CHAPTER 4

INTERNATIONAL LAW AND THE NEW WORLD ORDER: REDEFINING SOVEREIGNTY

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We have before us the opportunity to forge for ourselves and for future generations a new world order, a world where the rule of law, not the law of the jungle, governs the conduct of nations.[1]

President George H. Bush

World events since 1648 have reflected the political, social, economic, and military aspirations of people organized into sovereign states. Increasingly, they reflect the influence and authority, both real and perceived, of international law, a development which has become evident since the end of the Cold War, but whose roots go back much further. Recent international interventions in places as diverse as Kuwait, Somalia, East Timor, Haiti, and Kosovo, conducted under the auspices of the United Nations, regional organizations such as NATO, or by ad hoc coalitions, are shaped by a large and growing body of treaties, practice, and custom collectively referred to as international law.

Americans traditionally respect and support international law and have in fact been instrumental in its development for more than a century.[2] At the same time, they become frustrated when international law restrains or limits the pursuit of national interests. This was vividly illustrated in the debates and reactions surrounding American-led efforts to compel disarmament or regime change in Iraq throughout 2002 and 2003. Regardless, it is essential that strategic leaders understand the global environment as it exists today. International law constitutes an important element of the geopolitical environment, one we ignore at our peril.

This chapter traces the development and evolution of international law, its principal components and characteristics, and its relative influence on international politics and events over time. It proposes that international law has evolved to a level where it competes with sovereignty as an organizing principal of international relations. Although sovereignty is likely to remain a critical component of the international system, it faces a growing threat from international organizations and institutions that pursue international order and individual rights at the expense of traditional rights enjoyed by sovereign states.

Conventional wisdom would hold that this phenomenon sprung to life after the collapse of the Soviet Union and the end of the Cold War in 1990. To the contrary, as this chapter will demonstrate, the "recent" ascendancy of international law represents major developments in religion, philosophy, and law over centuries, and is shaped by the cataclysmic wars and associated excesses of the twentieth century. Critical components of today's international system matured in relative obscurity during the Cold War as groups and nations sought self-determination, peace, democracy, and individual freedoms. While it is easy for scholars and statesmen alike to overlook historical trends, we must examine how developments in international law have subtly but certainly redefined sovereignty and how states have adapted, or not adapted, to this reality.

Foundations of International Law

Humans seek order in life. Religion traditionally reflects our search for meaning and purpose, but social institutions also reflect this desire. In ancient times, families organized themselves into tribes, then cities, states, and empires. Social order implies security and a sense of predictability. Order promotes prosperity and growth — both individual and collective. At the same time, order discourages destructive social behavior and competition for scarce resources.[3] Order requires a degree of cooperation and sacrifice, and by definition some inherent limitation on individual freedom. The political process is the means usually used to create order and determine social rules and mores. Laws are crafted to facilitate and support this process.

Order may be imposed within groups or nations or states. On occasion, international order may be imposed by hegemonic powers, for example, the Roman Empire, the British Empire at its height in the nineteenth century, and by American power since 1945. But scholars typically describe the international system as unstructured, or anarchic, in nature. States strive for supremacy, or hegemony, over other states. International politics is a "ruthless and dangerous business . . . [t]his situation, which no one consciously designed or intended, is genuinely tragic."[4] Others analyze the international system in different terms: the dynamic of how states establish international order, e.g., balance of power, bipolar, or hegemonic systems; the nature of state actors as determining state behavior, e.g., democracies act one way, revolutionary states another, etc.; and the influence of individual decisionmakers, e.g., great men drive events — Churchill, Hitler, etc.[5]

Rule of law is widely regarded as an independent basis of international order. The National Security Strategy of the United States tells us that the "nonnegotiable demands of human dignity" include "the rule of law; limits on the absolute power of the state; free speech; freedom of worship; equal justice; respect for women; religious tolerance; and respect for private property."[6] Establishing the rule of law was a stated objective of international efforts in Bosnia, Kosovo, and Afghanistan, among others. Efforts to establish rule of law in places such as Kosovo and more recently Iraq, illustrate the tensions between international law and sovereignty which we will examine in detail later.

Defining International Law

Law prescribes norms of proper behavior, or as Blackstone says in his *Commentaries*, "a rule of civil conduct, commanding what is right, and prohibiting what is wrong."[7] These rules may be prescribed by the sovereign, but they are usually based on religious, cultural, and moral values. As such, the law often depends on voluntary compliance, or more precisely on social pressure to conform. Sanctions may be imposed in cases where individuals will not or cannot comply.

Others feel that laws by definition require sanctions:

> It is essential to the idea of a law that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience If there be no penalty annexed to disobedience, the resolutions or commands, which pretend to be laws will, in fact, amount to nothing more than advice. . . . [8]

Regardless, law provides a foundation for order, stability, predictability, and enjoys general acceptance by the population at large. Laws not generally accepted, perhaps because they do not reflect widely-held beliefs or morals, or serve no constructive purpose, are often ignored and prove particularly difficult to enforce.[9] Lastly, law evolves; it is not static. Laws change regularly, and considerably over long periods of time. While all this is true with respect to municipal, or domestic, law, does it apply equally to international law?

International law has been defined as "the body of rules and principles of action which are binding on

civilized states in their relations with one another."[10] Critics question, and we will examine later, whether international law can be "binding," and the efficacy of its application outside its Western European incubator — the so-called "civilized" states. Yet a closer look reveals that international law plays an essential role in global trade and commerce, regulating disputes, compensation, banking, and laws applying to a given transaction. It is indispensable to international transportation, regulating sea and air routes, privileges and immunities, and claims for loss or damage.[11] International treaties establish standards for the sciences, health, and the environment.[12]

The law of war is most familiar to us as that branch of public international law regulating armed conflict between states, and increasingly within states suffering from civil war or intrastate conflict. This body of law provided the foundation for the war crimes tribunals at Nuremberg and Tokyo following World War II, and later for the international tribunals organized to adjudicate war crimes and crimes against humanity in former Yugoslavia and Rwanda. Even more recently, the Rome Statute established the International Criminal Court, a standing, rather than ad hoc, tribunal which recently became operational and whose jurisdiction may be unlimited.[13]

In most aspects, international law serves the same purposes as and shares common attributes with municipal law: it provides a foundation for order; is founded on religious, cultural, and moral values; serves to provide stability and predictability; and enjoys general acceptance among the international community. International law protects rights of states and individuals alike. In one important particular, however, the international legal system differs from municipal systems — there is no sanction for noncompliance, if by sanction is meant imposition of penalty by a higher authority. This theme recurs in any discussion of international law, although its relevance is often overstated.[14]

Sources of International Law

Classical Antecedents

Historians refer to the "laws" of ancient Greece and Rome and their influence on modern western institutions. Although recognizing that a sophisticated system of laws provided a foundation for order and stability, as well as for a wide-ranging commercial system that stretched from Britain to Asia Minor and ringed the Mediterranean, neither civilization understood the concept of international law as we apply the term today.[15] Ancient Greeks, Romans, and Chinese did not customarily treat outsiders as their equals in an international system of equals. Greeks regarded non-Greeks as uncivilized; The Roman Empire didn't negotiate acquisitions, it simply took them. The Chinese considered any group of peoples outside the "Middle Kingdom" as barbarians not worthy of their full attention.[16]

Natural Law, Feudalism, and Westphalia

Elements of modern international law existed before creation of the Westphalian system in 1648. Ancient philosophers, the Romans, and their heirs believed in "natural law," a higher law of nature that controlled all human endeavors, and to which all are bound, even kings and rulers. An expression of this concept is found in the term *ius gentium,* meaning a principle of universal application that all follow because it has been independently discovered by application of reason, a "natural law." Our contemporary use of the phrase "human rights," examined in this context, becomes for us a form of natural law, or *ius gentium,* and a fundamental principle of international order.[17]

Other elements of international order evolved during the Middle Ages, particularly concepts of property rights and loyalty to the sovereign, key elements of modern nation-states. Under feudalism, property rights of the ruler shaped feudal society, and dictated a network of complicated, but well-understood, relationships

that provided stability and order. Feudalism depended on loyalty up and loyalty down the social hierarchy. All were bound by reciprocal responsibilities. While the Catholic Church provided legitimacy and support of feudal institutions, these principles survived the Reformation. The idea that states enjoy sovereignty and the right to control territory is a feudal legacy.[18]

Finally, following the self-destructive upheaval of the religious wars of the sixteenth and seventeenth centuries, the Treaty of Westphalia in 1648 provided needed order, stabilizing borders and relationships. Kings could dictate any religion they wished within their borders, but foreswore any rights to interfere in the religious affairs of other sovereign states. This principle was frequently violated for political, if not religious, reasons, but the Treaty achieved its purpose.

Once states became sovereign, a way had to be found for them to interact on a nominal basis of equality. Guiding principles of relations between sovereign states rested on five basic assumptions. States had the right to: make laws; act independently in international affairs; control their territory and people; issue currency; and utilize the resources of the state. Sovereignty thus became the organizing element of modern history.

International Law Hierarchy

The sources of international law are divided into four categories, arranged in a hierarchy.[19] At the top are conventions, treaties, and agreements, such as the UN Charter, or the Law of the Sea Treaty. These represent contractual relationships between sovereign states, and states are bound by their obligations freely undertaken.[20]

The second source of international law is the practice of states, referred to as customary international law. No hard and fast rule governs customary international law. It reflects the behavior of states over time, acting in accordance with what they believe to be the dominant rules of international order. Customary law exists independently of treaty law, although treaty law may help to shape customary law.[21]

The third source is principles of law recognized by the leading, or so-called "civilized," nations. International politics help to define these principles, which are also shaped by the municipal law of states.[22]

The fourth and final source of international law represents judicial decisions and the writings of jurists and scholars. These include the opinions issued by the International Court of Justice, its predecessor the Permanent Court of International Justice, the European Court of Human Rights, and the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR). Writings of scholars supplement these decisions, illustrating and explaining the state of the law based on their experience and study. Changes in the law are often preceded by debate among jurists and scholars over what the law should be. Their authority is persuasive and influential, not substantive.[23]

International Law and Sovereignty—An Evolutionary Relationship

A Marriage of Convenience

International law has never existed in a vacuum. It reflects existing norms and mores, and illustrates the difficulty of constructing international order in a disordered world. The Westphalian system has provided the fundamental framework for order for over three centuries and has greatly influenced the development of international law. Over time sovereignty has ebbed and flowed, as prevailing practices and international politics shaped the behavior of the leading states. To the extent these practices and politics establish binding precedent, they help to define international law.

This portion of the chapter examines how recognized principles of international law and sovereignty developed simultaneously over time. Although sovereignty has provided the dominant basis for international order, it has consistently adapted to accommodate evolving concepts of government, freedom, human rights, and the quest for predictability and stability,[24] the historical attributes of international law.

Sovereignty and the Divine Rights of Kings

Early models of sovereignty were based on the prevailing form of government in seventeenth century Europe — monarchies ruled by hereditary dynasties of kings or emperors. Consistent with historical political and religious practice, individuals were subordinate to the state, represented by the King. Other precedents existed, going back to classical Greece and its democratic ideals,[25] but prevailing norms made Kings absolute rulers of their states, and they exercised their authority with little regard for the sensibilities of their subjects.

Contemporary writers described the nature of this relationship. Jean Bodin wrote in 1576 that law comes from the King, who, although not bound by his own laws, was not above the law of nature, an important exception bearing on future developments.[26] Thomas Hobbes wrote in *Leviathan*: "It appeareth plainly that the sovereign power . . . is as great as possibly men can be imagined to make it."[27] Louis XIV of France, the "Sun King," epitomized the classical sovereign — not merely the head of the state, but its very embodiment, anointed by God to rule. Subjects owed unquestioning loyalty to the King, who might or might not act in their best interests. More precisely, the King's interests were the state's interests. Hence the dynastic wars of Louis XIV, waged to expand the glory of France and of Louis XIV, were the business of the King and his advisors, not the people of France. As characterized in popular culture: "It's good to be the King!"[28]

Not everyone regarded sovereignty this way. Hugo de Groot, also known as Grotius, is referred to as the father of international law for his treatises on international law and the law of war. He was also a proponent of the law of nature and reason. He saw excesses in unbridled sovereignty:

> I saw prevailing throughout the Christian world a license in making war of which even barbarous nations should be ashamed; men resorting to arms for trivial or for no reasons at all, and…no reverence left for divine or human law, exactly as if a single edict had released a madness driving men to all kinds of crime.[29]

As the culminating act of the English Civil War and the Thirty Years' War, the British throne of Charles I fell to the reformist Protestant armies of Oliver Cromwell. In 1649, one year after Westphalia, Cromwell had King Charles beheaded. Sovereignty was no longer coexistent with monarchy.[30]

The Enlightenment and Age of Reason

During the eighteenth century, philosophers, scholars, and popular writers rediscovered the writings of the ancient Greeks, combining them with Christian philosophy and natural law into a doctrine of Enlightenment. Locke, Rousseau, and Jefferson, among others, emphasized individual rights and the obligations of sovereigns toward their citizens.[31] Their beliefs were incorporated into the Declaration of Independence and the American and French Revolutions.

The established order elsewhere did not change, but regime change in America and France, replacing monarchies with democratically-based governments, was a harbinger of things to come. It advanced the idea that sovereignty vested in the people, rather than in the government or the ruler, and demonstrated the efficacy of a higher law, themes that would resurface periodically in the nineteenth century and erupt in the latter half of the twentieth. International agreements and treaties began to recognize that individuals as well as states have rights.[32]

The Concert of Europe, Industrialism and Colonialism

Following the 25-year struggle to suppress Revolutionary France and Napoleon Bonaparte, the major powers of Europe in 1815 sought to reestablish order, stability, and a balance of power. In response to Napoleon's imperial ambitions, the political leaders who met in Vienna created a system firmly grounded in sovereignty and balanced so as to preclude a return to revolution. Under the leadership of Prince Metternich of Austria and Lord Castlereigh of Great Britain, they succeeded in establishing a framework for peace that would survive essentially intact for a hundred years.[33]

Other influences shaped the nineteenth century. Charles Darwin's scientific work on evolution stimulated development of a social philosophy known as social Darwinism, extrapolating Darwin's theories of natural selection and survival of the fittest species into international relations and politics. Those nations which were strongest were most likely and best suited to survive. Social Darwinism heavily influenced political leaders such as Bismarck and Theodore Roosevelt.[34] Sovereign states exerted a sort of muscular self-interest in their international relations, demonstrating their superiority by economic growth and territorial acquisition. The last great era of Colonialism was the result, as France, Great Britain, and Germany competed to acquire overseas colonies. The United States, too, succumbed to temptation at the end of the century, acquiring overseas interests in the Hawaii, the Philippines, Cuba, and Panama, among others.[35] The sovereign rights of underdeveloped, militarily weak states counted for little in this environment.

Facilitating economic expansion in an era of relative peace were the modern technologies of steamships, railroads, and telegraphs. The speed of communication and transportation caused the world to "shrink," as trade, commerce, and banking connected the continents, creating the first era of "globalization." The modern unified industrial state came into its own as the United States, Germany, and Italy consolidated their territorial boundaries and joined the ranks of the great powers.[36] In many regards, it was the apogee of sovereignty.

At the same time other, largely unseen, developments reflected the dark side of unbridled sovereignty and hinted at issues that would rise to prominence in the twentieth century. The industrial revolution prompted upward mobility and increased the size of the middle class in most western nations, yet it also created a new urban underclass, with associated problems of disease, family breakup, and child labor. Visible disparity in wealth and power in developed states caused socialism to flourish, creating revolutionary pressures that threatened the established order. Karl Marx promulgated his economic theories preaching class warfare. Modest political reform helped to defuse tensions and postpone the final accounting for at least another generation.

Public international law played an important role in international affairs, particularly through treaties regulating trade, communication, and finance. Henri Dunant founded the International Red Cross in Geneva in 1863 to mitigate the destructive effect of modern war.[37] The first Geneva Convention covering treatment of sick and wounded on the battlefield was signed in 1864.[38] Based largely on the Lieber Code of 1863,[39] promulgating laws of war for Union armies in the American Civil War, the Hague Conventions of 1899 and 1907[40] attempted to prescribe means and methods of warfare consistent with existing humanitarian principles. Concerns over certain acts in the recent war with Iraq — use of civilian hostages, fighting from protected places such as hospitals or mosques, combatants not wearing military uniforms — can be traced directly to the Hague Conventions.[41]

The Twentieth Century—Age of Conflict and Ideology

The twentieth century was marked by tremendous highs and abysmal lows. The best and the worst of

human nature were on public display, often at the same time. The era was marked by three major world wars, two hot and one cold, and the clash of powerful ideologies. Socialism, Communism, Nazism, and Fascism emerged fully-grown on the world stage, competing with Democracy for primacy in the hearts and minds of nations. Tentative steps to form world government were taken. Natural law resurfaced in the guise of anti-colonialism, self-determination of peoples, the human rights movement, and demands for equality by the non-Western world. Change accelerated development, redefining political and cultural priorities. The second great era of globalization and progress brought the world closer, yet left others even farther behind. The similarities between 1903 and 2003 are striking, as are the differences. The maturation of international law and sovereignty's accommodation to change is one major highlight of the century that we will examine more closely.

The Great War—Changing of the Guard

The period immediately following World War I is essential to understanding the rest of the twentieth century. The issues facing the allied powers in Versailles, and the choices made then and over the next decade, dictated the course of events for the remainder of the century. International law emerged as a critical component of international order and would play a major role in international politics.

World War I, The Great War, caused tremendous upheaval in the established order. The victorious allies attempted to address these problems at Versailles in 1919. First was the unexpected scope of violence and destruction, prompting calls for vengeance — war reparations to be paid by the losers and trials of those responsible for the conflict. Second was the collapse of major empires — the German, Austrian-Hungarian, and Ottoman Empires on the losing side, and the Russian Empire in 1917 on the allied side — and the emergence of the United States as the predominant military and economic power.[42] The third problem was the creation of new nation-states out of the former empires. Lastly, lack of consensus concerning the goals of the war and what the allies had won plagued the peace and designs for international order.

Revolutionary efforts to create a world government fell short—the League of Nations was a start, but not a sufficient one. President Wilson's visions for the postwar order clashed with the national interests of the allies and frustrated effective, unified action. The Versailles Treaty became a compromise. Complicating matters, Wilson failed to persuade the American public or the U.S. Senate to ratify the treaty creating the League of Nations; and without American participation, the League proved too weak to enforce Wilson's vision of collective security — peace through the rule of law, supported by military force when necessary.[43] Wilson's vision would be revived in 1945 and again in 1990 with relatively greater success.

Attempts to try the Kaiser and others for War Crimes encountered similar problems. The Allies could not agree, and the Germans would not cooperate. Ambitious plans drawn up at the Paris Peace Conference in 1920 called for some 900 war criminals to be tried, but Allied disunity and German recalcitrance prevailed. As a compromise, 12 German soldiers ranging from private to lieutenant general were tried in German courts; six were convicted, with the most severe sentence being four years.[44]

One encouraging development at Versailles was public debate over rule of law and ethics superseding national interests and international politics. The conflict between these poles of international order would continue throughout the twentieth century and still exists. As Kissinger characterizes it:

> At the end of the First World War, the age-old debate about the relative roles of morality and interest in international affairs seemed to have been resolved in favor of the dominance of law and ethics. Under the shock of the cataclysm, many hoped for a better world as free as possible from the kind of *Realpolitik* which, in their view, had decimated the youth of a generation.[45]

Efforts to enforce peace through rule of law continued for over a decade following Versailles. Arms

control agreements took the place of serious collective security enforcement. Examples include the Naval Conferences at Washington in 1922 and London in 1930, regulating the number and size of battleships, cruisers, destroyers, and submarines, then considered the major strategic weapons of the great powers.[46] In the Kellogg-Briand Pact of 1928, the signatory parties agreed to renounce war as an instrument of national policy.[47]

In the end, sovereignty and national interests proved too strong for the Wilsonians. International law became just another diplomatic tool as the great states rearmed themselves for World War II. Former President Theodore Roosevelt, still a keen observer of world events, captured the essence of power politics when he said: "As yet there is no likelihood of establishing any kind of international power . . . which can effectively check wrong-doing . . . I regard . . . trusting to fantastic peace treaties, to impossible promises, to all kinds of scraps of paper without any backing in efficient force, as abhorrent."[48]

Sovereignty in the Nuclear Age

World War II and the Search for International Order

The world got a second chance in 1945 to recreate international order. The unprecedented destruction of the second major war in a generation dwarfed that of 1914-18 and brought modern war to the home front with a vengeance. Millions of noncombatants became casualties of war. The discovery of nuclear fission at the end of the war threatened even greater destruction in any future conflict. Sovereignty had to be checked, and international law was applied to the task. The problem was neatly defined by one study:

> A sovereign state at the present time claims the power to judge its own controversies, to enforce its own conception of its rights, to increase its armaments without limit, to treat its own nationals as it sees fit, and to regulate its economic life without regard to the effect of such regulations upon its neighbors. These attributes of sovereignty must be limited.[49]

The creation of the United Nations in 1945 and the proceedings of the Nuremberg Tribunal immediately following were watershed events that permanently altered the nature of the debate regarding a state's right to wage war and its treatment of its citizens. Together they announced to the world that aggressive war would no longer be tolerated, and that individuals who commit aggression and crimes against humanity will be held criminally responsible for their acts. It was a sincere effort and a good start, enjoying almost universal support.

One of the United Nations' early proclamations, the Universal Declaration of Human Rights,[50] outlined fundamental human rights in terms reminiscent of the Declaration of Independence and the Bill of Rights. It was intended as common standard for "all peoples and all nations."[51] Although aspirational in tone and lacking an enforcement mechanism, it has served for more than 50 years as a beacon for people in search of freedom and justice. Over the following decades, International agreements outlawing genocide, recognizing the rights of minorities, and emphasizing humanitarian concerns consistently advanced individual rights at the expense of state sovereignty.[52]

Collective security acquired new life after World War II with the creation of the United Nations, the North Atlantic Treaty Organization (NATO), the Organization of American States (OAS), and other international and regional organizations. Although the Cold War provided the initial impetus for NATO, it survives as a viable, productive organization. With expanded membership and new missions, NATO today provides collective security while extending democracy and prosperity to the nations of Eastern Europe, a development unimagined a generation ago.

The Rule of Law and Human Rights Center Stage

The rule of law in international affairs is manifest in many ways: by actions of the UN Security Council and other UN organizations;[53] by NGO's advancing collective western values and international humanitarian law; by treaties regulating strategic nuclear weapons, conventional weapons, and chemical/biological weapons;[54] by international agreement on global warming; by creation of an international criminal court;[55] and by the number of "coalitions of the willing" contributing forces to intervene in intrastate conflicts.

A common misperception is that these developments emerged all at once in 1990 with the collapse of the Soviet Union and the end of the Cold War.[56] The incorporation of international law and human rights into international relations since 1945 stems from historical trends and events. It reflects timeless values, classical and modern philosophy, and the common experiences of mankind over centuries. Although it is true that the bipolar system and threat of great power veto limited the ability of the UN Security Council to take effective action throughout the Cold War, the quest for international order based on rule of law consistently influenced political developments and discourse.

The struggle to end colonialism and promote self-determination of peoples following World War II is illustrative. The UN Charter, firmly rooted in sovereignty, contemplated the end of Western colonialism.[57] The United States advocated renunciation of overseas imperial holdings and supported self-determination.[58] During World War II, in fact, our stance on this issue periodically created rifts within the Anglo-French-U.S. partnership.[59] After the war, at the same time we were developing a Containment Policy against Communism, we were calling for an end to British and French rule in Africa and Asia. When newly independent colonial states lapsed into Communism, as happened in Vietnam, we suddenly found ourselves with a new problem on our hands, one as much political as military in nature.[60] The search for order, justice, and democracy stumbled on the rock of great power politics. International law alone could not preserve the peace.

Cold War arms control agreements[61] reflected not so much American and Soviet optimism as they did global public opinion, uneasy over the prospect of annihilation at the hands of the two superpowers. With the advent of intercontinental ballistic missiles, mutual assured destruction became a fact. With satellite technology, the United States and the Union of Soviet Socialist Republics (USSR) acquired the capacity to place nuclear weapons in earth orbit.[62] Many states became fervent practitioners of international law for purely parochial reasons, but the success of the international community, particularly non-aligned states, in framing global debate demonstrated the force of western values and the rule of law. These trends emerged in the 1950s and acquired prominence in the 1960s and 1970s. Neither the United Nations nor the international community could force the great powers to take specific actions against their interests, but this does not mean that the great powers, including the United States and USSR, were free to do as they pleased. Pressures to comply with world opinion were subtle and often invisible, but real nonetheless.

Contributing to the force of international law was the proliferation of nongovernmental organizations, or NGOs, in the decades following World War II. NGOs pursued their own special interests, but most had an underlying humanitarian agenda, advancing the cause of human rights and promoting "International Humanitarian Law."[63] The International Committee of the Red Cross is the oldest and best-known of the NGOs.[64] Human Rights Watch, Doctors without Borders, CARE, and thousands of others effectively precipitated international intervention in what had been considered previously the internal affairs of sovereign states.[65]

Two examples illustrate the power and influence NGOs have acquired. The first is the UN intervention in Somalia in 1992 under American leadership to ensure delivery of relief supplies and avert a humanitarian

disaster forecast by NGOs and highlighted on television screens around the world. UN intervention alleviated the immediate problem, but failed to address the underlying problem of stability. When it did, too little and too late, it led to the battle of Mogadishu and eventual withdrawal of U.S. forces.

The second example of NGO influence is the Ottawa Treaty banning landmines.[66] The preamble to the Treaty states in part:

> *Stressing* the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of anti-personnel mines and recognizing the efforts to that end undertaken by the International Red Cross and Red Crescent Movement, the International Campaign to Ban landmines, and numerous other non-governmental organizations around the world, *Basing* themselves on the principle of international humanitarian law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, . . .[67]

NGOs and international celebrities like Princess Diana of Britain actively participated in the Conference process, dismissing security concerns raised by the United States. Humanitarian concerns over civilians killed or maimed by abandoned land mines preoccupied the Conference and carried the day. While not a party to the treaty, the United States has conceded substantial compliance by policy.[68]

The State of the State— Sovereignty in the New Millennium

Trends and Developments

Trends evident in 2003 reflect the foregoing discussion. In advanced states, post-industrial society has replaced basic industry and manufacturing, which has migrated to less-developed countries with lower labor costs. Globalization draws nations and peoples closer, despite recent economic setbacks. The World Trade Organization is a powerful international force that influences decisions of the leading economic powers, including the United States.[69] International labor organizations demand basic standards and benefits for workers and workplaces. These trends undermine sovereignty and reflect a tightly structured international environment that constrains even the strongest states to behave in ways promoting international order.

Human rights influence international agendas and domestic actions. International humanitarian intervention, evident in Kosovo, East Timor, and possibly Iraq, is an emerging precedent that demands attention. It is not yet customary international law, but lively debate on the subject tends to redefine how we view sovereignty.[70] This represents, ironically, the triumph of values advanced by Woodrow Wilson at Versailles almost a century ago. The principles of the American and French revolutions have become universal, though not all states concede that individual rights supersede the welfare of the state, most notably China, the world's most populous state.

Themes for the Twenty-first Century

International law will play an important role in addressing issues and trends likely to persist for decades to come. The most important of these include a globalized economy, urbanization, intrastate conflict, clash of cultures, unequal distribution of wealth, environmental degradation, transnational crime, collective security, multilateralism, and humanitarian intervention. Global problems require global solutions; sovereign states cannot solve them, although they can address symptoms within their borders. Most, eventually, will require international cooperation.

Implications for Strategic Leaders

International law challenges strategic leaders to think globally, not nationally. The positivist approach to international law expressed in the S.S. *Lotus* case: "Restrictions upon the independence of States cannot therefore be presumed,"[71] is threatened by a new paradigm: "a law more readily seen as the reflection of a collective juridical conscience and as a response to the social necessities of States organized as a community."[72] UN Secretary General Kofi Annan articulated this new paradigm as follows:

> State sovereignty, in its most basic sense, is being redefined—not least by the forces of globalization and international cooperation. States are now widely understood to be instruments at the service of their peoples, and not vice versa.[73]

The implications of this principle are staggering. Yet Kofi Annan is no revolutionary; his language is reminiscent of Thomas Jefferson's in the Declaration of Independence: "That to secure these rights, Governments are instituted among Men, deriving their just power from the consent of the governed." States exist to promote and protect individual rights and freedoms. The challenge for international leaders is what action the international community should take in those cases where states deliberately and systematically violate the human rights of their citizens.[74]

None of this implies that sovereign states cannot guarantee, promote, and advance human rights. To the contrary, the American experience teaches us that individual rights and rule of law are mutually supportive and thrive in a strongly nationalistic, democratic environment. Ironically, the American experience also encourages internationalism in the promotion of democratic values. As President Bush has stated in his National Security Strategy: "We will defend the peace by fighting terrorists and tyrants. We will preserve the peace by building good relations among the great powers. We will extend the peace by encouraging free and open societies on every continent."[75] This sentiment resembles Woodrow Wilson's and, indeed, those of most presidents since 1918. Kissinger portrays this as an essential element of American altruism motivating our actions abroad: "Wilson put forward the unprecedented doctrine that the security of America was inseparable from the security of *all* the rest of mankind. This implied that it was henceforth America's duty to oppose aggression *everywhere. . . .*"[76]

The current world situation encourages debate over the scope and authority of international law. Recent American actions in Iraq, taken contrary to international public opinion, without the endorsement of the UN Security Council, and against the wishes of longstanding allies such as France, Germany, and Turkey, support Mersheimer's proposition that great powers behave as their interests dictate.[77] Perhaps sovereignty is alive and well after all.

Unilateral action can, at least in certain cases, achieve the same results as multilateral efforts. Proponents of international order and rule of law argue that lasting order cannot be imposed unilaterally. The Congress of Vienna in 1815, which created the "Concert of Europe," was a collective, multilateral effort, albeit predicated on sovereignty. But it took enormous cooperation to maintain international order for a hundred years. Even the British Empire at its height in the nineteenth century realized its limitations and attempted to construct a favorable balance of power. John Ikenberry, in *After Victory*, analyzes the rebuilding of international order after major wars. He says the diplomats of 1815 created a "constitutional order," which are "political orders organized around agreed-upon legal and political institutions that operate to allocate rights and limit the exercise of power."[78]

Ikenberry's concept of "constitutional order" helps to explain how the current international system evolved after World War II, and how it operates today. At its heart was the sharing of power by the United States, by far the most powerful state in the world in 1945. The framework was an extensive system of multilateral institutions, including alliances, which bound the United States and its primary partners in

Europe together. The Cold War may have accelerated this process, but it did not create it.[79]

If this theory is correct, then the primacy of international law and institutions is no accident, but instead the direct and expected result of efforts to create a framework of mutually supporting and binding ties. As we have seen, these international institutions have performed as designed. It should come as no surprise, viewing the international system in this way, that international organizations and politics restrain the choices and actions of sovereign states. From this perspective, international order displays many of the characteristics of municipal order. Ikenberry explains this: "if institutions—wielded by democracies—play a restraining role . . . it is possible to argue that international orders under particular circumstances can indeed exhibit constitutional characteristics."[80]

The New World Order and American Hegemony

Who Owns International Law?

What is America's role as the sole superpower in the current environment? How will the international system respond to the threat of global terrorism? Can it maintain the security and prosperity created by American leadership since 1945? Can the rule of law accommodate the national interests of the great powers and protect the interests of weaker states threatened by demagogues, genocide, civil war, and internal armed conflict? The remainder of this chapter will attempt to suggest answers to these questions.

Dynamic, disparate forces challenge the international order. Globalization promises prosperity and freedom, but failed states, disease, pollution, and rising birthrates hold large segments of the world's population hostage. Furthering individual rights and enforcing collective security requires international cooperation, but depends at present on the good will and determination of powerful sovereign states.

A brief look at two recent developments illustrates the nature of the challenge and provides insights as to possible courses of action. The first of these is the creation of the International Criminal Court (ICC); the second is the American-led war on terrorism.

The International Criminal Court is an idea whose time has come. It fulfills the hopes and aspirations of a majority of the world's nations. Eighty years in the making, from Versailles in 1919 to the Rome Statute in 1997, it reflects a new consensus on international justice and the rule of law. Recognizing that sovereignty protected rulers and their agents from accountability for crimes ranging from aggressive war to democide,[81] the ICC provides a permanent forum for prosecution when state courts cannot or will not act. As of this writing, 139 nations have signed the treaty, and 89 have ratified it. The Court commenced operations on July 1, 2002, and according to its charter enjoys almost universal jurisdiction.[82] Its potential impact is enormous, even without U.S. participation.[83]

At the same time, the United States leads international efforts to locate, isolate, and destroy international terrorist groups with global reach. These groups threaten international order and prosperity. They promote extremist views and promise false hopes to states and individuals left behind on the road of progress.

> While most states support and encourage American efforts to eradicate this plague, the international system is not well-suited for the struggle. There is no international agreement on terrorism, and none that even attempts to define the term. Several treaties address individual terrorist acts—hijacking, murder, money laundering, illegal crossing of borders, etc., but their solutions require state action—apprehension, extradition, and prosecution of individual terrorists.[84]

To date, therefore, the international response to terrorism depends on American leadership, moral and physical. Coalitions are formed to fight terrorism, but they form and reform constantly depending on where

American efforts are focused. In Afghanistan a multilateral effort enjoyed broad international support;[85] in Iraq, another theater in this global war, the coalition fell short of expectations, and the intervention remains controversial.[86] The search for order and the rule of law means different things to different states. America may lead, but others need not follow.

These events are closely related. They represent opposite poles of debate over how we are to pursue Ikenberry's "constitutional order" on a global scale. While most states agree in theory with multilateral institutions, the utility of the United Nations, and the need for rule of law within and among states, international law must contend with the "friction" of sovereignty.[87] This uneasy relationship is likely to continue. Ironically, some states and prominent individuals have called for the ICC to investigate American intervention in Iraq as an "illegal" use of force in violation of treaty law and customary law.[88]

Unilateralism: What Price Sovereignty?

This situation is unhealthy for international order. The new world order described in preceding sections of this chapter is real, and it is here to stay. The ties that bind the international community are strong and enduring, and international institutions enjoy unprecedented support and influence. Perhaps the most amazing point of all is that American values and leadership were instrumental in creating this environment. We are reminded once again that we have to be careful what we wish for.

American actions are well-intended, although many people sympathetic to American interests do not accept this proposition at face value. To the extent that American national interests must be served, we can continue to make unpopular decisions and execute American grand strategy without broad international support. But we cannot do so indefinitely. America may act unilaterally on a case-by-case basis, weighing costs and benefits. We need to be honest with ourselves when we do so, however. Others may perceive our actions as excessive and bullying.

The cost of military intervention can be high: proponents must establish a legal basis, a jus ad bellum, for action; they must apply force consistent with the laws of armed conflict and possible mandates of the UN Security Council; the fighting must be controlled both in time and in space; fallout and political reactions must be anticipated; and, lastly, those advocating intervention must expect the unexpected. Murphy's Law applies to all human endeavors. Given the national interest in defeating terrorism and preserving international order, some degree of risk is normal and expected.

The Road Ahead: Surviving in the New World Order

We do not operate in a vacuum. The international environment outlined in this article demands our attention if not our cooperation. It provides several useful lessons to guide our conduct in the twenty-first century.

First, multilateral action is preferred in most cases. America lacks the political and military strength to go it alone in every instance. U.S. economic and military power provides the mobility and ability to go anywhere, but coalitions provide additional resources, political support, and legal justification and legitimacy for international operations. If international relations theorists are correct, states that pursue hegemonic order motivate other powers to combine to frustrate their efforts. Although such a backlash against American hegemony is not evident at present, no one can guarantee that further unilateral adventures will not produce one.

Second, the United States has tremendous capabilities at its disposal without employing the military element of power. Diplomatic, economic, and informational tools provide enormous flexibility in

formulating strategy and handling complicated problems as they arise. Infrequent demonstration of American military power will suffice to remind opponents of military capabilities, while diplomats pursue peaceful resolution of disputes by other means. This approach will also reassure friends, allies and critics alike of American intentions and demonstrates a willingness to exhaust all reasonable alternatives before applying force. It will preserve valuable goodwill.

Third, every crisis does not require international intervention or the use of military forces. Acknowledging the threat posed by global terrorist networks, most international crises are local and have little impact on terrorism or global security. Many of them, we need to remind ourselves, may be safely ignored and left to others to solve. Unless international stability is seriously threatened, mobilizing the international community and its resources might prove counterproductive. We have learned, since the heady days of 1991 and the great Gulf War Coalition forged by President Bush, that the new world order promised by the collapse of the Soviet Union and the end of the Cold War has not come to pass, at least not in the way we imagined it. But there is a new world order, and nation-states have to live in it.

The fourth and final lesson we can draw from this analysis of international law and sovereignty is that the international system as it exists (and as it was designed) reflects American values and American visions for the future. It is a legitimate part of our heritage. When we presume that all institutions oppose our interests because some do, or presume that all treaties are suspect because some are, we deny that heritage. More often than not, international institutions and agreements further American interests.

It is important for us to remember that democracies tolerate differences, and in fact thrive on them. If the core of "constitutional order" in the world is Western democracy, then we must expect that there will be disagreements and heated debate among states. We will not always agree on everything. But in a constitutional system, everyone must play; the rules don't allow a state to simply take its ball and go home whenever it doesn't get its way. True, no referee will step in, blow a whistle, and impose a penalty, but true international order, just like domestic order, depends on mutual respect and cooperation and responsible behavior. Those who claim global leadership within the system have the greatest responsibility to ensure the system works. It is time to reassess America's role and reclaim our rightful position as the leader of the world community. Struggling against the ties that bind us, like a modern Gulliver, is counterproductive.

Notes - Chapter 4

1 George H. Bush, "Address to the Nation Announcing Allied Military Action in the Persian Gulf," January 16, 1991, available at *http://bushlibrary.tamu.edu/papers/1991/91011602.html*, accessed 24 July 2003.

2 U.S. War Department, General Orders No. 100, Instructions for the Government of the Armies of the United States in the Field, April 24, 1863. The first comprehensive summary and codification of the humanitarian rules governing land warfare. Frequently called the "Lieber Code" after its author, Dr. Francis Lieber, G.O. No. 100 furnished inspiration for the Geneva Conventions of 1864 and 1929 and the Hague Conventions of 1899 and 1907.

3 Werner Levi, *Contemporary International Law* (Boulder, Westview, 1991), 14.

4 John J. Mersheimer, *The Tragedy of Great Power Politics* (New York, W.W. Norton & Company, 2001), 2-3.

5 John W. Spanier and Robert L. Wendzel, *Games Nations Play*, 9th Ed. (Washington, DC, Congressional Quarterly, Inc., 1996), 22.

6 George W. Bush, *The National Security Strategy of the United States of America* (Washington, DC, The White House, September 2002), 3.

7 Blackstone, *Commentaries on the Laws of England*, Book One, Chapter One, p.118. Available from The Avalon Project, Yale Law School, at *www.yale.edu/lawweb/avalon/blackstone*. Accessed 11 April 2003.

8 Alexander Hamilton, "The Federalist, No. 15," *The Federalist* (New York, The Modern Library, 1941), 86.

9 E.g., The prohibition of alcohol, U.S. Constitution, amendment 18. It was repealed by the Twenty-First Amendment fourteen years later.

10 J.L. Brierly, *The Law of Nations*, 6th Ed. (Oxford, Oxford Press, 1991), 1.

11 E.g., Convention on International Civil Aviation (Chicago Convention, 1944); United Nations Convention on the Law of the Sea (UNCLOS III, 1982).

12 E.g., The United Nations Framework Convention on Climate Change (9 May 1992); Kyoto Protocol to the United Nations Framework Convention on Climate Change (11 December 1997).

13 Rome Statute of the International Criminal Court (United Nations Diplomatic conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998).

14 Horace B. Robertson, Jr., "Contemporary International Law: Relevant to Today's World?" *U.S. Naval War College International Law Studies, Vol. 68*, ed. John Norton Moore and Robert F. Turner (Newport, Naval War College Press, 1995), 3.

15 Brierly, 17.

16 Levi, 6.

17 Brierly, 17.

18 Ibid., 3. See also Levi, 6-9.

19 Statute of the International Court of Justice, Article 38.

20 The *SS Lotus Case* (Fr. v. Turk.), 1927, Permanent Court of International Justice, 1927 (Ser.A), No. 10, at 18-19 (7 September): "The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law. . . ." International law scholars disagree on the fundamental nature of law. There are two distinct schools of thought. The Monist view holds that international law and municipal (state) law are simply parts of an integrated system. The focus is on the individual. Dualists believe that international law and municipal law are two distinct systems. The focus of domestic law is the individual; the focus of international law is on states. These views influence contemporary debate. See Levi, 22-23.

21 Levi, 35. Levi cites as an example the launching of Sputnik by the Soviet Union, which claimed that artificial satellites could fly unimpeded over state territory, and the general acceptance of this proposition.

22 Ibid., 5.

23 Brierly, 66.

24 Although both predictability and stability are encompassed in the phrase "rule of law," the phrase is itself of fairly recent origins, representing the triumph of the western democracies since World War II. Historically, international law has concerned itself more with creating a stable, predictable world, rather than with a particular technique used to accomplish these ends.

25 Democracy in ancient Greece, notably Athens, was real and vibrant but limited in modern terms: only citizens could exercise political rights or hold land; women had few rights; slavery was an essential institution. None of this, however, diminishes the power and influence of Greek thought on leaders of the Enlightenment. See William Y. Elliott and Neil A. McDonald, *Western Political Heritage* (New York, Prentice-Hall, 1955), 63-74.

26 Brierly, 7.

27 Ibid., 13.

28 Mel Brooks, Director, *History of the World, Part I*, Fox Films, 1981.

29 Levi, 10.

30 Bernard Grun, *The Timetables of History*, 3rd Ed. (New York, Touchstone, 1991), 294.

31 Levi, 8.

32 Ibid, 9.

33 Henry Kissinger, *Diplomacy* (New York, Touchstone, 1994), 78.

34 Ibid., 40, 127.

35 See Fareed Zakaria, *From Wealth to Power* (Princeton, Princeton University Press, 1998), Chapter 5: "The New Diplomacy, 1889-1908."

36 Ibid.

37 Eric. S. Krauss and Mike O. Lacey: "Utilitarian vs. Humanitarian: The Battle Over the Law of War," *Parameters*, 32 (Summer 2002): 73, 76.

38 Ibid.

39 General Orders No. 100, supra note 1.

40 The Hague Conventions of 1899 were largely incorporated in the Conventions of 1907, of which five are important: (1) Convention Relative to the Opening of Hostilities, 18 October 1907, 36 Stat. 2259; (2) Convention Respecting the Laws and Customs of War on Land and Annex, 18 October 1907, 36 Stat. 2277; (3) Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907, 36 Stat. 2310; (4) Convention Concerning Bombardment by Naval Forces in Time of War, 18 October 1907, 36 Stat. 2351; and (5) Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 6 July 1906, 18 October 1907, 36 Stat. 2371.

41 Kenneth Anderson, "Who Owns the Rules of War?," *New York Times Magazine*, 13 April 2003, 38.

42 Kissinger, 259.

43 Ibid., 247.

44 Department of the Army, Pamphlet 27-161-2*, International Law*, Vol. II (Headquarters, Department of the Army, 1962), 221. These trials, known as the Leipzig trials, demonstrated the problem obtaining jurisdiction over war criminals—Germany was not defeated and occupied as in World War II. The Leipzig trials did motivate the allies in 1945 to establish an international tribunal at Nuremberg.

45 Kissinger, 247.

46 Ibid., 373. The Washington Conference of 1922 attempted to regulate capital ships; the London Conference of 1930 attempted to regulate submarines as well. See Department of Army Pamphlet 27-161-2, supra, at 16. For a detailed study of the Naval Treaties, see W. Hays Parks, "Making Law of War Treaties: Lessons from Submarine Warfare Regulation," *U.S. Naval War College International Law Studies, Vol. 75*, Michael N. Schmitt, ed. (Newport, Naval War College Press, 2000), 339.

47 The Kellogg-Briand Pact, or Pact of Paris, is formally known as The General Treaty for the Renunciation of War (27 August 1928), 46 Stat. 2343.

48 Kissinger, 40.

49 Brierly, 47, quoting from the International Conciliation Pamphlet, 1941.

50 Universal Declaration of Human Rights, UN General Assembly, 10 December 1948.

51 Ibid, Preamble.

52 See the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277, art.VI; the Geneva Conventions of 1949 (four separate conventions—on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, on the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, the Geneva Convention Relative to the Treatment of Prisoners of War, and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War); and Protocols to the Geneva Conventions of 1949 (1977). These conventions form the nucleus of what is commonly called "International Humanitarian Law."

53 E.g., The Food and Agriculture Organization, the World Health Organization, the International Civil Aviation Organization, the United Nations Educational, Scientific and Cultural Organization, the International Labor Organization, and the International Monetary Fund, to name only a few.

54 E.g., the START and SALT strategic arms negotiations and Anti Ballistic Missile (ABM) treaties with the U.S.S.R, and multilateral international agreements, including the Conventional Weapons Treaty (1980), the Chemical Weapons Convention (1993), and the Ottawa Treaty on Anti-Personnel Land Mines (1997).

55 Notes 11 and 12, supra.

56 E.g., Ivo H. Daalder, "The United States and Military Intervention in Internal Conflict," in *International Dimensions of Internal Conflict*, Michael E. Brown, ed. (Cambridge, MIT Press, 1996), 461.

57 UN Charter, Chapter I, Article 2, para. 1 and Chapter XI.

58 Eric Larabee, *Commander in Chief* (New York, Touchstone, 1987), 632.

59 Ibid.

60 E.g., Vietnam. Our efforts to combat aggressive communist expansion encountered international opposition both at the UN and in other international forums. Agreements such as Protocols I and II to the Geneva Conventions of 1949 and the UN Convention on Law of the Sea displayed a distinct anti-Western and anti-American bias, yet reflected the considered opinion and practice of many states. International law was no longer the sole province of the great powers and the "civilized" states, and traditional American leadership in international law began to fade.

61 SALT, START, ABM, START II, etc.

62 Nuclear weapons (and other weapons of mass destruction) have been banned from space, although space has not been "demilitarized." Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies (Outer Space Treaty, 1967).

63 International Humanitarian Law essentially encompasses the principles enunciated in the Geneva Conventions of 1949 and Protocols I and II of 1977.

64 See Joint Pub 3-08, *Interagency Coordination During Joint Operations*, Vol. II, 9 October 1996, Appendix B, for a detailed listing of NGOs and countries in which they operate.

65 There are many examples. International support of the Palestinians is one; international efforts to remove white racist governments in Rhodesia and South Africa are another.

66 The Ottawa Treaty, formally known as the "Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and Their Destruction," December 1997. The Ottawa process featured active participation by NGOs and international celebrities. Their priorities were humanitarian, not utilitarian, in nature. See Krauss and Lacey, supra, note 36 at 81.

67 Preface to the Ottawa Treaty, ibid.

68 On 17 September 1997, President Clinton announced that the United States would develop alternatives to anti-personnel land mines by 2003, and would replace all "dumb" land mines in South Korea by 2006. The principle U.S. objection to the Ottawa Process was its failure to acknowledge U.S. fielding of "smart" or self-destructing land mines. The Conventional Weapons Convention of 1980 prohibits indiscriminate laying of mine fields and requires mapping, marking, and removal, among other requirements. The Ottawa Process is unlikely to stop rogue states and revolutionary movements from indiscriminately laying and abandoning mines.

69 World Trade Organization sessions have attracted enormous demonstrations by diverse groups ranging from environmentalists to religious organizations to unrepentant communists.

70 See, e.g., George K. Walker, "Principles for Collective Humanitarian Intervention to Succor Other Countries' Imperiled Indigenous Nationals," *American University International Law Review*, Vol. 18, No. 1, 35; John C. Yoo, "The Dogs That Didn't Bark: Why Were International Legal Scholars MIA on Kosovo?," *Chicago Journal of International Law*, Spring 2000, 149, accessed on line at *www.proquest.umi.com/pqdweb?TS* on 27 January 2003.

71 Supra, note 19.

72 *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice, 8 July 1996, Declaration of President Bedjaoui at para. 13., quoted in Robert F. Turner, "Nuclear Weapons and the World Court: The ICJ's Advisory Opinion and Its Significance for U.S. Strategic Doctrine," *U.S. Naval War College International Law Studies, Vol. 72*, Michael N. Schmitt, ed. (Newport, Naval War College Press, 1998), 309, 312.

73 Kofi A. Annan, "Two Concepts of Sovereignty," *The Economist*, 18 September 1999, p. 49.

74 See Thomas W. McShane, "Blame it on the Romans: Pax Americana and the Rule of Law," *Parameters*, Vol. 32 (Summer 2002): 57.

75 Bush, National Security Strategy, supra, note 5, Preface.

76 Kissinger, 47.

77 Mersheimer, supra, note 3.

78 G. John Ikenberry, *After Victory: Institutions, Strategic Restraint, and The Rebuilding of Order after Major Wars* (Princeton, Princeton University Press), 29.

79 Ibid, 163, 166. These institutions included the United Nations, NATO, The Marshall Plan, and the World Bank, among others.

80 Ibid, 4, 6.

81 Democide refers to the torture and killing of citizens by their own governments, generally despotic and totalitarian in form. One figure attributes 170 million deaths to democide over the course of the twentieth century, a number two to four times greater than the total number killed in war. See John Norton Moore, "Opening Comments," Vol. 149, *Military Law Review*, 7, 10 (1995). Professor Moore, Director of the Center for National Security Law at the University of Virginia School of Law, made these comments in a symposium on "Nuremberg and the Rule of Law: A Fifty year Verdict" at the U.S. Army Judge Advocate General's School, 17 November 1995.

82 Universal Jurisdiction is based upon the principle that certain crimes violate international interests and norms and that states may take action regardless of the location of the crime or the nationality of the perpetrator or the victim. At present international law recognizes universal jurisdiction for certain offenses (e.g., crimes against humanity, war crimes) covered by the Geneva Conventions of 1949. The apprehension of Nazi war criminal Adolf Eichmann in Argentina and his trial in Israel in 1961 is often used to illustrate the concept. Others would extend the principle further, to cover domestic crimes that violate humanitarian principles not formally recognized in international law. See *The Princeton Principles on Universal Jurisdiction*, the Princeton Project on Universal Jurisdiction (Princeton, Program in Law and Public Affairs, 2001).

83 President Clinton signed the treaty on behalf of the United States on 31 December 2000. It was never sent to the Senate for ratification, and on 6 May 2002 the United States officially notified the United Nations of its intention not to become a party. See U.S. Department of State Press Statement containing the official notice, accessed on line at *www.state.gov/r/pa/prs/ps/2002/9968pf.htm* on 29 October 2002.

84 See, e.g., Convention on Offenses and Certain Other Acts Committed on Board Aircraft, 14 September 1963, 20 U.S.T. 2941; Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), 16 December 1970, 22 U.S.T. 1641; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), 23 September 1971, 24 U.S.T. 564.

85 The United Nations Security Council endorsed, although it did not direct, efforts to remove the Taliban and destroy Al Qaeda bases in Afghanistan.

86 The UN Security Council did not support intervention in Iraq beyond weapons inspectors. With at least two of the permanent members, France and Russia, likely to veto any Security Council Resolution sanctioning invasion, the United States led a "coalition of the willing."

87 As Undersecretary of State Marc Grossman stated on 6 May 2002, as he explained why the United States withdrew from the ICC Treaty: "We believe that states, not international institutions, are primarily responsible for ensuring justice in the international system." Remarks at the Center for Strategic and International Studies, distributed via email by *Listmgr@PD.STATE.GOV* on 6 May 2002.

88 This represents politics as much as law. UN Security Council sanction is not a prerequisite for intervention. Article 51of the Charter permits state action in self defense, and customary law provides an independent basis for action. The Kosovo precedent of

international humanitarian intervention without Security Council approval also supports American intervention to remove the rogue regime of Saddam Hussein. International law scholars do not agree on these points.