

John Bolton and the United States' Retreat from International Law

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Abstract: This article focuses upon the writings of John R. Bolton who was for four years US Under-Secretary of State for Arms Control and International Security. He is currently the US Ambassador to the United Nations. His position with regard to international law is, at least for non-Americans, extraordinary, but also extraordinarily important since it resonates with the views of many in the current Bush administration. In essence, he is sceptical of the entire category of international law and argues that it cannot ever be accepted as superior to US domestic law. He doubts that it can be distinguished from international relations. These views need to be taken seriously if the implications for the world of diplomacy and international relations, and indeed domestic law, are to be understood. This the article attempts to do.

Keywords: John Bolton; exceptionalism; international law; neo-conservatives; United States Constitution

This article takes as its focus the writings of John R. Bolton, who when we first became interested in him was US Under-Secretary of State for Arms Control and International Security, a position he held from May 2001. At the time of writing he has just become the US Ambassador to the United Nations. At first sight, at least to a European critic, Bolton might seem to come from what could be labelled the 'Redneck School of American Jurisprudence' – certainly at least with his writings on international law (though to so label it is to prejudge an argument Bolton wants to have). But although Bolton is the focus of this article, he is not its sole justification. It is because much of what Bolton has to say is representative of many other legal writers, and particularly members of the current Bush administration, that it demands serious attention and consideration. Those whose views are similar are often subsumed within the label of 'neoconservatives', and it will be necessary to allude to writings from this group in order to illustrate the breadth of support Bolton's writings command. (For a useful discussion of neo-conservatism generally, see Halper and Clarke (2004), J. Murphy (2004), Reus-Smit (2004) and Hamm (2005).) At first sight it might seem that in Bolton's broadest attacks on international law he is simply attempting to re-fight battles long lost. Writing of international law in 1880 the *Encyclopaedia Britannica* entry reads: International Law is the name now generally given to the rules of conduct accepted as binding [between themselves] by the nations – or at all events the civilized nations – of the world. International law as a whole is capable of being

very differently interpreted according to the point of view from which it is regarded, and its rules vary infinitely in point of certainty and acceptance. According to the ideas of the leading school of jurists it is an impropriety to speak of these rules as being laws; – they are merely moral principles, – positive, it is true, in the sense that they are recognised in fact, but destitute of the sanctioning force which is the distinguishing quality of law. (Volume XIII: 190)

Such a position remains very much the view of Bolton. But while the 1880 author had the grace to add that the problem with that proposition is that it may ‘unduly depreciate the actual force and effect of the system as a whole’, John Bolton would accept no such qualification. For him the legal positivism of the Austinian kind is an obvious truth with significant implications for international ‘law’ and its influence on US policies generally and (for exemplification purposes in this article) on the attitudes of the US administration to human rights in particular.

Before presenting the relevant Boltonian arguments it is necessary to make some suggestions about why his views resonate so easily with those of a large section of the US public for whom Bolton claims to speak. He is very much a populist (not an easy thing to be in American jurisprudence), and one cannot but suspect that there is much in what he says when he observed in one address the gap between ordinary US citizens and a ‘committed minority’ in the appreciation of the US and its place in the world:

Even the apparently simple act of entitling a conference ‘Trends in Global Governance: Do They Threaten American Sovereignty?’ is likely to expose the vast disparities which exist between two quite different factions within the United States. One party, small but highly educated, voluble and tireless, knows instinctively (and often emotionally) what global governance is and why it is desirable. Consisting of academics (largely, but not exclusively, law and international relations professors) and media professionals; members of self-styled human rights, environmental and humanitarian groups; rarified circles within the ‘permanent government,’ and at present even in the [Clinton] White House; and a diverse collection of people generally uneasy with the dominance of capitalism as an economic philosophy and individualism as a political philosophy, these ‘Globalists’ find allies all around the world. Their agenda is unambiguously statist, but typically on a worldwide rather than a national level.

The other faction, consisting silently of virtually everyone else in the United States, has no clue as to whether that ‘global governance’ is even an issue worth discussing, since, among other things, it has formed no part of any political campaign in recent memory. This large party cannot define global governance, does not think about it, and – when it is explained – typically rejects it unhesitatingly.

Although overwhelmingly predominant numerically, these Americans (who are comfortable with individualism and capitalism) are little recognized abroad, lost from view beneath the prolific production of academic papers, endless international conferences, and international media appearances of the diverse and often contradictory views of those whose primary urge, if not their ultimate objective, enrolls them in the party of global governance. Accordingly, when the ‘Americanists’ speak out, foreigners often assume that they are simply the knee-jerk voice of reaction, the great unlettered and unwashed, whom the cultured and educated Globalists simply have not yet got under proper control. Europeans in particular will instantly recognize the disjunction between elite and mass political opinions that has characterized their societies for almost their

entire democratic experience, and they will empathize, needless to say, with their elite, Globalist counterparts. (Bolton, 2000a: 205)

In holding such views it is important to remember that not only is Bolton far from alone, but he is a part of a mainstream historical tradition that has long debated the extent and desirability of US engagement in world affairs. Even though the necessity of such engagement is now conceded, the terms are still a matter of vigorous debate. If isolationism is no longer a respectable political position, the level and type of engagement remain at large and even since the Second World War have manifested themselves in disagreement over quite what the United Nations means to the USA, and what the USA means to the UN – a disagreement apparent most obviously in the debate over US funding contributions to the UN, considered further later. More fundamentally the debate has been about attitudes to globalization, but less economic globalization than political, as will be seen.

To many Europeans such debates seem scarcely credible. The world is seemingly now so obviously interconnected (a feeling greatly enhanced by the reality of the European Union) that the notion of one state being outside of the international community and its rules is unthinkable. Why might ordinary US citizens and their ‘Jesse Helms type’ representatives beg to differ? Why might they want to claim exemption from the rules of international law? There are, in our view, strong historical reasons which Europeans ignore at their peril as to why Boltonian Americans might consider that international law must on occasions apply to every state but the US, which should (in the eyes of such Americans) be unconstrained.

A ‘Boltonian’ thumbnail sketch of the development of international law, directed towards explaining why the USA must be unconstrained in its endeavours to use its overwhelming strength for the good of itself first, and for the good of the world second, might be roughly as follows:

Let us first of all remember that we live in a world largely constructed by 18th and 19th- and 20th-century Europeans. They it was who through their policies of colonial expansion, whether intentionally or not, whether well intended or not, redefined the world in terms of spaces, territories and nascent states in a way which haunts us yet. The careless drawing of boundaries in Africa (to put it no higher); negligent colonial administration, not to mention a tradition of slave trading; have condemned that Continent to almost incessant fratricidal violence. In the Middle East it was Europeans who combined Sunnis, Shias and Kurds into one unlikely entity, it was they who drew boundaries bringing wealth to the few (Kuwaitis, Gulf States and Saudi Arabian populations); and poverty to the many. It was they who both persecuted and murdered their Jewish populations then sought to assuage their guilt by creating a land for them far away and in other people’s homes. It was they who indulged in a meaningless and absurd First World War, (and not really a World War at all unless you are European), finally resolved only by US intervention and sacrifice; but yet also leading to that most inhumane system of government yet invented, ludicrously titled by those who knew nothing, ‘communist’. A system finally overthrown after Ronald Reagan refused to accept the co-existence compromises a pusillanimous Europe demanded, and made their corrupt system unworkable. It was Europe where the Second World War began, once more resolved only with US intervention and sacrifice. It was Europe on its economic knees, which revived only with US

economic and political help.

There is a further irony. At a time when European states dominated the world, the only international law they respected was designed to further their nefarious activities and legitimate their explicit domination of all peoples everywhere.

Not for 19th-century Europe proscription on international intervention.

Not for them a requirement that in enforcing ‘order’ they act with humanity and within the rule of law. Not for them the requirement to respect other religions or belief systems. Certainly not! For them might was right, civilization was European and the European anthropologists confirmed European racial superiority.

You can begin to get the drift of the Boltonian argument. And it might continue:

Is the final legacy of this degenerate, oppressive and cruel epoch of European superiority to be a system of rules (which Europe itself is too weak to enforce) designed to ensure the continuing moral superiority of Europe? Are the constraints preventing intervention in order to improve the lot of the people (as in Iraq), to be subject to rules of non-intervention intended in their design to prevent further European aggression and fratricide? How ironic!1

Thus, when the United Nations, itself very much a product of US draftsmanship, was created in the wake of the most recent European fratricide, albeit that the cause was the rise of fascism and national socialism, no doubt much of the Charter was drafted with this in mind, and equally without doubt it certainly was not drafted with the intention of shackling the foreign policy of the United States (Schlesinger, 2003). And although the Universal Declaration of Human Rights of 1948 (sometimes referred to as ‘Eleanor Roosevelt’s Declaration’) was not intended to have legal effect, in reflecting the four freedoms proclaimed by the USA and the UK in the Atlantic Charter, its ideology too was thought to reflect US ideology in a way that would not constrain US actions at home or abroad (Morton, 1943; Simpson, 2001).

This is the background against which neo-conservatism, at least in its foreign policy aspects must be understood. With isolationism no longer viable as foreign policy (Bolton, 2000b) there was a growing body of opinion of the view that nevertheless so different was the USA from all other states that some form of ‘exceptionalism’ (on which see Koh (2003)) was not only desirable but inevitable.² In something of an irony the writing of Hans Morgenthau could be quoted in aid of this view. When Morgenthau (1960) wrote of international law,³ he quoted with approval Oppenheim’s (1912) statement in his book to the effect that it is of the essence of international law that there is both community of interest and a balance of power without which there can be no international law. The balance of power, says Morgenthau, according to Oppenheim is ‘an indispensable condition of the very existence of international law’ (Morgenthau, 1960: 278). And Oppenheim (1912) continued:

Six morals can be deduced from the history of the development of the Law of Nations:

1) The first and principal moral is that a Law of Nations can exist only if there be an equilibrium, a balance of power, between the members of the Family of Nations. If the Powers cannot keep one another in check, no rules of law will have any force, since an over-powerful State will naturally try to

act according to discretion and disobey the law. As there is not and never can be a central political authority above the Sovereign States that could enforce the rules of the Law of Nations, a balance of power must prevent any member of the Family of Nations from becoming omnipotent. (p. 193) Although a footnote observes that editions of Oppenheim, post-1912 omitted this statement, there is little doubt that Morgenthau continued to accept it. Given that international law is, as Rosenne (1984) put it: ‘a system of co-ordination, rather than subordination’ (p. 2), it is dependent upon, at the very least, the formal equality of states.⁴ If one state is in a position, or believes itself to be in a position to act unilaterally without fear of the consequences, the force of law seems to have disappeared. The United States, the neo-conservatives have argued, is now in this position.

It has been accurately observed that as early as 1992 with the so-called *Defense Planning Guidance Draft*, a confidential document leaked to the press (Gellman, 1992), drafted under the supervision of Paul Wolfowitz and subsequently revised and muted by Dick Cheney, the Defense Secretary, the idea was introduced that the USA was now uniquely strong enough to be able to contemplate with equanimity unilateral military action, the preemptive use of force and ‘the maintenance of a US nuclear arsenal strong enough to deter the development of nuclear programmes elsewhere’ (Hoffman, 2003). As Hoffmann points out, what that document did not do was to explain how such policies might be reconcilable with the many international agreements and obligations the USA had voluntarily undertaken since the Second World War.

With the Project for the New American Century’s letter to then President Clinton in 19975 arguing for unilateral action to overthrow Saddam Hussein’s regime in Iraq, regardless of a lack of unanimity among the Veto powers in the Security Council, the *Defense Planning Guidance Draft* came into its own after 11 September 2001. In *The National Security Strategy of the United States* of September 2002, published under the seal of the White House, it was asserted that the United States now claimed the right of pre-emptive action, leaving the limitations on the international use of force in the UN Charter in utter disarray. And while claiming this right, it was asserted that the ‘United States will use this moment of opportunity to extend the benefits of freedom across the globe. We will actively work to bring the hope of democracy, development, free markets, and free trade to every corner of the world’ (p. 2).⁶

Such documents, themselves reflecting a reconsideration of US attitudes to international law, even if John Bolton had no part in their drafting, are certainly consistent with his expressed views to which we now turn. In order to do so we want to concentrate upon, and critically elucidate his views, first, upon ‘Globalism’ and global governance, second, upon his attitude to international law generally and his view of US treaty obligations particularly, and then to exemplify the implications of such views by considering their role in contemporary aspects of US human rights policy. And while the Bolton view of the International Criminal Court is relevant to this article, it is mainly so for what it implies over and beyond the human rights importance of that Court.

BOLTON’S ARGUMENTS AGAINST ‘GLOBALISM’

We have already quoted Bolton's views of global governance. As may be noted, 'he's against it'! But what is it to which he is opposed? It is not globalization as such to which he objects. He specifically excludes from his objections 'what people do in their private capacities' (Bolton, 2000a: 206) in which he includes business, commerce, religion and culture. Rather it is the action of 'Globalists' in advancing 'their agenda' and colonizing or appropriating 'substantive field after field – human rights, labor, health, the environment, political military affairs, and international organizations – the Globalists have been advancing while the Americanists have slept' (p. 206). What is intolerable to Bolton is that the intention, sometimes explicit but always implicit, of such globalizing attempts is to constrain the United States.⁷ This concern underlies all Bolton's writings. Such constraints are unacceptable because the power of the USA means it need defer to no other entity. His specific complaints concern first the idea that the international use of force is only legitimate when exercised pursuant to the UN Charter⁸ because the Security Council is argued to be the sole source of legitimacy for such action. Second, he objects to international agreements seeking to define acceptable (or unacceptable) weaponry, and in particular and for example, the 1997 International Land Mines Convention because of the potential to remove from US decision making and jurisdiction an important option, albeit one that might never be used.

Third, and in a related way, he saw the negotiated and signed Comprehensive Test Ban Treaty (rejected by the Senate in October 1999), not necessarily as objectionable in itself (though quite possibly so) but objectionable again because it was depriving the US of the freedom to take decisions in the future dictated only by its own interests. When the ratification was defeated, the Clinton administration stated that pursuant to Article 18 of the Vienna Convention on the Law of Treaties, 1969, it would not, as an unratified signatory, take any actions that would frustrate the intent of the treaty prior to its ratification. What incensed Bolton was that while the President of the USA was clearly empowered within that country to act in a way consistent with the provisions of the Comprehensive Test Ban Treaty, notwithstanding its lack of ratification, to attribute such conduct to the unratified (by the US) Vienna Convention rather than to his constitutional authority, needlessly accepted external constraints upon conduct rather than asserting constitutional (domestic) supremacy.

What we see so far looks very much like an assertion of American exceptionalism. The USA must be free to act in a way which its citizens democratically determine. Every attempt to constrain through external agreement moves authority away from the Constitution to the international community whose interests may not coincide with those of the USA. Why fetter future governments and, arguably, unconstitutionally hand power to outsiders? Implicit in this argument is the exalted and elevated status of the US Constitution, than which no greater authority apparently exists. We shall return to this point.

Bolton's fourth complaint about the Globalists is what he calls 'Limiting the United States under human rights cover', and this is intimately related to the final section of this article. Here he perceives two major dangers. On the one hand 'the Globalists' are intent on creating human rights standards

through international law with the aim of ‘removing them from common political processes, and in effect [superseding] national constitutional standards with international ones’ (Bolton, 2000a: 212). The claimed aim is to dictate to the US and also, with the growing use of ‘universal jurisdiction’,⁹ to threaten US citizens outside of the USA with criminal prosecutions for breaches of international law.¹⁰

On the other hand Bolton fears that much of the action of the Globalists in human rights promotion is aimed directly at the USA. He openly accepts that this is aimed at ‘American exceptionalism’, a concept with which he is entirely comfortable. His example, perhaps not an easy one for European eyes, concerns the use by the USA of the death penalty. He cannot accept that a body such as the United Nations, and specifically the UN Human Rights Commission should have any views upon the US exercise of a punishment accepted as constitutional and democratically approved. His reaction to a ‘forty page, single-spaced, heavily footnoted report’ of a Senegalese death penalty rapporteur is scathing and dismissive. The Rapporteur was unsurprisingly critical of the USA (Ndiaye, 1996) to which Bolton (2000a)

responds:

Most Americans will wonder how the UN arrived at such a position, so fundamentally different from our clearly-expressed democratic choice, without our knowing about it. They will also wonder how and when the United Nations ever came to believe it had the authority to make such judgments in the first place. The real agenda of the rapporteur and his allies, of course, is to leverage the stature and legal authority of the United Nations (such as they are), into our domestic debate, an effort most Americans would find fundamentally illegitimate. (p. 215)

The penultimate objection to the Globalists is the rise of international Non-governmental Organizations (NGOs). While many people see these as a manifestation of participatory democracy, Bolton sees them as exactly the opposite – pressure groups without a democratic mandate concerned to judicialize various issues and thus remove them ‘from the purview of national politics’. He sees these NGOs as competing, sometimes on equal terms with states, in the major international organizations and particularly in the UN.¹¹ Further they operate in opposition sometimes even to the state from whence they come or where they are based. The effect, it is argued, is to subvert the national democratic order by having a voice in international fora which may well have been defeated in national debate. Unsuccessful national and international pressure groups, usually representing minority causes, are yet able to achieve the same platform as state governments which are democratically elected. The effect may be to have to re-run debates lost nationally, internationally.

This argument is one shared with many conservatives. Kenneth Anderson in particular has vehemently argued for clarification of NGO status. Not only does he reinforce Bolton’s view, but he also argues that the NGO threat to democratic processes and legitimacy is aggravated by the uses to which they are put by international organizations. There is, he suggests, a symbiotic relationship (and an unhealthy one) between international organizations and NGOs. International organizations, whether the UN and its organs, the WTO, the World Bank, or the IMF, or any other, suffer from a lack of all but

the most indirect democratic legitimacy. By paying heed to NGOs and granting them a status in discussion and policy formulation, international organizations use them to foster the illusion of democratic participation, accountability and legitimacy. By responding to NGOs, rather than to state governments the argument made is that this is profoundly undemocratic (Anderson, 2000, 2001). (For a contrary view see Glasius, 2002.) There is of course an element of truth in this argument. When one looks at the participants in the Rome Conference who drafted the Charter for the International Criminal Court, one sees significant activity from international human rights groups. But although they had a significant influence, they were not finally the decision makers. Their position was closely akin to internal lobbyists in the USA. Their influence may easily be exaggerated. Lastly, Bolton fears that much of the Globalists' agenda is aimed directly or indirectly at curbing the power of the US by effectively transferring some of the sovereignty of the US to worldwide institutions and norms. From the New International Economic Order (originating in the UN General Assembly Resolution 'Declaration and Programme of Action on the Establishment of a New International Economic Order' (GAR 3201 and 3202, 1 May 1974)) to UNESCO, to UNCTAD Bolton sees a continued attempt to regulate the world in a way not necessarily consistent, and often indeed designed to be inconsistent, with US interests and freedom. Recent attempts at such international perfidy in his view include the Kyoto Protocol on Climate Change, World Health Organization preoccupation first with breast milk and now with tobacco control, the International Labour Organization and 'labor' standards. 'In short, for every area of public policy, there is a Globalist proposal, consistent with the overall objective of reducing individual nation-state autonomy, particularly that of the United States' (Bolton, 2000a: 220). The price of such Globalism, he concludes, is that: The costs to the United States – reduced constitutional autonomy, impaired popular sovereignty, reduction of our international power, and limitations on our domestic and foreign policy options and solutions – are far too great, and the current understanding of these costs far too limited to be acceptable. (p. 221)

BOLTON AND AMERICAN EXCEPTIONALISM

Harold Hongju Koh (2003) sought to analyse the content and significance of American exceptionalism. Before considering the relevance of this analysis some preliminary comments are called for. The concept of exceptionalism seems to have two broad meanings. The first, which relates to the Oppenheim proposition that any system of international law requires an equilibrium between states, seems to assert that such is the power of the United States that as a matter of fact the USA cannot be a party to international law because any consequent restraints are simply unreal and would have to depend for their effectiveness upon voluntary, but disadvantageous compliance. But within this proposition are two possible conclusions. If the USA is above and beyond international law, where does this leave lesser states? Either the entire system falls and international law, failing to constrain the mightiest, similarly fails to constrain any state with the power to reject constraints in any particular case with impunity; or international law retains

its distinctive character for all states but the United States. The first interpretation really is the nuclear interpretation. Every principle of international law would lose its legal character and fall back into the principles of international relations. The second suggests that lesser states continue to be bound by *pacta sunt servanda* and only the USA has impunity and immunity. Both cases have significant implications for the United States.

In the first case the gain for the USA while obvious, also carries major dangers and difficulties. In moving from the international rule of law to power relationships unmediated by law, it may be expected that if the USA is to persuade other states to do its bidding, force, the threat of force will become a much more prominent part of US foreign policy – in itself an option with significant cost. In the second scenario where only the USA is outside of the international law regime, the perils are hardly less. The hypocrisy of the greatest power exempting itself from the rules of international law while requiring the compliance of other states is also a dangerous position. It *may* be possible, at a cost, to police such a system if the USA really believed it to be in its interests so to do. But when second-order states seek to follow the principle espoused by the USA then, for all its power, the position of the USA could not regularly prevail.

The second and more limited meaning concerning exceptionalism suggests that because of its power (and perhaps other reasons such as the US Constitution and its federal structure) the United States either must necessarily be, or should be, in a position to accept the rules of international law with a discretion not appropriate to other states. Two examples are pertinent. The USA might argue that notwithstanding the number of states that have already signed and ratified the treaty creating the International Criminal Court, with its overtones of the acceptance of universal jurisdiction, its own exceptional international responsibilities and powers, together with its confidence in its own special needs and abilities mean that it must claim exemption for itself alone. This in no sense condones war crimes or crimes against humanity. It simply asserts that for the USA, this is more appropriately dealt with in its own domestic jurisdiction. Even with the Kyoto Protocol on Climate Change the argument might be, that given the explicit intention of the Defense Strategy to remain the supreme power, it is inappropriate for the USA to risk any lessening of its industrial power, regardless of environmental cost. Of course both these examples have many arguments in favour of compliance and many of the problems of hypocrisy remain, but some argument is perhaps maintainable.

Koh (2003), in his analysis distinguishes four manifestations of American exceptionalism which range from the least problematic to that deserving of the most opprobrium. It is clear that Bolton's arguments as discussed so far all fall within one or more of these. Koh seems to assume that exceptionalism is much more limited in its effect than we have suggested – or at least Bolton has argued. For Koh the two most difficult facets of exceptionalism concern first what Louis Henkin called 'America's flying buttress mentality'. By this Henkin meant that the USA often identified with the values expressed in international human rights documents, and indeed, often in fact complied with their requirements, yet this country was unwilling to subject itself to the critical examination processes provided in such Conventions. The effect was external support (like a flying buttress) but not the internal support of

a pillar. In other words the USA was willing to comply (and in fact did) but would not want to recognize any external authority as having the power to examine and judge its conduct. Just as in Bolton's example of President Clinton unnecessarily quoting external authority for his actions following the Senate's rejection of the ratification of the Comprehensive Test Ban Convention (CTBC), so here the argument is that compliance without ratification has some advantages for the USA. One sees a parallel too in the US decision to intervene in Afghanistan post-9/11, without the authority of a Security Council Resolution, notwithstanding the fact that it would almost certainly have been forthcoming. The USA does not want to look beyond its borders for the authority for domestic or foreign policy choices. Koh's view is that the result of this is that the USA often receives unnecessary condemnation, and sometimes pariah status, for appearing to align itself with other states not ratifying, or not complying with, conventions – states with appalling human rights records.

The real problem of exceptionalism, however, according to Koh (2003) arises when the USA uses its power to promote a double standard by which it is proposed 'that a different rule should apply to itself than applies to the rest of the world':

Recent well-known examples include such diverse issues as the International Criminal Court, the Kyoto Protocol on Climate Change, executing juvenile offenders or persons with mental disabilities, declining to implement orders of the International Court of Justice, with regard to the death penalty, or claiming a Second Amendment exclusion from a proposed global ban on the illicit transfer of small arms and light weapons. In the post 9/11 environment, further examples have proliferated: America's attitudes toward the global justice system, holding Taliban detainees on Guantanamo without Geneva Convention hearings, and asserting a right to use force in pre-emptive self-defence.

(p. 1486)

In our view the first two examples – the ICC and the Kyoto Protocol – should be distinguished from the rest because in those cases the USA did not (publicly) accept the usefulness of either for the world as a whole or for the United States. But for the rest the problem is not only the appearance of hypocrisy but the reality. For the USA to ignore ICJ decisions (the only nation to have done so), and to assert that it may continue to act in a way contrary to internationally accepted standards because of its constitutional validation leaves open similar arguments to every pariah state in the world. While the US response is that these other states do not have similar democratic validation, this has no necessary truth.

BOLTON'S ARGUMENTS ABOUT INTERNATIONAL LAW

Some of the foregoing has already touched upon the status and quality of public international law. But it is necessary now to look specifically at Bolton's views. To an international lawyer, educated both to accept the reality international law and to assume its significant benefits for the world community, Bolton makes uncomfortable, and occasionally disconcerting reading. On the other hand it does seem that his arguments are informed and driven by the conclusions he has already reached. His views against globalism would be scarcely sustainable without a view of international law which

it overwhelmingly as international relations by another name. Believing he does in the obvious superiority of US democracy under the US Constitution to all other legitimations, he has little alternative but to reduce international law to a considerably inferior status.

At the beginning of this article it was observed that Bolton's understanding of the meaning of law is very much of the positivist kind. John Austin's Victorian understanding of law as commands from a sovereign (in the widest sense) backed by the threat or use of coercion, sanctions or force, is also Bolton's.¹² That being so, the rules of international law 'destitute of sanctioning force which is the distinguishing quality of law' seem to be reduced something much less – perhaps even mere rhetoric, as Bolton suggests. But perhaps even as stated in 1880, that view may indeed 'unduly depreciate the actual force and effect of the system as a whole' (*Encyclopaedia Britannica*, 1880, Volume XIII: 190).

Bolton's attack on international law is comprehensive. It is an attack on treaty law and customary international law, along with the other usually claimed sources of international law as found in Article 38 of the Statute of International Court of Justice of 1945.

As readers will be aware, almost all international lawyers and all state governments are in agreement that at the heart of international law is the crucial principle of *pacta sunt servanda* (usually loosely translated as 'agreements or promises are to be honoured'). Acceptance of this principle is one immediate means of distinguishing international law from international relations. It is because it is a legal principle that it is generally accepted uncritically. This, however, does not mean that a state will invariably comply with the principle, just as in domestic jurisdiction not all will obey all laws. two obvious points need to be made. First, the fact of occasional noncompliance in the domestic realm does not negate the law. The same is true internationally. Second, internationally even if there is no direct sanction, the price of breaking treaty obligations will rarely be cost free, though it may be nothing more than a level of opprobrium from other states, or a hesitancy upon their part to enter into future international legal relations. Universally accepted though this is, Bolton disputes it. When Bolton claimed in 1997 that regardless of the UN Charter, the USA was not bound to pay its dues, the response from Robert F. Turner (1997) of the University of Virginia Law School was as follows:

How do we know that international treaty commitments are legally binding? Because every single one of the 185 [now more] states that are members of the United Nations, and every one of the few states that are not, acknowledge that fact. Article 26 of the Vienna Convention on the Law of Treaties recognizes the fundamental and historic principle of *pacta sunt servanda*: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' To be sure, like some of our own citizens, members of the international community of states do on occasions violate their legal obligations. But when they do, they never assert that treaty commitments are merely non-binding 'political' undertakings. Stalin, Hitler, Kim Il Sung, Gadhafi and Saddam Hussein all either denied the allegations against them, pretended that their acts of flagrant international aggression were really in 'self-defence' to a prior attack by their victims, or proffered some other legal basis for their conduct. Not one of them asserted that treaties 'were not binding,' because they realized that no

country would accept such a patently spurious assertion – it simply would not pass the straight-face test. (cited in J. Murphy, 2004: 11)

Why then does Bolton want to argue that treaties are not legally binding upon the USA and what are the implications? There are two aspects to his arguments here. The first is concerned with the status of treaties in the international world, and the second with the status of treaties within the domestic jurisdiction of the USA. Internationally it is the lack of sanction which persuades Bolton that the obligation to comply can only be moral or political (neither to be underestimated but, he says, not to be confused with the legal). If one accepts his premiss that it is only the threat or use of sanctions which makes an obligation legal, then his argument is irrefutable. Few would accept the premiss. Legality is not in essence necessarily linked with sanction or punishment. Rather most lawyers would accept that the legal quality arises from the universal acceptance of the legal aspect. This is not as circular as it sounds. It is because of the acceptance of the legal quality of *pacta sunt servanda* that overwhelmingly most states, almost all of the time, accept their treaty obligations automatically, and only very rarely subject them to unilateral reconsideration. Bolton attempts to avoid this argument by emphasizing that his position does not mean that the USA should not ordinarily comply with its treaty obligations, only that it need not do so. With this position the debate might seem to be purely semantic, arising from his understanding of the term ‘legal’. It is more than that, simply because by avoiding ascribing the term ‘legal’ Bolton hopes both to elevate the US right to ignore treaties, and to downgrade the need for compliance.

Bolton (2000c) effectively admits this intention when, having observed that ‘In the rest of the world, international law and its “binding” obligations are taken for granted’ (p. 8), he goes on to observe of US citizens:

When somebody says ‘That’s the law’, our inclination is to abide by that law. Thus if ‘international law’ is justifiably deemed ‘law’, Americans will act accordingly . . . On the other hand, if it is not law, it is important to understand that our flexibility and our policy options are not as limited as some would have us believe. It follows inexorably, therefore, that the rhetorical persuasiveness of the word ‘law’ is critically important. (p. 9)

It is manifest then, and admitted, that the argument he makes is driven by the end he wishes to achieve: the return of international law to the political world.

If, then, his arguments about the international obligations arising from treaties are specious, what of customary international law? For Bolton ‘customary international law’ deserves, at the least, inverted commas expressing incredulity. Of course debates over customary international law are familiar and continuing (D’Amato, 1987; Byers, 1999) and there are problems in defining when customary international law comes into existence; there are difficulties in proving *opinio juris*; there are problems with the position of ‘the persistent objector’; and there are problems with flexibility and malleability. Such nice jurisprudential questions have no place in Bolton’s mind. He denies the very existence of customary law. For him practice is practice, and custom is custom; neither one is law.

Again this extraordinarily extreme position is driven by the conclusion which Bolton seeks, namely the view that the USA is not, and should not be, constrained in its policy decisions or conduct by any customary international

law whether in its international relations or domestically. Internationally, as explained in his discussion of the CTBC, Bolton's view is that the USA must pursue its own path. If this path should coincide with what other states regard as customary international law that is well and good, but it is coincidence, not compliance. This is a point made also by Anderson (2001) with regard to anti-personnel mines and the banning thereof. While Anderson does not advocate the ratification of the Ottawa Convention Banning Landmines, he argues that the random effect of such weapons means that the USA should choose not to use them while denying any developing customary international law.

As with treaty law, any recognition of customary international law has both international and domestic significance and implications. This is particularly true in the area of human rights. Bolton's fear is that through means other than internal democratic approval, changes in standards created by 'the international community' might affect the USA. Thus internally he fears, for instance, that US courts could (though he approves the fact that they have generally not) look to developing international customary law in determining whether the US death penalty might constitute cruel or unusual punishment. Internationally the effect might be to incur international legal condemnation for acts seen by the US administration as necessary for its own security or interests.

The contrast of international and national effect of the status of treaties is well illustrated by Bolton's arguments with regard to the UN Charter and in particular with the US obligation to fund the UN in accordance with the Charter provisions. The UN Charter (representing a 'political deal' rather than a 'legal obligation' according to Bolton) was signed by the 50 nations represented at the United Nations Conference on International Organizations on June 26, 1945.¹³ The UN came into existence on 24 October 1945 after ratification by the five permanent members of the Security Council and by a majority of the other 46 signatories. In the case of the USA, the Senate gave its consent to ratification by 89 votes to 2 on 28 July 1945. In December of that year the Senate and the House of Representatives unanimously voted to request that the UN's headquarters be located in the USA.

Given that Article VI, Clause 2 (the 'Supremacy Clause') of the Constitution of the USA states:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding . . .

it might have been concluded that the provisions of the Charter fairly clearly form part of the 'supreme law of the land'. The very fact that the USA has remained in arrears, paid (partially) only when conditions not to be found in the Charter were met, and restricted the activities to which it was prepared to contribute, does perhaps bolster Bolton's position in realist, if not legal terms. The truth is that although the Charter obligation to pay dues as assessed¹⁴ seems clear (if inferable), the USA has rejected its obligation without direct penalty. As has been argued, however, this does not affect the legality of the position, only its enforceability and, although the US administration would claim to be indifferent to this effect, it has certainly not raised

the USA in the perception of other states, and particularly in the perception of those who have contributed proportionally a much greater percentage of the UN budget than the US. In the words of The Netherlands' permanent representative in the UN speaking to the Security Council on 30 March 2000: The United Nations cannot survive without the United States, and that is why we cooperate and why we agree that a solution has to be found.

But it should be clear that we are not cooperating because we think your arguments are valid, but simply because we feel that the United States has to not only stay in the United Nations, but has to be a committed, influential member. So we are not – I just want to make that clear – we are not persuaded by your arguments, but by our enlightened self-interest. (J. Murphy, 2004: 136)

JOHN BOLTON'S ATTITUDE TO INTERNATIONAL LAW AND ITS IMPLICATIONS: THE HUMAN RIGHTS EXAMPLE

It is now necessary to consider the effects of Boltonian jurisprudence to demonstrate that this is no mere academic discussion. Given Bolton's appointment as the US Ambassador to the UN it seems appropriate to exemplify the results of his theoretical position (even when held by others) by discussing some aspects of US human rights policy.

It will have become obvious that Bolton's denial of legal status, at least for the US, to so-called international law is absolute. But with what are we left in the international regulation of affairs? Bolton's view is that the world of international relations must remain political rather than legal. Of course it has always been the case that the effect of translating political (or social) disputes into legal disputes is (at least theoretically) to negate the difference in power of the protagonists. The essence of the rule of law is that the parties are equal in the dispute before the law. And just as in domestic law all people are equal before the law, so too in international law sovereign equality dictates the same formal equality. This is one reason why many neo-conservatives and their allies have mounted an attack upon sovereign equality.¹⁵ But as has been argued elsewhere, this formal equality has very little effect beyond international law and the votes of the General Assembly. It certainly does not operate in the Security Council, in the World Bank or in the International Monetary Fund:

The crucial respect in which formal equality between states is still valid, is of course in international law. It may be that this is one reason why so few powerful states have accepted the compulsory jurisdiction of the International Court of Justice in their international disputes. The strength and weakness of the ICJ is that, as in other courts, all parties appear as equals in the legal dispute. No state has advantage because it has power. Of course this does mean that powerful states hesitate before appearing before international courts for that very reason. The removal of sovereign equality of states would effectively end the role and the rule of law in international relations. The whole *raison d'être* of law has been to escape from the 'might is right' way of understanding the world. (Mansell, 2004: 454; see also Kahn, 2001)

In addition, perhaps paradoxically, the USA has been at the forefront of those states attempting to create an international legal regime intended to further the cause of free trade ('free trade' at least as defined by the US administration). The USA has in general been prepared to participate in the distinctly

legal dispute-resolution mechanism of the World Trade Organization. It has enthusiastically backed attempts to legalize international protection of intellectual property rights, and has demanded in legal terms access for its goods and services into states with which it enjoys regulated trading status. It is this blatant and political ambivalence towards international law that further undercuts Bolton's position. His reply would probably be that international trade law is very different from international human rights law. The former is intended to further the interests of the USA, the latter, and related areas, are intended to constrain the USA and to prevent it from freely taking political decisions validated by constitutional democracy. Bolton is always at pains to observe, with amazed dismay, the readiness of European states to voluntarily surrender significant aspects of sovereignty to a central (and arguably undemocratic) European Union, and the consequent predisposition to enter into sovereignty-limiting treaties.

What is the significance of this argument, reducing international law to international politics for the US role in the international definition, promotion and protection of human rights? We would argue that we have already seen some unfortunate results, and that the Boltonian approach to international law, often reflected in US administration policy has been little short of disastrous both for the international protection of human rights and also for the United States itself. Underlying the approach is always the argument that international law seeks to curb the power of the USA. There is no recognition that international treaties concerning human rights are intended to be for the benefit of all.

A prime example has been the decision of the US government to apply the Geneva Convention selectively when dealing with those it believes to be involved in acts of terror. Shortly after Congress authorized the use of force against those believed to be involved in the 9/11 attacks, the President authorized the detention of anyone he had 'reason to believe' was a member of Al Qaeda or involved in acts of international terrorism against the United States (*Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 13 November 2001, reproduced in Greenberg and Dratel, 2005: 25). As observed by Fletcher (2002) this Order is peculiar in seemingly giving power to George W. Bush personally. Pursuant to this order, about 550 'enemy combatants', some of whom were captured in locations far away from active combat in Afghanistan and Iraq, have been taken to the 'legal black hole' (Steyn, 2004: 1) at Guantánamo Bay. The government claims it is entitled to detain them until the war on terrorism ends or until the executive 'in its sole discretion' decides they no longer threaten national security (*In re Guantanamo Detainee Case* [2005]: 39–40). Some of the detainees have been selected for trial for violations of the laws of war before military commissions, which while according them more rights than some other Guantanamo detainees, is legally problematic if they enjoy protected person status under the Geneva Convention (see Koh, 2002; Mundis, 2002, 2004; Ratner and Ray, 2004).

In a revelatory article published in *The New York Times* (Golden, 2004) there is an insight into just how the decisions were taken to deal with those apprehended who were in fact taken to Guantánamo, and also those apprehended in the USA and suspected of terrorist involvement. When the deputy White House counsel sought advice from the Justice Department's Office of

Legal Counsel (OLC) on ‘the legality of the use of military force to prevent or deter terrorist activity inside the United States’ the response was drafted by John Yoo, a Bush appointee with ‘a reputation as perhaps the most intellectually aggressive among a small group of conservative legal scholars who had challenged what they saw as the United States’ *excessive deference* to international law’. Yoo’s advice of 21 September was not protective of civil liberties.

In the planning for the military tribunals it is reported that while most of the government’s experts in military and international law were left out of discussions, in a memorandum drafted by Patrick Philbin (a deputy in the Justice Department’s legal counsels’ office) on 6 November 2001, it was suggested that the 9/11 attacks were “‘plainly sufficient” to warrant applying the laws of war’. But, it was added, the White House would be entitled to apply international law selectively. ‘It stated specifically that trying terrorists under the laws of war “does not mean that terrorists will receive the protections of the Geneva Conventions or the rights that laws of war accord to lawful conduct”’ (Golden, 2004).

Central to enemy combatant status is the purported non-applicability of the third Geneva Convention, even though the convention does not recognize enemy combatant status as such, but only the categories of combatants and non-combatants (Roberts, 2004: 742). Correspondence between the Department of Justice and the Department of State reveals fundamental disagreement between William H. Taft, legal adviser to the Secretary of State and ‘a small, hawkish group of politically appointed lawyers’ (Mayer, 2005)16 of the Department of Justice, as to the applicability of international humanitarian law to Taliban and Al Qaeda detainees and ultimately as to the nature of international law and its relationship with US domestic law. Taft disagreed with the OLC’s determination that the President could interpret the third Geneva Convention as inapplicable to Taliban detainees eliminating the need for a tribunal required ‘in case of doubt’ by article 5 of the third Geneva Convention, a determination which was set out in, among other documents, a memo of 22 January signed by Jay S. Bybee (Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, *Re Application of Treaties and Laws to Al Qaeda and Taliban Detainees*, 22 January 2002, reproduced in Greenberg and Dratel, 2005: 107). Taft (2002a: 2) had challenged this conclusion also contained in an earlier draft in a letter to John Yoo. While the view taken by the OLC was that the Geneva Convention was inapplicable to Al Qaeda as a non-state actor, Taft considered that common article 3 continued to apply as ‘minimal standards applicable in any armed conflict’ (p. 4). The OLC advised that the power to suspend treaty obligations lay at the President’s discretion. If sought, however, justification could be found in the nature of Afghanistan as a failed state (Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, *Re Application of Treaties and Laws to Al Qaeda and Taliban Detainees*, 22 January 2002, reproduced in Greenberg and Dratel, 2005: 91), a conclusion which Taft (2002a: 4) had disputed both in principle and as a matter of fact, as the notion of a failed state for him was a political and not a legal concept. More fundamentally, Taft and the lawyers of the Department of Justice disagreed as to the effect of international law in

‘domestic decision making’. The advice emanating from the Department of Justice was that the validity of suspending the Geneva Convention at international law had ‘no bearing on domestic constitutional issues’ but was ‘worth consideration as a means of justifying the actions of the United States in the world of international politics’ (Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, *Re Application of Treaties and Laws to Al Qaeda and Taliban Detainees*, 22 January 2002, reproduced in Greenberg and Dratel, 2005: 102). Furthermore the nation’s right to self-defence could not be overridden by treaty, nor did customary international law ‘bind the President or the US Armed Forces in their decision concerning the detention conditions of al Qaeda and Taliban prisoners’ (p. 116). Customary international law certainly could not constrain the Commander-in-Chief:

Importing customary international law notions concerning armed conflict would represent a direct infringement on the President’s discretion as the Commander in Chief and Chief Executive to determine how best to conduct the Nation’s military affairs. (pp. 115–16)

For Taft (2002b), however, domestic law could not relieve the United States of its international obligations. That he and the Department of Justice officials appeared to be talking past each other can be seen the following way they responded to his concerns:

You have more expertise than our Office in judging whether certain international legal argument will be accepted by the international public opinion and different international organizations. In fact, we wish to make clear that this Office has no interest or competence in commenting on such policies. But we are afraid that your approach has confused law with policy, in which the decision makers may legitimately concern themselves with the effects of international public opinion. Those concerns, however, have no place as a matter of interpreting the domestic legal effect of Article II treaties, just as they would have no place in the interpretation of constitutional or statutory provisions. (Yoo and Delahunty, 2002)

The views of the lawyers of the Department of Justice, entirely consistent with Bolton’s views of international law, prevailed. On 7 February 2002 the President, expressly referring to a Department of Justice memorandum and a letter from Attorney General John Ashcroft determined that Taliban and Al Qaeda detainees were not entitled to prisoner-of-war status but to humane treatment consistent with the Geneva Convention in so far as ‘appropriate and consistent with military necessity’ (*Humane Treatment of Al Qaeda and Taliban Detainees*, 7 February 2002, reproduced in Greenberg and Dratel, 2005: 135).

What does not seem to have been understood (or at least accepted) by the OLC was that the Geneva Conventions were drafted to be a code in the interests of all. Objecting to the kind of ‘flying buttress mentality’ that Koh describes, Taft (2002c) wrote to Gonzales:

Basically, it seems to me the issue here is whether we want to admit that we are carrying out our commitments under international law or assert that we are not required to do so while following an identical course of conduct. I fail to see the advantage in repudiating our treaty obligations when our actions conform to them.

This selective application of the laws of war was resoundingly rejected by District Judge James Robertson in the case of *Salim Ahmed Hamdan* [2004]

on 10 November 2004:

[t]he government's attempt to separate the Taliban from Al Qaeda for Geneva Convention purposes finds no support in the structure of the Conventions themselves, which are triggered by the place of the conflict, and not by what particular faction a fighter is associated with. (p. 15)

Hamdan, who had been captured in Afghanistan in 2001 and taken to Guantanamo Bay in 2002, was selected for trial by military commission and charged in July 2004. In *habeas corpus* proceedings he challenged the validity of military commissions and the nature and duration of his pre-trial detention. Judge Robertson held that Hamdan was entitled to the protections of the third Geneva Convention until a competent tribunal determined his status in accordance with article 5 of the third Geneva Convention and that trial before a military commission would be unlawful unless provisions on excluding the defendant and withholding evidence were amended. After the decision as reproduced on the JURIST (2004) website, the Department of Justice restated its belief in the legality and good policy of the administration's approach towards the detainees:

We believe the President properly determined that the Geneva Conventions have no legal applicability to members or affiliates of al Qaeda, a terrorist organization that is not a state and has not signed the Geneva Conventions. We also believe that the President's power to convene military commissions to prosecute crimes against the laws of war is inherent in his authority as Commander in Chief of the Armed Forces, and has been memorialised by Congress in statutes governing the military.

By conferring protected legal status under the Geneva Conventions on members of Al Qaeda, the Judge has put terrorism on the same legal footing as legitimate methods of waging war. The Constitution entrusts to the President the responsibility to safeguard the nation's security. The Department of Justice will continue to defend the President's ability and authority under the Constitution to fulfil that duty.

Subsequent events in this case are less important for our purposes than this illustration of the debate to which Boltonian notions of international law have led.

The debate concerning permissible interrogation methods of those detained is no less significant. Initially, the opinion of the OLC on the applicability of the Torture Convention, incorporated by sections 2340–2340A of title 18 of the US Code,¹⁷ to interrogations outside the USA, proceeded from an extremely restrictive understanding of torture. Only physical pain that was 'equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death' reached the relevant threshold of physical pain. Mental pain must result in 'significant psychological harm of significant duration' (Memorandum for Alberto R. Gonzales Counsel to the President, *Re Standards of Conduct for Interrogation under 18 U.S.C. paras 2340–2340A*, 1 August 2002, reproduced in Greenberg and Dratel, 2005: 172). It was advised consistently with the OLC approach towards the powers of the President as Commander-in-Chief, that the application of art 2340A to interrogations of enemy combatants ordered by the President would be unconstitutional. Finally, it was counselled that in [t]he government's attempt to separate the Taliban from Al Qaeda for Geneva Convention purposes finds no support in the structure of the Conventions

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The result was that '[p]olicies approved for use on al Qaeda and Taliban

detainees, who were not afforded the protection of the Geneva Conventions, now applied to detainees who did fall under the Geneva Protections’ (p. 14). In attempting to restrict the effect of human rights and international humanitarian law, with only a Boltonian justification, the USA has both lost prestige and endangered its own citizens who might be captured by opposing forces, as recognized by Judge Robertson in *Salim Ahmed Hamdan v Donald H. Rumsfeld* [2004]:

The government has asserted a position different from the positions and behaviour of the United States in previous conflicts, one that can only weaken the United States’ own ability to demand application of the Geneva Conventions to Americans captured during armed conflicts abroad. (p. 21)

Few outside of the United States accept that Guantanamo with its prisoners operates within international human rights law (Borelli, 2004) – although this is insignificant if John Bolton’s position is to be accepted.

The implications of Bolton’s position are also to be seen in the controversy in the USA over the International Criminal Court. The neo-conservatives have been at the forefront of those arguing not only for non-cooperation but also for action to prevent its operation. Bolton’s (2002) view on transitional justice is that:

It is within national judicial systems where the international effort should be to encourage the warring parties to resolve questions of criminality as part of a comprehensive solution to their disagreements. Removing key elements of the dispute to a distant forum, especially the emotional and contentious issues of war crimes and crimes against humanity, undercuts the very progress that these peoples, victims and perpetrators alike, must make if they are ever to live peacefully together.

This view appears to have influenced the establishment of the Iraqi Special Tribunal by the Iraqi Governing Council outside the existing structure of UN-sponsored international tribunals (whether hybrid or international).

The problem, as Alvarez (2004) writes, is that:

The Tribunal’s origins doom its legitimacy, not merely because it appears to be yet another instance of the Hegemon applying to others what it refuses to apply to itself. De-legitimizing perceptions of hegemony, as well as risks of local noncooperation,

arise from the suspicion that this Tribunal has taken the localized form that it has, not because Iraqis have genuinely insisted upon it, but because it suits US policy goals – including to undermine the ICC or to make it less likely that its number-one-defendant will be permitted to embarrass the US. (pp. 326–7)

Among Bolton’s (2002) concerns are that binding the USA to the ICC ‘with its unaccountable Prosecutor and its unchecked judicial power, is clearly inconsistent with American standards of constitutionalism’ and that a ‘politically unaccountable Prosecutor’ could act ‘as part of an agenda to restrain American discretion, even when . . . actions are legitimated by the . . . constitutional system’. On 6 May 2002 the USA took the legally unprecedented step of ‘unsigned’ the Rome Statute, opening the way for it to act contrary to the Convention’s object and purpose (McGoldrick, 2004: 415). The USA’s attempt to achieve immunity from the jurisdiction of the ICC has been largely successful. Although Security Council Resolutions providing for the immunity from the Court of forces from non-ICC party states contributing

to UN operations (SCR 1422, 2002; SCR 1487, 2003) have not been renewed since the abuse of prisoners at Abu Grahیب came to light, so-called ‘article 98 bilateral agreements’ protecting US nationals from the ICC’s jurisdiction, have proved more successful, although still of questionable legality (McGoldrick, 2004: 423).

CONCLUSION

The argument of this article is that the world beyond the USA must now take seriously what in the past it might have chosen to ignore. What appeared to be an extreme – and rather esoteric – position calling into question the whole international law regime, is now arguably at the heart of the current US administration. While the implications of this phenomenon are not yet clear (almost certainly not even to the US administration) they will be substantial and will have a profound effect both on international relations and on the methods of diplomacy. The human rights examples confirm this but in other areas, especially the use of force in international relations, the changes may be even more profound.

A final irony has to be observed. The neo-conservative assault on international law may well fuel the kind of globalism to which Bolton objects so forcefully. The claimed supremacy of the United States Constitution and the United States Presidency over international law greatly diminishes the weight of US participation in treaty and convention negotiations. The claimed superiority puts it beyond *pacta sunt servanda* but not always to its advantage. If it is want to remain beyond the reach of international law, this can only increase the urgency for international cooperation among all its economic, social and cultural competitors, not to mention those with different foreign policy objectives.

NOTES

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1. We do not of course identify entirely or even largely with this ‘history’, nor yet would John Bolton, but we think it important for Europeans to recognize that superiority is too easily assumed.

2. A sentiment recently expressed by Michael Ignatieff (2003):

Being an imperial power, however, is more than being the most powerful nation or just the most hated one. It means enforcing such order as there is in the world and doing so in the American interest. It means laying down the rules America wants (on everything from markets to weapons of mass destruction) while exempting itself from other rules (the Kyoto Protocol on climate change and the International Criminal Court) that go against its interest.

3. Significantly naming the chapter concerned with international law in *Politics Among Nations*, ‘The Main Problems of International Law’.

4. This concept is one most reviled by the neo-conservatives (Glennon, 2001). For an excellent discussion of the contemporary meaning and significance of

‘sovereign equality’, see Simpson (2004).

5. The letter (available at: <http://www.newamericancentury.org/iraqclintonletter.htm>) was signed by many who had played a part in the administration of Ronald Reagan and/or the first Bush administration and who clearly considered that there remained unfinished business. The signatories included Elliot Abrams, John Bolton, Robert Kagan, Richard Perle, Donald Rumsfeld and Paul Wolfowitz (and indeed, Francis Fukuyama).

6. For a substantial critique of this paper, see Pena (2003).

7. Ignatieff (2003) puts it as follows: ‘A new international order is emerging, but it is designed to suit American imperial objectives. America’s allies want a multilateral order that will essentially constrain American power. But the empire will not be tied down like Gulliver with a thousand legal strings.’

8. A view of relevance to the subsequent decisions to intervene in Afghanistan post-9/11 without explicit UN authorization or even endorsement; and to the decision to invade Iraq, again without authorization.

9. The principle of universal jurisdiction allows a state to exercise jurisdiction over persons accused of committing international crimes anywhere in the world, irrespective of the nationality of the perpetrator, or, indeed, the victim(s).

10. For interesting (if self-serving) US perspectives on universal jurisdiction, see Kissinger (2001) and for a spirited reply, see Roth (2001).

11. Over 200 NGOs attended the Rome Conference on the International Criminal Court. See the website of the NGO Coalition for the International Criminal Court at <http://www.iccnw.org/romearchive.html>.

12. ‘To start, let us define in summary fashion what, at least in the United States, “law” is commonly understood to be. We understand “law” to be a system of commands, obligations and rules that regulate relations among individuals and associations, and the sources of legitimate coercive authority in society. These are the forces that can compel behaviour and enforce compliance with rules’ (Bolton, 2000c: 2).

13. As many as 1200 NGOs participated at San Francisco. Their role, especially in ensuring that the United Nations Charter incorporated human rights concerns, was unprecedented. The importance of their contribution was acknowledged by US Secretary of State after the conference (Charnovitz, 1997: 251–2).

14. Article 17 states:

1. The General Assembly shall consider and approve the budget of the Organization.

2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.

3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

15. For an attack on the concept, see Glennon (2003a) and the slightly longer (and slightly more circumspect) version of this piece (Glennon, 2003b). The additional circumspection seems to come from the difficulties being experienced in administering a conquered Iraq (Mansell, 2004).

16. Correspondence between Taft and Yoo, including previously unreleased material obtained by Mayer, can be found on *The New Yorker* website at www.newyorker.com/online/content/?050214on_onlineonly02.

17. According to S 2340, torture is ‘committed by a person acting under the color

of law specifically intended to inflict severe pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control’.

CASES CITED

In re Guantanamo Detainee Case, Memorandum Opinion Denying in Part and Granting in Part Respondents’ Motion to Dismiss or for Judgment as a Matter of Law [2005] US District Court for the District of Columbia, 31 January at <http://host3.uscourts.gov/02-299b.pdf>.

Rasul et al v Bush, President of the United States et al [2003] Supreme Court of the United States, 542 US (2003) No. 03-334, 28 June at <http://www.supremecourtus.gov>.

Salim Ahmed Hamdan v Donald H. Rumsfeld [2004] US District Court for the District of Columbia, 8 November at <http://www.dcd.uscourts.gov/02-1519.pdf>.

REFERENCES

- Alvarez, J. (2004) ‘Trying Hussein: Between Hubris and Hegemony’, *Journal of International Criminal Justice* 2: 319–29.
- Anderson, K. (2000) ‘The Ottawa Convention Banning Landmines: The Role of International Non-Governmental Organisations and the Idea of International Civil Society’, *European Journal of International Law* 2: 91–120.
- Anderson, K. (2001) ‘The Limits of Pragmatism in American Foreign Policy: Unsolicited Advice to the Bush Administration on Relations with International Nongovernmental Organizations’, *Chi. J. Int’l L.* 2: 371–88.
- Bolton, J. (2000a) ‘Should We Take Global Governance Seriously?’, *Chi. J. Int’l L.* 1: 205–21.
- Bolton, J. (2000b) ‘Unilateralism is Not Isolationism’, pp. 50–82 in G. Prins (ed.) *Understanding Unilateralism in American Foreign Relations*. London: Royal Institute of International Affairs.
- Bolton, J. (2000c) ‘Is There Really “Law” in International Affairs?’, *Transnt’l L. & Contemp. Probs* 10: 1–47.
- Bolton, J. (2002) ‘The United States and the International Criminal Court’. Remarks to the Federalist Society, Washington, DC, 14 November. Available at: www.htholyoke.edu/acad/intrel/bush/icc2.htm.
- Borelli, S. (2004) ‘The Treatment of Suspects Captured Abroad’, pp. 39–61 in A. Bianchi (ed.) *Enforcing International Law Norms Against Terrorism*. Oxford: Hart.
- Byers, M. (1999) *Custom, Power and the Power of Rules: International Relations and Customary International Law*. Cambridge: Cambridge University Press.
- Charnovitz, S. (1997) ‘Two Centuries of Participation: NGOs and International Governance’, *Michigan Journal of International Law* 18: 183–296.
- D’Amato, A. (1987) ‘Trashing Customary International Law’, *AJIL* 81: 101–5.
- Encyclopaedia Britannica* (1880) 9th edn. Edinburgh: Adam and Charles Black.
- Fletcher, G. (2002) *Romantics at War: Glory and Guilt in the Age of Terrorism*.

- Princeton, NJ: Princeton University Press.
- Gellman, B. (1992) 'Keeping the U.S. First', *The Washington Post*, 11 March.
- Glasius, M. (2002) 'Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court', pp. 137–68 in *Global Civil Society Yearbook 2002*. Oxford: Oxford University Press.
- Glennon, M. (2001) *Limits of Law, Prerogatives of Power*. New York: Palgrave.
- Glennon, M. (2003a) 'The UN Security Council in a Unipolar World', *Va. J. Int'l L.* 44: 91–111.
- Glennon, M. (2003b) 'Why the Security Council Failed', *Foreign Affairs* (May/June): 16–36.
- Golden, T. (2004) 'How U.S. Rewrote Terror Law in Secrecy: White House Group Devised New System in Aftermath of 9/11', *New York Times*, 25 October.
- Greenberg, K. and J. Dratel (eds) (2005) *The Torture Papers: The Road to Abu Ghraib*. New York: Cambridge University Press.
- Halper, S. and J. Clarke (2004) *America Alone: The Neo-Conservatives and the Global Order*. Cambridge: Cambridge University Press.
- Hamm, B. (2005) *Devastating Society: The Neo-Conservative Assault on Democracy and Justice*. London: Pluto.
- Hoffmann, S. (2003) 'The High and the Mighty: Bush's National Security Strategy and the New American Hubris', *The American Prospect* 13(24).
- Ignatieff, M. (2003) 'American Empire: Get Used To It', *New York Times Magazine* January.
- Independent Panel to Review Department of Defense Detention Operations (2004) Available at: <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>.
- JURIST (2004) Available at: <http://jurist.law.pitt.edu/paperpurchase/2004/11/doj-toappeal-ruling-on-gitmo-military.php>.
- Kahn, P. (2001) 'American Hegemony and International Law: Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order', *Chi J. Int. Law* 1: 1–18.
- Kissinger, H. (2001) 'The Pitfalls of Universal Jurisdiction', *Foreign Affairs* 80(4): 86–97.
- Koh, H. (2002) 'The Case Against Military Commissions', *AJIL*: 337–44.
- Koh, H. (2003) 'On American Exceptionalism', *Stanford Law Review* 55: 1479–527.
- Mansell, W. (2004) 'Goodbye to All That? The Rule of Law, the United States and the Use of Force', *Journal of Law and Society* 31: 433–56.
- Mayer, J. (2005) 'Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program', *The New Yorker*, 8 February.
- McGoldrick, D. (2004) 'Political and Legal Responses to the ICC', pp. 389–449 in D. McGoldrick, P. Rowe and E. Donnelly *The Permanent International Criminal Court: Legal and Policy Issues*. Oxford: Hart.
- Morgenthau, H. (1960) *Politics among Nations*. New York: Knopf.
- Morton, H. (1943) *Atlantic Meeting*. London: Methuen.
- Mundis, D. (2002) 'The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts', *AJIL* 96: 320.
- Mundis, D. (2004) 'The United States of America and International Justice: Has Lady Liberty Lost her Way?', *Journal of International Criminal Justice* 2: 2–10.

- Murphy, J. (2004) *The United States and the Rule of Law in International Affairs*. Cambridge: Cambridge University Press.
- Murphy, S. (2004) 'Contemporary Practice of the United States Relating to International Law: International Criminal Law: U.S. Abuse of Iraqi Detainees at Abu Graib Prison', *AJIL* 98: 591–6.
- Ndiaye, B. W. (1996) *Questions of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories*. Report of the Special Rapporteur Submitted Pursuant to Commission on Human Rights Resolution. UN Doc E/CN4/1998/68/Addendum 3.
- Oppenheim, L. (1912) *International Law*. London: Longmans Green, and Company.
- Pena, C. (2003) *Bush's National Security Strategy is a Misnomer*. Cato Policy Analysis No. 496, 30 October.
- Ratner, M. and E. Ray (2004) *Guantánamo: What the World Should Know*. White River Junction, VT: Chelsea Green Publishing.
- Reus-Smit, C. (2004) *American Power and World Order*. Cambridge: Polity.
- Roberts, A. (2004) 'Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11', *EJIL* 15: 721–49.
- Rosenne, S. (1984) *Practice and Methods of International Law*. New York: Oceana.
- Roth, K. (2001) 'The Case for Universal Jurisdiction', *Foreign Affairs* 80(5): 150–4.
- Schlesinger, S. (2003) *Act of Creation: The Founding of the United Nations*. Boulder, CO: Westview Press.
- Simpson, A. (2001) *Human Rights and the End of Empire*. Oxford: Oxford University Press.
- Simpson, G. (2004) *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*. Cambridge: Cambridge University Press.
- Steyn, J. (2004) 'Guantanamo Bay: The Legal Black Hole', *ICLQ* 53: 1–15.
- Taft, W. H. (2002a) Letter to John Yoo, 11 January, and accompanying annotated draft. Available at: http://www.newyorker.com/printable/?fact050214fa_fact6
- Taft, W. H. (2002b) Memorandum to John Yoo, 23 January. Available at: http://www.newyorker.com/online/content/?050214on_onlineonly02
- Taft, W. H. (2002c) Note for Judge Gonzales, 23 January. Available at: http://www.newyorker.com/online/content/?050214_on_onlineonly02
- US Department of Justice, Office of Legal Counsel (2004) Memorandum for James B. Comey, Deputy Attorney General *Re Legal Standards Applicable Under 18 U.S.C. paras 2340–2340A*, 30 December. Available at: <http://news.findlaw.com/hdocs/docs/terrorism/dojtorure123004mem.pdf>.
- Working Group Report on Detainee Interrogations in the Global War on Terrorism (2003) *Assessment of Legal, Historical, Policy, and Operational Considerations*. Available at: <http://www.defenselink.mil/news/June2004/d20040622doc8.pdf>.
- Yoo, J. and R. J. Delahunty (2002) Letter to Taft, 14 January. Available at: http://www.newyorker.com/online/content/?050214_on_onlineonly02