

"INTERNATIONAL
ECONOMY

THE MAGAZINE OF
INTERNATIONAL ECONOMIC POLICY

888 16th Street, N.W.

Suite 740

Washington, D.C. 20006

Phone: 202-861-0791

Fax: 202-861-0790

www.international-economy.com

editor@international-economy.com

Why America Is *Different*

*No matter who wins the
2004 presidential contest,
serious tensions with the
United Nations will persist.*

BY CRITON M. ZOAKOS

In the early days of the U.S. occupation of Iraq, pundits rushed to employ the Vietnam-era term “quagmire” to describe the situation on the ground. On closer inspection, the term does not apply to the situation in Iraq but rather to an unresolved double dilemma confronting the entire American political class—both parties, all branches of government, elected and appointed officials.

This double dilemma is: Which principle of international law is more important for American national security in the present global security environment, the legitimacy or the sovereignty of states? And if the legitimacy of states is more important, then who is to decide whether a state is legitimate? This is what underlies international criticism of U.S. policies and ongoing tensions between the United States and the United Nations. Moreover, it is what underlies most Democratic criticism of the Bush administration.

The presidential election campaign of 2004 is likely to settle the domestic aspect of this debate and produce a national consensus in favor of legitimacy over sovereignty. But the international debate will continue to rage as other nations will continue to uphold the UN founding principle that sovereignty trumps legitimacy.

Criton M. Zoakos is President of Leto Research, L.L.C., in Leesburg, Virginia.

The early sign that a domestic U.S. consensus is in the process of forming—thereby providing an eventual exit from the “quagmire”—is the publication, on October 31, of a Democratic National Security Strategy, called Progressive Internationalism, by the Democratic Leadership Council and its think-tank, the Progressive Policy Institute. Billed as the security policy that any Democratic nominee will need to win the presidency, Progressive Internationalism embraces most of Bush’s policies. It supports the wars in Afghanistan and Iraq, it pledges to build the American military as “the world’s most capable and technologically advanced.” It views the war on terrorism, like the Cold War, as the struggle that is “likely to last not years, but decades.” It pledges to fight terrorism and “gross human rights abuses ... if need be outside a sometimes ineffectual United Nations.”

In short, no matter who wins the next presidential election, the “quagmire” will likely end and, as a result, tensions between the United States and the United Nations will persist and probably get worse.

THE END OF THE WESTPHALIAN SYSTEM

The ongoing tension between the United States and the United Nations arises from the fact that the United Nations as an organization is based on a legal principle that is continental European in origin and not ecumenical, as is usually and mistakenly assumed. This is the principle of the 1648 Peace of Westphalia which asserts that sovereignty is superior to legitimacy, and it is a principle that the United States never accepted. Non-European powers, especially in resurgent Asia, rather than blindly follow this European tradition in international law, could seize the opportunity to make contributions from their own legal traditions if the United Nations is to be reformed in any meaningful and workable fashion. For this, a review of the U.S.-UN matter would be useful.

The United States believes that legitimacy, namely the consent of the governed, confers sovereignty. The United Nations holds that sovereignty confers legitimacy, a principle in international law inherited from the 1648 Peace of Westphalia to which the United States never subscribed and against which it argued in detail in its Declaration of Independence.

The Westphalian principle that sovereignty confers legitimacy regardless of consent is enshrined in Article 2.1 of the UN charter. The article asserts sovereign equality of members, sidestepping the issue of legitimacy, in order to enable the international community to deal with issues of war in the tradition of Westphalia. It does not replace the foundational U.S. view that sovereignty is a mere attribute of legitimacy and that legitimacy is the consent of the governed.

True, the 1648 Peace of Westphalia asserted this supremacy of sovereignty over legitimacy when the notion of

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legitimacy of the period was odious and autocratic. But the Peace of Westphalia did not assert an alternative democratic principle of legitimacy; it merely elevated the sovereignty of nation-states above any legitimacy.

From 313 A.D. until the Thirty Years War (1618–1648), the West believed that legitimacy of government derived from one source, the principle of “Universal Christian Monarchy.” At the time of Martin Luther’s Reformation in 1517, this legitimizing principle was represented by the chief of the Habsburg family, the largest landlords on the continent, because the Roman Catholic Church (the second largest landlord) had conferred on him the title of Holy Roman Emperor.

The Thirty Years War was waged by Protestant Princes against this legitimizing principle of the “Universal Christian Empire” and its representative, the Habsburg Holy Roman Emperor. Protestant Princes were joined by Catholic Princes (most notably the King of France), who saw profit in challenging the legitimizing principle of the time. Some of the profit was political—freedom from Papal political interference in their administration. Some was economic—freedom to expropriate and secularize vast Church lands.

Since both Papacy and Emperor were too weak at the beginning of the Reformation, a temporary compromise was struck in the 1555 Treaty of Augsburg which for the first time abandoned the legitimizing principle of “Universal Christian Monarchy” and settled on “*cujus regio, ejus religio*,” roughly translated as “whoever reigns imposes his religion in his realm.” In plain English: “Might makes right.” The compromise failed when the Catholic Church gathered forces and launched its Counter-Reformation for the purpose of restoring the original legitimizing principle of “Universal Christian Monarchy.”

This led to the Thirty Years War, which devastated all sides. Drained of resources by the war, near collapse, but still roughly equally balanced and without hope of deci-

sive victory for either side, the exhausted adversaries settled down with the 1648 Peace of Westphalia. In it, the parties agreed that if they were to survive, the sovereignty of each was far more important than any legitimizing principle on which that sovereignty rested. “Cujus regio, ejus religio,” the old principle of 1555, was finally enforced.

Seen against this background, the history of the formation of the United States—from the Mayflower Compact of 1620, the revolution of 1776, the U.S. Constitution of 1787, George Washington’s admonition against “foreign entanglements,” American neutrality during the Napoleonic Wars, the Monroe Doctrine of 1821, the expansion to the Pacific coast and the Gulf of Mexico—is best viewed as a contrast to the Westphalian system. The original English and Dutch settlers of North America were men and women who rejected the Westphalian agreement that gave to each ruler—the State—sole right to establish and disestablish religion. When these settlers eventually wrote their Constitution, its First Amendment was a clear, explicit rebuff of *cujus regio, ejus religio*: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

While the Westphalian system is strictly and absolutely agnostic on the matter of legitimizing principle, the American experience asserts the supremacy of its legitimizing principle, over any sovereign. In the Westphalian system, sovereignty trumps legitimacy. In the American system, legitimacy trumps sovereignty. The only sovereign recognized in the American system is the Constitution, i.e., the legitimizing principle itself.

In contrast, continental Europe has maintained the Westphalian system to this day, creating a fundamental distinction within the West that has produced two centuries of sharply differing histories. America’s insistence on legitimacy produced the oldest continuously functioning constitution for 226 years—the longest in recorded history. Europe’s principled agnosticism about legitimacy in sup-

port of sovereignty produced numerous local conflicts, the Napoleonic wars, the Franco-Prussian war, two world wars, innumerable colonial wars, Fascism, Nazism, Communism, numerous social revolutions, and endless successions of constitutions within each state (e.g., three French “empires” and five “republics” from 1789 to date).

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America’s foreign affairs increasingly became missions to undo the damage that Europe’s Westphalian system was wreaking on the world: the Spanish-American war to end the Spanish Empire; intervention in the First and Second World Wars to end the Austro-Hungarian, German, Czarist/Russian, French, and British Empires and the slaughter and genocide they had wrought; post-Second World War diplomacy to contain the Soviet/Russian Empire (Cold War) and prevent revival of the French and British Empires (the Suez crisis). Numerous American diplomatic strategies—including the Monroe Doctrine, the U.S. refusal to join the League of Nations after the First World War, the War Crimes Tribunals after the Second World War—were in direct conflict with the Westphalian notion of sovereign equality. So was Congress’s bipartisan injection of the “human rights” agenda in the conduct of U.S. foreign policy dating from the administration of Jimmy Carter.

Four years ago, Jesse Helms (R-NC), then Chairman of the U.S. Senate Foreign Relations Committee, in an unprecedented address by a U.S. lawmaker to the United Nations, said:

“It is a fanciful notion that free peoples need to seek the approval of an international body (some of whose members are totalitarian dictatorships) to lend support to nations struggling to break the chains of tyranny and claim their inalienable, God-given rights. The United Nations has no power to grant or decline legitimacy to such actions. They are inherently legitimate ... The sovereignty of nations must be respected. But nations derive their sovereignty—their legitimacy—from the consent of the governed. Thus, it follows, that nations can lose their legitimacy when they rule without the consent of the governed; they deservedly discard their sovereignty by brutally oppressing their people.” ◆

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