GLOBAL JUSTICE VS. U.S. GLOBAL HEGEMONY: REJECTING BOLTON'S OPPOSITION TO THE ICC

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ABSTRACT

Former U.S. National Security Advisor John R. Bolton has announced that as an official Trump Administration national security policy, the USA will not support the International Criminal Court (ICC) and instead will work for its demise. At issue here is a concept of global justice versus insistence on US global hegemony and a Pax Americana. Here, the author argues against Bolton's position rejecting the legitimacy of international law and the ICC. Bolton's appeal to a principle of consent must yield to a principle of salience, as defended by Ronald Dworkin; a concept of justice, as advocated by Amartya Sen; and a concept of legitimacy, as defended by Allen Buchanan and Robert Keohane.

"In the past five millennia, thousands of wars have been fought and billions of lives extinguished. Ironically, it was in the modern era, characterized by a codification of laws and customs of war and a growing body of international norms, that war achieved unprecedented destructive capacity. The twentieth century has the infamy of being the bloodiest century in the history of mankind."

—Jackson Nyamuya Maogoto (2004)[1]

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1 JACKSON NYAMUYA MAOGOTO, WAR CRIMES AND REALPOLITIK: INTERNATIONAL JUSTICE FROM WORLD WAR I TO THE 21ST CENTURY 1 (Lynne Rienner Publishers 2004).

I. PROJECTING U.S. GLOBAL HEGEMONY

> They just made the decision to go to war with Iraq. He said, "I guess it's like we don't know what to do about terrorists, but we've got a good military and we can take down governments." And he said, "I guess if the only tool you have is a hammer, every problem has to look like a nail." [I] came back to see him a few weeks later, and by that time we were bombing in Afghanistan, I said, "Are we still going to war with Iraq?" And he said, "Oh, it's worse than that." He reached over on his desk. He picked up a piece of paper. And he said, "I just got this down from upstairs"—meaning the Secretary of Defense's office—"today." And he said, "This is a memo that describes how we're going to take out seven countries in five years, starting with Iraq, and then Syria, Lebanon, Libya, Somalia, Sudan and, finishing off, Iran.[2]

It is highly probable that most of the American public remains unaware of these remarks from former NATO Supreme Allied Commander General Wesley Clark, uttered in reflection about U.S. defense and security policy and a strategy that he discovered while visiting the Pentagon some days after September 11, 2001 ("9/11"). The narrative speaks volumes of American hubris in the aftermath of the former Soviet Union's fragmentation and in the questionable decision taken by the George W. Bush Administration (the "Bush Administration") to prosecute a global "war on terror," beginning with engagement of the Taliban in Afghanistan and then Saddam Hussein in Iraq. All of this was part and parcel of the strategic policy known as the Project for a New American Century ("PNAC").

2 General Wesley Clark & Amy Goodman, *Global Warfare: We're Going to Take Out 7 Countries in 5 Years: Iraq, Syria, Lebanon, Libya, Somalia, Sudan & Iran*, Video Interview with General Wesley Clark, DEMOCRACY NOW (Mar. 2, 2007), https://www.globalresearch.ca/we-re-going-to-take-out-7-countries-in-5-years-iraq-syria-lebanon-libya-somalia-sudan-iran/5166.

The "plot," as Clark put it, was clear: "to destabilize the Middle East, turn it upside down, make it under our control;" the new "purpose" of the U.S. military was "to start wars and change governments," not "to deter conflicts."[3] In short, Clark's remarks mean that "regime change" is now an explicit policy of the U.S. military, one to be undertaken unilaterally in a supposedly unipolar world of American superiority. The statement is not an exaggeration. In its statement of principles, PNAC sought agreement on "strategic objectives," in view of "American global leadership" as "the world's preeminent power," shaping "a new century favorable to American principles and interests."[4] In September 2000, PNAC published its report entitled *Rebuilding America's Defenses: Strategy, Forces, and Resources for a New Century*.[5] John R. Bolton ("Bolton"), former National Security Advisor in the Trump Administration and former U.N. Ambassador in the Bush Administration, was among the directors of PNAC at the time. In his published work and his official capacities, Bolton has continued to champion American national sovereignty and bilateral treaty agreements against multilateralism and the authority of global institutions. It is no surprise then that in his previous position in the Trump Administration, Bolton pounced on a national security policy that rejects the authority of the International Criminal Court ("ICC").

Bolton's position accords with that of PNAC, which maintains a preemptive strategy: "[t]he history of the 20th century should have taught us that it is important to shape circumstances before crises emerge, and to meet threats before they become dire."[6] This means working to sustain a *Pax Americana* privileging American security interests on the basis of "four core missions": (1) to "defend the

3 Glenn Greenwald, *Wes Clark and the Neocon Dream*, SALON (Nov. 26, 2011, 5:45 PM UTC), https://www.salon.com/2011/11/26/wes_clark_and_the_neocon_dream/.

4 *Statement of Principles*, PROJECT FOR THE NEW AMERICAN CENTURY (June 3, 1997), http://www.newamericancentury.org/statementofprinciples.htm [https://perma.cc/LV6N-EUXC].

5 PROJECT FOR THE NEW AMERICAN CENTURY, REBUILDING AMERICA'S DEFENSES: STRATEGY, FORCES, AND RESOURCES FOR A NEW CENTURY, PROJECT FOR THE NEW AMERICAN CENTURY (2000), https://www.researchgate.net/publication/304401816_The_Force_of_the_Better_Argument_Americans_Can_Learn_Something_from_Jurgen_Habermas_and_Deliberative_Democracy/fulltext/5a3304e2458515afb68ffca2/The-Force-of-the-Better-Argument-Americans-Can-Learn-Something-from-Juergen-Habermas-and-Deliberative-Democracy.pdf.

6 *Statement of Principles*, *supra* note 4.

American homeland;" (2) to "fight and decisively win multiple, simultaneous major theater wars;" (3) to "perform the 'constabulary' duties associated with shaping the security environment in critical regions;" and (4) to "transform U.S. forces to exploit 'the revolution in military affairs.'"[7] These core missions assume requisite resources to "maintain nuclear strategic superiority" over Russia, China, and any other regional power asserting itself on the global stage.[8] The security task is "to match military means to geopolitical ends."[9] The name of the game is geopolitics with the United States as global hegemon. This includes the specific goal to "defend key regions of Europe, East Asia and the Middle East," not so much relative to the protection of allies but for the projection of American interests.[10] However, the PNAC mission goes beyond "defense" per se: "past Pentagon wargames have given little or no consideration to the force requirements necessary *not only to defeat an attack but to remove these regimes from power and conduct post-combat stability operations*."[11] For PNAC, what matters in policy are preemptive military and intelligence operations, regime change, and "constabulary" military occupation until such time as a favorable regime is put into power in any country in which the U.S. engages in armed conflict.[12]

However, as General Clark put it, at all times senior command officers must respond to cabinet level orders, understanding that military officers should be "bigger than" their job, asking themselves "the moral, legal and ethical questions first."[13] Clark was not one to resign in conscientious objection to questionable defense and security policy; he opined the U.S. military invasion of Iraq was "not illegal," premising that, "it was authorized by the United States Congress. It was authorized by the United Nations Security Council resolution."[14] Yet, Clark made an important technical distinction: "[i]t's an illegitimate war, but not an illegal war."[15] The distinction points to a conceptual distinction of legality and morality: what can be legal can nonetheless be immoral relative to a given practical rationality or moral framework of critique, assuming there can be an ethics

7 PROJECT FOR THE NEW AMERICAN CENTURY, *supra* note 5, at iv.
8 *Id.*
9 *Id.* at 1.
10 *Id.* at 2.
11 *Id.* at 10 (emphasis added).
12 Clark & Goodman, *supra* note 2.
13 *Id.*
14 *Id.*
15 *Id.*

appropriate to the conduct of international affairs other than standards of *realpolitik*, the logic of statecraft, and adherence to the principle of sovereignty. The question today is whether there can be an effective commitment to global justice despite appeals to national sovereignty and democratic constitutionalism.

II. THE POST-WORLD WAR II QUEST FOR JUSTICE

The quest for justice has always been situated within a conceptual debate involving diverse perspectives on law and morality. These perspectives are grounded within the Western philosophical tradition's discourse on political theory, moral philosophy, and the philosophy of law. In the case of international law and the quest for a normative dimension of international affairs, one finds diverse conceptual frameworks further articulated in classical and contemporary international relations theory. More recently, there have been reasonable efforts to advance this quest from non-Western philosophical and religious perspectives, thereby challenging the hegemony of Western reason. Since at least the last quarter of the twentieth century, the discourse has shifted, however, from that of international relations (with a focus on nation-state interests and the logic of statecraft) to that of world order (attention to the broader human interest, global interdependence, and the realities of global danger to human survival from causes both natural and anthropogenic).[16]

The fact is, however, that this Western post-war tradition was been unable to prevent atrocities of the twentieth century that have "shocked the conscience" of humanity—crimes of genocide, crimes against humanity, crimes of war, crimes of aggression—many of which have occurred after the Nazi genocide of European Jews during the Second World War, which has often been understood as a sea change both in international human rights law and in prioritizing prevention of the aforementioned crimes. It has been said that "Holocaust" and "Shoah" both count as "ideographs" manifesting a

16 *See, e.g.*, ON THE CREATION OF A JUST WORLD ORDER (Saul H. Mendlovitz ed., The Free Press 1975); RICHARD A. FALK, THE END OF WORLD ORDER: ESSAYS ON NORMATIVE INTERNATIONAL RELATIONS (Holmes & Meier 1983); CULTURE, IDEOLOGY, AND WORLD ORDER (R.B.J. Walker ed., Westview Press 1984); THE CONSTITUTIONAL FOUNDATIONS OF WORLD PEACE (Richard A. Falk, Robert C. Johansen & Samuel S. Kim eds., SUNY Press 1993).

complexity of meaning not readily represented by the words alone.[17] Since the Nuremberg Tribunal in particular, these categories of crime have refocused contemporary philosophical, legal, and political discourse with a concern for human rights, for a reasonably defensible moral "law of humanity." The fact is that, as John Silber has emphasized, "[t]hough Hitler's policy of genocide was historically unique in Western civilization, a genocidal Holocaust could happen again. Indeed, it can happen in any society—industrial or non-industrial—when there is sufficient will on the part of a ruthless leadership."[18] We now know it to be true, as a matter of historical fact since Auschwitz, even if not with the industrial scale of the mass slaughter that occurred within the Nazi extermination camps. We have had all too many occasions of genocide and other crimes against humanity in the twentieth century and beyond that denounce the supposed superior law and morality of the modern nation-state and that provide evidence that the modern nation-state is hardly benign in the pursuit of national state interests—in Armenia, in the occupied territories of Palestine, in the former East Pakistan that became Bangladesh, in the killing fields of Cambodia, in Rwanda, in the former Yugoslavia, in Iraq and Afghanistan, in Myanmar, in Yemen, to name those for which there is reasonable propriety to the charge of genocide and other atrocities.

Of course, the logic of statecraft adheres to the supposedly inviolable principle of sovereignty, defining the scope of social, cultural, economic, political, and civil rights recognized within national-state jurisdictions. In the post-World War II ("WWII") era, however, a "declaratory tradition" of international law continues to be developed in an effort to deter nation-states from conduct that undermines international peace and security both between and within nation-states.[19] Various conventions having the legal status of treaty law (whether they be bilateral, multilateral, or regional) and a corresponding foundational commitment to the principle of *pacta sunt servanda* have been put in place with a view to both a deterrent effect and a more positive quest for a just world order.[20] That task continues

17 JOHN SILBER, *Kant at Auschwitz*, *in* KANT'S ETHICS: THE GOOD, FREEDOM, AND THE WILL 314, 315 (Walter de Gruyter, Inc. 2012).

18 *Id.* at 315-16.

19 Dorothy V. Jones, *The Declaratory Tradition in Modern International Law*, *in* TRADITIONS OF INTERNATIONAL ETHICS 42, 42-61 (Terry Nardin & David R. Mapel eds., Cambridge University Press 1992).

20 *See* BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED COURSEBOOK (West Academic Publishing, 4th ed. 2006).

to be expressed as one which is both structural and normative, i.e., in transforming international institutions and patterns of behavior and transforming philosophical orientations and values. Primary among these conventions is the Rome Statute of 1998 (the "Statute"), which entered into force in July 2002 and established the ICC in an effort to prosecute those persons (in contrast to states) guilty of the most egregious of human atrocities.

The U.S. government has a sustained history of expressed exception to the rule of the ICC, resisting both its establishment and its jurisdiction.[21] Most recently, the Trump Administration has signaled an American antagonism that seeks to undermine the ICC and contribute to its demise.[22] This is part of an articulated American "national security policy," according to John Bolton.[23] It behooves us, therefore, to speak to this persistent antagonism in the context of the international community's quest for international justice, despite the institutional challenges to that quest. This is especially necessary in light of international relations theories and state practice that together champion a realist doctrine of state conduct (even if not exclusively interpreted as *Realpolitik*). Before engaging the specific arguments advanced by Bolton, it is worthwhile first to remind ourselves of some basic provisions of the Rome Statute.

III. THE ROME STATUTE

The state parties to the Rome Statute are committed to a long-standing declaratory tradition of international law that unites otherwise sovereign nation-states in a common obligation to international peace and security, against any number of atrocities that deeply shock the conscience of humanity. The Statute concedes to every nation-state the authority—as well as a *duty*—"to exercise its

21 *See, e.g.*, Jimmy Gurule, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions*, 35 CORNELL INT'L L.J. 1 (2001). *See also* William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L L. 701 (2004); Dapo Akande, *The Jurisdiction of the International Criminal Court Over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT'L CRIM. JUST. 618 (2003).

22 *See* John Bolton, Nat'l Sec. Advisor, The White House, Address to Federalist Society in Washington, D.C. (Sept. 10, 2018), transcript available in AL JAZEERA, https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html (last visited Nov. 11, 2019) [hereinafter Bolton, Address to Federalist Society].

23 *Id.*

criminal jurisdiction over those responsible for international crimes."[24] This duty belongs first and foremost to a governing national-state judicial authority. However, this duty speaks to the responsibility national authorities have for the human rights of both present and future generations irrespective of national identity or citizenship. When that duty is not fulfilled at the level of a given national jurisdiction, it is then the responsibility of the ICC to prosecute "the most serious crimes of concern to the international community as a whole," even though as a court of last resort the ICC functions in a manner "complementary to national criminal jurisdictions."[25] Such is the intent of the Statute's principle of complementarity.

Both national duty and the subsequent duty of the ICC are grounded in an appeal to a standard of "international justice." According to the Rome Statute, the ICC is constituted as an "international legal personality," authorized to prosecute (a) the crime of genocide, (b) crimes against humanity, (c) war crimes, and (d) the crime of aggression.[26] Each of these categories of international crime is defined in extant international law by treaty conventions (e.g., the Geneva Convention of 1949, "established principles of the international law of armed conflict," "internationally recognized human rights law," etc.),[27] and thus these categories and their scope are not per se at issue. The Statute clarifies the authority and jurisdiction of the ICC, stipulating the meaning of these crimes (*see* Article 6 on genocide; Article 7 on crimes against humanity; Article 8 on war crimes).[28] In 2010, the Statute was amended to clarify the crime of aggression (following Article 8).[29] This clarification is especially important since other categories of crime historically occur consequent to aggression against ostensibly non-belligerent parties, hence without just cause. However, the Statute is also clear, at Article 11, that the ICC has jurisdiction "only with respect to crimes [mentioned above] committed after the entry into force" of the Statute,

24 U.N. General Assembly, *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9, at Preamble (July 17, 1998) [hereinafter *Rome Statute*].

25 *Id.*

26 *Id.* at art. 4, 5.

27 *Rome Statute*, *supra* note 24.

28 *Id.* at art. 6-8.

29 U.N. Secretary General, *Depositary Notification: Review Conference Adopting Amendments on the Crime of Aggression to the Rome Statute by Resolution RC/Res.6*, C.N.651.2010.TREATIES-8 (June 11, 2010).

i.e., as of July 2002.[30] Additionally, Article 16 requires the ICC to defer any investigation or prosecution of crimes consequent to a deferral request from the U.N. Security Council ("UNSC") (pursuant to passage of a resolution under Chapter VII of the U.N. Charter).[31] Whether the Council would do so, however, is a matter of some debate. Some find the ICC institutionally in tension with the Council in deciding when and how a violation of international peace and security occurs and what is to be done to manage and resolve occasions of conflict.[32]

It is central to the ICC's function in the quest for international justice that it acts according to the principle of complementarity, i.e., as a court of last resort acting in the event of a failure of national states to address the relevant crimes with their respective domestic legal authorities.[33] The Court adheres to the legal principle, "*nullum crimen sine lege*,"[34] That is not to say the Court operates only by appeal to a positivist conception of law, which disavows appeal to standards of morality not expressed in written law per se. Hence, as is common with norms of criminal law within domestic jurisdictions, Article 22 leaves no ambiguity or appeal to analogy in clarifying that "the definition of crime shall be strictly construed."[35]

Article 17 specifies, in anticipation, that a case may be inadmissible when the State may be "unwilling or unable genuinely" to carry out either an investigation or a prosecution or both; *that a State may (wrongly) decide not to prosecute a case through "unwillingness or inability of the State genuinely to prosecute;" that or, a State having initial jurisdiction acts intentionally to "shield" persons "from criminal responsibility for crimes within the jurisdiction of the Court;" or proceedings undertaken do not satisfy expectations of reasonable independence or impartiality according to "norms of due process recognized by international law*."[36] Consistent with the principle of complementarity, the ICC prosecutor normally

30 *Rome Statute*, *supra* note 24, at art. 11.

31 *Id.* at art. 16.

32 *See* Mark S. Stein, *The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression*, 16 IND. INT'L & COMP. L. REV. 1 (2005).

33 *But cf.* William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53 (2008).

34 *Rome Statute*, *supra* note 24, at art. 22.

35 *Id.*

36 *Id.* at art. 17.

defers to a given State's investigation for a time-limited period when identifiable nationals of the given State are alleged to have committed crimes and when there is evident *bona fide* investigation by the State.[37]

Nevertheless, pursuant to Article 19, the ICC has the authority to "satisfy itself that it has jurisdiction in any case brought before it," notwithstanding the rights of various entities (accused persons or States) challenging its jurisdiction, even as victims of crimes submit their own observations as to the Court's jurisdiction or admissibility of evidence.[38]

IV. THE RECENT CHALLENGE IN U.S. NATIONAL SECURITY POLICY

In light of the foregoing provisions, it is problematic that in a speech before The Federalist Society in Washington, D.C. in September 2018, Bolton issued a "major announcement on U.S. policy toward the ICC."[39] Bolton was clear that he, as a policy representative of the Trump Administration, differed with "advocates" of "global governance," who desire "a supranational tribunal that could supersede national sovereignties and directly prosecute individuals for alleged war crimes."[40] Bolton finds establishment of a supranational entity inconsistent with the rights of those states that function on the basis of "strong constitutions, representative government, and the rule of law."[41]

The operative assumption here is that nation-states with these key traits supposedly have the ability to respond to atrocities adequately through domestic law, therefore eliminating the need for an institution such as the ICC. Bolton admits that global governance advocates are concerned not merely with this ability per se, but with manifest "perceived failures" of governments to actually do so.[42] Bolton decries the gap between theory and practice in the function of the ICC, complaining that it has been "ineffective, unaccountable, and indeed, outright dangerous."[43] Of course, as political scientist and former U.S. Congresswoman, Cynthia McKinney, observes, both the ICC and the International Court of Justice ("ICJ") "reflect the present power configuration of international relations: those who have come under

37 *Id.* at Preamble, art. 1.

38 *Id.* at art. 19.

39 Bolton, Address to Federalist Society, *supra* note 22.

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

the scrutiny of the ICC thus far are the weak, powerless, and inconvenient individuals while a parallel phenomenon allows judgments rendered by the ICJ to be completely ignored."[44] The U.S. and other States, ignore or actively undermine both the ICJ and the ICC, contributing to their marginal performance and perception of inadequacy.[45] Bolton eschews global governance as he construes it theoretically.[46] The most obvious danger here, for Bolton, is the interest of those who seek "to constrain the United States" in its military excesses, and to "target" not only "individual U.S. [military] service members, but [also] America's senior political leadership."[47]

Although Bolton does not say who specifically falls into this category, anyone with an empirical sense of regional armed conflict since the events of 9/11 would be ready to pronounce names such as former President George W. Bush and his deputies—former Vice President Dick Cheney, former Secretary of Defense Donald Rumsfeld, former National Security Advisor Condoleeza Rice, former Secretary of State Colin Powell, and others championing military interventions in Afghanistan, Iraq, Libya, Syria, etc., as part of a global "war on terror," the justification for which has been questionable when evaluated against just war criteria and other elements of international law.[48] Those also accountable include former British Prime Minister

44 Personal Communication from Cynthia McKinney, former U.S. Congresswoman (Sept. 30, 2018) (on file with author). *See also* CYNTHIA MCKINNEY ET AL., THE ILLEGAL WAR ON LIBYA (Cynthia McKinney ed., 1st ed. 2012).

45 *See, e.g.*, Natasha Turak, *US Rejects International Court of Justice Ruling on Iran, Continuing Its Isolationist Charge*, CNBC (Oct. 5, 2018), https://www.cnbc.com/2018/10/05/us-rejects-international-court-of-justice-ruling-on-iran-continuing-its-isolationist-charge.html; Jennifer Trahan & Andrew Egan, *US Opposition to the International Criminal Court,* AMERICAN BAR ASSOCIATION (Jan. 1, 2003), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol30_2003/winter2003/irr_hr_winter03_usopposition/; Human Rights News, *United States Efforts to Undermine the International Criminal Court: Legal Analysis of Impunity Agreements*, https://www.hrw.org/legacy/campaigns/icc/docs/art98analysis.htm (last visited Jan. 15, 2020); Human Rights Watch, *US Threatens International Criminal Court*, (Mar. 15, 2019), https://www.hrw.org/news/2019/03/15/us-threatens-international-criminal-court.

46 *See* John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205, 205-21 (2000).

47 Bolton, Address to Federalist Society, *supra* note 22.

48 *See, e.g.*, Gerry Simpson, *The War in Iraq and International Law*, 6 MELB. J. INT'L L. 167 (2005); Alex J. Bellamy, *International Law and the War with Iraq*, 4

Tony Blair and members of his administration who authorized the use of military force in support of US military objectives as part of a "coalition of the willing."[49]

It is no surprise to observers of U.S. foreign policy, therefore, that President Bush "[authorized] the United States to 'un-sign' the Rome Statute" on the rationale that, according to Bolton, the ICC is "fundamentally illegitimate"—not only because of its seeming unaccountability, but because it constitutes "an assault on the constitutional rights of the American people and the sovereignty of the United States."[50] If American democracy means government of the people, by the people, and for the people, which thus presupposes the consent of the governed, then, as Bolton would have it, the ICC is illegitimate because it claims "jurisdiction over individuals without their consent."[51] For Bolton, this claim of jurisdiction is invalid if and when the ICC seeks to prosecute individuals "even if their own governments have not recognized, signed, or ratified the treaty,"[52] as is the case for the U.S.

Bolton is quick to remind that "in 2002 Congress passed the American Service-Members' Protection Act, or ASPA," the intent of which is clear: the president is authorized, in his capacity as Commander-in-Chief, "to shield [American] service members and the armed forces of our allies from ICC prosecution" and otherwise to obstruct "cooperation" with the ICC.[53] Working against its perception of the dangers of supranational global governance, the Bush Administration worked bilaterally "to prevent other countries from delivering U.S. personnel to the ICC."[54] Unfortunately, Bolton laments, the Bush Administration was unsuccessful in the same effort with the European Union, "where the global governance dogma is strong."[55] Bolton's use of the word "dogma" here is clearly pejorative and dismissive in view of his own personal hostility to the ICC's

MELB. J. INT'L L. 497 (2003); Andreas Paulus, *The War Against Iraq and the Future of International Law: Hegemony or Pluralism?*, 25 MICH. J. INT'L L. 691 (2004).

49 *See The Coalition*, GLOBAL POLICY FORUM, https://www.globalpolicy.org/invasion-and-war/the-coalition.html (last visited Nov. 11, 2019).

50 Bolton, Address to Federalist Society, *supra* note 22.

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

mission. Acts of Congress are normally understood to prevail if there is a perceived conflict between such acts and international treaties.[56]

Further, as Bolton observes, the Trump Administration fears that the ICC may initiate a formal investigation of American armed forces for "alleged war crimes" committed during the war in Afghanistan.[57] Accordingly, Bolton has delivered, "on behalf of the president of the United States," the message that "[t]he United States will use any means necessary to protect our citizens and those of our allies from unjust prosecution by this illegitimate court."[58] The argument is straightforward: if the ICC is an illegitimate court by lack of consent, it is contrary to the principles of requisite justice it purports to uphold. As far as Bolton and the rest of the Trump Administration are concerned, the ICC is an illegitimate court by lack of consent. Hence, any prosecution the ICC attempts against American armed forces personnel and/or those of American allies is contrary to the requisite of justice. However, this argument must be queried, since both the conditional premise and the assertion made in the supporting premise are doubtful, if not wholly objectionable.

Bolton identifies several principal reasons for objecting to the ICC, thus buttressing his claim of the illegitimacy of the court, which can be enumerated as follows: The ICC—

1. "unacceptably threatens American sovereignty and US national security interests."[59]
2. "claims jurisdiction over crimes that have been disputed and [have] ambiguous definitions, exacerbating the court's unfettered powers."[60]
3. "fails in its fundamental objective to deter and punish atrocity crimes."[61]
4. "is superfluous, given that domestic US judicial systems already hold American citizens to the highest legal and ethical standards."[62]

56 Chukwuemeka A. Okenwa, *Has the Controversy Between the Superiority of International Law and Municipal Law Been Resolved in Theory and Practice?*, 35 J.L. POL'Y & GLOBALIZATION 116, 116-24 (2015).

57 Bolton, Address to Federalist Society, *supra* note 22.

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.*

5. The Court's "authority has been sharply criticized and rejected by most of the world."[63]
6. "In sum, an international court so deeply divisive and so deeply flawed can have no legitimate claim to jurisdiction over the citizens of sovereign nations that have rejected its authority."[64]

V. REPRISING THE "OLD" AND "NEW" BOLTON

Any observer of the Trump Administration will readily opine that Mr. Trump is himself utterly uninformed as to the particulars of international law and, arguably, morality, not to mention the particulars of the Rome Statute and the operations of the ICC.[65] The so-called new "policy" is in fact nothing other than the strident reiteration of a political view long-held by Ambassador Bolton, and one which he has published extensively in other venues. Below, we shall consider his position as he articulated it in several papers.[66] These particular papers link to Bolton's theoretical position questioning the veracity of international law in its entirety.[67]

A. The Ontological Status of "International" Law

Bolton is correct from a theoretical perspective that "[t]here is a rich tradition of skepticism about the 'legality' of international law."[68] This tradition premises an "understanding [of] why nations behave as they do among themselves and whether concepts of law used

63 Bolton, Address to Federalist Society, *supra* note 22.

64 *Id.*

65 In fact, Lucy Reed is rather accurate in her remarks that, "elderly, frail, and (only apparently) powerless Korean 'comfort women'" demonstrated by "bringing charges against the Japanese government in 1994 in a Tokyo district court and demanding a written apology and compensation for crimes against humanity," that these women "understand the legal difference between Japanese government expressions of remorse and a formal apology admitting a violation of international humanitarian law, while many of our highest public leaders have only the most unsophisticated knowledge, if any, of international law." Lucy Reed & Andrew Jacovides, *Great Expectations: Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law?*, 96 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 219, 219-37 (2002).

66 Bolton, *Should We Take Global Governance Seriously?*, *supra* note 46, at 205-21. *See also* John R. Bolton, *The Risks and the Weaknesses of the International Criminal Court from America's Perspective*, 41 VA. J. INT'L L. 167, 167-80 (2000-2001).

67 *See generally* John R. Bolton, *Is There Really "Law" in International Affairs?*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 1 (2000).

68 *Id.* at 1.

domestically can be exported" for the purposes of adjudicating relations among states.[69] Bolton identifies himself as an "Americanist" contending against "Globalists."[70] As such, he seeks to counter the globalist "belittling" of American "popular sovereignty and constitutionalism."[71] Citing the views of the Commission on Global Governance, Bolton says, globalists undertake the "challenge" to manage global affairs in a way "responsive to the interests of all people in a sustainable future," "guided by basic human values," which "makes global organization conform to the reality of global diversity."[72] Bolton remains suspicious that such rhetoric in fact masks a desire for world government. After all, if the globalists are successful in restraining use of military force, "limiting [the] decisions [of states] or transferring them to another source of authority," then the consequence is "diminution of sovereignty and the advance of global governance."[73] Bolton reminds that the U.S./NATO "air campaign over former Yugoslavia in 1999" was "a military action not authorized by the U.N. Security Council" at the time, and was therefore contrary to the U.N. Charter's provisions for "a universally legal basis for the use of force."[74] He rejects the logical consequence, e.g., former U.N. Secretary General Kofi Annan's objections to the US/NATO campaign in the absence of UNSC authorization: "NATO's Kosovo campaign was illegal," implicitly assuming here that the UNSC provides "the sole source of legitimacy" for authorization of armed conflict.[75]

Bolton then speaks to the Rome Statute specifically as "a much broader Globalist advance, creating a potentially powerful new international institution, with the authority to override national judicial systems, and with a jurisdiction far more sweeping even than the existing International Court of Justice."[76] At issue here in the case of the bombing campaign in the former Yugoslavia is the question of whether the U.S./NATO military and political authorities could be charged with "the crime of aggression."[77] Problematic here for Bolton is an expansionist view of "the concept of universal jurisdiction,"

69 *Id.*
70 Bolton, *Should We Take Global Governance Seriously?*, *supra* note 46, at 1.
71 *Id.* at 206.
72 *Id.* at 207.
73 *Id.* at 208.
74 *Id.* at 208.
75 *Id.* at 209.
76 Bolton, *Should We Take Global Governance Seriously?*, *supra* note 46, at 210.
77 *Id.*

motivated by "democratic inefficiency" and failures in decision taken by nation-states.[78] He concedes that "globalists' reject" "American exceptionalism" in the face of such claims to universal jurisdiction.[79] He opposes the "globalist" agenda insofar as it reduces "constitutional autonomy," impairs "popular sovereignty," reduces the USA's "international power," and limits U.S. "domestic and foreign policy options and solutions."[80] Yet, as he himself understands, the undeterred events of genocide (such as in Bosnia and Rwanda) that called for *ad hoc* tribunals have contributed causally to the argument in favor of formation of the ICC, especially because, as he himself observed, up to that time "[o]nly the sporadic use of national judicial mechanisms existed, and more often than not these legal systems were either unavailable to the victims of war crimes and crimes against humanity, or were deemed inadequate afterthoughts."[81]

Problematic, from the perspective of U.S. administrations since the Clinton Administration, is U.S. approval of the Genocide Convention in 1986 with several "reservations," stated "understandings," and a "declaration," which is in stark contrast to Article 120 of the Rome Statute that provides for no reservations whatsoever. Thus, Bolton argues that this is a manifest challenge to the authority of the United States Senate's oversight of treaties signed by the executive branch.[82] Bolton's fear, however, is less concerned with potential war crimes committed by U.S. armed forces than with, as he warns, "the president, the cabinet officers who comprise the National Security Council, and other senior civilian and military leaders responsible for [U.S.] defense and foreign policy" would fall within the universal jurisdiction of the ICC and be exposed to criminal prosecution.[83] As President Trump's former National Security Advisor,[84] Bolton's fear was all the more heightened, given current U.S. military posturing (as with North Korea and Iran) and ongoing military involvements in various parts of the world (including Iraq,

78 *Id.* at 213.

79 *Id.*

80 *Id.* at 221.

81 John R. Bolton, *Courting Danger: What's Wrong with the International Criminal Court?*, 54 NAT'L INT. 60, 60-71 (Winter 1998/1999) [hereinafter Bolton, *Courting Danger*].

82 *Id.*

83 *Id.*

84 Although Mr. Bolton resigned his position as National Security Advisor on September 10, 2019, the extended argument here concerns his sustained intellectual position on the ICC and not merely the fact of his position in the Trump Administration.

Syria, Libya, and Afghanistan), where an appeal to the authority of the post-9/11 Authorization for the Use of Military Force ("AUMF") is yet in question. U.S. involvement in Afghanistan is "perpetual" and unceasing, already moving into seventeen years of military engagement.[85] Whether the U.S.'s intentions in continued military engagement here are sufficient to constitute war crimes committed by the U.S. military remains to be decided.

Bolton's concern over potential retroactive criminal liability of the provisions for war crimes and crimes against humanity is simply incorrect. He has stated that the Statute "[leaves] one unable to answer with confidence whether the United States was guilty of war crimes for its aerial bombing campaigns over Germany and Japan in World War II."[86] The fact is that the ICC's jurisdiction carries no retroactive authority to judge those questions or to consider these justiciable matters that pre-dated the Rome Statute. No one supporting the ICC's jurisdiction argues to a claim of "retroactive imposition of criminal liability"[87] for these events. It is simply unfair of Bolton to argue, subjectively, that "the Court would find the United States guilty" and that "the United States would have been guilty of a war crime for dropping atomic bombs on Hiroshima and Nagasaki."[88] While this may be argued convincingly from the perspective of just war theory and thus from a position of moral philosophy, this does not automatically carry over into a legal assessment that all of a sudden leads to imposition of a post hoc judicial remedy (e.g., war reparations) due to the populations of Hiroshima and Nagasaki, not to mention similar claims in the case of the fire bombings of Dresden, Tokyo, and other cities in Japan.

That said, however, such reflections are pertinent to contemporary assessments that apply to current military behavior of any number of governments relative to the definition of crimes of aggression. In the same way the State of Israel "feared in Rome that its pre-emptive strike in the Six-Day War almost certainly would have provoked a proceeding against top Israeli officials had the Statute been in effect in June 1967," so today any resort to pre-emptive strikes with either conventional or thermonuclear weapons (be they strategic or

85 *See* Tanisha M. Fazal & Sarah Kreps, *The United States' Perpetual War in Afghanistan*, FOREIGN AFF. (Aug. 20, 2018), https://www.foreignaffairs.com/articles/north-america/2018-08-20/united-states-perpetual-war-afghanistan.

86 Bolton, *Courting Danger*, *supra* note 81.

87 *Id.*

88 *Id.*

tactical) is subject to evaluation by the ICC Prosecutor if such strikes occur without UN Security Council authorization.[89] This, of course, is notwithstanding the right of a sovereign state to self-defense, which requires assurance that such strikes are indeed defensive in the face of verifiable "imminent attack" and not otherwise merely pretextually rationalized acts of aggression. It is in the face of such pretextual rationalization that the ICC rightly puts in place a Prosecutor with "the power of law enforcement,"[90] i.e., laws identifying the various categories of atrocious crime stipulated in the Statute. Bolton is correct that the U.S. Constitution (Article II, Section 3) charges the president to "take care that the laws be faithfully executed;"[91] however, that does not mean this charge is in some way or other wrongly expropriated by the ICC judicial authority.

Article VI, Section 2 of the Constitution of the United States (the "Supremacy Clause"), provides for municipal effect of international treaties properly signed by the executive branch and ratified by the U.S. Senate, in which case it falls to the executive branch to see to it that such "law" is upheld wherever it applies.[92] Such a "doctrine of incorporation" includes the law of armed conflict governing American armed forces as well as American civilian personnel up to and including cabinet-level officers. Clearly, there is a debate between "monists" and "dualists" about the legal relation.[93] As summarized by Ferreira and Ferreira-Snyman, "[a]ccording to a monist approach public international law is . . . directly enforceable before municipal courts without any need for incorporation into municipal law. A dualist approach, on the contrary, implies that public international law has to be formally incorporated into municipal law before it would be enforceable before a municipal court."[94] Bolton's argument sides with the dualists, privileging the authority of domestic legal institutions over international institutions such as the ICJ and the ICC, insisting on the consent of the governed (i.e., the American citizenry) purportedly demanded by the Constitution.

89 *Id.*

90 *Id.*

91 *Id.*

92 U.S. CONST. art. VI, § 2.

93 *See, e.g.*, G. Ferreira & A. Ferreira-Snyman, *The Incorporation of Public International Law Into Municipal Law and Regional Law Against the Background of the Dichotomy Between Monism and Dualism*, 17 SCI ELO/PELJ 1471 (2014).

94 *Id.* at 1471.

Yet, the fact is that the American judiciary has long recognized the validity of municipal effect of international law.[95] As Louis Henkin observed in 1984, it is a principle of American jurisprudence that international law is part of American law, despite disputes over whether this is due to "the law of nations" (otherwise known as *jus gentium*), which is customarily observed; "common law" since the American declaration of independence from England and English law; or consequent to statehood.[96] However, a point of distinction is in order. Henkin writes: "[w]hile the obligations of international law are upon the State as an entity, a State ordinarily finds it necessary or convenient to incorporate international law into its municipal law to be applied by its courts."[97] The more pertinent point is the following: While it is true that, "[i]n the United States neither state constitutions nor the federal Constitution, nor state or federal legislation, have expressly incorporated international law," nevertheless "from our beginnings, however, following the English tradition, courts have treated international law as incorporated and applied it as domestic law."[98] Thus, one may appeal legitimately to the practice of the American judiciary for the authority accorded to international treaty law as American law.

Curtis A. Bradley provides a useful concept of the U.S. Supreme Court as a "filter" between international law and American constitutionalism, thus assuring that "when international law passes into the U.S. legal system, it does so in a manner consistent with domestic constitutional values."[99] This filtering, Bradley argues, occurs through "the intersection of treaties and individual rights;" "the relationship between treaty power and American federalism;" "delegations of authority to international institutions;" and "the domestic application of customary international law."[100] Given this interpretation, one is reminded that, "from time to time, the U.S. Supreme Court has taken it upon itself to use international law as persuasive authority [i.e., informative but non-binding] to interpret

95 *See, e.g*., Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1555-69 (1985).

96 *Id.* at 1555-56 ("An entity that becomes a State in the international system is *ipso facto* subject to international law").

97 *Id.* at 1556.

98 *Id.* at 1556.

99 Curtis A. Bradley*, The Supreme Court as a Filter Between International Law and American Constitutionalism*, 104 CALIF. L. REV. 1567, 1568 (2016).

100 *Id.* at 1570.

various provisions of the U.S. Constitution," despite "passionate response from Congress."[101] Indeed,

> In the first decade of the twenty-first century, the Supreme Court decided a series of high-profile cases related to international law. In *Sosa v. Alvarez-Machain* (2004), the Court considered the federal judiciary's role in applying customary international law under the Alien Tort Statute. In *Lawrence v. Texas* (2003) and *Roper v. Simmons* (2005), the Court used international law as a tool for helping to resolve difficult constitutional issues arising under the Eighth and Fourteenth Amendments. In *Hamdan v. Rumsfeld* (2006), the Court grappled with questions involving the proper interpretation of Common Article 3 of the Geneva Conventions. In *Sanchez-Llamas v. Oregon* (2006) and *Medellin v. Texas* (2008), the Court confronted questions involving the U.N. Charter, the Vienna Convention on Consular Relations and the domestic effects of judgments of the International Court of Justice.[102]

In short, Bolton is mistaken: international law truly is law accepted by U.S. jurisprudence, and thus international institutions governed by treaty are to be reasonably accorded status in American jurisprudence.

Associate Justice of the Supreme Court of the United States Stephen Breyer has spoken aptly about the problematic aspects of American "judicial isolationism."[103] Global "interdependence," Justice Breyer reminds, is such that "judicial awareness" of foreign matters "can no longer stop at the border." Justice Breyer is clear: there is a reasonable "evolution of constitutional doctrine concerning the Court's efforts to review presidential, or congressional, actions related to the preservation of national security,"[104] without automatically dismissing the validity of those actions or dismissing challenges to either presidential executive decision or congressional legislative actions. Justice Breyer argues that "often, the best way to further the basic goals of, for instance, an American statute with foreign implications, or to properly enforce a treaty, or to determine how far

101 *See* Rex D. Glensy, *The Use of International Law in U.S. Constitutional Adjudication*, 25 EMORY INT'L L. REV. 198, 198 (2011).

102 *International Law in the Supreme Court: Continuity or Change?*, SANTA CLARA LAW SCHOOL, https://law.scu.edu/international-law-in-supreme-court/ (last visited Sept. 21, 2018).

103 *See* STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES (Alfred A. Knopf ed., 2015).

104 *Id.* at 5.

beyond our shores our Constitution's protection may extend, is to take account of a foreign as well as the domestic legal landscape."[105] That jurisprudential comportment surely holds for the legal operations of the ICJ and the ICC as they affect national state interests or individual persons subject to criminal liability under the categories of crime subject to ICC investigation and adjudication.

Granted, Justice Breyer's perspective (along with that of former associate justice Anthony Kennedy, justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan) differs from that of the other more conservative associate justices (the late Antonin Scalia, Clarence Thomas, Samuel Alito, Jr.) and Chief Justice John G. Roberts, Jr., who "have denounced references to foreign and international law as a threat to the country's tradition of democratic self-governance."[106] Yet, as John Fabian Witt notes, "[i]n a series of decisions over the past decade and a half, the Supreme Court has pushed back against the absolute power of the executive branch and Congress over detainees," with Justice Breyer emphasizing that U.S. "involvement in international affairs—a role for the court he sees as relatively new—will require that judges know something about international security problems."[107] That view is obviously not consonant with conservative or neo-conservative elements of the Republican Party or those who advise on national security matters. Nevertheless, "reconciling security and civil liberties is a problem that nearly every democratic society confronts,"[108] as Justice Breyer argues. In this respect, the judicial task is to coordinate, defer, or dismiss legal cases arising from foreign shores but seeking redress in American courts. The emerging fact is that there are genuine "limits" to the democratic self-governance that Bolton champions: "We have entered a post-American era in which other nations will depend far less on our leadership."[109]

Of course, the U.S. Supreme Court has delivered "mixed signals" on international law, as constitutional law expert Noah Feldman

105 *Id.* at 7.

106 *See* John Fabian Witt, *Stephen Breyer's 'The Court and the World'*, N.Y. TIMES, (Sept. 14, 2015), https://www.nytimes.com/2015/09/20/books/review/stephen-breyers-the-court-and-the-world.html.

107 *Id.*

108 *Id.*

109 Brett Bruen, *Donald Trump's Global Insignificance Is About to be Exposed*, CNN (Sept. 23, 2018), https://www.cnn.com/2018/09/21/opinions/trump-global-insignificance-unga-opinion-intl/index.html.

remarked.[110] For example, the Court "ruled in March 2008 (*Medellin v. Texas*) that U.S. states were not bound by International Court of Justice judgment on staying the execution of a Mexican national, running counter to Bush administration wishes."[111] However, "[i]n a separate judgment (*Boumedine v. Bush*) in June 2008, the [C]ourt gave Guantanamo detainees the right to have federal judges review the reason for their detention. That also challenged the White House, this time on its policy of detaining non-enemy combatants."[112] Consequent to these rulings, U.S. compliance with international obligations may be interpreted in a confused manner:

> It means that we're communicating a kind of schizophrenic vision to those who are watching closely abroad . . . . Sometimes the president will be of one party and Congress of a different party and there are differences in the foreign policy that we're projecting as a result of that division . . . . [It seems] at least the judiciary in the United States is very suspicious of international tribunals that make legal decisions. That's probably the most important message, or foreign policy consequence of the decision [about the death penalty]—that legal institutions of the United States, including the Supreme Court, are very nervous about submitting the United States to the judgment of these international bodies.[113]

To hold as the Supreme Court did in asserting that states do not have to abide by ICJ decisions is problematic:

> What's happening in this situation is that it's the states that sentence these individuals to death and it's the states that have the primary obligation to follow the international treaty, the Vienna Convention on Consular Relations (VCCR). The states violated the VCCR and yet, it's the United States as a country that's been held to be in violation of the treaty, because it's the country that is the signatory to the treaty . . . .[114]

110 Robert McMahon, *The Supreme Court's Mixed Signals on International Law*, COUNCIL ON FOREIGN REL. (Oct. 10, 2008), https://www.cfr.org/interview/supreme-courts-mixed-signals-international-law.

111 *Id.*

112 *Id.*

113 *Id.*

114 *Id.*

In the other case, "[t]he great difficulty with Guantanamo is it was perceived correctly as being a place where people were not being detained subject to rules,"[115] as detainees were not even treated according to Geneva Convention expectations governing the treatment of prisoners of war.[116] The Court's ruling means, in essence, that "the principle of the rule of law trumps the separation of powers," that "rule of law" is not merely American law but necessarily accounts for American obligations under standards of international law.[117]

Despite Bolton's dismissal of the "reality" and "legitimacy" of international law, and despite obstructive behavior of the U.S. as it operates on a questionable assumption of its global hegemonic power in a unipolar world and assumed right of exception to the declaratory tradition, the fact is that international relations and the quest for a just world order depends on the operational validity of such law. Granted, there is, as Friedrich Kratochwil commented, "the common sense notion that law and morals are two distinct sets of norms that ought to be distinguished."[118] With that said, however, one may argue reasonably (as Kratochwil adds) that, morality "is charged with articulating the standards by which legal prescriptions can be evaluated."[119] One may argue that law is "a less than perfect instrument for determining our obligations."[120] It may be observed that, if law is merely what a given State stipulates relative to its territorial and popular sovereignty, then "[d]eriving obligatory standards from the mere practice of different cultures might prove too thin a reed to hang one's hat on, quite aside from the inherent dilemma that following such a procedure seems to involve us somehow in the questionable activity of deriving an 'ought' from an 'is.'"[121] In that case one only speaks of "civil" rights and not of inalienable, inviolable "human" rights, contrary to the clearly supported post-WWII comportment and practice of the international community expressed

115 *Id.*

116 McMahon, *supra* note 110.

117 *Id.*

118 Friedrich Kratochwil, *International Law as an Approach to International Ethics: A Plea for a Jurisprudential Diagnostics*, *in* ETHICS AND INTERNATIONAL AFFAIRS: EXTENT AND LIMITS 14, 14-41 (Jean-Marc Coicaud & Daniel Warner eds., 2001).

119 *Id.*

120 *Id.* at 15.

121 *Id.* at 16.

in the Universal Declaration of Human Rights and associated protocols specific to political, economic, social, and cultural rights.[122]

Granted, initially "[g]lobal reformers widely believed that the way forward involved a stronger United Nations at the expense of state sovereignty, with cumulative moves to enhance global governance. . ."[123] However, as Ersel Aydinli and James Rosenau opine, there are "changing paradigms that are altering the structures of world politics and adding new issues to the global agenda."[124] This includes "a bifurcation of global structures into state-centric and multicentric worlds," with ongoing concern for "the impact of global terrorism"—as well as the counterinsurgent "global war on terror . . . on the so-called security dilemma of states."[125] The fact is that since "the nature of individual and collective security" is in question, the focus on "state security" central to realist political discourse is no longer sustainable in the context of diverse dilemmas of globalization.[126] That does not mean one therefore defers to an abstract, ostensibly ahistorical, normative ethics to stipulate analytically derived principles of conduct. There is, after all, the approach of *legal analysis* favored by Kratochwil, such that "an ethical reflection informed by a legal mode of reasoning is at least sensitive to the institutional settings, the factual circumstances, and the inevitable problems of conflicting values, all of which are mostly neglected when we focus on the elaboration of context-free criteria derived from an analytic enterprise."[127] This approach favors the practical rationality of "casuistry" in contrast to the seemingly abstract appeal to universal or general principles of morality.[128]

B. Settling Bolton's Question of Legitimacy

At issue here is the legitimacy of global institutions in general when they are perceived to challenge the authority and prerogatives of sovereign states. Specifically, Bolton's main concern is the legitimacy

122 *See* BURNS H. WESTON, RICHARD A. FALK, HILARY CHARLESWORTH & ANDREW L. STRAUSS, SUPPLEMENT OF BASIC DOCUMENTS TO INTERNATIONAL LAW AND WORLD ORDER (West Academic Publishing, 4th ed. 2006).

123 WESTON ET AL., *supra* note 20, at 1266.

124 ERSEL AYDINLI & JAMES N. ROSENAU, GLOBALIZATION, SECURITY, AND THE NATION-STATE: PARADIGMS IN TRANSITION 1 (SUNY Press, 2005).

125 *Id.* at 1-2.

126 *Id.* at 2.

127 Kratochwil, *supra* note 118, at 17.

128 *Id.*

of the ICC as an institution of law having seemingly supranational jurisdiction. One must appreciate, however, as Allen Buchanan and Robert Keohane explain, that "'[l]egitimacy' has both a normative and a sociological meaning."[129] Thus:

> To say that an institution is legitimate in the normative sense is to assert that it has the right to rule—where ruling includes promulgating rules and attempting to secure compliance with them by attaching costs to noncompliance and/or benefits to compliance. An institution is legitimate in the sociological sense when it is believed to have the right to rule.[130]

On this distinction, one would say that Bolton's disagreement with the ICC is normative, not sociological. Obviously, as Buchanan and Keohane admit, if any global institution lacks legitimacy, then its "claims to authority are unfounded" and it is "not entitled to our support;"[131] however, one must ask whether this is really the case with the ICC. Likewise, the other side of the argument is that if an institution is legitimate, then "[one] should support or at least refrain from interfering with legitimate institutions."[132] Clearly, Bolton's recent speech places the Trump Administration in the position of neither supporting nor refraining from interfering in the operations of the ICC when the U.S.' interests or its allies' interests (Bolton mentions the State of Israel in particular) are placed in jeopardy by the Office of the Prosecutor.

Rather than concede to the Trump Administration's point of view, however, one should consider (as Buchanan and Keohane propose) the purported justification of an appeal or rejection: "The concept of legitimacy allows various actors to coordinate their support for particular institutions by appealing to their common capacity to be moved by *moral reasons*, as distinct from purely strategic or exclusively self-interested reasons."[133] One may ask: is Bolton appealing either to *moral* reasons, to *strategic* reasons, or to *self-interested* reasons? Perhaps, at least from his writing, it is reasonable to assert that it is a combination of the three in various measures.

129 Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, *in* ETHICS & INTERNATIONAL AFFAIRS: A READER 155, 155 (Joel H. Rosenthal & Christian Barry eds., Geo. Univ. Press 3d ed. 2009).

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.* at 158.

However, Buchanan and Keohane are correct to remind us that we "need a standard of legitimacy that is both accessible from a diversity of moral standpoints and less demanding than a standard of justice. Such a standard must appeal to various actors' capacities to be moved by moral reasons, but without presupposing more moral agreement than exists."[134] Bolton obviously appeals exclusively to what he perceives to be the rational self-interest of the United States, expressed in a legal—not moral—concern for both military and civilian persons plausibly subject to criminal investigation by the Office of the Prosecutor: "[t]o say that an institution is legitimate implies that it has the right to rule even if it does not act in accordance with the rational self-interest of everyone who is subject to its rule."[135]

One may ask, from a utilitarian standpoint, whether the benefits of the ICC are superior to the practices and outcomes under *ad hoc* tribunals that have been used to adjudicate war crimes, crimes of genocide, and crimes against humanity, such as in Nuremberg ("IMTN"), Tokyo ("IMTT"), Yugoslavia ("ICTY"), Rwanda ("ICTR"), Bangladesh, etc.[136] For example, in the case of ICTY, the statute granting its authority did not "expressly provide for the body of law which the court [was] to apply to determine the scope of its jurisdiction *ratione materiae* and to define the crimes which come within that jurisdiction," even if the assumption was that the tribunal would, as the UN Secretary General offered, "apply 'rules of international humanitarian law which are beyond any doubt part of customary law' when making that jurisdictional determination."[137] This is a clear limitation on the permissible procedure, since it excludes "jurisdiction over violations of treaty law or violation of domestic law unless those conventional or national prohibitions have additionally become part of customary international law."[138] The Rome Statute is a significant improvement over the statute authorizing ICTY and its jurisdictional process, thus adding to the ICC's claims that

134 Buchanan & Keohane, *supra* note 129, at 158.

135 *Id.*

136 *See* GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 3-4 (Oxford University Press 2005).

137 *Id.* at 5.

138 *Id.* at 6.

> [t]he problem as far as the *ad hoc* Tribunals are concerned is that, with the exception perhaps of the Genocide Convention, none of the instruments which they could apply in relation to their subject-matter jurisdiction may be said to provide for international crimes. First, there is no international treaty which could arguably be said to provide for the criminalization of crimes against humanity. Concerning war crimes, it must be noted that neither the Geneva Conventions, nor their Additional Protocols may serve—nor were they ever meant to serve—as a basis for criminal conviction . . . . The Geneva Conventions and their Additional Protocols are international treaties and as such, in principle, are binding on states only. Even if it were accepted that some of their provisions might be self-executing and would therefore apply to individuals *qua* treaty, none of those provisions, not even their grave breaches sections, were ever meant to be regarded per se as an international criminal code the breach of which could entail individual criminal responsibility directly under the treaty regime.[139]

The *ad hoc* tribunal process has been unsatisfactory because it mistakenly

> . . . . equates two levels of international prohibitions: illegality and criminality. Because a particular conduct is prohibited under a treaty provision, its breach does not necessarily (and generally does not) entail individual criminal responsibility for the perpetrator for in fact . . . not every illegal act is criminal . . . . From the point of view of the individual, "a finding to the effect that a given norm is binding upon a state—*qua* custom or treaty law—does not entail that its breach may also engage the criminal liability of the individual who committed the act, let alone that it may have that effect under customary international law."[140]

Nonetheless, "[t]he recognition in the Tribunals' Statutes that certain serious violations of the laws of war entail individual criminal responsibility, and the provision of a clear enforcement mechanism for the trial and punishment of those crimes, gives new potency to the standards. The fact that the United Nations Tribunals were given jurisdiction over various categories of serious violations of laws or

139 *Id*. at 8.
140 *Id.* at 9.

customs of war gives meaning to the idea that such violations as well as their punishment are matters of universal interest and concern."[141]

The U.S. cannot have it both ways, as it has inaugurated the jurisdictions of the Nuremberg and Tokyo Tribunals and supported the Genocide Convention with a view to holding individuals accountable for such crimes (notwithstanding its reservations, etc.). The Rome Statute manifestly advances over the *ad hoc* deliberative ambiguity of such tribunals by specifying the pertinent criminality of atrocities and being clear as to the accountability of individual persons and not States *per se*. What the ICC may "learn" from such tribunals and whether judgments taken by them serve as reasonable precedents in prospective ICC judicial proceedings remains debatable, of course. For example, ICJ judge Christopher Greenwood argues that the ICC "can, and should, learn from the jurisprudence of other international courts and tribunals."[142] He clarifies that "there is much wider acceptance [today] of the principle that 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'"[143]

Today, we have effectively moved beyond dealing only with issues of illegality with reference to State conduct—falling under the jurisdiction of the ICJ—to dealing with issues of criminality with reference to the conduct of individuals of a State—falling under the jurisdiction of the ICC. This effectively means the international community has evolved beyond rational self-interest in accounting for the legitimacy of institutions such as the ICC.

Buchanan and Keohane remind of the philosophical quest for justice *qua* that which is "best" in contrast to that which is "good."[144] We all recognize there is no unanimous assent to a concept of international justice. Even so, "even if we all agreed on what justice requires, withholding support from institutions because they fail to meet the demands of justice would be self-defeating from the standpoint of justice itself, *because progress toward justice requires effective institutions*"[145]—and that includes effective global

141 *Id.* at 23.

142 Christopher Greenwood, *What the ICC Can Learn from the Jurisprudence of Other Tribunals*, 58 HARV. INT'L L.J. 71, 73 (2017).

143 *Id.* at 72 (referring to Judgments and Sentences, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 171-341, 365-66 (1947)).

144 Buchanan & Keohane, *supra* note 129, at 160.

145 *Id.* (emphasis added).

institutions when nation-states find themselves in disagreement as to interests, rights, and obligations. Hence, Buchanan and Keohane argue, "[t]o mistake legitimacy for justice is to make the best the enemy of the good."[146] Sometimes we must commit ourselves to what is good despite the desideratum of what is best. That is surely true in the case of international justice and the establishment of the ICC.

C. Considering Standards of Legitimacy

The fact is that there are competing standards of legitimacy that Buchanan and Keohane bring to our attention: (a) state consent, according to which a global governance institution is legitimate "if (and only if) [it is] created through state consent;"[147] (b) consent of democratic states, given the participatory features of such political associations and the assumption of "'substantial' voluntariness . . . thought to be a necessary condition for consent to play a legitimating role;"[148] (c) global democracy, i.e., "global governance institutions are legitimate if and only if they are democratic . . . in the sense of giving everyone an equal say in how they operate."[149] This last criterion is manifestly problematic, however. "At present," as is well known, "there is no global political structure that could provide the basis for democratic control over global governance institutions, even if one assumes that democracy requires direct participation by individuals."[150] At issue here, however, is the operative assumption that legitimacy is a function of being democratic "*on the democratic model*." This is a view that Buchanan and Keohane challenge and, hence, they propose a more complex standard for legitimacy. It is worthwhile considering the six criteria they propose and to then subsequently consider whether the ICC satisfies this standard of legitimacy. We can do this by posing questions that incorporate the criteria, thus:

1. Does the ICC "provide a reasonable public basis for coordinated support . . . on the basis of moral reasons that are widely accessible in spite of the persistence of significant moral disagreement—in particular, about the requirements of justice?"[151] The answer here is in the affirmative. The ICC's

146 *Id.*
147 *Id.*
148 *Id.* at 161.
149 *Id.* at 163.
150 Buchanan & Keohane, *supra* note 129, at 163.
151 *Id.* at 164.

jurisdiction over categories of crime is grounded in the international community's sense of moral conscience. Moreover, the processes of becoming a State Party and ratification, as well as the principle of complementarity, presuppose a reasonable public basis for coordinated support for the ICC from the international community it seeks to serve and benefit through its investigation and adjudication.

2. Does the ICC avoid confusing "legitimacy with justice" while not allowing a situation in which "extremely unjust institutions are legitimate?"[152] Here too, the answer is in the affirmative. The Rome Statute recognizes the evolving features of international law and international criminal justice, distinguishing its jurisdiction from that of States Parties by acknowledging its authority as a court of last resort. And, surely, by no means does the ICC condone any extremely unjust institution to be legitimate.
3. Does the ICC "take the ongoing consent of democratic states as a presumptive necessary condition, though not a sufficient condition, for legitimacy?"[153] The answer is yes, consistent with remarks above. The ICC remains an "international" institution and not a "supranational" institution, since its authority is dependent on the commitment and support of the state parties that have ratified its operation. Clearly, the Office of the Prosecutor works to satisfy conditions of admissibility and elements of law in any situation it investigates prior to deciding on prosecution and adjudication of alleged crimes.
4. Does the ICC "promote the key values that underlie demands for democracy?"[154] Again, the whole of the Rome Statute presupposes support gained through the democratic process as a matter of treaty law, recognizing that the Rome Statutes grants both rights and obligations consistent with the long-standing principles of "*nullum crimen sine lege*" and "*pacta sunt servanda*."
5. Does the ICC "properly reflect the dynamic character of global governance institutions: the fact that not only the means they employ, but even their goals, may and ought to change over time?"[155] Clearly, the Rome Statute allows for

152 *Id.* at 164.
153 *Id.* at 164.
154 Buchanan & Keohane, *supra* note 129, at 164.
155 *Id.* at 164.

amendments to its provisions as the States Parties work together to clarify their goals and the means to the effective work of the ICC. The amendment governing the crime of aggression is an obvious example that shows this commitment to the evolving features of rule-making.

6. Does the ICC "address the . . . . problem of bureaucratic discretion and the tendency of democratic states to disregard the legitimate interests of foreigners?"[156] Inasmuch as the ICC is new in its operations, this last criterion is subject to ongoing review on the first element of bureaucratic discretion. However, by the very nature of the crimes to be prosecuted within the jurisdiction of the court, it is unlikely the ICC would disregard the legitimate interests of "foreigners," especially since it is open to sources of complaint seeking remedy.

In light of the foregoing criteria, then, one may answer with reasonable confidence that the ICC is a "legitimate" global institution, notwithstanding Bolton's rebuff.

VI. "REASONABLE CAUSE" FOR ICC INVESTIGATION OF THE USA

Accounting for our time as one of conflicting values, and accounting as well for sundry factual circumstances, we are behooved to recall Rosenau highlighting the post-9/11 world as "expressive of a war between a hegemon and actors in the multicentric world."[157] Neither bipolar nor unipolar hegemony is being tolerated as the former "periphery" of centers of hegemonic and colonial power assert their interests in distributive justice in particular. Thus, Peter Kuznick reminds, "[t]he War on Terror that the U.S. and its allies have waged for the past 15 years has only created more terrorists. Military solutions rarely work. Different approaches are needed and they will have to begin with redistribution of the world's resources in order to make people want to live rather than kill and die."[158]

Simultaneous with these challenges to hegemonic power, the fact is that the U.S. and some European states have been prepared to bypass

156 *Id.*

157 James N. Rosenau, *Turbulence and Terrorism: Reframing or Readjusting the Model?*, *in* AYDINLI & ROSENAU, *supra* note 124, at 221.

158 Peter Kuznick & Edu Montesanti, *Peter Kuznick: The Untold Story of US War Crimes*, GLOB. RES. (July 6, 2018), https://www.globalresearch.ca/the-untold-history-of-us-war-crimes/5523546.

even U.N. Security Council authority to pursue various military objectives, as happened in Kosovo and the Persian Gulf. As Weston has argued, the U.S./U.K.-led coalition opted for war "for reasons unconvincing to most governments and world public opinion as expressed by unprecedented governmental and grassroots opposition, culminating on February 15, 2003 in several million persons taking part in peaceful street demonstrations in cities throughout the world."[159] Furthermore, "[p]roponents of the Iraq War had argued that the war was necessary due to threats posed by Iraqi possession of weapons of mass destruction;" yet, "[n]ot only were no such weaponry present in Iraq, but official documents now make clear that the U.S. government in particular was guilty of 'cooking' the evidence to give its allegations some credibility."[160] Some have argued, on the basis of reasonably admissible evidence, that "[t]he violence of the Iraq War and the chaos that has come to Iraq, can be traced directly to the illegality of the invasion [in 2003] and occupation of that country and the illegality of the tactics and weapons being used to maintain the occupation."[161]

Those calling the administrations of Bush and Blair to account for criminal actions have challenged official accounts of the adequacy of terms of engagement in light of the number of civilians killed and wounded as well as the massive destruction of civilian property: "Cluster bombs were dropped on urban areas, including residential neighborhoods. Munitions containing depleted uranium were used in bombs and artillery shells. Tanks fired into hotels and residential areas."[162] Further, it is argued "the failure to adequately rebuild the civilian and social infrastructure; the failure to provide civilians with appropriate security; and the choices of weapons and tactics often used in military operations all constitute war crimes."[163] These claims call for precisely the kind of accountability of persons, both military and civilian in the U.S. and U.K., that the ICC is authorized to investigate

159 WESTON ET AL., *supra* note 20, at 1267.

160 *Id.*

161 *War Crimes Committed by the United States in Iraq and Mechanisms for Accountability*, CONSUMERS FOR PEACE (Oct. 10, 2006), http://www.consumersforpeace.org/pdf/war_crimes_iraq_101006.pdf.

162 *Invasion of Iraq by United States of America is a Serious Violation of International Law. Explain?*, THE LAWYERS & JURISTS, https://www.lawyersnjurists.com/article/invasion-iraq-united-states-america-violation-international-law-explain/ (last visited Nov. 11, 2019).

163 *War Crimes Committed by the United States in Iraq and Mechanisms for Accountability*, *supra* note 161.

and which worries ideologues such as Bolton. He is likely aware, as Christopher Greenwood opined, that:

> [i]n *United States v. von Leeb* ("the *High Command Case*"), the Tribunal explored whether individuals might incur responsibility for crimes against peace. It rejected the prosecution's arguments that members of the German General Staff should be convicted of crimes against the peace. The Tribunal wrote that "it is not a person's rank or status, but his power to shape or influence the policy of his State, which is the relevant issue for determining his criminality under the charge of Crimes against Peace." The Tribunal required not only knowledge that the war being planned was one of aggression, but also that the person possessing that knowledge, was "in a position to shape or influence the policy that brings about its initiation or its continuance." In light of the requirement in article 8 *bis*(1) of the Rome Statute of the International Criminal Court that the crime of aggression be committed by "a person in a position effectively to exercise control over or to direct the political or military action of a State," the *von Leeb* judgment is clearly relevant to the work of the ICC.[164]

U.S. military and intelligence operations in Iraq, Afghanistan, Libya, Syria, and potentially in Iran, all call into question the legitimacy of these operations, [hence the ICC preliminary investigations that Bolton finds dangerous]—and notably dangerous even to himself personally, were he to have continued in his capacity as National Security Advisor, thus in a position to shape or influence the policy that brings about initiation or continuance of crimes of aggression and other hostilities having criminal effect. It is, therefore, important to the quest for international justice that the ICC Office of the Prosecutor has initiated preliminary investigation of the situation in Iraq and Afghanistan. Bolton surely is aware that, "[o]n 10 January 2014, the European Center for Constitutional and Human Rights…together with Public Interest Lawyers…submitted an article 15 communication alleging the responsibility of United Kingdom…officials for war crimes involving systematic detainee abuse from 2003 to 2008."[165] Granted, judicial remedy from the ICC

164 Greenwood, *supra* note 142, at 72 (internal citations omitted).

165 Office of the Prosecutor, *Prosecutor of the International Criminal Court, Fatou Bensouda, Re-Opens the Preliminary Examination of the Situation in Iraq*, 13 May 2014, https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-iraq-13-05-2014.

is problematic, since the issue of jurisdiction is consistent: On the one hand, (1) "Iraq is not a State Party to the Rome Statute," (2) it "has not lodged a declaration under article 12(3) accepting the jurisdiction of the Court," and (3) "In accordance with article 12(2)(b) of the Statute, acts on the territory of a non-State Party will fall within the jurisdiction of the Court only when the person accused of the crime is a national of a State that has accepted jurisdiction."[166] Yet, on the other hand, "[t]he UK deposited its instrument of ratification to the Rome Statute on 04 October 2001," in which case "[t]he ICC therefore has jurisdiction over war crimes, crimes against humanity and genocide committed on UK territory or by UK nationals as of 01 July 2001."[167]

In the case of Afghanistan, the Prosecutor reports, the preliminary investigation under Phase 3 (Admissibility), Afghanistan has "deposited its instrument of ratification to the Rome Statute on 10 February 2003,"[168] and thus availed itself to the ICC's jurisdiction over crimes committed on the territory of Afghanistan. In this case the Prosecutor is concerned with crimes committed by the Taliban in particular, by Afghan government forces, the Afghan national police, and—of concern to Bolton and others in the U.S. Administration—"war crimes of torture and related ill-treatment, by U.S. military forces deployed to Afghanistan and in secret detention facilities operated by the Central Intelligence Agencies, principally in the 2003-2004 period, although allegedly continuing in some cases until 2014," and committed "in all 34 of Afghanistan's provinces."[169] The Prosecutor reports that, specifically:

- Members of US armed forces appear to have subjected at least 61 detained persons to torture, cruel treatment, outrages upon personal dignity . . .
- Members of the CIA appear to have subjected at least 27 detained persons to torture, cruel treatment, outrages upon personal dignity and/or rape…on the territory of Afghanistan and [the territories of] other States Parties to the Statute (namely Poland, Romania and Lithuania) . . .

They allege crimes that "appear to have been committed as part of approved interrogation techniques."[170] The Prosecutor

166 OFFICE OF THE PROSECUTOR, *Report on Preliminary Examination Activities 2016*, INT'L CRIM. CT. 1, 18 ¶ 79 (Nov. 14, 2016).

167 *Id.* at 18, ¶ 78.

168 *Id.* at 43, ¶ 193.

169 *Id*. at 44, ¶ 199.

170 *Id*. at 44, ¶ 212.

acknowledges complementarity allowing U.S. civilian and military courts to exercise their jurisdiction in these matters. However, "[a]ccording to the information available, the Prosecution was unable to identify any individual in the armed services prosecuted by courts martial for the ill-treatment of detainees within the Court's temporal and territorial jurisdiction."[171] Concerning alleged CIA crimes, the Prosecutor reports that "the US Attorney General further emphasized that 'the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees.'"[172] The Prosecutor concludes, in an interim assessment, that "taking into account the gravity of the crimes and the interests of victims, based on the information available the Office would have no substantial reasons to believe that the opening of an investigation would not be in the interests of justice."[173]

The foregoing assessment speaks to the inadequacy of depending on national military or civilian judiciaries to prosecute crimes governed by the Rome Statute. This is true also of the U.S., regardless of political party. It is important to acknowledge, as a matter of political assessment, that although "[the present] US leadership seems increasingly captive to a radical right world view," the associated fact is that this view "does not fully represent the values of American society as a whole or the viewpoint of most US citizens."[174] This is an important point despite the fact that, since the Bush Administration, a neoconservative agenda has been pursued "on the reactionary side of almost every debate about global policy and intractably opposed to any reliance on international law to resolve or mitigate world problems."[175] The normative consequent, from the perspective of global governance, is as Weston has argued:

> . . . while we recognize that fundamental challenges of a new sort need to be addressed by the global security agenda, we also are mindful that, more than ever, it is important not to interpret international law on the basis of current American preoccupations or by exaggerating the significance of the United States as a global actor . . . . At stake is the imperative of converting international (i.e., inter-

171 *Id*. at 44, ¶ 220.
172 *Id.* at 50, ¶ 225.
173 *Id*.
174 WESTON ET AL., *supra* note 20, at 1267.
175 *Id.*

> state) law into a global law of humanity and to this end making the rule of law part of the discipline of foreign policies of even powerful countries.[176]

What this means, as a matter of renovating the extant world order in the direction of humane values, is that a structural change similar to that of the 1600s must occur now. That is, just as Hugo Grotius articulated a reasonable concept of international law essential to closure of the Thirty Years War, at a time (1) "when religious unity no longer provided normative coherence to relations among political communities in Europe," which (2) enabled "the displacement of medievalism based on feudal control and an overarching Christendom as a world order construct by an emergent construct that combined territorial sovereignty with an acceptance of secular governance and a far-sighted realization of the positive roles that law could play in the moderation of world politics," so, similarly, "[i]n our time, the resilient framework of relations among sovereign states that has persisted since the 1648 Peace of Westphalia that ended the Thirty Years War is being challenged by several contending approaches to global governance."[177] In an age in which technology contributes ominously to state military capacity in a setting of globalization, in which crimes of aggression occur without deterrent or effective constraint and restraint, it is no longer reasonable to assume that the nation-state as such, democratic or otherwise, is a benevolent or benign actor on the world stage. Indian political scientist Rajni Kothari made this point in the latter quarter of the twentieth century, contributing to the world order discourse of that time, and since then this is all the more persuasive.[178]

Clearly, since WWII the international community has acknowledged the importance of criminalizing wars of aggression while allowing for national self-defense. Granted, as Hersch Lauterpacht explains, "[i]nternational law, in the three centuries which followed [Grotius's] *De Jure Belli ac Pacis*, rejected the distinction

176 *Id.* at 1268.

177 *Id.* at 1269.

178 *See, e.g.*, RAJNI KOTHARI, FOOTSTEPS INTO THE FUTURE: DIAGNOSIS OF THE PRESENT WORLD AND A DESIGN FOR AN ALTERNATIVE (The Free Press 1974); RAJNI KOTHARI, TRANSFORMATION & SURVIVAL: IN SEARCH OF HUMANE WORLD ORDER (New Horizon Press 1989); Rajni Kothari, *National Autonomy and World Order: An Indian Perspective*, 66 AM. J. INT'L L. (1972); Rajni Kothari, *Globalization and New World Order: What Future for the United Nations?*, 30 ECON. & POL. WKLY 2513, 2513-17 (1995) (India).

between just and unjust wars," with war understood to be "the supreme right of sovereign states and the very hall-mark of their sovereignty."[179] And, indeed, as Hedley Bull reminds, "by accentuating the Grotian tradition, Lauterpacht overlooked deliberately the eighteenth and nineteenth century development of a more positivist-state-centered-conception of international law . . . [achieved] . . . in the Vattelian tradition," according to which one denies "the existence of any overarching international community on which to ground an ethos of human solidarity."[180] But, even so, scholars writing in the twentieth century have provided lucid and compelling arguments differentiating criteria for just and unjust wars especially in the context of potential thermonuclear warfare, thereby influencing the extant law of armed conflict and rules of engagement of armed forces to avoid a catastrophic shift from conventional to nuclear warfare. This is consistent with the initial impetus provided by Grotius in the expectation that relations of states would occur through the rule of law and not through the exercise of brute force. Following Grotius, Lauterpacht states that "the will of states cannot be the exclusive or even, in the last resort, the decisive source of the law of nations."[181]

Clearly, Bolton presses a rather antiquated existential or ontological question about international law, raised seriously in the 1950s, as Ronald Dworkin reminded, but otherwise no longer at issue as a matter of international legal practice. After all, as Dworkin wrote, "[a]lmost everyone assumes there is international law," even if "the old grounds for challenge remain" or "they are only ignored" (except by Bolton and his ideological allies).[182] If the challenge is made, it tends to be from those who hold a legal positivist concept of law. Following H.L.A. Hart's interpretation of positive law, so long as there are rules of construction and rules of recognition for the formulation and implementation of law, then a political community observes "primary" laws. Thus, if Hart is correct, then "what the law of a community actually is depends on nothing more than a contingent aspect of its social and political history. Political or personal morality

179 Sir Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1 (1946).

180 WESTON ET AL., *supra* note 20, at 1285.

181 *See* Lauterpacht, *supra* note 179, at 18-53. *See also* WESTON ET AL., *supra* note 20, at 1270-81.

182 Ronald Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUB. AFF. 2, 2 (2013).

has nothing to do with it."[183] It is on this basis, on this philosophy of legal positivism, that Bolton rejects the ICC and appeals to the consent of the American public as the singular standard for rejection of global institutions like the ICC. However, Dworkin has provided the apt foil to this antiquated position.

Dworkin's argument against appeal to the principle of consent is at once effective and compelling. He argues, first of all, that "[t]he idea of customary law presupposes that there is some different, more basic principle at work, in the identification of international law."[184] Once one identifies this principle, then "we cannot take the self-limiting consent of sovereign nations to be the basic ground of international law."[185] Dworkin locates "the source of political obligation," i.e., that of nation-states, "in the more general phenomenon of associative obligation;" that phenomenon accounts for the difference between "what the law is and what it ought to be."[186] Key to this concept is Dworkin's proposition: "we identify the law of a community by asking which rules its citizens or officials have a right they can demand be enforced by its coercive institutions without any further political decision."[187] This pertains even for the U.S., despite its appeal to democratic constitutionalism and sovereign appeal to the principle of consent. In this way the conceptual move is from merely law to political morality and seeing law as "part of political morality."

Obviously, legal positivists reject this linkage. However, if a court like the ICC is to be understood as a judicial institution "with compulsory jurisdiction and sanctions at [its] disposal, then it is reasonable to expect it be "subject to special moral standards of legitimacy and fairness."[188] And, consistent with this view, any nation-state appealing to the principle of sovereignty surely has a "general

183 *Id.* at 4.

184 *Id*. at 9.

185 *Id*. at 10. This view is independently argued by Dapo Akande. *See* Akande, *supra* note 21, at 618-19 (Akande reminds of several provisions under which the ICC may exercise jurisdiction: (1) "in situations referred to the ICC Prosecutor by the UN Security Council;" (2) "when they have committed a crime on the territory of a state that is a party to the ICC Statute or has otherwise accepted the jurisdiction of the Court with respect to that crime;" (3) "where the non-party has consented to the exercise of jurisdiction with respect to a particular crime."). *See also* David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999); Michael Scharf**,** *The ICC's Jurisdiction Over Nationals of Non-Party States: A Critique of the U.S. Position*, 64 L. & CONTEMP. PROBS. 67 (2001).

186 Dworkin, *supra* note 182, at 12.

187 *Id.*

188 *Id.* at 14.

obligation . . . to improve its political legitimacy," and that includes "an obligation to try to improve the overall international system."[189] Dworkin argues cogently that "[i]f a state can help to facilitate an international order [one may argue, more specifically, the 'world' order] in a way that would improve the legitimacy of its own coercive government, then it has a political obligation to do what it can in that direction."[190]

With that conditional proposition, one can affirm the antecedent—that a state can act to facilitate the world order in such a way—and, affirming that antecedent, one can reasonably concur consequentially that a state has such a political obligation. That is undoubtedly so for the U.S., in which case, every administration in the U.S. (whether Republican or Democrat) has this political obligation, which also includes affirmation of the role and authority of the ICC.

Why might this be so? Because, as Dworkin observes:

> People around the world believe they have—and they do have—a moral responsibility to help to protect people in other nations from war crimes, genocide, and other violations of human rights. Their government falls short of its duty to help them acquit their moral responsibilities when it accedes to definitions of sovereignty that prevent it from intervening to prevent crimes or to ameliorate their disastrous effects.[191]

The American public likewise has its own moral sensibilities, which are historically clear, since the American support for prosecutions against crimes against humanity, war crimes, the crime of aggression, and the crime of genocide began with the Nuremberg Tribunals and have been reiterated through expressed concern for human rights violations throughout the globe, despite recognition of national sovereignty. Hence, instead of appealing to the principle of *consent*, as Bolton supports, Dworkin proposes the principle of *salience* and argues:

> If a significant number of states [recalling here the concept of associative obligation], encompassing a significant population, has developed an agreed code of practice, either by treaty or by other form of coordination, then other states have at least a prima facie duty to

189 *Id.* at 17.

190 *Id.* at 17.

191 Dworkin, *supra* note 182, at 17-18.

> subscribe to that practice as well, with the important proviso that this duty holds only if a more general practice to that effect, expanded in that way, would improve the legitimacy of the subscribing state and the international [world] order as a whole.[192]

Furthermore, Dworkin argues,

> [t]he charter of the United Nations are best understood not as arrangements binding only through contract or on signatories but as an order all nations now have a moral obligation to treat as law. The obligation is created not by consent but by the moral force of salience as a route to a satisfactory international [world] order. Indeed—more generally—multilateral agreements setting out conceptions of such an order, like the Charter, the Geneva Conventions, the genocide agreement, and the Treaty of Rome establishing the International Criminal Court, are made international law for all, not just their initial signatories, through that principle.[193]

In this way, contemporary nation-states advance the cause of a more relevant and updated *jus gentium*. This latter concept, understood in its contemporary sense, means that a just world order must be such that it "protects political communities from external aggression, protects citizens of those communities from domestic barbarism, facilitates coordination when this is essential, and provides some measure of participation by people in their own governance across the world."[194]

Bolton speaks of the right of the governed, i.e., the American populace, to consent to individual accountability before the ICC. Yet, it is also a fact that the two world wars claimed "some 50 million lives, including many civilians who had little or no role in their governments' bloody adventures."[195] It is also true that many civilians, including many in the U.S., object to "the impatience of the nation-state" as its leaders "invoke national interest to justify violation of legal or ethical rules and [seek to] win support for a calculated gain in material or geopolitical advantage."[196] In the era of weapons of mass destruction, whether tactical or strategic in their deployment, it is the fool's counsel to follow the lead of Carl von Clausewitz who, in his

192 *Id.* at 19.
193 *Id.* at 20.
194 *Id.* at 22.
195 MAOGOTO, *supra* note 1, at 1.
196 *Id.* at 2.

book, *On War*, argued that "in war the party seeking to win should inflict upon his enemy as much harm as is necessary to ensure a decisive victory."[197] The rule of proportionality in just war theory is clearly set forth to diminish excess harm under situations of technological ambiguity and mistaken unilateral use of armed force.

It is important, from the practical perspective on international justice, that operative assumptions are in order:

> (1) "one need not know just war principles in order to figure out how to prevent genocide or how to remove the oppressive mantle of colonialism."[198]
>
> (2) one need not "require comprehensive theories of justice that could presumably provide moral guidance for all or most of the important practical questions that individuals, countries and other agents faced as participants in international politics."[199]

Nonetheless, the late twentieth-century manifests the additional perspective of cosmopolitan egalitarianism, which views that "culture, nationality, or ethnicity should not make a fundamental difference to the obligations of justice that people have to one another."[200] As Carmen Pavel clarifies, "[t]his is a fundamental liberal commitment that rests on respecting people as morally autonomous agents [thus 'deontological' in a neo-Kantian sense]; and there is no good justification, these cosmopolitans believe, for restricting its applicability to bounded political communities," especially when one accounts for an "imaginary geography" that is subject to witness changes in national boundaries and jurisdictions for sundry reasons.[201] Pavel is correct to say that, "progress can be made on specific issues without appeal to a comprehensive theory of perfect international justice."[202]

Amartya Sen presents a reasonable argument relating to this comportment when he argues for "remediable" justice. In *The Idea of Justice*, Sen aims "to clarify how we can proceed to address questions

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197 *Id.* at 3.

198 Carmen E. Pavel, *International Justice*, *in* THE ENCYCLOPEDIA OF POLITICAL THOUGHT (Michael T. Gibbons et al. eds., 2014) (discussing the concept of international justice, both practical and ideal).

199 *Id.*

200 *Id.*

201 *Id.* The expression "imaginary geography" was generally used by Richard A. Falk, Albert Milbank Emeritus Professor of International Law and Practice, Princeton University, in discussing the novel 20th century world order discourse challenge to the logic of statecraft.

202 *Id.* at 4.

of enhancing justice and removing injustice, rather than to offer resolutions of questions about the nature of perfect justice."[203] On this view, Sen argues that "the policy chosen by the US-led coalition in starting the war in Iraq in 2003 was mistaken" on several grounds.[204] On this view, Sen and Dworkin are correct, in contrast to the opinion expressed by General Wesley Clark at the outset.[205]

One may, after review of the timeline of facts, have at least the *impression* that (1) the decision taken by the U.S./U.K. to invade Iraq was an *unjust* decision, and that (2) the armed invasion was an act of *injustice*. As per Sen's thesis, one may opine that this "impression" is one's "diagnosis" of injustice. But, as such, it requires "critical examination" and a determination whether this is only subjectively valid or there is objectivity to the impression (i.e., it is a reliable judgment made on the basis of admissible evidence). Several arguments in critical assessment may be advanced:

- One may argue that there was a need for more global agreement, particularly through the United Nations Security Council, before any one country or coalition of the willing could land its army or deploy its air forces in another country like Iraq. Given that there was no global agreement (i.e., no majority U.N. support and no explicit authorization from the UNSC, etc.), therefore the policy chosen by the US-led coalition in starting the war in Iraq in 2003 was mistaken. That is to say, it was an unjust invasion and, as such, a crime of aggression.
- One may argue, further, that there was a necessity to be well-informed on the facts regarding the presence or absence of weapons of mass destruction (and which kind—biological? chemical? nuclear?) in pre-invasion Iraq under Saddam Hussein. It is beyond a reasonable doubt that U.S. and U.K. intelligence agencies were factually inaccurate, whether by error or by deliberate misrepresentation. Hence, on this line of argument, again, an injustice has been done.
- Moreover, one may argue that a democratic government implies governance of the people, by the people, and for the people, a notion that is especially prevalent in the case of American and British perspectives of democratic governance. However, information presented to the American and British publics was distorted, including cultivated fictions and imaginary

203 AMARTYA SEN, THE IDEA OF JUSTICE ix (Harvard University Press 2009).

204 *Id.* at 3.

205 Dworkin, *supra* note 182, at 25.

links between Saddam Hussein, the acts of terrorism that occurred on 9/11, and the Al Qaeda terrorist network. Accordingly, the policy of invasion chosen by the U.S./U.K. was mistaken at best, and unjust based on the evidence.

- Finally, one must be aware that just war requires a likelihood, or high probability, of (a) a successful outcome (e.g., improvement in international peace and security; improvement in peace and security of Iraq after invasion, occupation, and closure of active combat operations; and/or improvement in peace and security in the Middle East), and (b) a reduction in dangers of global violence and terrorism. However, the fact is that the invasion of Iraq only intensified the dangers, did not restore peace to Iraq or the Middle East as a whole, or reduce global violence and terrorism (one need only examine the rise of the Islamic State of Iraq and the Levant, otherwise known as "ISIS" or "ISIL," as well as the insurgencies of Al Qaeda in other locations). Therefore, once again, we have ample reason to conclude the U.S./U.K. invasion was unjust and specifically unjust as a crime of aggression.

Sen's reasoning here is informative about the fact that, "we can have a strong sense of injustice on many different grounds and yet not agree on one particular ground as being the dominant reason for the diagnosis of injustice."[206] His point here, however, is that this is the kind of reasoning that *could* have, and *should* have, been done *prior* to the decision to invade Iraq, such that if this reasoning *had* been done, then there would not have been a mistaken decision to engage in military activity, and thus acts of injustice to the Iraqi people by the U.S. and U.K. would have been avoided. This set of arguments bolsters the legitimacy of calls for American and British accountability by whatever judicial remedy, including that of the ICC in the face of failure of action related to complementarity. Thus, one need not have an ideal or perfect concept of international justice to respond to international criminal behavior or failures of compliance with treaties.[207]

206 SEN, *supra* note 203, at 2.

207 Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Order (Oct. 3, 2018), https://www.icj-cij.org/files/case-related/175/175-20181003-ORD-01-00-EN.pdf [https://perma.cc/U4FG-J2F5] (exemplifying the international community's rejection of US unilateralism and its presumed exceptionalism to treaty law).

Accordingly, in the post-WWII era, we live with a U.N. structure of global institutions established on compromise by the state powers then present and declaring their intent to abide by, and be accountable to, the various treaties and conventions of international law. However, we are now sufficiently past that period of compromise to advance the cause of global justice on a ground of moral legitimacy, such as Dworkin's legal philosophy and Sen's concept of justice both envision for our edification. The fact is that crimes against humanity, genocide, war crimes, and crimes of aggression can no longer be left to "national determination" for a just remedy. That is the moral, legal, and political salience of the ICC in a setting of associative moral obligation. We have embarked upon a formatively new *jus gentium* that speaks less of the principle of sovereignty and more of transnational justice, less of the logic of statecraft and more of the normative demand for a just world order. That is the promise of the twenty-first century to be pursued despite the recalcitrance of major global powers like the United States. With this intellectual comportment grounding one's approach to international law, the skepticism advanced by Bolton is properly to be characterized as an antiquated and misplaced conception of the value of international law and of the role of the International Criminal Court in contributing to the creation of a just world order.