

Doctrines of Impunity: John Bolton and the International Criminal Court (ICC)

By [Dr. Binoy Kampmark](#)

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The Trump administration's national security advisor John Bolton has never been a fan of international law, a concept he has found, at best, rubbery. Any institution supposedly guided by its spirit was bound to draw the ire of both his temper and temperament. Before members of the Federalist Society on Monday, Bolton [took to the pulpit](#) with a fury reserved for the unreflective patriot certain that his country, right or wrong, was above such matters.

"The United States will use any means necessary to protect our citizens and those of our allies from unjust prosecution by this illegitimate court."

The wicked body, in this instance, is the International Criminal Court, established by the Rome Statute to try instances of genocide, war crimes and crimes against humanity, a "court of last resort" backed by 123 nations.

The instigation for such concern on Bolton's part came from the ICC prosecutor Fatou Bensouda, who requested that the court investigate the commission of war crimes and crimes against humanity in Afghanistan from 2003 by forces including elements of the US military and intelligence services. In doing so, she was moving the frame of reference beyond a continent that has featured all too readily in the court's prosecutions: Africa.

Bolton [was quick](#) off the mark after the announcement in 2017, with a blistering observation in the *Wall Street Journal*:

"The Trump administration should not respond to Ms. Bensouda in any way that acknowledges the ICC's legitimacy. Even merely contesting its jurisdiction risks drawing the US deeper into the quicksand."

Bolton has been consistent with such tirades. In 2000, he contemplated the issue of whether there was such a thing as "law" in the matter of international affairs. His sustained attack in [Transnational Law and Contemporary Problems](#) remains salient to a parochial understanding of how such rules work. For Bolton, the central defining issue was one of liberty: how such "law" might "affect individuals in the exercise of their individual freedom". Prior to the Second World War, international law was essentially a matter of nation states rather than individuals and groups.

Bolton wishes it remained there, a courtly, distant matter separate from the populace. But “the logic of today’s international law proponents drives them toward more pervasive international command-and-control structures that will deeply affect the domestic policies and constitutions of all nations.” Such law lacked notions of “popular sovereignty or public accountability through reasonably democratic popular controls over creation, interpretation, and enforcement of laws”. It lacked clear sources and a mechanism to determine its change. In short, and here, reflective of the sum of all his grievances against international law, such juridical phenomena were not of the US order of things, specifically the “United States Constitution and its system of government, exemplifying the kind of legal system acceptable to a free person.”

His address to the Federalist Society recapitulates his critique: the “supranational” and “unchecked” conspiracy of the ICC advanced by “‘global governance’ advocates” inimical to the Founders’ vision.

“Any day now, the ICC may announce the start of a formal investigation against these American patriots, who voluntarily signed on to go into harm’s way to protect our nation, our homes, and our families in the wake of the 9/11 attacks.... An unfounded, unjustifiable investigation.”

The efforts of the ICC was to be frustrated at every turn. No assistance would be provided to its functions and its pursuits.

“And, certainly, we will not join the ICC. We will let the ICC die on its own. After all, for all intents and purposes, the ICC is already dead to us.”

Bolton keeps interesting company in having such views. The [refusal](#) by the US to ratify the ICC’s founding document in 2002 was joined by Israel, Saudi Arabia and China, fearing its “unacceptable consequences for our national sovereignty”. Bolton subsequently led efforts as Under Secretary of State in the George W. Bush administration to broker some hundred bilateral deals preventing countries from surrendering US nationals to the ICC. These remain, by his own admission, a proud achievement.

The ICC has had its fair share of bad press. It groans under a bureaucracy that has led to accusations of justice delayed being justice denied. It has conspicuously failed to deter the perpetration of atrocities in Syria, Yemen and Myanmar. It’s Africa-focus has also caused more than a flutter of dissent from states on that continent. Early last year, the African Union [passed](#) a non-binding resolution for member states to withdraw from the court, or at the very least seek reforming it. South Africa confirmed its desire to remove itself from the jurisdictional reach of the ICC, a decision that [continues](#) to shadow law makers.

Bolton’s resentment, in short, has fuel to fire. President Donald Trump sees any international pact untouched by his influence to be deficient and contrary to the values of the imperium. But the ICC still has legs, however plodding, and such efforts to despoil their function will not necessarily cripple, let alone kill it.

In contrast to Bolton’s view is another stream of US legal thought that sees international law and its enforcement as indispensable to peace. That view is unduly rosy, and held, at times, disingenuously. But for the US Chief Prosecutor Robert H. Jackson, [delivering](#) his opening

address in November 1945 to the judges of the International Military Tribunal at Nuremberg, such a body, far from being abstract, incoherent and spineless, supplied the animating legitimacy for an international court.

What fouled international law's decent nest were those wars of imperialism waged during the eighteenth and nineteenth centuries, leaving the impression "that all wars are to be regarded as legitimate wars." Jackson's point was that no one, not even the leaders of the United States, could always remain unaccountable, anathema to Bolton's idea of impunity outside the US constitution.

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Dr. Binoy Kampmark was a Commonwealth Scholar at Selwyn College, Cambridge. He lectures at RMIT University, Melbourne. He is a frequent contributor to Global Research. Email: bkampmark@gmail.com

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