elsewhere, we have a potential strategic advantage in this area because much of the competition in information warfare is occurring on the "battlefield" of US social media platforms (Facebook, Twitter, YouTube, etc.), and the US government has the power to regulate those platforms.[106] The US is currently squandering that potential strategic advantage by failing to regulate social media, and by granting Chinese and Russian agents unrestricted access to US social media platforms. Moreover, Chinese and Russian cyber troops are exploiting US social media platforms to spread propaganda and disinformation to a global audience. Therefore, to win the information warfare

---

[103] *See* Austin Ramzy and Chris Buckley, *Absolutely No Mercy: Leaked Files Expose How China Organized Mass Detentions of Muslims*, N.Y. TIMES, Nov. 16, 2019.
[104] Bodansky, *supra* note 96, at 80-81.
[105] *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000).
[106] *See* DAVID L. SLOSS, TYRANTS ON TWITTER: PROTECTING DEMOCRACIES FROM INFORMATION WARFARE (forthcoming 2022).

competition, the United States should ban Chinese and Russian agents from U.S. social media platforms.[107]

Assuming that the United States is entering into a Cold War with China, we will not win that war militarily. Indeed, avoiding military confrontation with China should be a central goal of U.S. foreign policy in the coming decades. However, as the saying goes, "if you want peace, prepare for war." Thus, the United States must maintain strong military forces to help ensure that the Cold War with China does not become a hot war. The potential for military conflict in and around Taiwan presents the greatest danger in this respect.[108] Deterring China from attempting a forcible takeover of Taiwan will be a major challenge for the next decade or more. Failure to maintain an effective deterrent would have serious negative ramifications for the future of a rules-based international order.

Managing economic relations with China will require a delicate balance of cooperation and competition. In the twentieth century Cold War, the United States and its NATO allies operated economies that were almost completely independent from the economies of the Soviet Union and other Warsaw Pact countries. The economic reality today is quite different because Chinese and Western economies are highly interdependent. China has demonstrated its willingness to exploit that interdependence by using economic coercion to achieve its political goals. For example, in fall 2020, China "ordered traders to stop purchasing at least seven categories of Australian commodities," to retaliate against Australia after "Prime Minister Scott Morrison's government . . . called for an independent probe into the origins of the coronavirus."[109]

During the euphoria of the post-Cold War era, "globalisation led people to believe that companies could build supply chains wherever there was a labour or other cost advantage. The result would be lower prices, higher profits and greater prosperity internationally."[110] More recently, though, "great-power competition between the US and China piled on, making it obviously not in either country's national interest to have deeply entangled systems of research and production for their defence items and high technology."[111] Thus, Australia, India and Japan recently introduced a "Resilient Supply Chain Initiative" (RSCI) to allay concerns about "security risks associated with production networks significantly embedded in, or connected to, China. By disengaging strategic supply chains—semiconductors, automobiles, pharmaceuticals, and telecommunications—from China, and repositioning them substantially in countries without

---

[107] *See id.*
[108] *See* Oriana Skylar Mastro, *The Taiwan Temptation: Why Beijing Might Resort to Force*, FOREIGN AFFAIRS (July/Aug. 2021).
[109] BLOOMBERG NEWS, *China to Halt Key Australian Imports in Sweeping Retaliation*, Nov. 2, 2020.
[110] Michael Shoebridge, *Coronavirus and the Death of Xi's China Dream*, AUSTRALIAN STRATEGIC POLICY INSTITUTE, Feb. 28, 2020, https://www.aspistrategist.org.au/coronavirus-and-the-death-of-xis-china-dream/
[111] *Id.*

security threats, proponents of the RSCI hope to decouple from China in a broader strategic sense."[112]

It is neither realistic nor desirable to try to end economic interdependence with China completely. However, in the context of the new Cold War, compelling geopolitical considerations support a partial decoupling to reduce supply chain vulnerability in areas of strategic significance. At the same, it remains true that liberal international trading rules promote economic prosperity for everyone. For reasons explained by Kathleen Claussen in her contribution to this volume, the WTO is unlikely to be a viable forum for negotiating new agreements to broaden or deepen trade liberalization.[113] Therefore, the United States should attempt to broaden and deepen free trade with other democracies by joining the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and by reviving negotiations for the Transatlantic Trade and Investment Partnership (T-TIP). Liberal trading rules under these mega-regional trade agreements would help generate the wealth that the United States and its allies need to compete effectively with China, while simultaneously allowing states parties to reduce their vulnerability to Chinese economic coercion. Finally, the United States should adopt appropriate domestic policies to ensure that the economic benefits of free trade agreements accrue to a broad segment of the population, not just to the privileged elite.[114]

E. Democratic Decline and a New Marshall Plan

As explained previously, the ongoing trend of democratic decline is weakening the international human rights regime and nudging the broader system in the direction of a more sovereignty-based international order. The United States has a strong national interest in reversing democratic decline because a world with more democracies and fewer autocracies will generally be more hospitable to U.S. interests and values.

After World War II, the United States helped rebuild the domestic economies in Japan and Western Europe by devoting substantial resources to the Marshall plan. The goals of the Marshall plan were not merely economic; U.S. assistance also helped establish stable democracies in both Japan and Germany, despite the prior history of autocratic governments in both countries. As of 2021, the United States does not have the wealth (or the generous spirit) to fund a new Marshall plan for the entire world. However, we can combat the trend of democratic decline by: a) partnering with other G7 countries, wealthy philanthropic foundations, and large private companies; and b) targeting as recipients a select group of low and middle-income countries that have reasonably good democratic credentials.

---

[112] Amitendu Palit, *The Resilient Supply Chain Initiative: Reshaping Economics Through Geopolitics*, THE DIPLOMAT, Sept. 10, 2020.
[113] *See* Claussen, Chapter 9.
[114] *See* Judith Goldstein, *A New Era for Trade?*, 115 AJIL UNBOUND 52 (2021).

In selecting a group of beneficiary countries for the new Marshall plan, donors should consider both economic need and democratic *bona fides* because a central goal of the new Marshall plan should be to reverse the trend of democratic decline. I developed an illustrative list of potential beneficiaries by combining data from two sources. To measure economic need, I used the World Bank list of economies to classify national economies into four groups: "high income," "low income," "lower middle income," and "upper middle income."[115] To measure democratic credentials, I used the V-dem "liberal democracy" index. According to the V-dem codebook, "the liberal principle of democracy emphasizes the importance of protecting individual and minority rights against the tyranny of the state and the tyranny of the majority. The liberal model takes a "negative" view of political power insofar as it judges the quality of democracy by the limits placed on government."[116] Countries with strong protection for individual rights score closer to one on the liberal democracy index, whereas countries with autocratic governments score closer to zero.

Since countries that are lower on the income scale tend to score lower on the liberal democracy index, I adopted a "sliding scale" approach to select an illustrative list of beneficiary countries for the new Marshall plan. The resultant list includes: low-income countries with a score of .35 or better on the libdem index (The Gambia, Liberia, Malawi, and Sierra Leone); lower middle income countries with a score of .45 or better (Benin, Bhutan, Cape Verde, Ghana, Lesotho, Mongolia, Nepal, Sao Tome and Principe, Senegal, Solomon Islands, Sri Lanka, Timor-Leste, Tunisia, and Vanuatu); and upper middle income countries with a score of .55 or better (Argentina, Armenia, Botswana, Costa Rica, Jamaica, Namibia, Peru, South Africa, and Suriname). Notably, the list of beneficiaries is shaped less by the economic factors that tend to guide traditional development assistance and more by political calculations about which countries have the greatest potential to become stable democracies. If the G7 and other partners decide to pursue a new Marshall plan, the donors will invariably develop their own criteria for selecting beneficiary countries. Regardless, my illustrative list is instructive because the group of beneficiary countries is geographically diverse (an important goal), and the total of 27 beneficiary countries is neither too small nor too large for the program to be effective.

The United States cannot and should not try to implement the new Marshall plan by itself; the US will need to partner with other G7 countries,[117] large private corporations, and large

---

[115] Umar Serajuddin and Nada Hamadeh, *New World Bank Country Classifications by Income Level: 2020-2021* (July 1, 2020), https://blogs.worldbank.org/opendata/new-world-bank-country-classifications-income-level-2020-2021.

[116] V-DEM INSTITUTE, V-DEM CODEBOOK 43 (v10 March 2020), https://www.v-dem.net/en/data/data-version-10/.

[117] For these purposes, the G7 could be expanded to include other members of the OECD Development Assistance Committee (DAC) that have a proven record of providing generous development assistance. However, the full DAC, which includes 30 countries, is probably too large a group to permit efficient policy coordination. *See* OECD, Development Assistance Committee, https://www.oecd.org/dac/development-assistance-committee/ (last visited July 6, 2021).

charitable foundations to develop a coordinated strategy. One key element of that strategy should be an agreement among G7 countries to increase the number of employment-related visas for migrants from the agreed list of beneficiary countries.[118] In recent years, the total level of remittances sent by migrant workers in rich countries to family members in their home countries has been far greater than the total level of Official Development Assistance (ODA) sent from wealthy countries to poorer countries. For example, "remittances reached a record high of $548 billion in 2019 . . . outstripping international aid three times over."[119] Moreover, "worker remittances have a democratizing effect" because they "are often the only source of foreign income that circumvents the government. Beyond the reach of the state, those funds facilitate protest and undermine authoritarian tactics, tipping the balance of power toward citizens who mobilize for democratic change."[120]

Private investment in the information and communications technology sector (ICT) in beneficiary countries should also be a critical element of the new Marshall plan. In the past decade, Chinese companies have been actively involved in exporting ICT equipment and technology to the global South.[121] Chinese exports in the ICT sector have contributed to the rise of "digital authoritarianism"—a set of laws, policies and technical practices that empower governments to exploit digital technologies for surveillance, censorship, and online content manipulation.[122] Empirical analysis shows "that those authoritarian regimes that rely more heavily on digital repression are among the most durable."[123] In short, the exploitation of information and communications technologies by states that practice digital authoritarianism strengthens autocratic control. To counter this trend, the United States should partner with Western ICT companies to promote investments in Marshall plan beneficiary countries that support an open information environment that is largely free from government control.

The new Marshall plan should also include traditional forms of development assistance that promote economic growth in developing countries. As James Gathii and Sergio Puig note in their contribution to this volume, persistent North-South inequality is a major source of dissatisfaction with the current rules-based international order.[124] The new Marshall plan should aim to reduce the income gap between poor countries and wealthy countries by providing targeted development assistance to selected beneficiary countries. The 27 countries in my illustrative list

---

[118] *See* TOM GINSBURG, DEMOCRACIES AND INTERNATIONAL LAW (forthcoming 2021) (developing this idea in more detail).
[119] Abel Escriba-Folch, Covadonga Meseguer, and Joseph Wright, *Global Migration Drives Global Democracy: How Workers Abroad Weaken Dictators Back Home*, FOREIGN AFFAIRS (June 2, 2021).
[120] *Id.*
[121] *See generally* Danielle Cave et al., *Mapping China's Technology Giants,* AUSTRALIAN STRATEGIC POLICY INSTITUTE (April 2019).
[122] *See* Andrea Kendall-Taylor, Erica Frantz, and Joseph Wright, *The Digital Dictators: How Technology Strengthens Autocracy*, FOREIGN AFFAIRS (Mar.-Apr. 2020).
[123] *Id.* at 112.
[124] Gathii and Puig, Chapter 2.

have a combined population of about 320 million people,[125] roughly the equivalent of the current U.S. population. If the United States partners with other G7 countries and major philanthropic foundations, we can help lift millions of people out of poverty without breaking the bank at home. Moreover, if development assistance is combined with rule-of-law programs, we can help beneficiary countries build stable democracies, while simultaneously promoting economic security for millions of people.

Finally, it bears emphasis that the effort to resist democratic decline must begin at home.[126] The quality of democratic governance in the United States has deteriorated significantly in recent years. According to Freedom House, "the United States' aggregate *Freedom in the World* score has declined by 11 points," from 94 to 83, between 2010 and 2020.[127] Reversal of that trend is essential not only to support a global effort to resist democratic decline, but also to prevail in the broader ideological competition with China. To get its domestic house in order, the United States will need to adopt progressive domestic reforms to promote racial equality, and to promote both economic security and economic opportunity for those at the bottom of the economic ladder. We must also take steps to combat the electronic amplification of lies and misinformation, which is a major factor contributing to democratic decline in the United States.[128]

The program outlined above is undoubtedly ambitious; some will say that it is unrealistic. However, in the polarized political environment in the United States today, partisans on both sides agree that rising Chinese power poses a significant threat to American values and interests. Astute political leaders may be able to exploit widespread fear of China to mobilize support for a progressive political agenda designed to revitalize democracy at home and abroad. If that effort fails, the international system will drift further in the direction of a sovereignty-based international order, because continued erosion of liberal democracy within domestic legal systems will inevitably undermine protection for human rights, which is a central element of the modern, rules-based international order.

---

[125] *See* https://www.worldometers.info/world-population/population-by-country/

[126] *See, e.g.*, Stacey Abrams, *American Leadership Begins at Home: The Global Imperative to Rebuild Governance and Restore Democracy*, FOREIGN AFFAIRS (May 1, 2020).

[127] FREEDOM HOUSE, FREEDOM IN THE WORLD 2021: DEMOCRACY UNDER SIEGE 10 (2021).

[128] *See* David L. Sloss, *Stop Electronic Amplification of Lies*, 66 ST. LOUIS UNIV. L. J. xx (forthcoming 2021).