Good global governance: custom, the cosmopolitan and international law

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Abstract
International law has both less and more to offer to the cosmopolitan project than one might think. As currently understood, international law presages a global system of obligations comprising the convergent systems of universal customary international laws and near-universal conventional instruments (treaties), both of which legal forms are characterised by natural law tendencies. From the point of view of a pluralistic cosmopolitanism, this is a dead end. Thinking beyond these formulae requires that international law be treated as a species of general law rather than state-centred law.

I. Introduction
There would seem to be links between democracy, good governance and law, and in an era of globalisation this would seem to suggest a role for International Law. In turn, internationalised democracy would seem to connote some kind of cosmopolitanism. It is with the links between the cosmopolitan project and International Law (IL) that this paper is principally concerned, against the background of the aspiration to good global governance. At first blush, the concept of good governance would seem to be cognate with the concept of the cosmopolitan. Both are somewhat idealistic or at least optimistic notions about the desiderata for regulation in human affairs. Both, it might be said, connote some broad sense of democracy without necessarily articulating it. One task of this paper is to suggest that IL might provide a useful conceptual link between good governance and the cosmopolitan.

Relationships between democracy, good governance and law are themselves complex and contested (Skordas, 2003). It is often presupposed that good governance necessitates a constitutional structure that includes the basics of popular representation and legitimacy as indicated by periodic elections. The significance of the latter as indicia of democracy may owe more to pragmatics than to principle – occasional elections can be subjected to external scrutiny in ways that ongoing executive processes may not (Marks, 2000). The connection of transparency, openness and accountability with the familiar political structures of the West need to be scrutinised and ethnocentrism is an omnipresent danger. Yet enquiry into the nature of good governance need not be scuppered by ethnocentrism. The issues with which it is concerned transcend the specific current arrangements of western liberal states (Twining, 2005). One way of sidestepping the risk may therefore be to sidestep state-centred legal systems as the primary level of analysis. IL, if approached with caution but also with imagination, may offer some possibilities in this regard. This essay therefore aligns itself with the project of ‘general law’ as in the writings of William Twining (2000).

1 My thanks to Ian Ward and his colleagues at the University of Newcastle Law School, and to Dora Kostakopoulou and her colleagues at the University of Manchester Law School, for the opportunity to try out these ideas at seminars in 2006 and for their much-appreciated encouragement of my efforts; thanks also to William Twining for his boundless generosity.

2 Most commentators are more cautious than Skordas (2003), for whom ‘democracy is a universal evolutionary achievement built on the right of self-determination’ (pp. 330–1).
The tradition of general jurisprudence, which dates back through H. L. A. Hart to Bentham, makes it possible to ‘de-throne’ the state as privileged legal subject. For if, as Hart showed, municipal law cannot be adequately explained in terms of the commanding sovereign, then neither can IL be explained in terms of contractual relationships among such commanding sovereigns (or their democratic surrogates) (Morss, 2005). General jurisprudence offers the methodological resources with which to re-define the role of the state in IL. Thus, state X may in some circumstances need to be described as if it is a multinational corporation; state Y, as if an international non-governmental organisation; state Z may need to be described more like a state-less ‘people’. From this perspective, legal obligations that in some manner transcend sovereign borders inevitably gesture toward the cosmopolitan. Indeed, according to Twining, the project of general law promises to constitute a global yet pluralistic ‘cosmopolitan legal studies’.3

It is important to observe that IL as currently constituted falls considerably short of Twining’s aspiration. This is despite, and in contrast to, lay understanding of IL as a common transnational regime or as a shared, global understanding of basic legal matters as connoted by such informal terms as ‘The World Court’ for the International Court of Justice. There may well be a similar (but not necessarily consistent) lay understandings of the International Criminal Court.4 Sadly or not, these sanguine understandings are out of touch with the realities of the discipline. For both as discipline and as profession IL is structurally ill-disposed toward such utopian (as one might see it) aspirations. Broadly speaking, although with well-known exceptions and caveats that will be discussed below, IL remains a technical apparatus for the minimisation of tension between pre-existing sovereign states, ‘pragmatism all the way down’.5 It provides a partially systematised articulation of accepted limits of trespass between one state and another in respect of territory, dealing with nationals, and other practicalities. Its roots in diplomacy are deep. It is one aim of this paper to demonstrate that despite this, IL has the potential to contribute significantly to the cosmopolitan debate. The spirit of the lay understanding – seeing IL as ‘utopia’ rather than as ‘apology’ – is therefore in a sense recuperated.6

By the ‘well-known exceptions’ to state-centredness in IL is meant those aspects of IL that have been taken to indicate or at least adumbrate a pan-national regime of governance. These include a proto-global consensus with respect to some particularly heinous criminal acts and with respect to some inalienable individual rights. International criminal justice includes a role for international tribunals, overriding the protections of citizenship in some circumstances, even including the protection of high office in a sovereign state. Convergently, international human rights concerns raise the possibility of forceful humanitarian interventions within the borders of states (i.e. violating those states’ territorial sovereignty) as well as the possibility of citizens bringing an action against their own government in an international tribunal of human rights. All these trends, in different but cumulative ways, would seem to challenge the orthodox sense of state sovereignty.

Without denying the practical significance of these processes either in their own right or as chinks in the armour of state-centred IL, they will be treated here in terms of their conceptual foundations rather than in terms of their practical consequences. The conceptual foundations relate to the recognised sources of law in the international arena, of which two kinds of legal obligation

4 As in Sydney Pollack’s humdrum film The Interpreter (2005), where the ICC is portrayed as the UN General Assembly’s prosecution service.
5 Koskenniemi (2001), p. 516; Koskenniemi provides a detailed discussion of the vicissitudes of the cosmopolitan in the history of IL. On historical aspects also see Carty (1986).
6 The terms are from Koskenniemi (2005).
vastly predominate in practical terms: international custom and the inter-state convention (or treaty). These are the twin pillars on which the above developments rest.

For it is the agreed list of legitimate sources of international obligations that represents the core of contemporary IL, which has in practice treated the Statute of the International Court of Justice as providing the generally applicable list of available sources of law. Strictly speaking, the Statute governs only the deliberations of that Court; the Statute derives from the United Nations Charter and comprises in part the constitution of the Court within the UN system. However, the Statute itself was intended to reflect IL as whole in respect of its sources, and has in turn come to regulate the field that it is said to reflect.8

The Statute9 structures the list of sources into a hierarchy such that some kinds of source are subsidiary to others. Thus one major vehicle for international criminal sanction and for international human rights protection has been the ‘Customary International Law’ (CIL), a form of legal obligation on behalf of states that does not require the consent of those states.10 CIL would seem to be a significant contribution of IL toward the cosmopolitan. Yet, as argued below, it is deeply flawed. Its flaws are most patent, and of most consequence, in relation to the peremptory norm or *jus cogens*. This most special form of CIL is a command that is taken to be based on a quasi-universalist consensus among sovereign states. Peremptory norms cannot, it is said, be displaced by any treaty or other agreement, even if such were to be ratified by every member of the UN. A critical assessment of the role of CIL in relation to good governance and the cosmopolitan, thus constitutes Section II. The argument is presented that CIL is ‘past its use-by date’ and that it represents a dead end in relation to the hope for a cosmopolitanism of IL, and hence for an articulation of IL with good governance around the globe.

In section III another dead end for good global governance is identified – the dead end of quasi-universal treaties (conventions) on human rights, as representing global consensus (the ‘world community’). For the international law of instruments actively and voluntarily accepted by (the representatives of) states and other relevant parties has expanded to such a point that it now generates worldwide law on many issues. It thus complements or at times competes with CIL as the international law of worldwide conduct. Those conventions that are offered for signature to all nations, some of which indeed have been adopted by almost every state in the UN, purport to give expression to the world community’s position on issues of shared concern. The cautious, quasi-contractual character of the classic treaty has been replaced by the declaratory, Natural Law tone of the multilateral convention. The treaty or convention has increasingly become a vehicle for global aspirations, for statements that purport to represent the views of the whole of humankind (‘the international community’). Somewhat more empirically or ‘bottom-up’ than the manner in which

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7 The terms ‘convention’ and ‘treaty’ will be used interchangeably here; these instruments are in any event defined in IL by content rather than by denomination.

8 This kind of conceptual reciprocity – dialectic, inbreeding, or ‘double hermeneutic’ – will become familiar in the course of this essay.

9 Per Article 38:

1. ‘The Court . . . shall apply:
(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations;
(d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.’

10 Customary International Law is to be distinguished for present purposes from ‘Customary Law’ as a species of law alongside state law, international law etc. as in Tamanaha (2001), p. 226; conceptual and practical relationships between them are, however, of undoubted interest.
CIL operates, universalist conventions might be seen as approximating and even realising the cosmopolitan. As will be shown, however, despite their very significant technical differences as sources of IL, such conventions have converged in their effect with the customary form. The convergence between conventional (treaty-based) international obligations and principle-based obligations is most striking in the case of the peremptory norm or jus cogens.

It is thus the intention of sections II and III to identify, and demonstrate the inadequacies of, the currently recognised candidates within IL for developing into a fully fledged cosmopolitanism. Indeed, it will be argued that these candidates represent to some extent, obstacles to cosmopolitanism. Section IV moves on to a positive argument, in which a selection of conceptual and practical opportunities are identified.

II. Customary international law: past its use-by date?

There is sometimes said to be emerging a universal consensus on certain matters of international concern, such as in the areas of criminal justice and the use of force between nations. More generally, any obligation or prohibition that is held to be the subject of ‘Customary International Law’ may be thought of as expressing this kind of consensus.\textsuperscript{11} CIL is constituted by law-like conduct among nations which can be demonstrated independently of deliberate (treaty-based) agreements. Its unwritten character gives it the sense of tradition although some such obligations have been recognised as emerging with great rapidity. Strikingly, the obligation that arises from CIL may extend to relevant states that do not practice the relevant conduct and do not wish to be bound by the customary obligation.

CIL as a conceptual structure can be represented as an assumed or constructed consensus under which those states that dissent from a precise obligation that may be defined nevertheless agree to be bound because of the supposed collectively representative nature of the decision. There would thus be a kind of international social contract (or cabinet decision perhaps) at work, in which the consensus is agreed to be constituted by such articulated and proven customary obligations. While in some instances such obligations may be held to apply to only a few or very few states, customary international law (CIL) is by its nature couched in terms that tend toward the universal – to a claim regarding ‘what all we nations do’. The cosmopolitan implications are clear. CIL presents as IL’s frontline candidate for global governance, that is to say, as a general model for the achievement of worldwide consensus as well as furnishing numerous specific examples of substantial globalised obligations that have been thus arrived at.

CIL is held to depend for its legitimacy on two grounds: as well as sufficient practice, there must be a sense of obligation in those states that recognise it as such, even though that sense of obligation is tacit (as contrasted with the express agreement connoted by a treaty or ‘convention’). What could be the basis for such an obligation, and how could it be consistent with democracy or with good governance?\textsuperscript{12} This question is most pressing in relation to the peremptory norm, which might be said to be the trump card among all the sources of IL. The peremptory norm or jus cogens constitutes a non-derogable, principle-based international obligation. While its connections with CIL are not entirely clear,\textsuperscript{13} the peremptory norm can perhaps be thought of as an ‘elite’ form of CIL.\textsuperscript{14} To be

\textsuperscript{11} Regional and bilateral customs can be bracketed for the present purposes although they are not conceptually inconsistent with this observation.

\textsuperscript{12} The accepted requirement of these two forms of evidence (i.e. the procedural criteria for recognition of a new CIL) is itself founded on no more than the custom and practice of the Court.

\textsuperscript{13} Shaw (2003), p. 117.

\textsuperscript{14} Koskenniemi (2005), p. 324, n. 56.
sure, the peremptory norm lacks the requirement of ‘normal’ international custom that sufficient observation by states can be empirically shown. Yet it seems difficult to locate the peremptory norm within the set of sources prescribed in the Statute of the ICJ (see above) other than as a species of custom. If this approach has some validity, the CIL can thus be thought of as providing a general conceptual framework within which certain kinds of CIL have a particular privilege and are of special interest for that reason. When appropriately ‘played’ in a dispute (or in an advisory decision), the peremptory norm will (by and large) take precedence over a mere treaty (convention) agreement even if the latter is multilateral and even if every nation on earth had signed up to it. While the worldwide peremptory norm is something of an ‘ideal type’ for international customary obligation, it is also a very important concrete manifestation of it.

As noted above, CIL is defined with attempted precision as requiring a combination of sufficient state practice (observance) and a sufficient sense of obligation on behalf of states. This second form of evidence is referred to as the *opinio juris sive necessitatis* (usually shortened to *opinio juris*) – a quasi-subjective belief in the prescriptive or proscriptive force of the conduct. Thus, a newly claimed customary international law must have two kinds of factual basis. In tandem, these forms of evidence on objective and subjective adherence are taken to show that the conduct (or prohibition) in question has the force of law. Thus, to accept that some form of practice is to be included in the category of CIL, there must first be sufficient evidence of the practice in sufficient states. There is no definition of the number of states required, nor of the length of time over which adherence to the practice has been observed. The length of time may be as short as zero. No minimum level of participation has ever been defined; the number of complying states required has been found to be very variable. Widespread adoption of some practice within a certain region has sometimes sufficed to establish a customary international law with respect to that region. The sceptic might already be alert, if not alarmed.

Criteria for evidence that the practice is considered by those states that employ it to be in some way obligatory is likewise undefined. It is usually said that the evidence for the *opinio juris* requires in particular to demonstrate that the conduct is not merely a habit or a courtesy. The usual example given of conduct that meets the first criterion of widespread practice but not the criterion of the sense of obligation is the practice of saluting another state’s flag. A state’s consistent disavowal of a practice followed by its neighbours offers the technical possibility of evading obligation to fall into line, but this ‘persistent objector’ avenue has never been successfully pleaded and unsurprisingly is now seen as ‘falling into desuetude’.

By its nature, CIL would seem to transcend democratic process, even if treaties (typically signed by a very senior state official) are thought of as to some extent democratic. This is most particularly the case in respect of the ‘*jus cogens*’ or peremptory norm. It needs to be pointed out that no agreed list or definition of the peremptory norm exists, although various candidates have been suggested by commentators and by members of international tribunals. There is an inescapably alchemical tone to the peremptory norm, in that its existence is provided for in the relevant documentation yet there is no possible way in which any particular exemplar could ever be decided upon other than in the most circular of ways. The most authoritative of international tribunals may from time to time opine that

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15 As provided in the Vienna Convention on the Law of Treaties 1969, Articles 53 and 64, no treaty may override a peremptory norm of customary international law. This Treaty (VCLT) is frequently taken to exert obligations beyond its states parties, that is to say with some customary (while not yet peremptory) force: thus nicely illustrating and contributing to the *ménage à deux*.

16 It has been suggested that the emergence was ‘instant’ in the case of the regulation of space exploration: Cheng (1965).

some conduct (such as the use of force contrary to the UN Charter\textsuperscript{18}) is prohibited with \textit{jus cogens} status. Since IL knows no precedent (Article 38 providing that previous judicial decisions have no more than a subsidiary status), no decision of any international tribunal is binding on any other or on itself at a later date. Technically at least, IL makes no pretence to be gradually discovering firm principles of law, accumulating to a jurisprudential edifice on the lines of the common law narrative. In practice of course cumulation is indeed attempted as the denizens of these international tribunals seek to construct an international jurisprudence, at once flexible and ever-changing (with the world) and yet crystallising both procedures and principles that are at least provisionally stable.

The above comments apply in particular to the peremptory norm. It would be misleading to criticise all CIL as if it were peremptory, because much custom is held to apply to specific regions, or in other circumstances lacking any pretence to \textit{jus cogens} status. Where necessary, the distinction is observed in what follows. Yet the peremptory norm remains the ideal type of CIL, the version that the logic of the construct drives towards: that is to say, universal, principle-based international obligations. For the function of custom within IL is to convey expansive legal obligation with respect to values-based conduct or prohibition. One need not be a positivist in legal theory to hesitate at the derivation of ‘must’ from ‘ought’ that is represented by CIL in general and in particular by the peremptory norm, or at the hierarchy of superordinate rules or ‘norms’ that have been constructed with reference to the customary machinery.\textsuperscript{19}

In some respects, despite its empirical dimensions, CIL can be said to constitute back-door Natural Law.\textsuperscript{20} The Natural Law approach is characterised by the search for the legal obligations, deriving perhaps from a deity or from properly applied human reason, that stand behind (or above) the legal formulations arrived at by the more mundane, ‘positive’ processes (such as the parliamentary). Such obligations, which would tend to be thought of as absolute or universal,\textsuperscript{21} would bring together the realm of the moral and the realm of the legal. Natural Law is thus the term applied to a variety of approaches in law which share the aspiration to transfer absolute notions of what is right and what is wrong into legal terms. Prototypical versions of Natural Law are based on religious commitments, but any dogmatic value system might give rise to analogous formulations. Thus, Marxism or environmentalism (‘deep ecology’ perhaps: Clark, 2004) might give rise to an attitude to international law and justice as intransigent and arguably as anti-democratic as an attachment to a dogmatic religious formulation.

Those who adhere to such positions do not consider it in the power of any parliament, even some theoretical world parliament, to overturn a proper, morally based law. In the context of international law, it is indeed in areas where morality seems most relevant or indeed decisive, that universal legal obligations are most often pursued. In effect, in establishing or in applying CIL, the international bench is holding that certain values are held in common by reasonable citizens of civilised nations

\textsuperscript{18} That is, beyond the scope of legitimate self-defence and of UN initiated action.

\textsuperscript{19} Thus the Martens Clause (in humanitarian law) is a higher level ‘customary norm’, which facilitates ‘the emergence of new norms of customary humanitarian law’ (Skordas, 2003), p. 325: note that this superstructure is independent of peremptory status. Cassese’s (2005) ‘fundamental principles governing international relations’ (not to be confused with principles recognised under Article 38(1)(c)) are of a broadly customary style, but of varying status qua CIL. According to Cassese, these principles, which include the sovereign equality of states and the principle of the self-determination of peoples, make up the ‘constitutional principles of the international community’ and the ‘apex of international legislation’ (Cassese, 2005, p. 48). Some of them, indeed, are to be found in the UN Charter and hence are binding on UN members. Yet, as Cassese notes, these ‘fundamental principles’ are inconsistent even with each other. The exercise of seeking such overarching principles seems misconceived and even misleading.

\textsuperscript{20} CIL probably constitutes a species of Brian Tamanaha’s category of Natural Law: Tamanaha (2001), p. 230; also see Twining (2003), p. 222.

and by the states of which they are subjects. Not surprisingly, that is to say, the International Court of
Justice (ICJ) acts like any supreme court in a jurisdiction, such as the US Supreme Court, the House of
Lords, or the Privy Council.

A transcendental account of right and wrong is substituted for more complex routes by which
law may be determined, routes that involve debate, dispute and collaboration among living indivi-
duals, representative in some manner of larger numbers of their fellow citizens, as in the process that
we call parliamentary (Waldron, 1999). With the peremptory norm, in particular, we leave behind
the world of democratically decided actions to be monitored and reviewed. The conversation is over.
Or, rather, the conversation is continuing behind closed doors; it is suggested by the comments of
Waldron (2005) on a ‘common law of mankind’ that this kind of law-making process perceives itself
as gradually, if tentatively and with much back-tracking, constructing a coherent system rather
along the lines of scientific research and similarly, the Common Law approach is characterised by the
development of law through collaboration and conversation among judicial elites (Postema, 2002).

In relation to good governance, some degree of transparency and of openness is undoubtedly
present in CIL. The legal arguments are in effect in the public domain as are the decisions of the
bench. Yet the conceptual basis of CIL is opaque, especially in that no definitions exist for adequate
state practice nor for the *opinio juris*. Accountability is negligible: the processes by which individuals
are appointed to the bench of the ICJ are even further removed from the democratic than are the
appointment processes in the Supreme Courts of the United States or of New Zealand (Smillie, 2006),
or a House of Lords even including Giddens. It might be presumed that the ‘Rule of Law’ is a central
commitment of the legal process at its highest international level, yet at least in respect of CIL, the
basic requirements of Rule of Law – transparency, openness, accountability – seem unsatisfied.

III. Treaties and other sources of international law

Treaties constitute the second major source of IL according to the Statute of the ICJ. Like CIL, they
can take the form of global regulations, thus constituting a second model for a kind of cosmopolitan-
ism in world governance. Whether such governance is ‘good’ is again moot.

Conventions are at least in theory express agreements, voluntarily entered into between the
heads of (or other representatives of) states. This category thus includes agreements between two or
more international parties (mainly states)\(^{22}\) and includes the numerous bilateral treaties between
pairs of states, the human rights conventions some of which have been ratified by nearly every state
on earth, and everything in between. Agreements are made in effect between representatives of the
executive branch in each case and depending on the relevant processes of legitimacy supporting that
executive, may thus be thought to manifest some degree of democratic scrutiny. Further, it is the case
for many states that such international agreements will not give rise to legal consequences within
the state until a parliamentary approval has been gained. In other states such international commit-
ments by the executive will be incorporated domestically if consistent with a Constitution: again a
process with democratic credentials of a (limited) kind. Clearly, the international convention
manifests in its origins a process that has some connection with representative democracy, albeit
of an indirect and highly diverse kind.

There are many ways in which international agreements might be brought more closely under
the scrutiny of municipal parliaments, hence in principle improving the transparency of such
international processes and the accountability of the officers responsible for some aspects of their
implementation. (But not their inter-state implementation: the bench of the ICJ would be as it was.)
One radical suggestion which relates to this process of good governance is that of Waldron (2006).

\(^{22}\) The UN itself can enter international agreements of this kind, for example the agreement which established
the Special Court for Sierra Leone: Morss and Bagaric (2006).
who proposes that the default condition for international agreements should be impermanence, i.e. that such agreements should be thought of as pertaining ‘while the current circumstances prevail’.

In principle then, international conventions offer some footholds for democracy and for Rule of Law. This is, in effect, the positivist position on IL: for all its limitations, the treaty as least involves some degree of deliberate decision-making and democratic oversight. But while the contrast with CIL is stark in this respect, the relevant trends in the practice of the convention are such as to erase the contrast. This is because of the increasing convergence of international conventions with the form and the content of CIL. As their reach becomes greater, and their aims more lofty, the text of the agreements to which the great preponderance of the world’s states set their signatures becomes closer to the Natural Law: a statement of values held to be held in common. This process might of course be said to be central to any cosmopolitan aspirations of IL, since universal or near-universal membership of a treaty would constitute at least empirically a global obligation on states if not on individuals. The global convention is, as it were, at present the empirical route to cosmopolitan law whereas the CIL is the rational route.

While empirical (i.e. positive) in that sense, the process is only imperfectly described as ‘bottom-up’. For rather than being driven by the immediate needs of individual states, as (if imperfectly) represented by the government of a state, international conventions in modern times are frequently initiated by bodies with a universalist agenda especially in respect of rights and wrongs. Top-down has thereby displaced bottom-up as the dominant form of international agreement.

This convergence between the major sources – a convergence on the transcendental – is also manifested in the process of ‘reading up’ the international convention into international custom. For, whereas the formal relationship between treaty and customary international law is that they co-exist and are to be drawn upon as necessary in any particular dispute – sometimes one, sometimes the other, sometimes both – they frequently interact. The difficulties that arise from the coexistence of convention law and customary international law include the problem of the peremptory norm ‘trumping’ any convention-based agreement, as noted above. Another set of problems arises when the specific content of a customary obligation is held to coexist with a convention on the same issue: what might be called the problem of ‘double-dipping’. The aim of this seems to be to bestow higher status on the obligations provided in the treaty or convention. It might also be anticipated to ease the incorporation of the substance of an agreement into those municipal jurisdictions which require parliamentary approval of conventions but not of custom.

This practice of re-reading a convention as if it is at the same time a custom also illustrates the murkiness of the notion of CIL itself. An example is found in the case brought by Nicaragua against the USA in 1984 at the ICJ, based in the UN Charter’s prohibition on the use of force. The complaint seemed to fall at the first hurdle since the resolution of multilateral treaty disputes had been validly excluded by the USA from ICJ jurisdiction. The UN Charter is undoubtedly a multilateral treaty, if a rather special one. The Court, however, found that the Charter’s (qualified) prohibition on use of force between member states not only corresponded to a pre-existing customary prohibition to the same effect – as if the Charter had rendered the custom into robust, positive law – but that the customary version of the prohibition lives on alongside the Charter as a kind of echo. The Court found itself able to proclaim that there exists a CIL whose terms are exactly the same as the terms of the relevant article in the Charter. Nicaragua was therefore able to press its suit in the ICJ: relevant customary law was not (and arguably, could not possibly have been) reserved by the USA from the Court’s jurisdiction.

The bootstrapping process here requires scrutiny. The adoption of the Charter (by states parties) was seen as providing for ongoing evidence of opinio juris; widespread state practice was found on

23 Nicaragua v. United States (Military and Paramilitary Activities In and Against Nicaragua) (Jurisdiction and Admissibility) International Court of Justice Reports 1984.
much the same basis. There is a strong sense that a prohibition on inter-state use of force is universal because it *should* be – as every right-thinking state (as it were) would surely agree; that the UN Charter reflects such a conclusion; and that it therefore can be reframed into international custom. The dissenter Judge Jennings, refreshingly willing to call a spade a spade, wryly observed that from reading the majority decision, one might gain the impression that the USA’s reservation had simply been put to one side and the Charter directly applied, since the substantive arguments about the law effectively treated the supposed customary prohibition on force as a direct surrogate for the convention. There are thus conceptual difficulties with the doubling or ‘echo’ formulation, which could be said to undermine the credibility of the convention-based prohibition in this case. Certainly, the somewhat circular argumentation tends to elevate customary international law and to devalue what might be called ‘conventional’ conventional law (i.e. the kind that does not aspire to universal status). If applied generally, this approach might have the result that conventions are merely place-holders for nascent customary international law. Certainly, many conventions arise by the codification of prior customary law, or prior not-quite customary law (where, for example, a practice is widespread but lacks the sufficient *opinio juris*). But to treat the customary law as retaining its scope and applicability independent of the newly codified international convention would seem to negate the significance of the convention. Even if conventions are not to be considered preferable to custom, then they must surely be recognised as displacing custom when the substantive content is identical.

So conventions are important and troublesome in part because they may be (again) a back door to a Natural Law type ‘top down’ regulation – the ‘outsourcing’ of law to morality. What thus seems of concern here is the process by which such an ascription emerges. In effect, it has been evolved by the members of the international bench on the basis of their shared values and aspirations, values and aspirations which may well be shared by all right-thinking people as well as the UN but which should still perhaps remain open to democratic dissent if only as a matter of principle.24

With regard to other sources of international legal obligation recognised by the ICJ Statute, little need be said at this point because of their relative insignificance for dispute resolution and at least up to the present, for global prescriptions of legal obligation. A third source (after conventions and custom) is ‘the general principles of law recognised by civilised nations’. These general principles have been read by the ICJ as matters of procedure rather than of substance. The word ‘civilised’ is, of course, a warning here. The values of those states that consider themselves civilised have throughout history often been imposed on other states and their unfortunate occupants. Western Europe’s ‘Crusades’ were legitimated by a firm conviction of right on the part of the invading forces. Moorish and Ottoman incursions into Western Europe may well have been based on convictions of equal intensity and validity; such considerations of commitment clearly constitute an inadequate basis for a global jurisprudence. The Court has carefully excluded some candidate principles from this category indicating its reluctance to risk ethnocentrism of various kinds. It would seem that, on the question of general principles, the ICJ is well aware of its responsibility to harness a diversity of legal systems from across the globe, and therefore of the dangers of reading up the values of any one legal system into a world order. What is perhaps regrettable is that this sensitivity is not extended to the case of worldwide conventions and customs.

To round off the discussion of sources: the Statute also indicates that subsidiary reference may be made to the findings of relevant tribunals and the statements of authorities. Finally, and independent of the above sources – that is to say, on a formally equal footing to conventions, custom and general principles – reference is made to a principle of equity, such that cases may be determined ‘*ex aequo et
bono’ but only if both parties to a dispute agree to this (something which has never happened at the ICJ). Overall, it is the convention and the international custom that dominate the decision-making of the ICJ and similar bodies (such as the international criminal tribunals). Both these forms of international legal obligation inspire the transcendental in the form of universalised prescriptions and universalised prohibitions: ‘Thou shalt do X . . . Thou shalt not do Y.’

What has thus been argued here is that what might seem the most promising components of the grab-bag that is International Law ‘as we know it’ points to the universal rather than to the cosmopolitan (de Sousa Santos, 2002); that is to say, insufficient attention is paid to pluralism. The realisation of worldwide legal obligations has been derived in the main from the proclamation of the same as customary law and from the implementation of multilateral treaties of cognate style. Other developments in IL that might seem to challenge the nation-state focus consequential on the Westphalian settlement, such as the international criminal justice system, have the same basis. Thus the newly recognised ability of states to prosecute foreign nationals, even if they be former heads of state (for example over human rights violations), has its basis in an understanding of customary law. The international criminal tribunals themselves are based on instruments handed down by the UN (under section VII) or more recently agreed between the UN and the state concerned; the content of these instruments is derived from the Nuremberg process and is now echoed in the Statute for the International Criminal Court. The rights of individuals to take action against their own government for human rights violations is based in specific international conventions, in some cases of quasi-universal scope.

IV. Ways forward

If the universalist aspirations of IL have proved to be misconceived, then different ways forward toward an articulation with pluralism and with the cosmopolitan need to be investigated. For example, considerable attention has been paid above to the currently recognised sources of law as expressed in the ICJ Statute. Certainly there is scope for speculative unpacking of the ‘general principles’ clause, given the ICJ’s foreclosure on that category up to this point. Any approach which focuses on procedure as a route to justice25 (municipal or global) has the option of pointing to that category as a ‘loophole’. But it should be emphasised that IL is greater than that Statute and that cosmopolitan law is greater than IL. What follows should not be thought of as constrained by the Statute. What will be presupposed here is that law should become ‘post-Westphalian’ (Twining, 2003) – that is to say, that it must think beyond the series of squares that make up a United Nations of sovereign states. Becoming post-Westphalian would also involve a distancing from the municipal model of law as paradigm. The challenge perhaps is to marry up the notion of pluralism (Glick Schiller, 2005) with the notion of good governance. If this can be done then the cosmopolitan dream may begin to acquire some solidity.

 Appropriately, the solutions are plural26 and those provided here are merely indicative. A re-consideration of the meaning of jus gentium within IL may offer some cosmopolitan possibilities (Waldron, 2005). So may radical proposals for democratic reform of the United Nations, basing representation on population sizes rather than on the one-state-one-vote formula (Morss and Bagaric, 2005). Democracy at the international level is of course a challenging enterprise, with the European

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25 For example, it is possible that Habermas’ approach might be aligned here; see Kostakopoulou (2006).
26 As cosmologist Stephen Hawking has put it, ‘Give me three of everything’ (fenestral observation, Fitzbillies Restaurant, Trumpington Street, Cambridge, 2006).
Union currently providing some of the most pertinent initiatives (Kostakopoulou, 2005). At a rather more theoretical level, part of the solution may lie in a letting go of the control of the vocabulary.\textsuperscript{27} To that extent a pluralistic cosmopolitanism is to be enabled or facilitated, rather than established in a definitive manner. To John Keane’s charge that in respect of developing the Global Civil Society this enabling approach would unleash ‘the new-fangled post-modernist glorification of singularity,’\textsuperscript{28} it can be countered that his ‘universally applicable ethical ideal’ is a deeply unattractive alternative. Kant’s contribution to the cosmopolitan remains unfulfilled but it may well not take the form of the categorical imperative as Keane insists.\textsuperscript{29}

To bring matters down to earth, the findings of the ICJ need to be scrutinised with robustness and rigour. A tribunal with no appeals chamber should not expect its pronouncements to be received any other way. Indeed, what might be a most constructive move would be the establishment of an international panel of jurists as a voluntary Appeals Chamber to the International Court of Justice.\textsuperscript{30} Such a Chamber, as well as routinely reviewing ICJ decisions and determinations, would be in a position to investigate the tricky issue of the relationships between ICJ prerogative and the Security Council: may the ICJ overrule a SC decision on legal grounds? Further, such a shadow Appeals Chamber would adumbrate the Appeals Chamber to come when an International Court of Justice independent of the United Nations is established. In a complementary move, the political status of the UN needs to be challenged. It is of course an institution constantly under threat and subject to contestation and a system whose personnel are in many situations in harm’s way on our behalf. But, without climbing on inappropriate bandwagons the structural inadequacies of the system should still be addressed. The composition and powers of the Security Council are clearly among such inadequacies, demonstrating little more than the triumph of realpolitik over cosmopolitan aspiration. All of the above ‘reforms’, needless to say, would operate in the direct interest of accountability, transparency and openness.

Moreover, the role of devil’s advocate is by definition a contribution to pluralism as well as to good governance. An example of the need for plurality is in relation to the attitude to the constraint of future decisions of others. There is a dialectic between ‘stewardship’ of resources that will be ‘handed down’ – including, it may be, symbolic and conceptual resources – and the excessive constraining of the autonomy of future generations for example by means of entrenched constitutions. (This particular tension sounds very much like ‘parenthood.’) This sensitivity is required no less at the global level – perhaps especially at the global level. One way of expressing the required hybridity of description is that of de Sousa Santos (2002), who describes the ‘cross-cultural, mestizo conception of human rights’ required to deal with the problematics of human rights in any cultural setting.\textsuperscript{31} Similarly, as noted above, under the general approach to jurisprudence different types of legal actor are seen to jostle for attention on the world stage, the networks of regulation and obligation in which they operate overlapping and interpenetrating as in Charles Darwin’s ‘tangled bank’. Universalist formulations in International Law are a false dawn so far as the cosmopolitan project is concerned, for elite consensus is not democracy. But identifying them as such clears the ground for the labour that is to come.

\textsuperscript{27} Koskenniemi (2001), p. 238.
\textsuperscript{28} Keane (2003), p. 201.
\textsuperscript{29} Ibid., p. 202.
\textsuperscript{30} Something on these lines was implemented by the Coalition for an International Criminal Court: Pureza (2005), p. 270.
\textsuperscript{31} De Sousa Santos (2002), p. 272; also see Morss (2003).
References


