Goodbye to All That? The Rule of Law, International Law, the United States, and the Use of Force

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Abstract: The attitude of past United States administrations to public international law, particularly but not exclusively governing the use of force, has often seemed ambivalent, or sometimes decidedly hostile (where the conduct of the United States itself was called in to question). This paper considers the attitude of many of those with power or influence in the Bush administration (particularly that of the 'neo-conservatives'), and the implications of their often thinly disguised contempt for public international law which might seek to constrain the exercise of United States power. The conclusion is that while the academic arguments which seek to justify this American 'exceptionalism' are worthy of serious examination, they are ultimately inadequate and in the interests of neither the rest of the world, nor, finally, the United States itself.

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This essay considers the current state of public international law in a world in which some of its most basic tenets are being challenged or rejected. It argues that while the United Kingdom has remained concerned that its international actions, particularly forcible intervention, remain cloaked in legality, in the United States influential voices have been raised seeking to radically alter the very foundations of international law and international legitimacy.

This has led to confusion over the place and significance of legal debate in the resolution of international problems. In the debate over the forcible intervention in Kosovo, legality appeared as a central issue. It did so again in consideration of the response to the suicide/hijacking attack on the Twin Towers and the Pentagon on 11 September 2001; and most recently in arguments about the invasion and occupation of Iraq. But while the

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arguments seemed central, paradoxically they also seemed inconsequential to the course of events which subsequently occurred.[1]
With regard to intervention in Iraq, many international lawyers concluded that the matter could be resolved by recourse to what was argued to be clear international law. A brief letter to a national newspaper in the United Kingdom by the Good and the Great international legal academics of Great Britain spelt out this position.[2] Readers were curtly informed:

> We are teachers of international law. On the basis of the information publicly available, there is no justification under international law for the use of military force against Iraq. The UN charter outlaws the use of force with only two exceptions: individual or collective self-defence in response to an armed attack and action authorised by the security council as a collective response to a threat to the peace, breach of the peace or act of aggression. There are currently no grounds for a claim to use such force in self-defence. The doctrine of pre-emptive self-defence against an attack that might arise at some hypothetical future time has no basis in international law. Neither security council resolution 1441 nor any prior resolution authorises the proposed use of force in the present circumstances.
>
> Before military action can lawfully be undertaken against Iraq, the security council must have indicated its clearly expressed assent. It has not yet done so. A vetoed resolution could provide no such assent. The prime minister's assertion that in certain circumstances a veto becomes `unreasonable' and may be disregarded has no basis in international law. The UK has used its security council veto on 32 occasions since 1945. Any attempt to disregard these votes on the ground that they were `unreasonable' would have been deplored as an unacceptable infringement of the UK's right to exercise a veto under UN charter article 27.
>
> A decision to undertake military action in Iraq without proper security council authorisation will seriously undermine the international rule of law. Of course, even with that authorisation, serious questions would remain. A lawful war is not necessarily a just, prudent or humanitarian war.

1 For a typical statement of concern see S. Estreicher and P. Stephan, `Taking International Law Seriously' (2003) 44 Virginia J. of International Law 1:

> We cannot recall a time when such ambitious claims have been made on behalf of international law, nor a time when so many have complained so vehemently about its disregard. International law has become important politically, intellectually, and culturally. And yet international law remains the virtually exclusive province of its academic and practitioner specialists who have an interest in advancing quite expansive formulations of its reach. To its proponents, international law is morality in action, and plays a decisive role wherever moral judgments need to be made. This approach fits uneasily, however, within a tradition that looks to the individual nation state as the principle actor in the international law system, and predicates any extension of the law's reach on the consent of affected states.

2 Letter to the Guardian, 7 March 2003, signed by, among others, six leading legal academics from Oxford University, three from Cambridge University, and three from the London School of Economics.

The conclusion was thus inevitable. Because Article 2(4) of the United Nations Charter proscribes the use of force[3] except pursuant to Article 51 (allowing self defence), or pursuant to a Security Council Resolution under Chapter VII of the Charter, (the Council having been persuaded of the reality of a `threat to the peace, breach of the peace, or act of aggression'[4]) an invasion of Iraq could not be lawful. QED.

So strong, clear, and seemingly incontrovertible was this position that when the United Kingdom government sought to justify intervention, it purported to accept that legal analysis while finding room for manoeuvre within it. Advice accepted by the government argued the legality of the intervention because of non-compliance by Iraq with earlier Chapter VII resolutions which had authorized the use of force.[5] In the United Kingdom, the government accepted the need for its actions to be legal, accepted the constraints upon the use of force arising from the UN Charter, and argued within that circumscription. Thus, in the United Kingdom, the governance by the UN of the use of force was accepted as representing international law, and any illegality was denied.[6]

Nevertheless on a previous occasion the United Kingdom had, for whatever reason, shown itself unwilling to submit to an authoritative adjudication as to the legality of its participation in the NATO-led intervention in Kosovo. In that case also, of course, NATO elected to intervene forcibly in Yugoslav Kosovo, notwithstanding the absence of an empowering Security Council resolution. While the United Kingdom government remained adamant that NATO's actions were within international law, this was always a highly controversial opinion. When the Foreign Affairs Select Committee of the House of Commons, considered the events in Kosovo they were concerned to examine the legality of the intervention. (Their modest conclusion was that while the intervention was of dubious legality `in the current state of international law', it was justified on moral grounds.) Significantly, they also considered why the United Kingdom had avoided a hearing by the International Court of Justice into the question of the legality of intervention in such circumstances:[7]

3 Article 2(4) states: `All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'.
4 Required under Article 39, see below.
5 See the views of the Attorney General, Lord Goldsmith, on the legal basis for use of force against Iraq on the 10 Downing Street web site at <http://www.number-10.gov.uk/output/Page3287.asp>.
6 And see C. Greenwood, `International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' (2003) San Diego International Law J. 7. Also J. Cohan, `The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law' (2003) 15 Pace International Law Rev. 283
7 Fourth Report of the Foreign Affairs Select Committee, June 2000, para. 136. Available at <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmfaff/28/2802.htm>.

It would have been possible for the legality of the intervention to have been subject to the judgement of the International Court of Justice. Yugoslavia brought proceedings against several members of NATO, including the United Kingdom, in April 1999. The United Kingdom, decided, however, not to contest the substantive issue but to argue the procedural point that Yugoslavia had accepted the Court's compulsory jurisdiction too late for the United Kingdom to be required to deal with the substantive issue. Dr Jones Parry[8] agreed that this was `a legal technicality.' Mr Littman[9] was very critical of this decision because it had, in his view, deprived the world of an authoritative judgement on the legality of humanitarian intervention. Professor Lowe, however, argued that the United Kingdom should not accept jurisdiction in this case because the law in the area was in a state of development, and the International Court might arrest that development. The decision to rely on a technicality to prevent the International Court from deciding the issue does suggest a concern that the judgement would not have been favourable, though this was specifically denied by FCO witnesses, who instead said that the Government had been unwilling to allow the `capricious' use of the Court by the Yugoslavs.[10]

The suggestion that acceptance of jurisdiction might have led to a setback in the development of customary international law was a novel one, and one which becomes relevant later. For the moment however it suffices for the argument that the United Kingdom has remained concerned with the law of forcible intervention as expressed in the UN Charter and concerned to act in ways which were not manifestly in contravention of that Charter.[11] Few governments in the world would demur from this position.

Recently it has become clear that this position is not necessarily shared in the United States of America. Events there, in the aftermath of September 2001, have apparently led to quite dramatic reconsiderations of international law, particularly concerning the use of force. I say `apparently' because

8 Dr Emyr Jones Parry, Political Director at the Foreign and Commonwealth Office.
9 Mark Littman QC, author of Kosovo: Law and Diplomacy (1999).
10 Foreign Affairs Select Committee, op. cit., n. 7.
11 Nevertheless, one should observe that this position is arguably under review. See M. Byers, `A New Type of War' London Review of Books, 6 May 2004. He particularly draws upon a speech by Prime Minister Tony Blair in his Sedgefield constituency (reported in full in the Guardian, 5 March 2004), where, while asserting that the primary purpose of the Iraqi invasion `was to enforce UN resolutions over Iraq and Weapons of Mass Destruction' he went on to express his concern with the existing philosophy in international relations and said :
So for me, before September 11th, I was already reaching for a different philosophy in international relations from a traditional one that has held sway since the Treaty of Westphalia in 1648; namely that a country's internal affairs are for it and you don't interfere unless it threatens you, or breaches a treaty, or triggers an obligation of alliance.
Later in the speech he added:
It may well be that under international law as presently constituted, a regime can systematically brutalise and oppress its people and there is nothing anyone can do, when dialogue, diplomacy and even sanctions fail, unless it comes within the definition of a humanitarian catastrophe . . . This may be the law, but should it be?

contrary to common opinion there is a great deal of evidence which suggests that a reconsideration of international law and the use of force has been under way in the United States at least since the end of the Cold War in 1990. During the Clinton administration, many of those who were to become key figures in the administration of George W. Bush (now often referred to as the `neo-conservatives') were actively promoting a new role for the United States, with dramatic and drastic implications for international law, and indeed for the United States itself.[12] This promotion came in the form of submissions to the Clinton administration,[13] the activities of `think tanks',[14] and also in academic writings. All were concerned to redefine the legitimacy of international actions by the United States aimed at protecting United States' interests in a world with but one super-power. At the forefront of those writers in academic journals arguing for a total reappraisal of the use of force and international law in the twenty-first century are two American authors, very different in style but less so in conclusions. The first is Professor Michael Glennon of the Fletcher School of Diplomacy.[15] His concern with the state of such international law predates September 2001, and he would regard these events as simply reinforcing his earlier arguments. In a book published in 2001 he had directed his attention to the intervention in Kosovo in particular and the question of the use of force in general. The title of the book, Limits of Law, Prerogatives of Power, with the sub-title Interventionism After Kosovo,[16] summarizes its content remarkably accurately. Glennon's argument is that it is no longer proper, sensible or accurate to speak of the Charter of the United Nations as

12 See S. Halper and J. Clarke, America Alone: The Neo-Conservatives and the Global Order (2004).

13 See, in particular, the letter coming from the `Project for the New American Century' to President Clinton of 26 January 1998 urging action, unilateral if necessary, to overthrow Saddam Hussain and to ensure a new regime in Iraq. While considering that this course of action was already legitimate under existing United Nations' Security Council Resolutions, the letter nevertheless stated `In any case, American policy cannot continue to be crippled by a misguided insistence on unanimity in the United Nations Security Council'. The letter was signed by many who had played a part in the administration of Ronald Reagan and/or the first Bush administration and who clearly considered that there remained unfinished business. The signatories included Elliot Abrams, John Bolton, Robert Kagan, Richard Perle, Donald Rumsfeld, and Paul Wolfowitz (and indeed, Francis Fukuyama). The letter may be found at <http://www.newamericancentury.org/iraqclintonletter.htm>.

14 The Project for the New American Century, established in 1997, is but one example (but possibly the best) as its membership included not only those signing the letter to President Clinton but also Jeane Kirkpatrick and Dick Cheney. The Project's policy document, Rebuilding American Defences, advocates both total United States' global military domination and American global leadership. For further information, see <http://www.newamericancentury.org/index.html>. See, also, the American Enterprise Institute for Public Policy Research <http://www.newamericancentury.org/index.html>.

15 Tufts University, Boston.

16 M. Glennon, Limits of Law, Prerogatives of Power (2001); see, also, M. Glennon, `American Hegemony in an Unplanned World Order' (2000) 5 J. of Conflict and Security Law 3.

bringing legal control over the use of force in international relations. His conclusion begins thus:

> With the close of the twentieth century, the most ambitious of international experiments, the effort to subordinate the use of force to the rule of law, almost came to an end - the victim of a breakdown in the consensus among member states concerning the most basic of issues: the scope of state sovereignty. Never a true legalist order, the use-of-force regime of the UN Charter finally succumbed to massive global disagreement pitting North against South and East against West over when armed intervention in states' internal affairs was permissible.[17]

He went on to conclude that such had been the extent of the violation of Charter rules that it made little sense to speak any more of a legal regime. Subsequent events, as we shall see have reinforced his views.

The second such author is John R. Bolton, currently United States Under Secretary, Arms Control and International Security in the Bush administration, who, while being employed outside of the university sector has nevertheless published a number of vigorous articles concerning the United States and its relationship with international law. Two pieces of work in particular[18] complement the Glennon views although the style is very different. Bolton's arguments are populist and impassioned and calculated to appeal to those on the political right, unimpressed by those `pointy headed intellectuals' who counsel caution in world affairs, and an acceptance of the potential of global governance.

Both Bolton and Glennon[19] are concerned that international law, at least as now predominantly conceived, threatens to constrain United States power in a way which is simply unacceptable. Great emphasis is placed upon the constraints on United States sovereignty which international law might sustain, rendering it impotent in the face of threats perceived as real, both to its security and to its political and economic interests. It is not always clear in their writings whether the argument being made is that international law is generally and fundamentally flawed, or whether the unique wealth, military power, and wisdom of the United States means that it alone should be exempt from rules applicable to lesser nations.[20]

While either view may be unpalatable to international lawyers beyond the United States (and indeed to many within), it is important to understand the attraction of such a proposition to many of its citizens. Not only have most of

17 id. (2001), p. 207.
18 J. Bolton, `Is There Really ``Law'' in International Affairs?' (2000a) 10 Transnational Law and Contemporary Problems 1 and `Should We Take Global Governance Seriously?' (2000b) 1 Chicago J. of International Law 205.
19 See, also, P. Stephan, `International Governance and American Democracy' (2000) 1 Chicago J. of International Law 237; and H. Cohen, `The American Challenge to International Law: A Tentative Framework for Debate' (2003) Yale J. of International Law 551.
20 For a discussion of the concept of American `exceptionalism' see H. Koh, `On American Exceptionalism' (2003) 55 Stanford Law Rev. 1479.

them been educated to believe in the fundamental superiority of the United States Constitution and the form of governance it prescribes, but for other reasons it is possible for an educated outsider to comprehend, if not identify with this populist position.[21]

Such views are well expressed by Bolton:

> Even the apparently simple act of entitling a conference `Trends in Global Governance: Do They Threaten American Sovereignty?' is likely to expose the vast disparities which exist between two quite different factions within the United States. One party, small but highly educated, voluble and tireless, knows instinctively (and often emotionally) what global governance is and why it is desirable. Consisting of academics (largely, but not exclusively, law and international relations professors) and media professionals; members of self-styled human rights, environmental and humanitarian groups; rarified circles within the `permanent government,' and at present even in the White House; and a diverse collection of people generally uneasy with the dominance of capitalism as an economic philosophy and individualism as a political philosophy, these `Globalists' find allies all around the world. Their agenda is unambiguously statist, but typically on a worldwide rather than a national level. The other faction, consisting silently of virtually everyone else in the United States, has no clue whatever that `global governance' is even an issue worth discussing, since, among other things, it has formed no part of any political campaign in recent memory. This large party cannot define global governance, does not think about it, and - when it is explained - typically rejects it unhesitatingly. Although overwhelmingly predominant numerically, these Americans (who are comfortable with individualism and capitalism) are little recognized abroad, lost from view beneath the prolific production of academic papers, endless international conferences, and international media appearances of the diverse and often contradictory views of those whose primary urge, if not their ultimate objective, enrolls them in the party of global governance. Accordingly, when the `Americanists' speak out, foreigners often assume that they are simply the knee-jerk voice of reaction, the great unlettered and unwashed, whom the cultured and educated Globalists simply have not yet gotten under proper control. Europeans in particular will instantly recognize the disjunction between elite and mass political opinions that has characterized their societies for almost their entire democratic experience, and they will empathize, needless to say, with their elite, Globalist counterparts.[22]

Why should such opinions warrant an extended analysis and discussion? It is, in my view, because they themselves, if accepted, threaten the very bases of international law.[23] While doing so, and making the actions of

21 See below, concerning United States disenchantment with European historical activity.
22 Bolton, op. cit. (2000b), n. 18, p. 205.
23 See, too, J. Greenberg, `Does Power Trump Law?' (2003) 55 Stanford Law Rev. 1789. The title poses a question to which John Bolton would give short shrift:
> If asked `Does international law trump national constitutions?' most international lawyers would say, `Of course!' Most American citizens would emphatically disagree, however . . . International law is not law; it is a series of political and moral arrangements that stand or fall on their merits, and anything else is simply theology and superstition masquerading as law.

Bolton, op. cit. (2000a), n. 18, p. 48.

power always negotiable in terms of acceptability, they very dramatically alter the actual meaning of an international legal regime in a way which is of benefit to extraordinarily few states. While superficially appealing, at least to the United States government, it is the contention of this essay that it is crucially important that they be exposed as a simple argument for a dangerous return to the inherent legitimacy of power.

Glennon's latest article, at the time of writing, appeared in the American journal Foreign Affairs[24] after the invasion of Iraq. Once more he is able to find a title with more implications than a mere five words might be thought able to bear. `Why the Security Council Failed' is an analysis of the actions of the Security Council leading up to the time of the decision by `the allies' to forcibly intervene in Iraq without a legitimating Security Council resolution. It is a powerful polemic which demands response for fear of acceptance.

The Security Council, the international rule of law, together with the attempts in the Charter of the United Nations to ensure peace and eschew the use of force in international relations, have seldom been subjected to such a savaging as that presented by Glennon in his latest piece. Indeed the very principles of international law which have so long underlain world order, imperfect though it has undoubtedly been, are now, if Glennon is to be taken seriously, to be jettisoned. Sovereign equality of states, pacta sunt servanda (the obligation to comply with treaties), and the edifice of the United Nations are to be deconstructed, if not destroyed, awaiting reconstruction in architecture which will sensibly recognize and reflect the unipolarity of the world and the pre-eminence of the United States of America.[25]
Such an analysis is both sweeping and stimulating, and for readers from the United States probably exhilarating. For others, the arguments made are rather more problematic, implying as they do the most fundamental changes in international law since the Second World War, and changes of most doubtful advantage to all but the most powerful states (or state). This essay is intended to demonstrate just how tenuous are many of the premises and assumptions upon which the conclusions rest, and just how problematic are the conclusions themselves.

Underlying Glennon's writing is his recognition both of the rise of the United States since the Cold War to something approaching absolute power, or at least dominant hegemony, in the world of sovereign states (`unipolarity'), and his view that other lesser, but major states have been

24 M. Glennon, `Why the Security Council Failed' Foreign Affairs, May/June 2003, 16. A slightly longer (and slightly more circumspect) version of this piece is to be found as `The UN Security Council in a Unipolar World' (2003) 44 Virginia. J. of International Law 91. The additional circumspection seems to come from the difficulties being experienced in administering a conquered Iraq.
25 Bolton largely agrees with this position and explicitly argues that treaty obligations are political and moral but not legal (because there is generally no sanction for non-compliance). See Bolton, op. cit. (2000a), n. 18, p. 5.

concerned, if necessary through unlikely alliance, to curb and circumscribe this predominance. In particular he has suggested that France, Russia, China, and even Germany have all resisted the unipolarity and `have sought to return the world to a more balanced system'.[26] Although unstated, it is inferable that this resistance is considered unhelpful at best and positively obstructive at worst.

Implicit in the title of Glennon's article, `Why the Security Council Failed', is the assumption and assertion of failure. The failure to which he alludes concerns the actions of the Security Council in the period of time leading up to the military invasion of Iraq by the United States and its few allies in March of 2003. What is not clear from the title is what constituted this failure. Is the Security Council perceived to have failed because the United States felt able with impunity to break the rules of the Charter of the United Nations, a treaty the drafting of which had been a central concern of the United States in 1945?[27] Or can it be seen to have failed because too many Security Council members were, often with the best will in the world, unable to identify with the comprehension of the Iraqi situation by the United States, and thus found themselves unable to approve forcible intervention? Or must it be judged to have failed because it did not comprehend the new unipolar reality of the world in which the United States, as the most powerful state ever seen, had to be given approval by the international community for actions which it believed to be essential for the protection of its own interests and security?

It quickly becomes manifest that it is the third assertion which underlies the argument Glennon proposes. In essence, this argument (which follows from the conclusion of his book) is that the international law relating to international intervention is no longer to be found within the Charter of the United Nations. Beginning long before Kosovo and proceeding to Iraq, the United Nations has shown itself to be little more than an impediment to the achievement of worthy goals through necessary intervention. This is an impediment which has been overcome only by the Security Council being treated with disdain and ignored. The result is the failure alluded to in the title.

Quite what the result of this might be is less explicitly stated. At its broadest it seems to suggest that the world must recognize that might will dictate the correctness of any future such intervention; in the alternative it suggests that while the Charter may continue to constrain lesser states, the United States must be recognized to be above and immune from such constraints. This is so, it is argued, first, because of its special powers, special responsibilities and, perhaps, because of its uniquely benign international intentions; and second, because the motley collection of lesser states of which the Security Council is comprised cannot be allowed to constrain a United States with which they cannot compete.

26 Glennon, op. cit., n. 24, p. 16.
27 See S. Schlesinger, Act of Creation: The Founding of the United Nations (2003).

Another ambiguity concerns the scope of the special status apparently due to the United States. Is it confined to forcible intervention, including pre-emptive strikes, or does it also extend to other international law? Is it the argument that the United States is now to be able to rewrite or ignore other treaties and conventions which it finds irksome? Is the real conclusion that the United States is now able to argue for an American right to a unilateral declaration of independence from the entire international law regime? To the detached observer this may seem an extreme view but it is derivable from Glennon's views on what is perceived as an essential difference between the United States and `the rest of the West'.[28] His argument is that while that rest of the West is accustomed to effective rules of supranational standing, affecting and constraining sovereignty, whether these rules be derived from the European Union, the European Convention on Human Rights or other international organizations created by treaty (presumably including the International Criminal Court, the World Bank, the International Monetary Fund, and the World Trade Organization), the United States is very different. Such constraints on sovereignty for the United States are much more rarely acceptable because of the American tradition[29] which `sees no source of democratic legitimacy higher than the nation state'.[30] Among those constraints that he argues are anathema to the United States are Security Council decisions limiting the use of force. This is a truly extreme position (at least to a non-American), redolent of the history of United States isolationism, but one which sits ill with the oft promoted ideas of globalization.

In fact it is difficult to think of Security Council Resolutions which have had this effect. Rather it is the Charter of the United Nations itself which was intended to constrain states in their use of force. This is an important distinction, not least because of the centrality of the United States in drafting this most crucial of treaties.

This present essay queries both the accuracy of the assertions concerning international law and also the wisdom of the assertions were they to be accepted. On the first point it will be argued that the primary international law principle of pacta sunt servanda can only be ignored by the United States at the risk of creating the very international anarchy which itself facilitates threats to United States security. On the second point, the arguments of the recently deceased D.P. Moynihan, particularly in his book On the Law of Nations,[31] are called in to suggest that, inconvenient, irksome or worse though compliance with international law may be, in the greater scheme of things, all states, even the greatest, have an interest in preserving and sustaining the international regime.

28 Glennon, op. cit., n. 24, p. 21.
29 Probably to observe any parallel between this position and the Islamic position, recognizing no higher authority than the Koran (even international law), is unacceptable.
30 This is a quotation he takes from Francis Fukuyama.
31 D.P. Moynihan, On the Law of Nations (1990).

This point requires evidence. Why should the most powerful state the world has ever seen feel itself bound by the rules of the international community? Glennon alludes to the agonizing of James Madison at the time of the drafting of the United States Constitution as to what incentive there could be for the powerful to obey the law. Glennon does not find Madison's answer wholly convincing. It was that because the mighty might (or would inevitably) fall, and the strong become weak, each might thus require the protection of the law in future circumstances. Here was the incentive Madison sought. This conclusion becomes problematic however if the powerful are able to ensure their continuing strength, or at least believe that they have done so. The current Bush administration is very specifically directed towards this future security.[32] But although this incentive is contingent rather than necessary it does not end the argument.

The Moynihan answer to this question seems rather more subtle and certainly better adapted to an international arena where one state is determined to pursue policies intended to ensure its continuing superiority. Moynihan concludes that the great incentive for the United States to comply with international law is that it is in fact in its wider interests to do so. The reality is that immense power is not only never absolute, but it can be combined with stasis and impotence. The United States will never be able to intervene in all the states which cause it grave offence. Intervention in Iraq is feasible, intervention in Syria, Iran or North Korea less so, and intervention in Pakistan, in India, in Russia or in China (hopefully) inconceivable. With all other populous and powerful states, albeit considerably less powerful, the United States has a strong incentive to ensure compliance with the international legal regime and with its norms. This argument is surely being borne out in Iraq even now where the United States is forced to cast around for more states to share the burden of security and administration. Because of the relevance of Moynihan to the current debate, writing as he was after the results of the Reagan policy in Nicaragua had been so harshly judged by the International Court of Justice,[33] it is worth emphasizing his central proposition and the justification for it. Rightly or wrongly, Moynihan did not oppose the policy goals of the Reagan administration with regard to Nicaragua. What concerned him was that their implementation was carried out in a way which was unarguably incompatible with international law. Indeed it was this patent incompatibility which persuaded the United States to withdraw from the Merits phase of the decision.

Glennon may have difficulty with this proposition. His assertion is that the US invasion of Iraq may be unquestionably in contravention of the

32 See The National Security Strategy of the United States, September 2002 at <http://www.whitehouse.gov/nsc/nssall.html>.
33 Nicaragua v. US (Jurisdiction) (1984) ICJ Rep. 551 and Nicaragua v. US (merits) (1986) ICJ Rep. 14. See, also, T. Walker (ed,), Reagan Versus the Sandanistas (1987).

Charter of the United Nations. While many have much sympathy with that view it would certainly not be accepted by the United Kingdom government. Although their argument is tenuous, essentially based upon the effect of the combination of Security Council Resolutions and the argued continued non-compliance by Iraq, with necessary consequences, the crucial point is that it was arguable. With regard to the intervention in Kosovo the United Kingdom government argument has always been that this intervention was lawful and consistent with both the Charter and international law generally. This position has implications which will become clear.

In order to question Glennon's conclusions, it is necessary to examine his assertions, a number of which must seem remarkable to international lawyers at least. Underlying the mistaken assertions, it can be argued, is one central flaw in an understanding of international law. For Glennon, international law is law only if it is clear, explicit, and effective. It is this which leads him to conclude that by 2003 the main question to be asked by states considering the use of force was whether the use was wise, rather than whether it was lawful. This conclusion proceeds from an exceedingly doubtful subsequent discussion on the validity of treaties. The treaty which is the Charter of the United Nations is often said to be the most important international treaty of all. Virtually every state in the world is a party. It has even been suggested that it enjoys the status of an embryonic international constitution.

For Glennon, the fact that the entire international community agrees to its centrality fades into insignificance in the face of the many undoubted violations of the Charter provisions since 1945. In an extraordinary passage he implies that such violations mean that the international regime governing the use of force, as found in the Charter, has collapsed. Its collapse may be shown, according to Glennon, by one of three alternative analyses. First, it may be said to have collapsed because, since the Charter became law, the massive and numerous violations have cast the treaty in to desuetude - that is, it is simply no longer used. On a second analysis, these violations can themselves be argued to have amounted to custom, creating new customary international law supplanting the old treaty norms.[34] The third argues that there has now been so much practice contrary to the treaty, that these actions can be said to have created a non liquet by which is meant that the law is subsequently in such a state of confusion that no legal rules on the matter are now clear, and therefore no authoritative answer to legal questions concerning the use of force is possible.

Because this argument is so central to his thesis, it necessitates some examination. From earlier writings it is clear that the violations, which he contends have effectively destroyed the provisions of the Charter, are of two kinds. First, there are the inter-state violations where there has been an apparently blatant violation of Article 2(4) and yet the violation has

34 A proposition with which Bolton (op. cit., n. 18) would have grave difficulty, arguing as he does that customary international law is but a statement of what states do.

remained uncensored and unsanctioned. The second category is arguably even more Charter-threatening. This covers situations where the Security Council has chosen to intervene in the domestic affairs of states seemingly contrary to Article 2(7)[35] of the charter. Here the argument is that the Security Council itself has undermined the Charter by in fact arrogating to itself powers not granted by the treaty - in effect, acting ultra vires. Separate consideration is required.

The first category includes those cases often justified or at least described by analysts (but significantly, rarely by the states themselves) as cases of humanitarian intervention. Examples cited by Glennon include Tanzania's intervention in Uganda in 1978/79, which ended the cruel and despotic regime of Idi Amin (recently deceased while `enjoying' sanctuary in Saudi Arabia); France's intervention in the Central African Republic in 1979 to remove the notorious Emperor Bokassa; India's intervention in East Pakistan curtailing the oppression and aggression of West Pakistan and facilitating the creation of the state of Bangladesh. He also mentions other situations such as the intervention in Kampuchea (Cambodia) by Vietnam in 1979 thus removing from government Pol Pot and the Khmer Rouge, but treats it as a different case because the Vietnamese denied that their intervention had ever occurred. Before the intervention in Kosovo by NATO, these rather elderly instances are almost the only examples of what is argued to be sufficient disorder as to be utterly destructive of the prohibition on the use of force in the Charter.

But even the cases quoted fail to reveal any pattern of rejection of Article 2(4). Indeed their singularity, together with the justifications provided by the intervening state, in many ways reinforce the idea that each of the states accepts the authority of Article 2(4). In Central Africa, Uganda, and Kampuchea, the result of the intervention was to remove dictators with appalling human rights records (though not always to replace them with significant improvements). Thus the particular result tended to receive international approval. Such approval of the result did not, however, imply international approval of the use of force and in this lies the significance of the justifications provided by the intervening state.

Of course the motives of the intervening states were mixed. France was undoubtedly trying to reinforce its influence in Central Africa, President Nyerere wanted to re-establish his old friend Milton Obote in neighbouring Uganda, and Vietnam wanted to protect ethnic Vietnamese resident in Kampuchea. One obvious reason that no customary international law enabling or justifying humanitarian intervention has developed is because it is extraordinarily rare to discover motives that are not mixed. It is all too easy to assert humanitarian intentions while pursuing ulterior motives - a factor particularly obvious in the case of the United States' intervention in Grenada in 1983.[36]

35 See below, at p. 447.
36 See N. Chomsky, Turning the Tide: US Intervention in Central America and the Struggle for Peace (1985) 71.

From these examples Glennon concludes not that there is any developing customary international law but, rather, that international law provides no answer to the question concerning the permissibility of the intervention. He is half right. He is right to the extent that no person or body has yet been able to devise principles which do, or could distinguish the permissible from the impermissible, or the acceptable from the unacceptable. He is wrong however in that it is nevertheless appropriate to state that such interventions are contrary to international law. But, just as in domestic law, not every infraction will merit condemnation and/or sanction. Thus it is true that the rule remains that sovereignty precludes lawful humanitarian intervention, but, as will be argued, the infraction of international law will be but one factor in the consideration of intervention.

Several consequences follow from that proposition. The first, which is not incompatible with Glennon's conclusions, is that the morality of intervention might outweigh the legal proscription. But whether or not it does so may not be a matter of international unanimity. The second consequence is that some interventions will enjoy wider support than others. Thus, as the Foreign Affairs Select Committee of the House of Commons said of the Kosovan intervention, while it was of dubious legality, it was morally justified. This proposition was supported by all the NATO states. Where there is widespread regional support, intervention will be more difficult to condemn. Thirdly, a dispassionate judgement of any intervention may well be heavily dependent upon the motives, both explicit and implicit. Again, in the case of Kosovo, the assessment depended very much upon whether an observing state believed the very limited objectives asserted by NATO - an end to ethnic cleansing and a restoration of democratic governance - or whether the intervention was seen as a part of a broader strategy aimed at bringing the various parts of what had been Yugoslavia in to the free-market world of the West, as was believed by many who examined the proposed Rambouillet Accords.[37]
It is also significant that the most convincing criteria suggested as to how international law might develop to accept the legality of some humanitarian interventions have emphasized factors which were at least arguable in the Kosovan intervention. Hence Cassese's suggested criteria for the development of customary international law which would be permissive of humanitarian intervention in rare cases.[38] If the suggested criteria are to be fulfilled, the cases legitimated will be rare indeed. What they require of intervenors is that they adopt a position which is at once disinterested and also altruistic. That is, the intervention must be without the intention of gain

37 In the Interim Agreement for Peace and Self Government in Kosovo, 23 February 1999, Article 1(i) states `The economy of Kosovo shall function in accordance with free market principles'.
38 A. Cassese, `Ex inuria ius oritur: Are we Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 European J. of International Law 23.

except in the alleviation of suffering. Further it must be a response to gross and egregious breaches of human rights which the central authorities either participate in, condone or are unable to prevent. The Security Council must be unable to act because of the veto or other reason; all peaceful avenues must have been explored and exhausted; the intervention must be by a group of states rather than by one single state, and the armed force permitted is to be `exclusively used for the limited purpose of stopping the atrocities and restoring respect for human rights [and] not for any goal beyond that limited purpose'.[39] Cassese formulated these criteria in an effort to resolve the dilemma which he, like the Select Committee faced, when, considering the status of the intervention in Kosovo, he said:

> My answer is that from an ethical viewpoint resort to armed force was justified. Nevertheless as a legal scholar I cannot avoid observing in the same breath that this moral action is contrary to current international law.

While it is clear that such a development is for th
e future, it is also clear
both that the prohibition on the use of force has been breached, but also that the breaches such as they have been, have not threatened the proscription itself. Having thus argued that unlawful interstate interventions do not invalidate the Charter's prohibition on such threat or use of force, I turn to the cases where, it is suggested the Security Council has manifestly exceeded its powers.

From the time when the Charter was drafted there has been continual dispute concerning the power granted to the Security Council. Articles 2(7) and 39 essentially define and circumscribe the powers of the Security Council. Article 2(7) confines the actions of the United Nations itself. It does this by providing as follows:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Article 39 of Chapter VII of the Charter provides:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

In the cases that Glennon considers, he argues that the Security Council has in fact exercised powers which in law it does not possess. This will be either because it has intervened in matters essentially within domestic jurisdiction, or because it might have purported to determine the existence of a threat to the peace, breach of the peace, or act of aggression where none in fact existed.

39 id., p. 27.

As to his contention concerning domestic jurisdiction, historically at least it is possible to make a strong argument in his support. At the time of drafting, the Charter was seen as being a treaty which would govern relations between states. On the evidence of experience, threats to international peace were seen to arise not from activities or abuses within states, but between states. Again the centrality of sovereignty and its fundamental importance was seen to outweigh the desirability of policing internal affairs of states. At the time of drafting, the Charter then did not concern itself with domestic situations and this was not seen as a role of the United Nations. There were even commentators who in the early days of the UN went so far as to assert that this also meant that if strife was purely civil (that is, within a state) the UN would have no power to intervene because purely civil strife could never threaten international peace and security. This did not mean that such internal strife was of no interest to international law, rather it meant simply that it was not within the UN remit. It can also be argued that it was this fact which encouraged, and perhaps necessitated the formation of regional bodies concerned with just such cases. Most obviously the European Convention on Human Rights can be seen to be concerned with such internal matters - especially in its (little used) provision for inter-state complaints and consequent judgments where one state alleges domestic human rights abuses by another state.[40]

Additionally, the reasons for Article 2(7) should be rehearsed. It was not there simply because the Charter governed relations between nations; it was also because, overwhelmingly, the individual members of the UN wanted to ensure that as independent nations they could enjoy true independence free from external coercion. Many smaller states wished to ensure that their self-determination implied the freedom to choose such political and economic policies as they deemed fit, notwithstanding external disagreement.[41] Even where the quality of government was appalling, most governments took the view that the dangers and the colonial implications of intervention displaced any possible benefit.

Such are the bases and such are the reasons for Glennon's perception that the Security Council is in breach of the Charter which created it and that it asserts powers which it does not possess yet prevents any review, judicial or otherwise. Before considering the cases he suggests exemplify this chaos, some contrary arguments need to be made.

Even before the Charter was drafted, consideration had been given to the relationship of international law and questions of domestic jurisdiction. A number of writers had suggested that some aspects of domestic jurisdiction

40 See A. Simpson, Human Rights and the End of Empire (2001).
41 This point is made without judgement. It is of course possible to argue that this claim comes not from states but from governments whether honest or corrupt, benign or exploitative.

would always be beyond the scope of international law. As Rosalyn Higgins said in a still relevant study,[42] it was often maintained that:

> no matter what the inroads upon the domestic sphere by international law, there exists a certain hard core of topics which always remain within the exclusive jurisdiction of the state.

Nevertheless as she pointed out even the Permanent Court of International Justice (PCIJ) had observed the relative nature of domestic jurisdiction when in the Nationality Decrees case, 1923, it stated:

> The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations.[43]

And from the beginnings of the UN there were debates too about the meaning of intervention. Some states (particularly South Africa) even argued that the discussion of domestic matters would or could amount to intervention. Such arguments have crumbled in the face of the ever increasingly accepted international quality of human rights and their protection. Few would now be prepared to argue that egregious abuses of human rights could ever be regarded as within exclusive domestic jurisdiction.

A final point needs to be made. The wording of Article 39, whether one approves or not, does seem clear. It is for the Security Council to determine whether any factual situation does in fact evidence any threat to the peace, breach of the peace or act of aggression. Certainly and unsurprisingly the Security Council has interpreted its mandate in this way.[44] It is not an approach that commends itself to Glennon. His view is that notwithstanding the proviso to Article 2(7), Article 39 necessarily requires an objective appraisal of something beyond domestic boundaries. He argues that the proviso is only relevant once an international `situation' is being dealt with. For this, he makes a strong legalistic case but a case that once more ignores developments within the United Nations generally and the Security Council particularly. Notwithstanding the history of the creation of the United Nations, and indeed possibly the intentions of its founders, things have not developed as predicted. This is hardly surprising given that so much of the structure of the UN enforcement capability was never completed.[45]

The International Court of Justice (ICJ) has shown itself unwilling to attempt to judicially review the decisions of the Security Council when it makes the determination required under Article 39. This is possibly more

42 R. Higgins, The Development of International Law Through the Political Organs of the United Nations (1963).
43 id., p. 76.
44 See Lockerbie Case (1992) ICJ Rep. 3.
45 In particular, of course, the planned standing army was never created and states failed to come to agreement for the provision of troops as was expected in Article 43.

surprising to a lawyer raised under the US Constitution than it is for a lawyer schooled where there is no Supreme Court to review legislative acts. To the latter it will not seem unacceptable that the Security Council has effectively been given the power to define its own mandate. It is after all much more unlikely than likely that the Security Council will interpret its powers excessively widely. Only the rarest apparently domestic cases can be expected to persuade the Security Council of the necessity for action which any one permanent member can prevent. While to Glennon the decision to act in such a case might seem incompatible with a strict reading of the Charter, each of the cases adduced by him to support the incorrectness of the Security Council determination under Article 39, can plausibly be argued to be primarily domestic but with international implications, to be defined in their significance by that body. It is not even necessary to fall back upon what one author has referred to as `amendment by interpretation' of Charter provisions.[46] But that author's conclusion concerning Article 2(7) is of relevance:

> Therefore, the best course is to leave the divergence of interpretation of the provision of Article 2(7) to be decided by each concerned organ [of the United Nations], in each concrete case and whenever the issue of jurisdiction is pressed.[47]

The non-static nature of the comprehension of treaties was also emphasized by Rosalyn Higgins when she said similarly:

> It is therefore tempting, if one believes in a dynamic interpretation of the role of an international organization, to suggest that the reservation of domestic jurisdiction cannot now be said to impede the [Security] Council in any action falling within ChapterVII . . .[48]

Glennon rejects these arguments. But if all the permanent members of the Security Council and a majority of all its members are agreed that a case that seems prima facie one concerning domestic jurisdiction, is in fact to be found as a threat to international peace and security, what is the purpose of disagreement? There is only an answer to this seemingly rhetorical question if the objective of the answer is not simply to argue a legal point but to try to show that the Security Council has so abused its powers that the Charter can no longer be said to be of effect. Because this is Glennon's position, it is necessary to briefly consider his examples.

Those upon which he relies are the cases of Rhodesia (1965), South Africa (1977), Iraq (1991, after the Gulf War), Somalia (1992), Rwanda (1994), and Haiti (1994). They are scarcely numerous and even if they did justify concern for their inter vires status, they can scarcely be said to be destructive of the UN Charter. For this reason it will be sufficient to show

46 M.S. Rajan, United Nations and Domestic Jurisdiction (2nd edn., 1961).
47 id., p. 406.
48 Higgins, op. cit., n. 42, p. 87.

that whether they deserve the maverick status attributed to them is arguable, at the very least. It becomes clear that there is a fundamental argument concerning all these cases. For Glennon the `mere' fact of human rights abuses occurring within domestic borders can never be sufficient in itself to justify the application of Article 39. Such abuses in themselves, he maintains cannot threaten international peace.

There are two possible responses to this argument, one direct and the other oblique. The direct answer says that the most egregious human rights abuses within a state always threaten international peace. The provocation provided by apartheid with its assertion of racial superiority, by the mass murder of an ethnic group, by the intentional creation of thousands of refugees, and by the mass starvation of a people is always going to threaten international peace because neighbouring states will, if practicable, be likely to intervene if the international community does nothing.

The oblique answer asserts that it was not unreasonable for the Security Council to have concluded as it did in these cases that the external effects prevented the problem from being defined as simply domestic and made them truly international. Thus, apartheid South Africa was constantly fighting with its neighbours (literally), the refugees emerging from Iraq, Somalia, and Rwanda could easily have proved internationally destabilizing, as they did in fact in the case of Rwanda. These are not, then, essentially internal human rights violations as is suggested. Only Rhodesia and Haiti are difficult to fit within that analysis but here, even if the oblique answer is problematic, the direct still applies.

If the overall position is as Glennon argues it to be, it would be truly remarkable. But the fact is that not a single state has denounced the Charter. No state has ever, at least until the current intervention in Iraq, forcibly intervened in another state and announced that it was doing so notwith-standing the Charter. From the United States' intervention in Grenada, to the Iraqi invasion of Kuwait, every intervening state has attempted, however pitifully, to argue that its actions were consistent with international law in general and the Charter in particular.

Obviously this does not imply that every state believed its own rhetoric, but what it does acknowledge is the existence of the rules. Glennon's position seems simultaneously both to overvalue and to undervalue the role of international law.

When states are taking decisions concerning international policy, international law will always be a factor in the decision-making process, usually an important factor and often a crucial one. To this extent Glennon undervalues international law. But while international law will usually indicate the course of action which should be taken, it will be indicative of the appropriate action rather than dispositive (that is, of itself it does not dispose of the questions asked). There will be occasions when notwithstanding an arguable breach of international law, when that factor is placed in the balance, unlawful alternatives may still seem more beneficial

to the state.[49] But in deciding to act in arguable contravention of international law, most states will accept that such a choice will not be cost-free. International disapproval and opprobrium may well follow and there may be other sanctions. Nevertheless, when vital interests are perceived to be at risk, international law will sometimes be broken. For an example, one need only remember the French state's decision to bomb the Greenpeace ship Rainbow Warrior in New Zealand waters in 1985.[50]
But this takes us back to Glennon and Moynihan. Glennon requires of international law that it be clear and precise. `The first task' he says, `of any lawgiver is to speak intelligibly, to lay down clear rules in words that all can understand and that have the same meaning for everyone'.[51] This is laudable and appealing but not necessarily consistent with reality. Very few conflicts between states are reducible to simple legal questions that can be given simple legal answers. Because international legal disputes proceed from international social, political, and cultural disagreements, it is rare that such a dispute will be encompassed by its legal aspects.

In turn, this leads to the realization that legal answers to complex problems are almost always arguable and negotiable. Parenthetically this is no less true in domestic law where, at least in common law systems, and at least in appeal cases upon a point of law, almost all cases could actually be decided either way, yet in a manner consistent with precedent.[52] Were that not the case, it is highly unlikely that an appeal would be entertained.
It was the realization of this truth that led Moynihan to his conclusion that it was always better to act in a way which was arguably consistent with international law than not. When Glennon concludes that this is unimportant, he concedes a world of chaos in which not only is there no authoritative answer to legal questions but worse, `. . . where no restriction can be authoritatively established a country is considered free to act'.[53]
What needs emphasizing is that to assert that much international law is negotiable, and even unclear, is very different from asserting that its lack of clarity leads to all conduct being judged only in terms of the power a

49 As Louis Henkin put it:
Law, I sum up, is a major force in international relations and a major determinant in national policy. Its influence is diluted, however, and sometimes outweighed, by other forces in a `developing' international society. Failure to appreciate the strengths and weaknesses of the law underlies much misunderstanding about it and many of the controversies about its significance.
L. Henkin, How Nations Behave (2nd edn., 1979) 314. See, too, D. Joyner, `Bridging the Gap Between International Law and Foreign Policymaking' (2003) 31 Denver J. of International Law and Policy 437.
50 See Rainbow Warrior Arbitration (New Zealand v. France) (1987) 26 ILM 1346, 82 ILR 499
51 Glennon, op. cit., n. 24, p. 27.
52 See W. Mansell, B. Meteyard, and A. Thomson, A Critical Introduction to Law (3rd edn., 2004).
53 Glennon, op. cit., n. 24, p. 23.

state has to justify its actions. There is action which international law proscribes regardless of hopeful argument. The Iraqi invasion of Kuwait in which one member state of the United Nations purported to annexe another, is one. The humanitarian purposes used to justify concerted intervention in Kosovo meant that intervention remained contentious, while the invasion of Iraq by the United States and allies was close to unarguable except in the eyes of the United Kingdom's government lawyers.
Why does this matter? It matters because unless it is argued that all states have a right to forcible intervention in another state, that is, are free to act subject only to having the power to resist opposition, then new rules are difficult to find. Do states in the second rank of power such as China or Russia have the right to annexe neighbours, at least unless the United States threatens retaliation? Such a position would surely appeal to few, even within the present United States administration.

This emphasis upon the differences in power in terms of what a state may do and how it may behave is surely the antithesis of the rule of law in international relations. It is significant that Glennon chooses to address the question of comparative power directly. To him:

> Architects of an authentic new world order must therefore move beyond castles in the air - beyond imaginary truths that transcend politics - such as, for example . . . the notion of the sovereign equality of states.[54]

Later the sovereign equality of states is described as `one particularly pernicious outgrowth of natural law'.[55]

`Applied to states' says Glennon:

> the proposition that all are equal is belied by evidence everywhere that they are not neither in their power, nor in their wealth, nor in their respect for international order or for human rights. Yet the principle of sovereign equality animates the entire structure of the United Nations - and disables it from effectively addressing emerging crises, such as access to WMD, that derive precisely from the presupposition of sovereign equality.[56]

Such irrationality he illustrates by considering the effect of the votes of such states as Angola, Guinea, and Cameroon as elected members of the Security Council where their votes were the equal of the much larger elected states they sat beside - Spain, Pakistan, and Germany.

The first observation here is that the initial point that equality is belied by evidence, is no less true of individuals in domestic law. While all may be equal before the law within a state, it is incontrovertible not only that disparity in wealth and power is immense, but also that this disparity does in

54 id., p. 32.
55 In fact, this relationship between natural law and sovereign equality is highly problematic. It seems much more clearly derivable from the `anthropomorphizing' of states and their creation as legal persons with international personality.
56 Glennon, op. cit., n. 24, pp. 32-33.

fact affect the equality before the law. Nevertheless it is this formal equality in domestic law which is at the heart of the rule of law. The law aids and constrains, ideally without reference to such disparities. This is also at the heart of legal method in a liberal democratic world. It is because the subjects are depersonalized into units enjoying equal status that the law is able to assert its relationship with justice.

Secondly, in the international state arena, the formal equality of states is just that. It does provide equality of voting power in the General Assembly, and it is true that when elected to the Security Council (a very rare event) the votes of small states carry equal weight with other elected states. But here really, except in one crucial respect, the formal equality ends. Anachronistic though the choice of the permanent five members possessing the power of veto in the Security Council now appears, it does, even so, privilege at least some of the powerful. There is little power to be found in the General Assembly where, even when its resolutions are carried overwhelmingly, they will have little effect or influence unless they are accepted by the powerful Western states, and most importantly, by the United States of America.[57] In many other international institutions, such as the World Bank or the International Monetary Fund, sovereign equality is, effectively, totally absent.
The crucial respect in which formal equality between states is still valid, is of course in international law. It may be that this is one reason why so few powerful states have accepted the compulsory jurisdiction of the International Court of Justice in their international disputes. The strength and weakness of the ICJ is that, as in other courts, all parties appear as equals in the legal dispute. No state has advantage because it has power. Of course this does mean that powerful states hesitate before appearing before international courts for that very reason. The removal of sovereign equality of states would effectively end the role and the rule of law in international relations. The whole raison d'etre of law has been to escape from the `might is right' way of understanding the world.

It may be argued that in a unipolar world the most powerful state has the most to lose from such an equalizing process. Indeed, the United States can argue that its epoch of supreme power has arrived with proclaimed constraints unique in the history of the world. The limitations upon power through a legal regime were quite unknown to Greek or Roman Empires as they were to the nineteenth-century European colonial powers. No World Court, no Geneva Conventions, and certainly no International Criminal Court constrained their activities. (It is perhaps ironic that many of the legal constraints that have been created arose as a result of the irresponsibility of the European powers which persuaded them of the necessity of voluntary restraint.) On the other hand, neither did they have international law to legitimate their actions or to provide comparatively cost-free redress.

57 See W. Mansell and J. Scott, `Why Bother About a Right to Development?' (1994) 21 J. of Law and Society 171.

International law does provide a possible framework for stability from which a superpower can gain as much as a lesser state. Referring to another author,[58] Niall Ferguson acutely observes:

> As G. John Ikenberry has argued, American success after both the Second World War and the cold war was closely linked to the creation and extension of international institutions that at once limited and yet legitimized American power.[59]

In spite of Glennon's suggestion that the United States has a preference for `after-the-fact, corrective laws', favouring leaving the field open to competition as long as possible, with regulations as a last resort only to be employed after free markets have failed,[60] the evidence is rather to the contrary. In fact, it is the United States that has been most enthusiastic about regulating in advance, particularly with regard to trade. With the World Trade Organization generally, and with specific moves to protect, internationally, patent, copyright, and other intellectual property, and also international investment, the United States has shown itself to be in the vanguard of those states pressing for more, rather than less, international law. Nothing requires more regulation than the free market.

The argument of this essay then is that we are currently witnessing an alarming change in the attitude to international law of at least some influential spokespeople. It is no less alarming for the fact that such a change seems neither in the interests of the wider world nor indeed of the United States itself.[61] There seems a tendency within the current US administration to want both to proclaim a new and greatly expanded Monroe Doctrine, and to have the rest of the world accept that international law does not preclude such a unilateral assertion of lawful authority. Alarming though this is, it is important to appreciate that it is merely the latest in a series of attacks mounted against the international legal regime by those frustrated by its constraints. Writing in 1990, D.P. Moynihan[62] was able to point to the writings of Robert Bork in which he had observed:

> As currently defined, then, international law about the use of force is not even a piety; it is a net loss for western democracies. Senator Moynihan, speaking of international relations in Woodrow Wilson's time, said approvingly, that `the idea of law persisted, even when it did not prevail.' That is precisely the problem. Since it does not prevail, the persistence of the idea that it exists can be pernicious. There can be no authentic rule of law among nations until nations have a common political morality or are under a common sovereignty . . .[63]

58 G. Ikenberry, After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars (2001).
59 N. Ferguson, Colossus: The Rise and Fall of America's Empire (2004) 297.
60 Glennon, op. cit., n. 24, p. 22.
61 See C. Reus-Smit, American Power and World Order (2004).
62 Moynihan, op. cit., n. 31.
63 R. Bork, `The Limits of International Law' (1989) 18 National Interest 3.

The reply to Bork's position is as relevant today as it was then. Writing in the New York Daily News in 1989, Lars-Erik Nelson retorted:

> Since the Bork view appears to be prevailing, America's message to the world is that we are strong, we are good, we are moral and we will do whatever we think is right. Most Americans will probably agree with this. Just don't be surprised if nobody else does.[64]

These then are the academic arguments suggesting that the United States should not attempt to exempt itself from international law governing the use of force. But given the current state of the Iraqi occupying coalition in the administration of Iraq, with continued violence, an inability either to create a coherent and acceptable government or to recreate physical infrastructure, together with evidence of foul deeds by all sides, the arguments are certainly not merely academic. The use of force in contravention of international law, while patently effective in conquest is, except in the rarest circumstances, much more relevant to destruction rather than construction. The coalition having circumvented the United Nations in its decision to invade, finds itself without any obvious means to extricate from the fiasco without international help.

The military unipolarity of the world at its most, is no more than that. There is still no common political morality, and certainly no common sovereignty. Unipolarity does not bring with it power absolute or infinite. For those familiar with the writings of E.P. Thompson, the case that has been made for the retention of legal constraints in the exercise of power will be a familiar one.[65] And interdependence will continue to be a feature of the twenty-first century. A cartoon by David Low from March 24, 1932 in the London Evening Standard, remains prescient, although the circumstances have changed. A number of men representing countries are in a small boat in stormy seas. At the stern of the vessel sit smaller nations bailing furiously. At the prow sit the larger nations observing the panic at the stern with the heartfelt comment, `Phew, That's a nasty leak. Thank Goodness it's not at our end of the boat!'

64 New York Daily News, 1 November 1989.
65 In particular, see E.P. Thompson's Whigs and Hunters (1975).