John Bolton, Donald Trump, and International Law

Professor Wade Mansell, Public International law

Greetings to all of you following the Public International law module. My name is Wade Mansell and I am the convenor of the Public International law course.

In March of 2017, Professor Jack Goldsmith, who is a Professor at Harvard University made the following statement, he said:

We are witnessing the beginnings of the greatest presidential onslaught on international law and international institutions in American history.[1]

Well that's obviously an extreme statement and, if it's accurate, it has enormous implications both for the United States, and for other states too – and indeed for this module. As I hope you have realized, a central theme of this course has been to explore the relationship between international law and the exercise of power. Put in other words, what is the relationship between 'might' on the one hand, and 'right' on the other? This module has argued that the concept of the 'rule of law' in international law is an assertion of the supremacy of 'right' over 'might' – or law over force. As the module argues, crucial to that concept is the acceptance of the sovereign equality of states, which can be found in the United Nations charter (Article 2(1)). But of course, as in domestic law, this formal equality is simply that. It makes no comment about the relative power or impotence, wealth or poverty, of different states. So its effect is to hide, at least in international law terms, the question of 'who wields the bigger stick?' in favour of 'whose arguments are validated by international law?' An understanding of that point should immediately suggest that its effect does not apparently favour those states who do in fact have more power. They will be constrained in obtaining goals through the exercise of that power unless it is consistent with international law. (This is not to suggest that all the advantage lies with the weakest states because strongest states also have an interest in ensuring an orderly society and system and one based on *pacta sunt servanda*.)

Until comparatively recently, these comments would have simply observed the factual situation although it might have been necessary to make some comment about the situations where power trumps law (so to speak). When in chapter 11 of your module guide I first spent some time discussing the extreme neo-conservative views of John Bolton on international law, I had not anticipated either his promotion to National Security Advisor to the current President, or the acceptance of many of his views by the US administration. In essence the positions adopted really do threaten both the concept of the rule of law in international law, and indeed the centrality of the United Nations. With the unilateral withdrawal from such multilateral treaties and agreements as Paris and that concerning Iran, not to mention the enforced modification of the North American Free Trade Agreement (NAFTA), together with the expressed suspicion of multilateral treaties which may have their own legal dispute resolution mechanisms (the WTO and UNCLOS), even the validity of *pacta sunt servanda* is called into question.

Some brief elaboration of couple of those examples is now appropriate if that rather dramatic assertion is to be sustained. The Paris Climate Change Agreement of December, 2015, intended to control global warming of course, was made under the UN Framework Convention on Climate Change of 1992. The Agreement was signed by 195 states and ratified by 184. President Trump, a climate change sceptic, who viewed the Agreement as unfair to the US in the controls it had

[1] Statement by Professor Jack Goldsmith, Henry L Shattuck Professor at Harvard Law School, in March 2017.

undertaken to accept, announced the withdrawal of the USA from the agreement in July 2017. Under the Agreement (Article 28) the earliest effective date of withdrawal is November, 2020, but some policy changes in contravention of the Agreement have already taken effect. This withdrawal from such a treaty which is in accordance with its domestic law, even if not in conformity with international law, is dependent upon whether the US legislature, has duly ratified treaties concluded by the executive. That notwithstanding, for the international community the implications of a unilateral and unauthorised withdrawal from a multilateral agreement, strikes at the very heart of *pacta sunt servanda*.

The implications and ramifications of the unilateral withdrawal of the USA from the Iran nuclear deal are at least as significant. In 2015 Iran had entered into a long term deal on its nuclear programme with the P5+1, that's the permanent 5 plus Germany (USA, China, Russia, UK, France and Germany). The resulting Joint Comprehensive Plan of Action (JCPOA) is a detailed, 159-page agreement with five annexes. It was an agreement widely applauded, though certainly not by the Israeli administration of Benjamin Netanyahu. In May, 2018, President Trump, denounced the Agreement as 'terrible' (as he had throughout his presidential campaign) and announced both the US's withdrawal, and the intention of the US to re-impose draconian sanctions against Iran and its regime. This withdrawal was contrary to the wishes of all other parties to the Agreement and despite asserting otherwise, no evidence of a breach of the agreement by Iran, was ever substantiated. But beyond the immediate effect of the US's action, the USA also announced that in order to ensure the efficacy of the sanctions it was imposing, it would also insist that other states comply with the sanctions and in turn, if they did not, they would face financial and other penalties. The response of the other states has been indignation with promises of reciprocal action in the event of US punitive measures. European Commissioner Jourová, speaking in the European Parliament in November, 2018, stated: 'We Europeans cannot accept that a foreign power – not even our closest friend and ally – takes decisions over our legitimate trade with another country. The ongoing work – led by France, Germany and the United Kingdom – aims at preserving the full and effective implementation of the JCPOA in all its aspects and in line with UN Security Council Resolution 2231. But protecting trade is also a basic element of our own sovereignty, and it is only natural that we are working in this direction.' I may say the question is to whether or not the other signatories to that agreement have the power to resist the United States remains very unclear.

This reference, by Commissioner Jourova to Security Council Resolution 2231 is important. Because that Resolution endorsed the Iran nuclear deal and urged full implementation. National Security Advisor, John Bolton, has now stated that the US would also cease to abide by the Resolution. Remembering that Article 25 of the UN Charter states categorically that 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter' the threat to the central role of the UN Charter and Organisations seems irrefutable. But there have been other developments since the withdrawal that are equally portentous. In an attempt to mitigate the severity of the sanctions, Iran had asked the International Court of Justice for a ruling to the effect that curbs on humanitarian trade announced by the Trump administration after pulling out of the Iran nuclear deal were illegal under international law. In support of this the Iranians had cited the 1955 treaty of friendship between the US and Iran[2], Article 1 of which stated that 'There shall be firm and enduring peace and sincere friendship between the United States of America and Iran'. In a preliminary ruling the ICJ stated that the US must remove 'any impediments arising from' the re-imposition of sanctions to the export to Iran of medicine and medical devices, food and agricultural commodities and spare parts and equipment necessary to ensure the safety of civil aviation. The response of the

[2] Treaty of Amity, Economic Relations and Consular Rights between United States of America and Iran.

USA within hours was that the US Secretary of State, Mike Pompeo, announced that the US was pulling out of what he referred to as an 'obsolete' 63 year old treaty, that's the treaty of friendship.

Meanwhile, at a press briefing in the White House, John Bolton, told reporters that 'We will commence a review of all international agreements that may still expose the United States to purported binding jurisdiction dispute resolution in the International Court of Justice'.[3] For good measure he went on to add that the US would not sit idly by 'as baseless politicized claims are brought against us'.

But while these developments might have been discombobulating for doctrinal international lawyers, hopefully those of us who have been following this module will be less surprised, recognizing that perhaps current developments simply serve to strip away the disguise of facts which were discoverable. As should have been seen, examples are legion where formal 'rights' in international law are in fact unexercisable. Thus, although all states have the right of self-defence, in fact that right of self-defence, is only exercisable by states who have sufficient resources, military or otherwise, to resist an attack. Again, although treaties will be invalid if they are produced through coercion, unequal bargaining power has always been a political reality, bringing with it many bilateral treaties which favour those with greater bargaining power. When the concept of universal jurisdiction was considered it was observed that its exercise is available to every state, but of course, smaller states have neither the power nor the temerity to indict foreign miscreants of the worst colour. And as a final example, just as Nicaragua found itself unable to enforce the judgment of the ICJ against USA, so too are states with territorial claims in the South China Sea, unable to have their claims to the Spratley Islands and the Paracels internationally definitively adjudicated, in the face of intransigence by the Peoples Republic of China.[4] Indeed China has recently shown itself, like the US, to be predisposed to prefer bilateral agreements rather than allowing neutral arbitration arising from multilateral treaties, as was seen in the position adopted by China in the face of attempts to seek a solution to conflicting territorial claims.

So I suppose what I've been arguing is that we've seen a move on the part of powerful states away from the 'rule of law' perhaps and certainly to a situation 'who has the biggest stick' remains important. And this of course is particularly the reason for the interest of powerful states and particularly the US and China to move away from multilateral treaties to bilateral treaties where the power relationship will be crucial in any agreement which is concluded.

Thank you, bye.

[3] See the report in the *Washington Times,* 'U.S. cancels 1950s treaty with Iran after international court rules against sanctions' 3 October, 2018.

[4] See *An Arbitration before an arbitral tribunal constituted under Annex VII to the 1982 United Nations Convention on Law of the Sea between the Republic of the Philippines and the People's Republic of China*. PCA Case 2013-19, which determined on 12 July 2016 that there was no legal basis for China to claim historic rights to resources within its 'nine-dash line' and that UNCLOS does not provide for a group of islands such as the Spratley Islands to generate maritime zones collectively as a unit. The ruling was rejected by China (and by Taiwan).