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Deprioritizing Human Rights Will Not Protect Territorial Sovereignty

by Tara Van Ho, Rachel López and Evelyne Schmid
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When the winning powers of World War II established the United Nations (U.N.), they did so with two principal goals in mind: avoid war and ensure respect for human rights.

That those two goals are the core of the preamble to the U.N. Charter is unsurprising. The international community had not only survived a war, it had also endured a genocide that under a previous, positivist approach to law, seemed lawful to commit against a state's own citizens. Those who survived two global wars in the span of thirty years understood that there is a link between respect for the individual and respect for other nations, one that may not always seem evident but that stems from the impact of a creeping degradation of equality and respect for others. As the Institut de droit international declared in its very first session after the war: "An effective legal order between States is inseparable from respect for the human person in the internal order of each State." In her recent piece, Professor Ingrid Wuerth undervalues this intrinsic link, advocating that we deprioritize human rights for the sake of world peace.

Wuerth calls for a 'restrained' international law that is less concerned with human rights and humanitarian objectives and more narrowly focused on territorial integrity. She argues that the "prohibition on the use of force has been undermined by efforts to pursue other objectives through international law, in particular human rights and humanitarian ends." By "expanding international law to focus on human rights and humanitarian objectives at the expense of territorial integrity," she claims international law has been weakened by "credibility and other problems."

In Wuerth's telling, inter-state peace and territorial integrity sit at odds with investing in human rights because "international law is not strong enough to do everything well." As such, it should focus only on what she deems most significant—territorial integrity—while diminishing objectives that would threaten that goal. Humanitarian objectives, she argues, should be pursued through other means while international law's core function should be to mediate states' territorial relationships.

Yet even in Ukraine today, we can see the link between respect for the individual and respect for the territory of another state playing out in stark form. The historical lead-in to the current war in Ukraine is deeply linked to the denial of human rights by Russian and past Ukrainian

leadership, and their reclamation (albeit with limited success) by the Ukrainian people. The 2014 Euromaidan protests centred on the need to rid Ukraine of corruption and human rights abuses by a Russian-backed government. It was that rejection of Russian-backed corrupt leadership that Russian President Vladimir Putin has responded to, first with the occupations of Crimea, Donetsk, and Luhansk and now with threats to Ukrainian sovereignty itself. That Putin is invoking baseless claims of genocide to try to legitimize and justify his current invasion does not change that reality or the legitimacy of his conduct in Ukraine.

Wuerth's proposal would have the United Nations disregard one of its two core purposes. It would also empower bad actors (and bad-faith actors) to define international law solely by and through their breaches rather than our communal goals and interests. Over time, this would require a constant narrowing of international law as each new breach or bad-faith argument linked to the disregard of territorial sovereignty would require a recapitulation of international law's focus solely to preserve its narrowest remit.

We do not believe this path is viable or desirable.

In response, we wish to focus on three related issues: the centrality of human rights to inter-state peace; the use of human rights and humanitarian law as a 'bogeyman' of international law; and the significance of human rights as a unique goal within international law.

Human Rights and Inter-state Peace

The language of human rights has been frequently invoked as a pretence for war, currently by Putin regarding Ukraine and previously by western states, inter alia, seeking regime change in Libya and Iraq. But, as Kevin John Heller has explained (and summarized here), human rights and humanitarian concerns are rarely invoked in any real legal sense to justify assaults on territorial integrity, with the UK's justification of action in Syria in 2018 being a troubling exception. Instead, human rights considerations are often used as political propaganda aimed at garnering popular support for war. That political propaganda should have little place in defining the appropriate relationship in international law between human rights and the prohibition on the use of force or the protection of territorial integrity in article 2(4) of the U.N. Charter.

As lawyers, we must not allow the manipulation of the language of human rights to obscure the connection between the two. Respect for human rights and territorial integrity generally go hand and hand instead of being at odds. The failure to respect human rights can generate significant armed conflicts that cross borders, such as those experienced on the borders between Colombia and Venezuela and Colombia and Peru. And, as the recent examples of North Korea and China show, nations that flout human rights at home are often willing to disrespect the territorial integrity of their neighbours.

Ultimately, a stronger commitment to human rights—rather than a weaker one—is likely to

enhance respect for territorial integrity rather than undermine it.

The Mythology of Human Rights Protections

A commitment to human rights takes time and effort. It is much easier to blame human rights for failing to solve the world's problems—or adding to those problems—than it is to generate real respect for them. A mythology has emerged suggesting human right laws is responsible for, or at least complicit in, the rise of populism or income inequality.

Unfortunately, the protection of human rights law—and its expansion—is not nearly as powerful as their critics would suggest and cannot be blamed for the limits of international law. If only respect for human rights were as central to, and influential within, the international legal system as Wuerth and others suggest, we suspect the world would be a more peaceful place.

Instead, the international community has reserved its weakest enforcement mechanisms for human rights and environmental protection. For international peace and security, the U.N. Charter allows for binding resolutions from the Security Council. For international investment law, arbitration panels can order awards in the billions that are enforceable without appeal in over 180 states and territories. For trade law, WTO panels can order a state's laws unenforceable. For international criminal law (and indirectly at least parts of international humanitarian law), we have established *ad hoc* tribunals and now the International Criminal Court.

But, for human rights, the U.N. system only permits non-binding views, opinions, and requests from treaty bodies and special procedure mandate holders. Human rights defenders must hope that the moral power of the claim for human rights will *persuade* a state to comply—or will *compel* the international community to act. Because the law itself does not provide for it.

Human rights have not assaulted territorial integrity: human rights law is not that powerful.

Moreover, even if Putin's claims of genocide were true, nothing in human rights law would justify his war. Even when the most egregious human rights violations occur, international law does not authorize states to unilaterally take action absent self-defence. This is perhaps the greater irony of Wuerth's argument: the erosion of territorial sovereignty by human rights law is more imagined than real. Even in the case of Russia's current invasion of Ukraine, it is the expansion of claims of self-defence, a principle meant to protect territorial integrity, that bears most of the blame.

Human Rights as a Legitimate Means and End

What is missing from Wuerth's argument is the place where human rights often matter most—within states. Where it is most effective, human rights law helps to prevent states from mistreating their own population and provides greater protections for the most vulnerable

among us.

Domestic state officials, local bureaucrats, non-governmental organizations and other "law intermediaries" regularly use human rights conventions in their day-to-day work. Invoking human rights law is rarely a panacea, but painstaking, mundane processes built on human rights law have led to concrete improvements for real people. By defining international legal expectations, the United Nations has provided the foundation for advancing human rights through domestic systems. We have witnessed the prohibition and prosecution of acts of torture and extrajudicial killings, the provision of healthcare and education on non-discriminatory grounds, greater access to public transportation for persons with disabilities, rebukes of unlawful evictions, and the creation of shelters from domestic violence, all built on international legal claims.

Most of the time, these successes occur far outside the radar of the international law literature, but the effects of international human rights law seem strongest in limiting and framing sovereign power within borders rather than between them. To say that international lawyers and the United Nations should deprioritize human rights work because it has been rhetorically misappropriated by states would throw the baby out with the bathwater.

Image: Information is posted for people fleeing war-torn Ukraine at the Hauptbahnhof main railway station on March 6, 2022 in Berlin, Germany (Photo by Carsten Koall/Getty Images).

About the Author(s)

Tara Van Ho

Tara Van Ho (@TaraVanHo) is Senior Lecturer at the University of Essex (U.K.).

Rachel López

Rachel López (@Rachel_E_Lopez) is an Associate Professor of Law and was recently named an Inaugural Dean's Research Fellow at the Thomas R. Kline School of Law at Drexel University. She also is a Fellow at the Carr Center for Human Rights Policy at the Harvard Kennedy School.

Evelyne Schmid

Associate Professor of International Law at the University of Lausanne. Follow her on Twitter @SchmidEvelyne.