

# EVIL REGIMES OF LAW: CHALLENGES FOR LEGAL THEORY AND FOR INTERNATIONAL LAW

JOHN R MORSS\*

## CONTENTS

I	INTRODUCTION .....	137
II	HART'S GUNMAN AND THE NATURE OF LEGAL OBLIGATION .....	141
III	APOLOGY, UTOPIA, AND PHILOSOPHY OF INTERNATIONAL LAW .....	144
IV	PEREMPTORY NORMS AND THE FIDUCIARY STATE.....	148
V	CONCLUSIONS.....	152

## I INTRODUCTION

This paper is concerned with the ethical dimension of the concept of legal system, both at a national and at an international level. The notion of an 'evil system of law' is an important yet troubling one. From the point of view of jurisprudence, evil regimes of law are either a contradiction in terms, or are deeply troubling. If an evil (or even merely bad) system of law is by definition not a system of law at all, as broadly claimed by theorists of the natural law orientation,<sup>1</sup> then evil regimes masquerading as legal systems need to be unmasked in that respect, as well presumably as resisted or challenged in other ways. They must be shown not to be legal systems at all. This would still raise difficult questions about the identification of 'goodness' and 'badness,' but would avoid the particularly tricky jurisprudential questions of how to describe and to 'interrogate' systems that are at the same time legal systems and systems that are to be reviled. That is to say, if there is anything at all in the legal positivist<sup>2</sup> claim that legality

---

\* Associate Head of School (Research), Deakin University Law School. Thanks to Danny Priel for robust debate over Hart and his gunman; and to colleagues at Deakin University Law School and to Helmut Aust and his colleagues at the Institute for International Law, Ludwig-Maximilians-University, who gave me valuable feedback on the topics discussed below. Some parts of the paper were discussed in 'Holy Grail or MacGuffin? What the search for *jus cogens* can tell us about international law,' seminar presentation at the Institute for International Law, Ludwig-Maximilians-University, Munich, October 2009.

<sup>1</sup> See John Finnis, 'Grounds of Law and Legal Theory: A response' (2007) 13 *Legal Theory* 315.

<sup>2</sup> John R Morss, 'Part of the Problem or Part of the Solution? Legal positivism and legal

is not absolutely incompatible with malevolence, then a whole series of theoretical challenges arise. These challenges include questions about the differentiation between good and bad legal systems, about boundary cases between those types, and about historical transition from one type to another – for example a good legal system going bad or a bad legal system going ‘good.’<sup>3</sup> But the challenges concern international as well as municipal (national) legal arrangements, and therefore contribute to an understanding of what might be called the nexus between ethics and world order.

One example of this ‘nexus’ is provided by the situation of the ‘failed state.’ The civilian populations of so-called ‘failed states’ might well be at the mercy of ‘war-lords’ or other extended quasi-criminal organisations, and if ‘law’ is not co-terminous with ‘good laws’ then the rule of such gangs might exhibit some elements of a legal system. Powerful criminal organisations operating within states that can hardly yet be called ‘failed’ – the case of Italy springing to mind here – might also demonstrate some legal characteristics. Again, ‘rogue states’ might well exhibit characteristics of legality both within their own borders and beyond despite conduct that is deplored by the international community. Afghanistan prior to the US-led invasion of late 2001 might be said to have exhibited the characteristics of a rogue state.<sup>4</sup> That is to say, early 2001 Afghanistan might be thought of as exhibiting a legal system as such, and as constituting an international legal actor. With respect to the latter, treating the 2001 invasion of Afghanistan as a matter of self-defence between sovereign states, that is to say as an armed response by one state (the USA) to the armed attack on it of the other, would seem to presuppose international legal subjecthood in both. In other words the formal character of Afghanistan was as a legally constituted and legally competent entity even though it was ruled by terrorists.

Something more should be said at this point on the question of international legal personality since this raises important points concerning the role of ethics at the global level. The recognition of legal personality at the international level is an extremely catholic

---

education’ (2008) 18 *Legal Education Review* 55.

<sup>3</sup> These terms are not employed disingenuously, but more precise terminology is elusive. An evil or bad system of law can be provisionally defined as one that benefits a few rather than the many or oppresses the many to the advantage of the few.

<sup>4</sup> Richard Falk, ‘Appraising the War Against Afghanistan’, Social Science Research Council <<http://essays.ssrc.org/sept11/essays/falk.htm>>.

procedure, at least when the sovereignty of a territorial state has already been established and a regime is recognised as effectively occupying that territory. The procedure is inclusive of diverse political regimes including military dictatorships.<sup>5</sup> Even if governments may from time to time decide not to recognise particular other governments as such, for example on the basis of unacceptable social arrangements such as *apartheid*, this political sanction leaves unaffected the international recognition of the state of which the impugned government is currently the steward. Ongoing international agreements are not voided. To this extent at least, international law thus finds no conceptual difficulty in the notion of evil legal system. Indeed finding ways of cohabiting with foreign regimes thought of as deplorable if not downright despicable is the bread and butter of the diplomatic tradition out of which much international law is derived.

It may thus be observed that the threshold for legal status in the international domain is extremely low. Perhaps it is to be anticipated that legality of a national system as such (of a system considered in respect of its own jurisdiction, rather than in terms of its international dealings) must be assessed against higher standards. But it may well be that these dual aspects of legitimacy – the internal and the external – while differing in many respects, are not entirely distinct.

Significantly, the problematic role of force is of relevance to questions of legality in both domains. An early approach to these matters would have suggested that internal legality would depend on force (as represented by the commands of the sovereign), and that the absence of enforcement on the international stage would, correspondingly, precisely negate the pretensions to legality of international arrangements. This ‘classical’ dualist account of the comparison between municipal and international law is unsatisfactory for a number of reasons. It is a notable trend of theoretical work and perhaps more significantly of practical realities in international law in recent decades that the sharp distinction between the domains of interstate legal relationships and of internal legal systems is becoming increasingly blurred.<sup>6</sup> Individual citizens have recourse to international human rights instruments and to tribunals that are empowered with jurisdiction over the citizen’s own national government. Non-state

---

<sup>5</sup> James Crawford, *The Creation of States in International Law* (2<sup>nd</sup> ed, 2006). States are also undefined as to upper or lower limits of population or of geographical size, that is to say there are no minima or maxima for these dimensions.

<sup>6</sup> See Franck’s ‘piercing the statist veil’ in Thomas Franck, *Fairness in International Law and Institutions* (1995) 6.

actors are of increasing importance at the international law level. States are coming to be thought of as one among many kinds of collective legal entity on the international stage.<sup>7</sup>

Of course, non-state actors come in many shapes, sizes and orientations. Another example that demonstrates affiliations between the criteria for international and for municipal legality is terrorism. Terrorism may often be associated with failed or 'rogue' states, as well as with organised 'polities' within and across the borders of states that are not or not yet either failed or rogue. If a terrorist organisation closely identifies with a religious movement then obedience to devotional obligations may in itself constitute a salient form of legality. That is to say, commitment to a systematic spiritual agenda may well give rise to organized collective coordination of action that amounts to compliance with the requirements of a legal system. (Both sides in the historical invasions known as the 'Crusades', as well as in similar conflicts such as the ejection of the Moors from Spain, might be said to have exhibited compliance with legal systems). Any form of legitimacy for a terrorist organisation is likely to be resisted by the state forces for counter-terrorism, for which a characterisation of terrorism in terms of criminality (or irrationality) is usually preferable. A similar attitude might also be taken by non-state organisations, whether national or international.<sup>8</sup> The recognition that legality is not the sole preserve of the virtuous, or that (which come to the same thing) the recognition that systems of obligation may be considered virtuous by those governed by them irrespective of the opinions of those governed by other regimes, gives rise to the same set of 'evil regime' questions.

These considerations suggest that evil systems of law merit scrutiny and conceptual analysis. If evil in the world remains a major issue facing humankind and if some of that evil is constituted by evil systems of law, then some hints about ways of changing such systems for the better would not go amiss.<sup>9</sup> These issues call for an enquiry into available theoretical resources, including relevant versions of 'the philosophy of international law'<sup>10</sup> as well as jurisprudential accounts of

---

<sup>7</sup> John R Morss, 'The Legal Relations of Collectives: Belated Insights from Hohfeld' (2009) 22(2) *Leiden Journal of International Law* 289.

<sup>8</sup> Religious organizations and civil peace movements might be thought of as opposed to terrorism in general or in particular.

<sup>9</sup> Philip Allott, *The Health of Nations: Society and Law beyond the State* (2002) 399; 37; also see Philip Allott, 'The Globalisation of Philosophy and the Philosophy of Globalisation' in Ronald St John Macdonald and Douglas M Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005).

<sup>10</sup> The question of a 'Rule of International Law' as discussed by Jeremy Waldron, is

the criteria for legality and legal obligation. Both sets of ideas, which may not be easy to reconcile with each other nor to synthesise, must be examined if progress is to be made in the ethics of the systems under which people live. In relation to the former, the philosophy of international law, the focus of discussion will be the proposal of Criddle and Fox-Decent that a set of precise 'peremptory' norms (*jus cogens* norms) can be identified, non-negotiably governing the conduct of states, and derived from the fiduciary responsibilities of the state towards its citizens and indeed to the citizens of other states.<sup>11</sup> In relation to the latter, one place to begin is with Hart.

## II. HART'S GUNMAN AND THE NATURE OF LEGAL OBLIGATION

Analytic jurisprudence takes Hart's *The Concept of Law* as its touchstone for the conceptualisation of legality in societal systems of control. For Hart, in the legal positivist tradition, the virtue or otherwise of a legal enactment is strictly irrelevant to its legal status as such. But Hart is equally wary of substituting force for virtue as the criterion for legality, instead seeking a middle way of a somewhat more sociological variety, so to speak in between the poles of legal realism and legal idealism. In this vein, Hart's account of the gunman situation<sup>12</sup> is intended to illuminate the distinction between obedience to a mere command, in particular a command backed up by the threat of violence, and obedience to the authoritative commands of law (obedience to a legal system).

According to Hart, Austin's much earlier (nineteenth century) account of legal obligation had made the mistake of treating law as fundamentally arising from the peremptory commands of a powerful sovereign. Such commands were assumed by Austin to be backed up by force or by the threat of force. According to Hart the command backed by force is merely gun-law, not real law. When a gunman robbing a bank orders the clerk to hand over the money, this 'order' is

---

relevant to this debate: John R Morss, 'Facts, Threats and Reds: Common Law Constitutionalism and the Rule of Law' (2009) 14 *Deakin Law Review* 79, 93; also see Philip Allott, *Towards the International Rule of Law: Essays in Integrated Constitutional Theory* (2005).

<sup>11</sup> Evan Criddle and Evan Fox-Decent, 'A Fiduciary Theory of Jus Cogens' (2009) 34 *Yale Journal of International Law* 331.

<sup>12</sup> H L A Hart, *The Concept of Law* (2<sup>nd</sup> ed, 1994) 19. Priel has suggested that the distinction of gunman versus legal system is misrepresented by Hart and by those who have followed him: Danny Priel, 'Sanction and Obligation in Hart's Theory of Law' (2008) 21 *Ratio Juris* 404.

no more than a peremptory instruction: 'Do it! (or else).'

It would not even be correct to say that the gunman is 'giving an order' to the clerk, in the sense that he might 'give an order' to his associate (henchman) guarding the door. Hart's point with this apparently pedantic observation is that 'giving an order' implies some kind of authority structure, that is to say some element of perceived or actual legitimacy, whereas mere 'ordering' does not. By 'authority structure' is meant a hierarchical arrangement, even with the bare minimum of stability, as a consequence of which an instruction rises above the merely arbitrary or gratuitous. 'Giving an order' partakes if only minimally of true command, that is to say 'an appeal not to fear but to respect for authority.'<sup>13</sup> If the clerk has any reason to treat the gunman's instructions as authoritative – if the gunman is wearing police uniform, for example, or if he is a respected member of the clerk's community – then something beyond mere coercion is taking place, loyalty for instance. There is instead something systemic at work – something so to speak sociological.

There is no doubt that this is the thin end of an important wedge. Structured legitimacy of authority runs all the way from such modest and admixed situations all the way to parliamentary enactments, and perhaps customary law,<sup>14</sup> not to speak of Common Law. In another direction perhaps it runs to the decisions of the UN Security Council, and of the International Court of Justice, and to the United Nations Charter itself.<sup>15</sup> Hart's argument is that lawful obligation involves authoritative regulation extended over time, over subjects or over concrete situations. In other words, rules rather than utterances. According to Kevin Toh,

Hart's signal contribution to the twentieth century legal philosophy

---

<sup>13</sup> Hart, above n 12, 19, 20. Some support for this distinction may also be found in Hobbes, writing in the seventeenth century and influential on Austin. For Hobbes the relationship is one of covenant, not naked fear. Hobbes' sovereign is an actor, acting in the name of those 'natural persons who have covenanted to treat the words and actions of the sovereign as their own.' Thus the sovereign 'puts on the mask of the natural person to whom he speaks, compelling that person to treat his words as commands and his actions as binding.' David Runciman, *Pluralism and the Personality of the State* (1997) 254. Hobbes' account is complex in other ways as well: the sovereign may be an assembly not a natural person.

<sup>14</sup> John R Morss, 'Can Custom be Incorporated in Law? On the Place of the Empirical in the Identification of Norms' (2008) 53 *The American Journal of Jurisprudence* 85.

<sup>15</sup> 'Another direction' in the sense that for Hart, international law has to be thought of as 'primitive' in comparison with the democratic municipality with its parliamentary enactments: John R Morss, 'Sources of Doubt, Sources of Duty: H L A Hart on International Law' (2005) 10 *Deakin Law Review* 41.

consisted of his arguments to show that if laws prevail among a community of people, then at least some members of that community treat existence of laws as furnishing reasons and even obligations to act according to such laws ... a departure from the older legal positivist positions of Bentham and Austin.<sup>16</sup>

Thus Hart shows that Austin's gunman scenario misses the point and that compliance with law is different from a response under duress.<sup>17</sup> For Hart unreflective obedience is the only kind of obedience applicable to the gunman scenario. There is no legal system to obey, only the ad hoc instructions of the criminal. To be sure, some of the subjects of a fully-fledged municipal legal system may obey the law or parts of it for reasons which differ little from the reasons of a gunman's victim – but this does not undermine the legality of the system by which they are governed. The upshot of Hart's analysis of the gunman scenario is that legal obligation is not constituted by physical force. But nor for Hart is it constituted by a recognition of the virtuous. A legal regime is a regime characterised by general rules of obligation – a matrix of social facts.

Among other consequences, Hart's analysis has the effect of 'dethroning' the sovereign and thereby undermining the international anarchism implied by Austin. Following Austin strictly, legal obligation only arises within the territorial jurisdiction of a sovereign; law can only be local (national), not international. Unless and until a sovereign of the whole world emerges – in which case there would be one global system of law – the world's legal systems are inevitably plural and there is no international law worthy of the name. Sovereigns are in a state of nature with each other on the world stage. With Hart's account, however, the sovereign is replaced by rule systems as the source of legal obligation, and the possibility of international law is no longer denied. At the same time any presumption that authoritative legal decrees, as of a sovereign, are benevolent either by definition or by empirical tendency is cancelled. In defining lawfulness on the basis of rules, Hart is expressly (for municipal law) or implicitly (for international law) affirming the possibility of bad or even evil legal

---

<sup>16</sup> Kevin Toh, 'An Argument Against the Social Fact Thesis (And Some Additional Preliminary Steps Towards a New Conception of Legal Positivism)' (2008) 27 *Law and Philosophy* 445, 457.

<sup>17</sup> Duress as a criminal defence, to murder for example, itself raises important issues, some of which arise in the international criminal justice setting: John R Morss and Mirko Bagaric, 'The Banality of Justice: Reflections on Sierra Leone's Special Court' (2006) 8 *Oregon Review of International Law* 1.

systems as well as benign ones.<sup>18</sup> This insight must be kept in mind while more recent contributions are examined.

### III. APOLOGY, UTOPIA, AND PHILOSOPHY OF INTERNATIONAL LAW

Contemporary philosophy of international law is best contextualized by reference to debates over international law as a whole system. In this respect conceptual debate in international law in the first decade of the present century has been dominated by two closely related concerns which together have defined what might be called international law's current problematic. These two concerns or agendas are 'fragmentation' and 'constitutionalisation.'

'Fragmentation'<sup>19</sup> bemoans the apparent breakdown of coherent, unified, principles-based legal regulation at the international level into myriad regimes. Public international law, it is suggested, is disintegrating into a confused agglomeration of specialised jurisdictions such as regional jurisdictions (Europe, Africa, the Americas), topic-based jurisdictions (law of the sea, of whales, of international arbitration), and mischief-based jurisdictions (such as the proliferating international criminal tribunals, themselves of various types and hybrids thereof). The simple series of sources for international law as laid out in Article 38 of the Charter of the International Court of Justice, and derived from the very similar instrument governing the earlier Permanent Court, are being overwhelmed by 'soft law' sources such as General Assembly Resolutions and by regional sources having de facto international effect such as EU law.

As well as contributing substantially to the 'fragmentation' debate, Koskenniemi<sup>20</sup> has analysed international law's discourse over several centuries as vacillating between the two poles of 'apology' (a realist,

---

<sup>18</sup> The role of legal officials in international settings is discussed by Patrick Capps, *Human Dignity and the Foundations of International Law* (2009) 98.

<sup>19</sup> Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1, 2.

<sup>20</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001); Martti Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 *European Journal of International Law* 113; Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, Erik Castrén Institute Research Reports 21/2007.



descriptive approach close to politics or 'international relations') and 'utopia.' If the concern with 'fragmentation' is an apologetic stance then 'constitutionalisation' is unashamedly optimistic if not quite utopian. The constitutionalisation movement within international law expresses the view that international law is becoming articulated in ways that converge with the typical features of public law in democratic municipal settings.<sup>21</sup> It therefore looks favourably on municipal techniques for exerting judicial constraint on executive power,<sup>22</sup> including the typical provisions of Bills of Rights, and seeks to model regulation at the international level on such exemplars. One notable version of international constitutionalisation would involve the proposal that the Charter of the United Nations in itself represents a World Constitution.<sup>23</sup> Similar claims have sometimes been made with respect to the *Universal Declaration of Human Rights*.<sup>24</sup>

It could be argued that such claims represent the position that international law as a whole system is benign – not just well-intentioned but also well articulated to deliver beneficial outcomes to people and to peoples around the globe. This is not to suggest any lack of sophistication or lack of awareness of shortcomings of the system in these contributions, but rather to point out that such proposals urge that at least the basics of a good international system are in place. This orientation is definitely optimistic, if not utopian. On the other hand the concern for fragmentation would seem to represent a pessimistic or somewhat dystopian view. The fragmentation argument would seem to suggest that international law as a whole is dysfunctional, and

---

<sup>21</sup> Benedict Kingsbury, Nico Krisch, and Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15; Nico Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *European Journal of International Law* 247.

<sup>22</sup> See similarly, the 'ongoing institutionalization of the international legal order' referred to by Georg Nolte and Helmut Aust, 'Equivocal Helpers – Complicit States, Mixed Messages and International Law' (2009) 58 *International and Comparative Law Quarterly* 1, 28.

<sup>23</sup> Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1997) 36 *Columbia Journal of Transnational Law* 529, 567; S. Breaux, 'The Constitutionalization of the International Legal Order,' (2008) 21 *Leiden Journal of International Law* 545; for an approach derived from critical theory, Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (2000).

<sup>24</sup> Simon Chesterman, 'I'll Take Manhattan: The International Rule of Law and the United Nations Security Council' 1 *Hague Journal of The Rule of Law* (2009) 67, 67; 2005 World Summit Outcome Document, UN Doc. A/RES/60/1 (16 September 2005), <<http://www.un.org/summit2005>, para 134>; also see André Nollkaemper, 'The Internationalized Rule of Law' (2009) 1 *Hague Journal of The Rule of Law* 74, 74.

therefore a 'bad' (if hardly 'evil') system. That international law has a 'dark side' is hardly to be denied.<sup>25</sup>

Conceptual work in international law thus opens up a debate over whether the global legal system as a whole is 'good' or 'bad,' in ways that connect up with the conceptual questions of evil systems of law. If as suggested above an evil or bad system of law can be provisionally defined as one that benefits a few rather than the many or oppresses the many to the advantage of the few, then there are several grounds on which international law might be vulnerable to characterization as a bad system. Extreme inequalities in terms of poverty and access to health services, escalating degradation of the environment and tolerance of the development of weapons of mass destruction by chosen elite states, are all examples of 'black marks' against the regime of international law as we know it — at least to the extent that international law plays a part in these crises. Less dramatically, and more technically, the same point could be made about international law's conservative axioms defending the territorial integrity of existing states against self-determination claims and defending colonial administrative boundaries in post-colonial times under the doctrine of *uti possidetis*.<sup>26</sup> Counter-arguments could be made, asserting the beneficial effects of international law, but the possibility of doing so conforms to the more general theoretical point as made by Hart: (international) law is not good by definition, or simply by virtue of its lawfulness to the extent it has any.

Against this background, some representative contributions to contemporary philosophy of international law may be sketched. Current debate in the philosophy of international law includes a range of proposals concerning the relationship between the discipline of international relations, the sphere of the ethical or moral, and international law. Allen Buchanan has made substantial contributions to debate in international law especially in relation to human rights, secession and self-determination, and the legitimacy of international legal systems. Thus Buchanan<sup>27</sup> proposes that if international law were

---

<sup>25</sup> David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004); Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (2007); Anne Orford, 'International Law and the Making of the Modern State: Reflections on a Protestant Project' (2008) 3 *In-Spire: Journal of Law, Politics and Societies* 5.

<sup>26</sup> Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The role of Uti Possidetis* (2002).

<sup>27</sup> Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (2004).

to be properly established on the basis of a systematic and coherent principled framework, its connections with the moral would be revealed and its contribution to a justice-based international relations would become possible. Buchanan's approach to international law (and indeed to international relations) might thus be termed reductionist with respect to the primacy of a domain of moral principles. On the other hand Ratner<sup>28</sup> has proposed that international law should, without losing its identity or complexity as a discipline and more or less in the form we know it, become the bridge between international relations and the ethical so that all three would be treated as autonomous yet contiguous disciplines. Ratner's proposal sees international law as the answer to a problem – the problem of establishing a meaningful nexus between ethics and world order, between the moral and the political. If politics is the art of the possible, and if ethics may be referred to as the art of the obligatory, then international law for Ratner presents itself as the missing link between those arts.<sup>29</sup>

Buchanan and Ratner share an approach that is cautious and pragmatic in comparison with Philip Allott for whom the necessary changes to international law are wholesale and rather revolutionary ones rather than piecemeal and evolutionary.<sup>30</sup> All three however agree on the significance of ethics for international law. This theme is developed in greater detail by two contemporary appropriations of Kantian theory in the context of international law: the 'state as fiduciary' argument of Criddle and Fox-Decent and the practical rationality approach of Patrick Capps.<sup>31</sup> Both contributions are concerned with systemic aspects of international law. Capps' contribution is much more technical in its appropriation of Kantian philosophy than is that of Criddle and Fox-Decent, for whom the appeal to Kant is of a somewhat general nature as indicated below. Partly for this reason, only the first of these contributions (Criddle and Fox-Decent) will be discussed in detail here, but the larger project of bringing to bear the resources of European moral philosophy on questions of international law should be thought of as an important aspect of the larger context for their work. In other words, the *evaluation* of international law is a matter of

---

<sup>28</sup> Steven Ratner, 'Is International Law Impartial?' (2005) 11 *Legal Theory* 39.

<sup>29</sup> Also see Hilary Charlesworth and David Kennedy, 'Afterword: - and Forward: There remains so much we do not know' in Anne Orford (ed), *International Law and its Others* (2006) 401, 401-2.

<sup>30</sup> Philip Allott, *Eunomia: New Order for a New World* (2001).

<sup>31</sup> Capps, above n 18.

lively debate.

#### IV PEREMPTORY NORMS AND THE FIDUCIARY STATE

Peremptory norms (*jus cogens* norms) are defined as non-derogable rules of law at the international level, proscribing the most egregious violations of human rights and prescribing various aspects of the conduct of states in their dealings with each other and with individual persons. The project of Criddle and Fox-Decent involves the scrutiny of a number of 'candidates' for peremptory norm status with a view to identifying those norms that truly deserve that special status, that is to say as norms that should *compel* the conduct of states. In effect Criddle and Fox-Decent are developing an ethics of international relations, a principled set of norms that states should treat as obligatory. This project has direct relevance to any discussion of the capacity of legal systems to embody virtue or benevolence. Indirectly, it also has relevance to the debate over evil systems of law.

It should be remarked that a narrow reading of the jurisprudence of the International Court of Justice finds only one such norm unambiguously and authoritatively identified (in 2006) – the prohibition of genocide.<sup>32</sup> However there are many international norms that are routinely categorized by influential commentators under this heading. These include such diverse norms as a (conditional) prohibition on the use of armed force; the principle of self-determination (of peoples); the prohibition of piracy; and the procedural requirement that international undertakings should be honoured, otherwise referred to as the principle of *pacta sunt servanda*.

In contrast with customary international law, to which the peremptory norm bears some resemblance, there is no requirement for the actual practice of states to provide evidence for such norms; their status is in some sense based on principle rather than observance, effect or consent. However it is important to stress that these norms are, in common with treaties or with customary international law, thought of as defining or constraining the conduct of states, not the conduct of other forms of collective or of individuals as such. Peremptory norms would appear to constitute constraints on the autonomy or sovereignty

---

<sup>32</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Rwanda) (Jurisdiction and admissibility)* [2006] (International Court of Justice, General List No 12, 3 February 2006) at <<http://www.icj-cij.org/docket/files/126/10435.pdf>>; a possible second being the prohibition on the use of force; on both see Criddle and Fox-Decent, above n 11, 339 fn 36.

of states but would also appear to rely on that sovereignty for their application. Peremptory norms constitute a set of rules as to what 'Princes' should and should not do, so to speak, in the light of reason.

Criddle and Fox-Decent examine the grounds for identifying peremptory norms. Consistent with the principled or deontological nature of these norms, Criddle and Fox-Decent enquire into the ethical basis or what might be called the 'inner morality'<sup>33</sup> of the identification criteria applicable to particular candidates for *jus cogens* status. Criddle and Fox-Decent may thus be said to be employing the machinery of the peremptory norm in order to define the good in a national legal system.<sup>34</sup> When is a state benevolent, and a good world citizen among the community of global states? Against what benchmarks may this be tested? Expressed in this blunt manner the questions may look unsophisticated but hardly trivial.<sup>35</sup>

The specific proposal by Criddle and Fox-Decent is that reconceptualising *jus cogens* or peremptory norms in terms of 'fiduciary' relationships helps to establish a normative basis for *jus cogens* that is not inappropriately reliant on state sovereignty. If anything the explanatory position is to be reversed: state sovereignty is to be redefined as reliant on the set of properly identified *jus cogens* norms. States are entitled to the prerogatives of sovereignty, such as the territorial prerogatives, only if their conduct, evaluated against their obligations towards natural persons, justifies that status. In effect Criddle and Fox-Decent define a good legal system as one that acts in accordance with the fiduciary *desiderata*. Their analysis relies on the important claim that understood in a normative manner (as against a merely procedural manner) legal relationships between states must be consistent with the responsibilities that states undertake for the welfare of their citizen. Indeed any state's legitimate power/authority is to be thought of as constituted (directly or indirectly) by its delivery of those responsibilities — by its caring for persons.<sup>36</sup>

---

<sup>33</sup> Consistent with this terminology, Fuller's articulation of the Rule of Law is incorporated into the Criddle and Fox-Decent analysis: *ibid* 361.

<sup>34</sup> For an argument that international law should itself display high (fiduciary) standards also see Evan Fox-Decent, 'Is the Rule of Law Really Indifferent to Human Rights?' (2008) 27 *Law and Philosophy* 533.

<sup>35</sup> A related set of questions is addressed in the work of John Rawls and the question of the good state versus the bad state is implicit if not explicit in much political philosophy; see Buchanan, above n 27, 45.

<sup>36</sup> Also see the international 'responsibility to protect:' Louise Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (2008) 34 *Review of International Studies* 445.

For Criddle and Fox-Decent the ‘fiduciary’ relationship is thought of in a manner derived from certain writings of Kant. Independently of his important writings on international law and the cosmopolitan as such, Kant had argued that the paradigm case of parental care to children (or more broadly of the present generation to the next generation) reflects a general kind of obligatory welfare attitude.<sup>37</sup> Children having not volunteered or agreed to be born in the first place, those responsible for procreation by those acts of procreation accept correlative obligations. For Criddle and Fox-Decent, this *desideratum* enables a principled categorisation of a number of putative candidates for the status of preemptory norm or *jus cogens*. Criddle and Fox-Decent thus attempt a novel definition of the *jus cogens* norm with the interesting outcome that some norms routinely included as preemptory are now to be excluded, and some unfamiliar norms are now included.

For Criddle and Fox-Decent, the rights of citizens that are to be protected are predominantly (but not entirely) their rights as individuals. States have duties to take care of their citizens’ (and in some circumstances, others’) individual rights, and the set of these duties may indeed exhaust the terms of Statehood – so States may exist solely in order to protect those (at least generally speaking) individual rights. Thus ‘States exercise sovereign authority as fiduciaries of the people subject to state power’<sup>38</sup> and correspondingly, preemptory norms ‘express constitutive elements of sovereignty’s normative dimension.’<sup>39</sup> The ‘chessboard’ of named states, each with its own defined geographical terrain, is to be thought of more as a political arrangement than a legal one.<sup>40</sup> This approach is broadly consistent with a tradition in international law particularly associated with Hersch Lauterpacht,<sup>41</sup> according to which (first), the (‘municipal’) legal systems of sovereign states are held to be in principle of a piece with and convergent with inter-State law – the so-called ‘monist’

---

<sup>37</sup> Somewhat closer to these better-known contributions of Kant is the authors’ search for a ‘fiduciary conception of cosmopolitan citizenship’: Criddle and Fox-Decent, above n 11, 380; thus ‘jus cogens norms constitute a universal bill of cosmopolitan human rights’, *ibid* 359. On Kant’s approach to social welfare and equality rights see Otfried Hoffe, *Categorical Principles of Law* (2002) 216; for a more contemporary viewpoint, T Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (2007).

<sup>38</sup> Criddle and Fox-Decent, above n 11, 333.

<sup>39</sup> *Ibid* 332.

<sup>40</sup> It might be said that Criddle and Fox-Decent converge with the position of Buchanan (see text above) in eliding international law as such by focusing on the role of the ethical.

<sup>41</sup> Capps, above n 18, 211.

position – and (second), this monism is understood on the basis that all legal regulation is ultimately concerned with the rights of individual people.

In contrast to orthodox accounts, the Criddle and Fox-Decent state-as-fiduciary analysis excludes from the domain of the peremptory *pacta sunt servanda*. This exclusion is made on the grounds that change of circumstances, affecting human survival and other rights, might properly override an inter-state agreement (for example, a trade treaty relating to foodstuffs).<sup>42</sup> It also excludes the prohibition of piracy (on the grounds that piracy is predominantly a private or quasi-criminal matter). On the other hand Criddle and Fox-Decent include as peremptory norms the observance of due process (for example in matters of arrest, detention and trial) even in emergency circumstances; and the prohibition of public corruption ('kleptocracy').<sup>43</sup>

The second of these – perhaps the most innovatory of their proposals – directly addresses matters of the bad, if not evil, regime of law. Thus Criddle and Fox-Decent locate a series of fundamental and non-negotiable obligations in those governmental bodies into whose care citizens entrust themselves. In effect good governance receives an operational level of description.<sup>44</sup> Correspondingly, their fiduciary approach, with its list of specific fiduciary duties, provides for some fine-grained analysis of 'bad governance:' for some gradation of those regimes in which one or more of these duties is neglected. It might be supposed that a regime neglecting sufficient of these duties would deserve the name 'evil' (or perhaps 'failed'). One could speculate that humanitarian intervention might be predicated on such a calculus. Certainly the Criddle and Fox-Decent model envisages that national legal regimes (states) may from time to time fall short of the ideal represented by the list of duties. Their analysis therefore contributes to our operationalised understanding of 'goodness' and 'badness' in legal systems.

---

<sup>42</sup> Criddle and Fox-Decent, above n 11, 377.

<sup>43</sup> Ibid 371-3. There are also communalities between the fiduciary and the orthodox lists, as with the principle of self-determination of peoples. It is not clear however who the fiduciary is for whom in this case and self-determination (that is to say autonomy) might even be said to be conceptually inconsistent with any fiduciary relationship.

<sup>44</sup> John R Morss (2007) 'Good Global Governance: Custom, the Cosmopolitan and International Law' (2007) 3 (1) *International Journal of Law in Context* 59.

## V CONCLUSIONS

While the Criddle and Fox-Decent approach is very different from Hart's in its commitment to an explicit set of values, it is alike to Hart's rule-based approach in that it can be used descriptively.<sup>45</sup> Bad or evil systems of law can be comprehended. Virtue is not presupposed. An intriguing question is whether international law as a whole could be evaluated on the basis of this model of fiduciary obligations. The interrelated topics of fragmentation and of constitutionalisation in global international law, outlined above, both embody values-based presuppositions about the purpose of international law. If legal systems may be hijacked for evil purposes, without thereby necessarily losing their status as legal systems, then it would seem that a global legal system, such as international law aspires to be, cannot be immune from such a fate.

It may be that a minimal level of such factors as efficiency and effectiveness must be reached before the question of 'hijacking' arises for any legal system – local, regional or global.<sup>46</sup> If so, international law as we know it may be considered safe from hijacking by virtue of its inadequacy in these respects. Even if that is the case the possibility would remain an unsettling if 'academic' one. One might compare that somewhat hypothetical concern with the concern explored by Kant in relation to a centralized world government. Just as Kant warned against the tyrannical possibilities in that scenario, so might one explore totalitarian possibilities in a unified scheme of international law. However despite 'fragmentation' both the efficiency and the effectiveness of international law 'as a whole' may be greater than its detractors sometimes suggest so that the concerns may be more than merely hypothetical. A whole world perspective on law, and one that suspends belief in the virtue of international law as such, would seem worth exploring. One contemporary approach to this is through the notion of systems.<sup>47</sup>

---

<sup>45</sup> A Hartian reading of the Criddle and Fox-Decent account could be made: with the set of fiduciary criteria playing the part of 'rule of recognition.'

<sup>46</sup> Strictly speaking of course, the term 'hijacking' must be thought to include benevolent as well as 'evil' purposes.

<sup>47</sup> Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law,' (2004) 25 *Michigan Journal of International Law* 999; Richard Collins, 'Constitutionalism as Liberal-Juridical Consciousness: Echoes from International Law's Past' (2009) 22(2) *Leiden Journal of International Law* 251. In this connection one might ask whether the world as a whole may be treated as a legal subject (I owe this idea to William Twining).



A common thread in the above issues is the use of force. Hart's analysis replaced the Austinian notion of obedience to law as duress with an account based on the implementation and following of rules. The force of law is for Hart not vulgar coercion by a 'gunman' but the more gentle persuasion of social practice. The Criddle and Fox-Decent proposals also centre on norms that compel, but which are not physically coercive. It seems that it is of the nature of legal systems, whether jurisdictionally circumscribed or international, that they comprise persuasive norms. Being persuaded 'to the dark side' is at least as salient as being persuaded in the other direction. It is important that the ethical malleability of law is not overlooked in times of emergency, for example at a time when international polities, as fiduciaries, are being challenged to cooperate over the regulation of environmentally catastrophic industrialization. Law's flaws must be acknowledged if law is to contribute to the saving of the world.

