Leading Through Law

by Anne-Marie Slaughter

Does the United States need international law? At times in recent years, it has acted as if it does not. Yet international law provides the foundation not only for momentous undertakings, such as the efforts to halt the spread of nuclear weapons and to protect the ozone layer, but also for more routine endeavors, such as defining the boundaries of territorial seas and guaranteeing the right of diplomats to move freely. The United States needs international law acutely now because it offers a way to preserve our power and pursue our most important interests while reassuring our friends and allies that they have no reason to fear us or to form alliances as a counterweight to our overwhelming might. And we will need the law more than ever in the future, to regulate the behavior not only of states but of the individuals within them.

International law is not some kind of abstract end in itself. It's a complex of treaties and customary practices that govern, for example, the use of force, the protection of human rights, global public health, and the regulation of the oceans, space, and all other global commons. Each of its specialized regimes is based in the consent of states to a specific set of rules that allow them to reap gains from cooperation and thereby serve their collective interests. Overall, the rule of law in the global arena serves America's interests and reflects its most fundamental values. But in many specific areas, existing rules are too weak, too old, or too limited to address current threats and challenges. The United States must recommit itself to pursuing its interests in concert with other nations, according to principles of action that have been agreed upon and that are backed by legal obligation, political will, and economic and military power. At the same time, it has every right to insist that other nations recognize the extent to which many rules must be revised, updated, and even replaced.

International law provides the indispensable framework for the conduct of stable and orderly international relations. It does not descend from on high. Rather, it's created by states to serve their collective interests. Consider, for instance, the concept of sovereignty itself, which is routinely described as the cornerstone of the international legal system. Sovereignty is not some mysterious essence of statehood. It is a deliberate construct, invented and perpetuated by states seeking to reduce war and violence in a particular set of historical circumstances.

The founding myth of modern international law is that the Treaty of Westphalia, which ended the Thirty Years' War in 1648, gave birth to the system of states and the concept of inviolable state sovereignty. The Thirty Years' War was the last of the great religious wars in Europe, which were fought not really between states as such but between Catholics and Protestants. As religious

minorities in one territory appealed to the coreligionist monarch of another, the Continent burned for three decades, and its people bled in a series of battles among the Holy Roman Empire, France, Sweden, Denmark, Bohemia, and a host of smaller principalities. The Treaty of Westphalia restored the principle of *cuius regio eius religio*—that is, the prince of a particular region determines the religion of his people. In today's language, this means that one sovereign state cannot intervene in the internal affairs of another.

But in reality, it took centuries for the modern state system to develop, and absolute sovereignty has never existed in practice, as many states on the receiving end of great-power interventions would attest. The architects of the Treaty of Westphalia glimpsed a vision of a world of discrete states armored against one another by the possession of "sovereignty"—a doctrine of legal right against military meddling.

It's important to realize that the right of sovereignty did not mean the prohibition of war. States were still free to go to war, as a matter of international law, until the Kellogg-Briand Pact of 1928 formally outlawed war (to evidently little effect). Sovereignty was the foundation on which modern states were built, but as they matured, their attacks on one another rapidly became the principal threat to international peace and security. After the conflagrations of World War I and World War II, it was evident that if interstate war continued unchecked, states—and their peoples—might not survive into the 21st century. Hence, the innovation of the United Nations Charter: Article 2(4) required all states to refrain from "the use of force in their international relations against the territorial integrity or political independence of any state." The right of sovereignty no longer included the right to make war.

Further, given the apparent link between Adolf Hitler's horrific depredations against the German people and his aggression toward other states, the right of sovereignty became increasingly encumbered with conditions on a sovereign state's treatment of its own people. Thus was born the international human rights movement, which today has turned traditional conceptions of sovereignty almost inside out. A distinguished commission appointed by the Canadian government at the suggestion of the UN secretary general released a report at the end of 2001 that defined a state's membership in the United Nations as including a responsibility to protect the lives and basic liberties of its people—and noting that if a member state failed in that responsibility, the international community had a right to intervene.

Why such a shift? Because the decade after the Cold War, much like the decades before the Treaty of Westphalia, revealed a seething mass of ugly conflicts within states. The dividing lines in those conflicts were drawn by ethnicity as much as religion, and the divisions were almost always fueled by opportunistic leaders of one faction or another. But unlike in the 16th and 17th centuries, the danger as the 20th century drew to a close was not so much from one sovereign's meddling in the affairs of another as in the failure of regional and international insti-

>Anne-Marie Slaughter *is dean of the Woodrow Wilson School of Public and International Affairs at Princeton University and president of the American Society of International Law. She was formerly J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law at Harvard Law School.*

The 1648 Treaty of Westphalia promised "universal peace" in Europe and recognition of the sovereignty of nations, but both promises have proved difficult to fulfill.

tutions to intervene early enough to prevent the conflicts from boiling into violence—producing streams of refugees and heartbreaking pictures broadcast into living rooms around the world.

The story of sovereignty, even highly simplified, illustrates a basic point about international law. It is an *instrumental* rather than an *essential* body of rules, instrumental to achieving the goals of peace, order, justice, human dignity, prosperity, and harmony between human beings and nature—in short, those ends that reflect the changing hopes and aspirations of humankind. It is a highly imperfect instrument, as indeed is domestic law. Because international law regulates a society of states with no central authority, it lacks even the hint of coercion that's implicit in every encounter with a domestic police officer. It can be enforced by the military might of one or more nations, but that sort of enforcement is the exception rather than the rule.

Yet for all its imperfections, international law survives because it is the only alternative for nations seeking to regularize their relations with one another and bind together credibly enough to achieve common gains. International law allows diplomats to escape parking tickets in New York City because without diplomatic immunity embassies would close. It allows a nation to set aside 12 miles of territorial waters for the use of its own fishing boats rather than just three or five or seven. And it allowed the first President Bush to assemble a UN coalition against Iraq quickly and easily in 1991 because Iraq had so flagrantly violated the UN Charter by invading Kuwait.

In the 1980s, political scientists such as Robert Keohane, Steve Krasner, and John Ruggie demonstrated more precisely what international lawyers had long believed: "Regimes," meaning everything from treaties to organizations to customary practices, allow nations to overcome a dilemma. The best solution to a

problem can be achieved only through cooperation, but any individual state risks a "sucker's payoff" if it acts cooperatively and other states do not. Rules and settled practices overcome this dilemma by making it easier for states to negotiate credible commitments, to gather and share information, and to monitor one another and develop reputations for good or bad behavior.

America's Founding Fathers knew that the United States needed international law as a shield to protect a new and weak nation. They went to great pains to declare their new democracy a law-abiding member of the society of nations. The Declaration of Independence set forth the legal case for revolution out of "a decent respect to the opinions of mankind." The Constitution enshrined treaties as "the supreme law of the land," alongside the Constitution itself and federal law. The first Congress made it possible for aliens to sue in U.S. federal courts "for a tort only, in violation of the law of nations." The statute was originally intended to assure foreign citizens and their governments that they would find sure redress in U.S. courts for violations of the laws governing relations among countries, such as diplomatic immunity. Today, it allows foreign victims of grave human-rights violations to sue their torturers if they find them on U.S. soil.

Just over a century after its founding, the United States was an emerging power with a new prominence in world affairs. Yet its commitment to international law remained firm—much more so, in fact, than we generally recognize today. Though most accounts of the crucial period after World War I are dominated by the struggle between President Woodrow Wilson and the American isolationists who opposed his vision of world order, an important group of Republicans championed a view of international relations that rested on a commitment to international law more zealous than Wilson's. The leader of this group was Elihu Root (1845–1937), the most distinguished lawyer-statesman of his day, who served as secretary of war under William McKinley, secretary of state under Theodore Roosevelt, and as a U.S. senator from New York. As Jonathan Zasloff recalls in *New York University Law Review* (April 2003), more than a decade before Wilson championed his great cause, Root was developing and implementing a distinctive vision of world order based solely on law. Using the kind of rhetoric that would later be associated with Wilson, Root scornfully declared that diplomacy in the past had "consisted chiefly of bargaining and largely cheating in the bargain." But unlike Wilson, who would propose a new international system based on the global spread of democracy and the political and military power of the League of Nations, Root argued for a system based strictly on law.

> THE CONSTITUTION ENSHRINED TREATIES AS "THE SUPREME LAW OF THE LAND," ALONGSIDE THE CONSTITUTION ITSELF AND FEDERAL LAW.

During the debate over the League, Root, though retired from the Senate, was the principal architect of Republican strategy. Leading Republican senators

embraced U.S. engagement with the world, but only on the basis of law, not of binding military and political obligations. They supported legal institutions such as the Permanent Court of Arbitration (established in The Hague in 1899) and the new Permanent Court of International Justice (created by the League of Nations in 1921). But they rejected the collective security guarantee that lay at the core of the League Covenant. They would vote for the Covenant only with reservations attached. Root himself denounced the Covenant for abandoning "all effort to promote or maintain anything like a system of international law, or a system of arbitration, or of judicial settlement, through which a nation can assert its legal rights in lieu of war." Wilson, however, would accept no compromise, and the Covenant was defeated.

WHY DID THE UNITED STATES, THE OVERWHELMINGLY DOMINANT POWER AT THE END OF WORLD WAR II, CHOOSE TO EMBED ITSELF IN A WEB OF INTERNATIONAL TREATIES?

Root worked hard throughout his life to put his vision into effect (in 1912 he won the Nobel Peace Prize, in part for negotiating treaties of arbitration between the United States and more than 40 other nations). But the Japanese invasion of Manchuria in 1931 and the remilitarization of the Rhineland in 1936 made the shortcomings of both isolationism and pure legalism evident. In 1945, Republicans and Democrats finally came together in strong support of a new international legal order in the United Nations, but one that melded law and power. The UN Charter was written, as *Time* put it, "for a world of power, tempered by a little reason." The provisions giving the Soviet Union, China, Britain, France, and the United States permanent seats on the Security Council, along with veto power over Council actions, were recognition that a law-based order has to accommodate the realities of great-power politics.

The interesting question is why the United States, the overwhelmingly dominant power at the end of World War II, would choose to embed itself in a web of international institutions—not just the United Nations but the World Bank, the International Monetary Fund, the General Agreement on Tariffs and Trade, and the North Atlantic Treaty Organization. In *After Victory* (2000), political scientist John Ikenberry argues compellingly that the United States pursued an institutional strategy as a way of entrenching a set of international rules favorable to its geopolitical and economic interests. Along the way, however, it was repeatedly compelled to accept real restraints on American power in order to assure weaker states in its orbit that it would neither abandon nor dominate them. For instance, U.S. officials had a sophisticated strategy for rebuilding Western Europe and integrating West Germany into a Western European order but sought to keep America aloof from the process. The Europeans, Ikenberry writes, "insisted that the binding together of Europe was only acceptable if the United States itself made binding commitments to them." The power of the United States to build a political order thus required the nation's willingness and ability to tie itself to a legal order.

Since the end of the Cold War, as Americans seem never to tire of repeating, America's power relative to that of other nations has only increased. But instead of hastening to reassure weaker nations by demonstrating our willingness to accept rules that further the common good, the United States is coupling its explicit drive for primacy with an equally explicit disdain for a whole range of treaties. Consider the current U.S. opposition to virtually all arms-control treaties—land mines, small arms, the Comprehensive Test Ban Treaty, the Anti-Ballistic Missile Treaty—and to efforts to strengthen existing treaties on biological and chemical warfare. The result? Nations around the world are arming themselves, if not directly against us, then at least, as in the case of the European Union, to ensure that they have an independent military capability.

WE HAVE AN OPPORTUNITY TO LEAD *THROUGH* LAW, NOT AGAINST IT, AND TO BUILD A VASTLY STRENGTHENED INTERNATIONAL LEGAL ORDER THAT WILL PROTECT AND PROMOTE OUR INTERESTS.

The 1945 strategy was the right one, and it is now more essential than ever. We have an opportunity to lead *through* law, not against it, and to build a vastly strengthened international legal order that will protect and promote our interests. If we are willing to accept even minimal restraints, we can rally the rest of the world to adopt and enforce rules that will be effective in fighting scourges from terrorism to AIDS. The Bush administration, or rather some of its leading members, have constructed and promoted a simplistic dichotomy: international law versus national sovereignty. The ridiculousness of that position is evident the minute one turns to the international economic arena, where the World Trade Organization has the power to impose enormous constraints on U.S. sovereignty. A panel of three independent trade experts, for example, can rule on the legality or illegality of a federal statute under international trade law, and then enforce its judgment by authorizing trade sanctions against the United States by all WTO members. No human rights or arms control treaty has teeth nearly as sharp. Yet the Bush administration strongly supports an expansion of the WTO regime. Why? Because the free-trade system ensured by the WTO yields benefits that greatly outweigh the costs of constraints on American freedom of action.

That is the right kind of calculus to make, rather than resorting to knee-jerk appeals to national sovereignty and fearmongering about world government. And by that sort of calculus, at a time when the United States is frightening and angering the rest of the world, the benefits—to ourselves and to other nations—of demonstrating once again that we are a superpower committed, at home and abroad, to the rule of law far outweigh the costs of self-imposed multilateralism.

International law today is undergoing profound changes that will make it far more effective than it has been in the past. By definition, international law is a body of rules that regulates relations among states, not individuals. Yet over the course of the 21st century, it will increasingly confer rights and

responsibilities directly on individuals. The most obvious example of this shift can be seen in the explosive growth of international criminal law. Through new institutions such as the International Criminal Court, created in 2003 and based in The Hague, the international community is now holding individual leaders directly accountable for war crimes, crimes against humanity, and genocide. Most important, under a provision that was insisted on by the United States, all nations that are party to the treaty have committed themselves to domestic prosecutions of potential defendants before the court. Only if the states prove unable or unwilling to undertake these prosecutions will the court have jurisdiction. Under this arrangement, for example, Chile would have had primary responsibility to prosecute former dictator Augusto Pinochet as soon as he was out of office. If the Chilean prosecutors and courts had failed to act, he would have been remitted to The Hague. (Instead, Pinochet was arrested in Britain in 1998, under a warrant issued in Spain, and after being returned to Chile was ultimately spared prosecution because of ill health.) The political effect of this provision is a much-needed strengthening of those forces in every country that seek to bring to justice perpetrators of such crimes within their countries.

But criminal law is only one field of change. A similarly radical departure from the traditional model of state-to-state relations is reflected in the 1994 North American Free Trade Agreement. Under its terms, individual investors can sue NAFTA member states directly for failing to live up to their treaty obligations. In one celebrated case, a Canadian funeral home conglomerate is suing the United States for $725 million over a series of Mississippi state court decisions that it claims deliberately and unfairly forced it into bankruptcy; the decisions allegedly violated NAFTA guarantees that Canadian and Mexican investors will be granted equal treatment with domestic U.S. corporations. The WTO grows out of a more traditional form of law in which only states can bring suit against one another, but even in the WTO, evidence of the new trend can be seen in the knots of lawyers who congregate outside WTO hearing rooms to represent the interests of individual corporations directly affected by the rulings of the organization's dispute resolution panels. And now nongovernmental organizations such as Environmental Defense and Human Rights Watch are fighting for the right to submit briefs directly in cases that raise important environmental or human-rights issues.

INTERNATIONAL LAW WILL INCREASINGLY CONFER RIGHTS AND RESPONSIBILITIES DIRECTLY ON INDIVIDUALS.

As they come increasingly to apply directly to individuals, future international legal regimes will have more teeth than ever before—through links to domestic courts and by building up a direct constituency of important voters in important countries. The United States has long complained about the weaknesses of international treaty regimes, worrying that they bind states with strong domestic traditions of the rule of law but allow rampant cheating by states that lack such traditions or are without systems of domestic governance that check the power of leaders disinclined to follow the rules. Now is the

moment to begin putting these international regimes on a new foundation, allowing them to penetrate the shell of state sovereignty in ways that will make the regimes much more enforceable.

If the United States participates in the formation of these new regimes and the reformation of the old, in areas that include foreign investment, anticorruption measures, environmental protection, and international labor rights, it can help shape a new generation of international legal rules that advance the interests of all law-abiding nations. If it does not participate, U.S. citizens will be directly affected by international rules that ignore U.S. interests. To take only one example, suppose the EU participated with other nations in drafting an international environmental treaty that imposed sanctions on corporations that didn't follow certain pollution regulations. The United States could stay out of the treaty, but any American corporation seeking to do business in the EU would be affected.

The United States needs international law, but not just any international law. We need a system of laws tailored to meet today's problems. The Bush administration is right to point out that the rules developed in 1945 to govern the use of force don't fit the security threats the world faces in 2003. But those aren't the only rules in need of revision. Well before September 11, politicians and public figures were calling for major changes in the rules governing the global economy (remember the cries for a "new global financial architecture"?), a redefinition of the doctrine of humanitarian intervention, and major UN reform, including expansion of the Security Council's membership. All those appeals proceeded from the premise that the rules and institutions created to address the economic, political, and security problems present after World War II were inadequate, and sometimes counterproductive, in the face of a new generation of threats to world order—to name but a few, AIDS and other new contagions, global warming, failed states, regional economic crises, sovereign bankruptcies, and the rise of global criminal networks trafficking in arms, money, women, workers, and drugs.

The mismatch between old rules and new threats is even more evident today. Two years after September 11, and one year after President Bush called on the Security Council to prove its strength and relevance in world affairs by enforcing a decade of resolutions against Saddam Hussein, the UN General Assembly convened this fall in a world that had changed radically yet again. Now both the United States and the UN are targets in a country and a region that seem to be spinning out of control. It's time to end the finger-pointing and get serious about generating new rules and updating old ones. Institutions, too, must be reinvigorated and reinvented. The UN Trusteeship Council, for example, could be used to spearhead the civilian rebuilding of countries devastated by war, disease, debt, and the despair of seemingly endless poverty.

The world needs international law. The United States needs the world. The dream of a just world under law may be no more than a dream. But the United States has never been stronger than when it has led the world in trying to make the dream a reality. ❑