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Global Governance and Shared Sovereignty

By John R. Bolton

On April 14, 2008, AEI senior fellow John R. Bolton gave the keynote address at the inauguration of the Global Governance Watch (GGW), a joint project of AEI and the Federalist Society. GGW is a web-based resource that addresses issues of transparency and accountability in the United Nations (UN), NGOs, and related international organizations. Edited excerpts from Bolton's remarks follow.

The phrase "global governance" is relatively new. Up until ten years ago, people used the term "global government." But that term was dropped because, at least in the United States, there was not a lot of enthusiasm for it. So its supporters turned to other approaches. The organization that was its strongest proponent in the United States was the World Federalist Society, and it attracted a fairly broad base of support after the founding of the UN. I have read, for example, that the young congressmen Gerald Ford and John F. Kennedy were at one point either card-carrying members or said nice things about it.

How times have changed. As people have come to appreciate that the concept of global government is unwise and unworkable for the United States, so the World Federalist Society, as I understand it, has gone out of existence here and has morphed into other organizations with names that are indistinguishable from product advertisements. This development reflects the basic political reality in the United States.

The World Federalist Society is about as important in our political debate as the Esperanto Society is, with its notion of a global language. But still the institutions of international norming continue, which brings me to the substance of the concept of norming itself. It is a newer concept than most people think. The AEI library's most recent edition of *Black's Law Dictionary* is from 1933, and the legal phrase *jus cogens* is not even in it. This idea of compelling law or peremptory norms, even though enshrined in the Vienna Convention on Conventions, is a relatively new development. (The United States has not ratified the Vienna Convention and is not bound by it, by the way.) The idea behind *jus cogens* and behind much of the growth of customary international law in recent years represents a fundamental change from what scholars and statesmen understood customary international law to be in the past.

"Customary international law," or as I prefer to call it, "customary international custom" is really the embodiment of state practice. This is something that evolves over decades, and it reflects a common-sense appreciation of the process involved as to what norms ought to be to govern behavior. It is the sort of evolution that we can accept and live with. But what has actually happened in the past several decades is that customary international law and the function of norming have become the captives of the international law professoriate, a dangerously underemployed group of people, who spend their lives developing new customary international law that does not derive from decades or centuries of state practice but comes from their own political agendas.

Indeed, the whole idea of *jus cogens* has expanded from the notion that two states cannot by bilateral treaty legitimize genocide or the slave trade to

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a world planted thickly with *jus cogens*, most of which happen to be contrary to any given American foreign policy on any given day, but which reflect nothing more than the received wisdom of a fairly limited and highly ideologically compatible group of people.

If this professoriate and their outriders were prepared to argue that customary international law derives from natural law traditions, then I would be prepared to grant some additional legitimacy to their line of argument. After all, if it is God's law, even if being explained by professors, it has a certain force to it. I doubt, however, that there are many members of the law professoriate who believe in God, let alone are prepared to argue that international law as it has evolved over the centuries from natural law tradition represents something from heaven. Instead, it is a creation of their own overactive intellects, and it is intended to advance an agenda not compatible by and large with American interests. It goes without saying that the U.S. Senate, which happens to be the legislative body that deals with international treaties, has never taken a vote on customary international law as a general proposition, or on *jus cogens*, or on what it means.

Now, people have argued that customary international law has evolved over the centuries much like the common law did in England, and we therefore should not be concerned about the growth in the authoritativeness of customary international law because of the role common law played in the development of our own legal system. I think the analogy is inapposite. The role of common law in its constitutional dimension took place at a time when there was no functioning democratic governance system in the United Kingdom. That was evolving in the same way that common law was evolving, and it put the king and his agents under the same rule of law that everyone else had to live under.

So when asked today why we would need this kind of developing common law system, I would say that at least for countries and systems of representative government, the need is considerably less. We have the ability acting through our representatives to decide what law is going to govern us. We do not need a separate natural law system that puts constraints on us. That is a very fundamental point because the notion that governments and peoples cannot decide themselves what they want to be bound by is a fundamentally antidemocratic precept, and it arises in a variety of different ways. For example, when the Ottawa Convention against land mines was signed in the late 1990s, the United States did not become a party to it. Yet that did not stop the proponents from saying, well, 130 or 140 countries have signed it, and that is evidence of state practice, and indeed land mines are terrible, so the Ottawa Convention has demonstrated that customary international practice that raises it to the level of *jus cogens*. Therefore, the United States is in violation of international law, even though we have expressly declined to take part in the convention. This is the kind of logic that is developing more and more, and that represents both the transformation of customary international law and an assault on democratic theory.

The idea of compelling law or peremptory norms is a relatively new development.

There are other ways this theory evolves, typically utilizing agencies in the UN system. As Leonard Leo, executive vice president of the Federalist Society, said, much of the development of norming within these bodies comes as a result of—at least on the American side—people who are dissatisfied with political outcomes they have achieved at the state and federal level, and who are determined to take their argument into the broader international context, joined by many like-minded people, especially our friends in Europe, who see the norming process as the way to constrain the United States. And here is where our Constitution is a particular obstacle. A friend of mine who is a professor of international law told me the story of being at a convention in an American city where another American professor said the problem with getting really effective global norming is the Americans and their attachment to their Constitution. They are so stuck on their Constitution, he said, that they will not consider these broader norming possibilities. I wish I had been there.

Let me give you some specific examples of how this has played out in recent years. Let us start with the issue of abortion. Abortion is a controversial issue in our society. We argue about it in virtually every federal election. It is a subject of debate in the Pennsylvania Democratic primary. People feel strongly about it. The rules have changed, and they will continue to change. The point is that we are having a debate about it in the United States. In the meantime, in the international sphere, every time a document comes up, whether on the environment or on trade or on the occupied territories, somehow the subject of reproductive health finds it way

into it, and we become involved in arcane discussions about verbal formulations that are really about abortion. They may sound like they are about equality of the sexes or reproductive health. But if you dig down into the archeology of the various phrases, they are fundamentally about whether you want to legitimize abortion. I am not here to argue one side or the other, but endless discussions in UN institutions about reproductive health and the occupied territories are not a positive way to spend our time either with respect to the Middle East or with respect to the abortion issue.

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The second area in which it comes up frequently is the death penalty. Once again, in the United States, there is a vigorous, active democratic debate over the death penalty at the federal and state level. I am not arguing one side or the other. But I am here to argue that, in our system, we will decide whether we have the death penalty or not. Constant, repetitious adopting of resolutions, first in the UN Human Rights Commission and now in its inadequate replacement, are not a legitimate exercise of time and attention in the UN system. There was a very revealing example of this at the UN early in Ban Ki-moon's tenure as secretary general when he was asked about application of the death penalty. He said that it was a matter for the member governments to take up. As a former foreign minister of South Korea, he was well aware that South Korea has the death penalty. The UN bureaucracy reacted in horror because the UN has acted on this question many times, and people there believe the death penalty is a no-no. So, he retreated and acknowledged the position of the UN. Now, I would ask you how anybody can believe the UN can have a position on an issue like this when we are debating it in a democracy. If you think the votes of the majorities that made up the anti–death penalty resolutions have more legitimacy internationally than our own democratic system, then I would welcome you saying it, and I would ask further what it is that makes anyone think that the use of the UN system for this purpose is going to have any global norming effect other than that ceaseless repetition finally wears people down. Global Governance Watch is not going to be worn down even if the UN Human Rights Commission passes another resolution on the death penalty.

The third example deals with gun control. We have seen in the life of this administration a number of efforts by American advocates of gun control to use the existence of an international problem—the illicit trafficking in a variety of weapons—to try to adopt a gun control agenda through the UN. The theory is that you get some kind of international convention on gun control adopted, that the U.S. Senate would ratify it, and the debate would be over. This strategy came up in the context of a number of conferences on what are called "small arms and light weapons" in conflict zones around the world. This starts the debate off in a loaded way because small arms and light weapons include everything from .45 caliber revolvers to crew-served mortars. I am a strong proponent of the Second Amendment, but even the Second Amendment does not preclude the government from banning mortars in your backyard. But by lumping them together, it all looks the same.

I thought that this was a mistake when I came across it in 2001 when I was in charge of arms control, which is how I got into the small arms and light weapons business. I was eager to give an address at the UN on small arms and light weapons. In my speech, I said that while we had legitimate national interest in illicit weapon trafficking, particularly in conflict zones where these weapons could be used against American troops, I did not think the conference should spend its time on issues within the domestic purview of member governments. This was especially true in the case of the United States, where we have a provision in the Constitution that former attorney general John Ashcroft had recently opined was a matter of individual right and not something that was a collective right. Therefore, I made the following revolutionary statement: we would not support any declaration or international convention that, if adopted as positive domestic law, would be unconstitutional in the United States. You would have thought that I had said something really

objectionable, and in fact, I *had*, because it undercut the fundamental political agenda of those who thought that it was precisely the purpose of the conference to adopt statements that would lead to a convention that would ultimately constrain the United States in its domestic law. Now, again, reasonable people can disagree on this. But one has to wonder why international norming on this issue is preferable to the playing out of our democratic system.

This gets to the nub of what sovereignty is all about. To Americans, sovereignty is not some abstract concept. It is not something held by a distant government or king. For us, in this country, we are sovereign. We govern; we determine what our government will do. So by talking about breaking sovereignty down or sharing it or limiting it, people are saying to us that we do not know how to govern ourselves effectively and that a little less self-government would be good for us. I disagree, and I think the vast majority of Americans disagree. I would love to have a debate in this presidential campaign about global governance and shared sovereignty. I hope we will have one. I think the AEI–Federalist Society global governance project will go a long way toward encouraging that debate.