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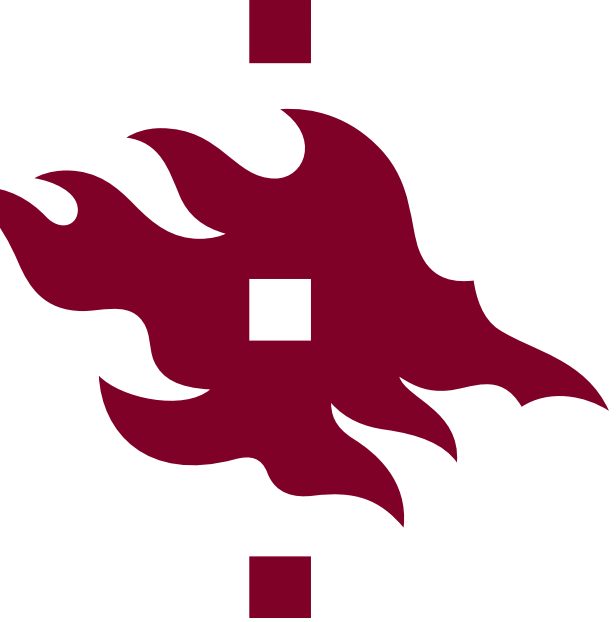

UNIVERSITY OF HELSINKI
FACULTY OF LAW

TOWARDS RESPONSIBLE GLOBAL GOVERNANCE

EDITED BY

JAN KLABBERS, MARIA VARAKI AND
GUILHERME VASCONCELOS VILAÇA

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Edited by
Jan Klabbers, Maria Varaki and
Guilherme Vasconcelos Vilaça

Helsinki 2018

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EDITOR'S INTRODUCTION

Jan Klabbers, Maria Varaki and Guilherme Vasconcelos Vilaça

In the summer of 2013, the research project 'Towards a Credible Ethics for Global Governance' was formally launched, sponsored by the Academy of Finland, Finland's premier research funding agency. Two doctoral students were hired, initially one post-doctoral researcher was hired (several others would follow), and the principal investigator was released from other duties, most blissfully from administrative duties, in order to fully concentrate on the project. He even received a unique title for the duration: he was formally appointed, for a period of five years (2013-2018), as the Academy of Finland Martti Ahtisaari Professor of International Conflict Management and Peace Research.

The present volume is one of the works produced during the project, which has come to its natural end in June 2018. In addition to a number of journal articles and book chapters; in addition to infusing more general international studies with an ethical sensibility, and in addition to several volumes still in the pipeline, we thought it would be nice if we could bring all those who had worked on the project together in a single volume. Such a volume would, we thought, perhaps not be particularly attractive to commercial publishing houses: these are generally not keen on publishing works produced within a single institution, without too many 'big name' marketable authors participating. Moreover, while our work has revolved around a single theme (the question whether there could be some role for virtue theory in global governance), we have not developed a single common approach, or a 'virtue school' of global governance, or any suchlike phenomenon. Hence, instead of aiming to persuade publishers of the wisdom of publishing our volume, we decided we should publish it ourselves: we decided to get a number of paper copies printed, and to publish the volume electronically, freely accessible for all who are interested.

Probably the most important political event taking place during the course of our project was the election of a rowdy, somewhat vulgar businessman as President of the United States. We are immensely grateful to Donald Trump for existing: when we started our project, it was difficult to explain to outsiders why we thought virtue theory could possibly be of some interest. Global governance, so we were often told, was the product of international institutions (the World Bank, the World Trade Organization), or powerful states (the US, China, Russia), or invisible and unaccountable experts, or informal conglomerates like the Military Industrial Complex of yesteryear. But surely, looking at the virtues of individual statesmen and others in a position of leadership would be silly, wouldn't it? Trump's election

demonstrated, once and for all, that perhaps looking at the virtues is not all that eccentric, really.

Now Trump's election is not the only relevant political event to take place between the summers of 2013 and 2018. Upheavals in the Middle East brought many refugees to European shores, which in turn triggered (or re-activated) widespread xenophobia and the surging popularity of so-called populist politicians all over Europe, from peroxide-coiffed Geert Wilders and urbane Thierry Baudet in Holland, to Orban in Hungary. A newly elected President of the Philippines decided that the best way to fight the war on drugs would simply be to kill all drug users. Russia helped create serious instability in the Crimea, and was complicit, many think, in shooting down a civilian airplane. And then there is Brexit, the attempt by a few spoilt and privileged boys with suspect hairdos to elevate themselves to greatness while their country is going down, akin to vying for the position of lead pianist on board the Titanic. In short, it seemed there was quite a bit of irresponsible governance going on; this prompted us to think of devoting this volume to the idea of 'responsible governance'.

Now, responsible governance is not, as such, a term of art; it does not have a settled (or even widely shared) meaning, and is a term that can easily be abused: those claiming to exercise power in the name of some greater good can always, if they so desire, invoke the notion of responsible governance. It is no coincidence that the Chinese are fond of saying that with great power comes great responsibility; likewise, it is no coincidence that some international institutions have invoked similar ideas ('good governance', most famously) to 'sell' their conceptions of what states and others should do. So we realize that in launching the term 'responsible governance', we are launching something that can, potentially, be abused. But the inevitable counter-argument is that the same can apply to each and every single political idea, unless it is so vague that no one can figure out what it means – and even then, chances are that some may come to abuse it for their own decidedly parochial gains, as the history of terms such as 'sustainable development' or 'rule of law' (or, indeed, 'good governance') amply illustrate. Indeed, the same holds true with many things in life: a hammer can be used for carpentry, but also to bash someone's skull. And guns, as the ever-responsible National Rifle Association knows all too well, can be used not just to kill people randomly, but also to defend home and hearth – or was it the other way around?

To us, the basic idea of responsible governance entails, rather modestly, something like taking political decisions without concentrating solely on immediate individual or parochial benefit of the decision-makers and his or her constituency. We do not claim to have identified a new grand theory, a new policy prescription for the 21st century, a new way to establish heaven on earth; there are plenty of those ideas around, and none of them seems to work very well. And that is not to mention the costs, often in terms of human lives, of aspiring to put such grand ideas into practice.

All we wish to do, by contrast, is draw attention to the possibility of taking the common interest (however precisely defined or conceptualized) into account in political decision-making processes. Politics is not just (or should not be just) about 'who gets what, when and how', but is (or should be) also about taking care of the world at large. In doing so, we construe politics broadly: politics is not just something that politicians do, but also something involving legal authorities, university professors, civil servants, and public intellectuals, among others.

The volume is structured as follows. In the opening chapter, Jan Klabbers aims to flesh out the idea of responsible governance, borrowing indiscriminately from especially Hannah Arendt and Avishai Margalit. This is followed, in Chapter 2, by a discussion by Ville Kari revolving around the monumental figures of Victor Hugo and Francis Lieber. In Chapter 3, Guilherme Vasconcelos Vilaça explores the way China's political initiatives and political philosophy can be traced and evaluated, paying due attention to China's proclaimed leadership role and concomitant responsibility. Chapter 4 contains a discussion by Lorenzo Gasbarri on the role of rhetoric in legal argument, fruitfully combining Aristotelian ethics and rhetoric.

In Chapter 5 Diliana Stoyanova discusses the place of ethics in the international civil service – the international civil service being caught between several senses of responsibility, and between responsibilities towards several constituencies. In Chapter 6 Tuomas Tiittala investigates the possibilities for inculcating a sense of the virtues in legal education, on the premise that many who go to law school end up in decision-making positions in their respective societies, at whatever levels. And Chapter 7, finally, closes the circle. It contains a discussion by Maria Varaki of one of the more problematic policy initiatives of President Trump: his decision to relocate the US embassy in Israel from Tel Aviv to Jerusalem.

Unfortunately, not all who have been part of the project have been able to contribute to this volume. For some, their involvement was of such short duration (as visiting fellows, e.g.), that no demand on their time could legitimately be made; and one or two others needed to prioritize different things, since their involvement with the project had already come to an end. Still, we feel that the current volume provides an interesting perspective on global governance, a perspective that has thus far remained rather under-illuminated in the scholarly literature. This applies to the role of the virtues in global governance generally; this applies equally to attempting to formulate a non-competitive conception of politics and governance.

21 July 2018,
Helsinki, Thessaloniki, Rome

CHAPTER 1
ON RESPONSIBLE GLOBAL GOVERNANCE

Jan Klabbers[1]

I. INTRODUCTION

The date on the calendar said 18 April, 2018. I had just spent two weeks in Wellington, New Zealand, talking to various people about global governance and leadership and ethics, and writing about the same topic in an office made available by the Law School of Wellington's Victoria University, and was about to embark on a flight. The airport bookstore caught my eye: it prominently displayed the book by former FBI director James Comey, which had probably only arrived to the bookstore that morning.[2] I had, of course, heard about the book: it would have been difficult to miss its launch. But I was not planning to buy it, or even read it. Usually, books written by participants in current affairs are academically not particularly interesting, except perhaps as testimony to what that participant was thinking or, more accurately perhaps, as testimony to the impression that participant would like to create. To the extent that such books sketch a historical picture, it is a personal one, biased, and usually too self-serving to be much good.

Still, having nothing better to do while waiting for my flight, I picked up the book, and started to read the back cover. The opening sentence was this: 'What is ethical leadership?', followed by 'How do you do what is right instead of what is politically expedient?'. This struck a nerve: it resonated precisely with the sort of things I had been talking and writing about, in Wellington and elsewhere, for a number of years. I changed my mind, bought Comey's book, and spent most of the flight reading it, enthralled by the story Comey told, enthralled also by what seemed to be his honesty and the sense of self-reflection not often found in books of this nature. As he notes, anyone writing on ethics and leadership can come across as sanctimonious, or self-righteous, traits I am not fond of in others and would like to diminish in myself.[3]

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1 Much of this contribution was written during a brief stay at the T.C. Beirne School of Law, University of Queensland, Brisbane.

2 James Comey, *A Higher Loyalty: Truth, Lies, and Leadership* (New York: Flatiron Books, 2018).

3 *Ibid.*, at ix.

For many years, I had been intrigued by the idea that not even the best rules or the most detailed and fine-grained rules, and the most sophisticated tribunals, can conclusively settle any political matter. Whatever our rules say, we need people to interpret and apply them, and people who decide whether they should be applied to the particular situation to begin with; no matter how sophisticated our courts and tribunals are, someone will always disagree, for the Rule of Law, so often praised and reified, does not and cannot, in pure and undiluted form, exist: it always and inevitably comes down to application by people – and that is a good thing too, lest the law becomes lost in algorithms. And since the Rule of Law is dependent on people, it may be fruitful and interesting to look at the sort of people that we entrust with the task of taking our political (and legal) decisions for us – broadly put: political leadership. The initial vocabulary for such an enterprise was already developed by Aristotle some 2500 years ago, and while it is clear that his thoughts cannot without further ado be transplanted to global governance in the twenty-first century, the virtue ethics he developed may still be inspirational, not so much to replace rules and tribunals, but as a complement to them.[4]

The current essay is an off-spring of my interest in virtue ethics and global governance, and taps into a related concern: what, if anything, can responsible governance mean? What, in other words, would responsible governance stand for, and how can it be given shape? It is the stated purpose of this chapter to flesh out a notion of responsible governance, and it seems that this is a task that has rarely been undertaken by thinkers about the state or other forms of political organization. Usually, political theory and political philosophy discuss governance in terms of structures, legal rules, governance systems. A decent state, in this manner, is one that has democratic decision-making structures; is one where citizens have access to legal procedures to complain about things affecting them; is one where basic human rights are generally protected. All these are, no doubt, necessary conditions for responsible governance, but they might not be sufficient. The above criteria encompass both Belgium and Sweden, but also Turkey and Russia, and yet it seems clear that the governance exercised in Belgium and Sweden is different in nature than that exercised in Russia or Turkey.

My interest is not with particular states – and not with criticizing particular states – but with the behavior of actors in the wider world. Responsible governance, it would seem, raises the obvious preliminary question 'responsible to whom?´, and for present purposes, this must be answered under reference to the world at large. It is too simple however to posit a dichotomy between the global interest and the national interest, and to suggest that one can be responsible to the national constituency, yet at the same time be legitimately irresponsible to a global

4 This will be further laid out in a forthcoming monograph: Jan Klabbers, *Discretion and Judgment: An Essay on the Virtues in Global Governance* (working title).

constituency (however imagined this global community may be[5]). In a globalized world, a bare minimum of bearing responsibility for global well-being is required. No state can completely isolate itself from the global sphere, neither in terms of the effects of global developments on that state, nor in terms of that state having the ability to affect global issues and developments. Hence, the constituency that matters is that of the global community, even if that constituency does not exist in a particular ontological manifestation.[6]

To propose any political concept is to arouse suspicion. There are, in an important sense, no universal political projects; only particular projects dressed up in universal clothing. Hence, the idea of working out a concept of responsible governance is likewise vulnerable to this criticism: whose concept is it? Who stands to gain and lose? Why should this command assent where other, competing projects do not? Such critical inquiry is necessary and pertinent but, importantly, caught up in itself as well. For why would someone's critique, itself the result of particularist sympathies and part of the critic's particular project, be allowed to torpedo a concept and others be cast aside? The point about universal projects is merited, but should not work so as to stifle our political imagination and relegate all projects to the dustbin of history before they are well and truly articulated. This is so for at least two reasons. First, it cannot a priori be excluded that some particular proposal actually will be universally embraced, or at least tolerated for a while. Second, giving in to the inevitable critique beforehand means leaving the status quo unaffected, or worse: it might mean paving the way for other people's particular projects. Often enough, after all, failing to act also constitutes action.

II. IRRESPONSIBLE GOVERNANCE?

On June 1st, 2017, US President Donald Trump announced that the US would unilaterally withdraw from the Paris Agreement on climate change, concluded with some fanfare in late 2015. The announcement was received with shock and disbelief in many quarters, including leading industrial sections in the US itself – even sections of the energy industry, implicated in the sort of emissions the Paris Agreement was designed to reduce.[7]

5 Most, perhaps all, political communities are imagined, as Anderson teaches us. Benedict Anderson, *Imagined Communities*, rev. edn (London: Verso, 1991).

6 Again, this is only to appease those who would claim otherwise: to speak of political community in ontological terms most likely already concedes too much. See not only the previous note, but also the work of constructivist scholars on international relations, including Friedrich V. Kratochwil, Rules, *Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, 1989) as well as Nicholas G. Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (re-issue, London: Routledge, 2013 [1989]).

7 https://www.theguardian.com/environment/2017/jun/01/donald-trump-confirms-us-will-quit-paris-climate-deal (visited 18 January 2018).

Later in the same year, the US administration announced it would re-locate the US embassy in Israel from Tel Aviv to Jerusalem, despite the well-documented circumstance that various groups have made vocal and violent claims on Jerusalem. Where solving the conflict between Israel and the Palestinians has proved intractable since the late 1940s, the relocation of the embassy is widely seen as throwing oil on a blazing fire.

In both cases, there is a suspicion that regular explanations for political behavior, based as they might be on power considerations, economic interests, or domestic pressures, might not work very well, and this suggests that something else may be going on. Both the re-location of the US embassy and the withdrawal from the Paris Agreement can be taken as examples of 'irresponsible governance', which then, in turn, demands an explanation as to what this might be a departure from. These are not the only recent examples: one can think of the US withdrawal from the 2015 nuclear arrangement with Iran[8]; or one can think of the US withdrawal from the talks about a global migration compact.[9] These are, however, less clear-cut examples of irresponsible governance than the withdrawal from the Paris Agreement or the relocation of the US embassy in Israel, in that they do not defy more or less rational explanations completely. It may be shortsighted, but insisting on domestic room for manoeuvre in the context of both migration and unilateral sanctions (hemmed in under the Iran deal) is not entirely inexplicable. I will thus not pay attention to these possible manifestations, and instead discuss the Paris agreement and the embassy relocation in what follows. In particular, I will explore why traditional explanatory models of political action might lack explanatory force.

Several notes are in order. First, it is not only states that engage in irresponsible governance; other actors can likewise behave irresponsibly. This applies to individuals in positions of great authority: it has been suggested that Pope Pius XII, nominally the spiritual leader of millions of people during much of the 1930s and 1940s, condoned the Holocaust and may have even been sympathetic to Hitler. There is some controversy as to whether this was actually the case, but if so, then he can be accused of acting irresponsibly.[10]

International organizations too can act irresponsibly. Journalist Graham Hancock recalls how in the 1980s the Food and Agricultural Organization delayed much-needed food aid to famine-stricken Ethiopia, most likely because the FAO's Director-General, Edouard Saouma, did not like one of Ethiopia's delegates to the FAO; food aid was only provided when the delegate in question was recalled to

8 https://www.ft.com/content/e7e53c72-538c-11e8-b3ee-41e0209208ec (visited 28 June 2018).

9 https://www.nytimes.com/2017/12/03/world/americas/united-nations-migration-pact.html (visited 28 June 2018).

10 For a highly critical account, see John Cornwell, *Hitler's Pope: The Secret History of Pius XII* (London: Penguin, 1999).

Addis Ababa.[11] Another example, better known perhaps, is how the United Nations stood by idly while a genocide was going on in Rwanda in 1994.[12]

Even courts can engage in something coming close to irresponsible governance – at least if it is accepted that court judgments can be exercises of governance. An example well-known to most international lawyers is how the International Court of Justice (ICJ), in 1966, decided by the casting vote of its President not to decide a case involving colonialism and apartheid on grounds of lack of jurisdiction, despite having earlier intimated that it would have the jurisdiction to decide.[13] The decision is generally seen as a retrograde step, with the ICJ closing its eyes to the realities of a new era and, more importantly perhaps, perpetuating large-scale injustice.

On a different scale, the European Court of Human Rights, in 2013, came perilously close to genocide denial in a case involving the prosecution of a Turkish politician who went on speaking tours voicing the opinion that there never was a genocide in Armenia. Upon being sentenced by a Swiss court, the Turkish politician complained that his freedom of speech had been implicated, which prompted the Court to balance his right to freedom of speech against the dignity of genocide survivors, and naturally, this was easiest accomplished by downplaying the genocide. This would have been bad enough if engaged in by an ordinary court; the spectacle of a human rights court coming close to genocide denial is downright baffling.

The second point to note is this. Both examples about to be discussed below are taken from US practice. While I would maintain that both are manifestations of irresponsible governance, it is most likely by no means only the US that is guilty thereof. One can think of Brexit as an example, albeit a less strong one, seeing that the issue of Brexit was accompanied by a referendum and thus, one may suppose, has some democratic support, however misinformed and thoughtless the campaigns may have been. To make a long story short, no matter how silly the entire Brexit episode may be (and there can be little doubt that future historians will come to regard it as a historical mistake), it can nonetheless be explained, at least up to a point, by regular explanations: governments are supposed to give some effect to popular desires, all the more so if these have been verified through focused democratic procedures.

Third, not all manifestations of poor or thoughtless of downright nasty governance fall in the same category and can be classified as 'irresponsible'. There

11 Graham Hancock, *Lords of Poverty* (London: Mandarin, 1989), at 85.

12 Michael Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (Ithaca NY: Cornell University Press, 2002); some of the international legal ramifications are explored in Jan Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act', (2017) 28 *European Journal of International Law* 1133.

13 See *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, [1966] ICJ Reports 6; for an in-depth analysis of the historical circumstances and the role of the Court's President, see Victor Kattan, 'Decolonizing the International Court of Justice: The Experience of Judge Sir Muhammad Zafrulla Khan in the *South West Africa* Cases', (2014) 4 *Asian Journal of International Law* 1.

is, in all likelihood, an irresponsible element to many policies. Strict protectionist trade policies, e.g., may result in greater inequality and extreme poverty, creating, in turn, a breeding ground for political opposition, some of it possibly violent. This is what people tend to have in mind when talking about tackling the root causes of terrorism for instance, or the root causes of Somali piracy. On such a line of thought, people are driven to terrorism or piracy by economic circumstances which are the result of policies adopted by others, and thus those policies can be deemed irresponsible. There is probably some truth in this, but these are not the irresponsible policies this paper is concerned with, as there may well be more or less rational explanations (depending on which explanatory model one adopts) for the policies concerned. Even the extremely vicious policy of separating immigrant children from their parents in an attempt to curtail immigration flows, nasty and pernicious as it is, is not 'irresponsible' in the sense used here. On at least one explanation (discounting the biblical injunctions advanced by the Trump administration), the policy makes some instrumental sense: if parents know their children might be taken away from them, they may think twice before crossing the border. Hence, ruthless and heartless politicians may think this is a great idea, serving the goal of stemming immigration flows. The long-run consequences can be expected to be dramatic (chances are those traumatized children will grow up with an axe to grind, and some might not hesitate to respond to inhumane treatment with violence), but the policy is not one that defies rational explanation altogether – no matter how shortsighted the explanation.

This leads to a final point, of a different nature. Judging by the examples to be discussed below, it would seem that irresponsible governance is naturally characterized by omissions, by not doing something, by withdrawing from something. Pope Pius XII may have been guilty of being silent when he should have spoken; the examples of the FAO and UN suggest that inactivity and irresponsibility go hand in hand; both the ICJ and the ECtHR took the easy way out in their decisions (the ICJ's decision not to take on the case; the ECtHR's facile downplaying of the Armenian genocide), and both the US withdrawal from the Paris Agreement and Brexit suggest much the same. It is, in fact, of the examples listed above, only the relocation of the US embassy that can be seen as action rather than inaction.[14]

14 Philosophers of action will point out that this is much too simple a discussion, and they would be right. However, the rough distinction outlined here will do for present purposes. For more in-depth discussion, see e.g. Jonathan Bennett, *Morality and Consequences*, available at https://tannerlectures.utah.edu/_documents/a-to-z/b/bennett81.pdf (visited 5 June 2018).

a. The Paris Agreement

Trump's explanation for his decision that the US withdraw from the Paris Agreement was a little unclear. He seemed to be under the impression that the Paris Agreement would lead to the loss of jobs in the US, to the benefit of other countries, and famously added that he was elected by the people of Pittsburgh, not Paris – a statement all the more telling in light of the fact that Pittsburgh is the heartland of what used to be the US coal mining industry. The Paris Agreement was supposed to harm domestic US coal production, and generally considered a 'bad deal' for the US.

For theorists of international affairs, whether political scientists or lawyers, Trump's move creates a puzzle, as his explanation is not particularly plausible. The Paris Agreement, like most multilateral environmental agreements, represents a compromise, where all parties give up a little in order to gain something else, in this case, a reduction in emissions, and therewith, in the long run, a reversal (or at least a slowing down) of climate change. This is generally considered necessary: while some may suggest that climate change may be a natural phenomenon rather than man-made, very few people are on record as saying that no change is taking place. And given that climate change can have dramatic consequences, it is generally considered a good idea to do something about it. For, regardless of whether climate change is caused by human activity, at least it can be slowed down by altering human activity. It is no coincidence then that well-nigh all states in the world have signed up: at the time the US announced its withdrawal, only two countries had still to sign up (Syria and Nicaragua), and they too have done so in the meantime.

There are various reasons why Trump's argumentation is not all that compelling. First, the Paris Agreement is cast in very soft terms, setting distant targets but containing few hard and fast obligations. It asks states to voluntarily set their own levels of emissions reductions, and contains no mechanisms to coerce states into doing so; indeed, this very feature is characteristic of many environmental deals, and usually heralded as one of the innovations of instruments such as the Paris Agreement. In other words: the US government retains control over the size of its own reductions. That's one thing.

Second, what applies to the US applies to all other parties, i.e. the entire globe. The US may, in the worst case scenario (from a parochial perspective), stand to lose a little, but so does everyone else, including other large emitters such as China and Canada. Hence, even if the Paris Agreement would make the US worse off in *absolute* terms (and that is a big 'if' in its own right), it does not necessarily make the US worse off in *relative* terms – at least not unless other states renege on their commitments, but the starting assumption has to be that everyone will live up to their commitments in good faith: this is what *pacta sunt servanda* is all about. If the Agreement hampers coal production in the US, it does the same in China and elsewhere, and it would not be impossible that losses in the coal sector might be

offset by gains in the development of clean technologies. This will hurt traditional coal mining communities (such as those in the Pittsburgh area), but will benefit other communities.

And third, there is the gain associated with the Paris Agreement. In climate change, the stakes are generally considered high, and any reduction of harmful emissions is to be welcomed in order to save the planet. The language may border on the hyperbolic, but the point is, in essence, a simple one. Climate change is bad for all; it does not pass by the US after its withdrawal – and indeed, the amount of hurricanes over the last few years doing their devastating work in the US suggests that the US might have a greater interest in controlling climate change than many others. It is one thing for a state not to participate in multilateral agreements of a coordinating nature, such as a convention on consular relations, or even on global trade relations. Staying outside such arrangements may not be the smart thing to do, and may turn out to be costly (forfeiting market access, for instance, in case of a global trade arrangement, or depriving your own citizens of consular assistance), but in such a case will harm mostly the outlier state itself. But with environmental protection agreements, the stakes are higher. In Crawford's pithy formulation, the world is 'better off with the Paris Agreement than without it'.[15]

b. Relocating the Embassy in Israel

In a different way, the decision to relocate the US embassy in Israel from Tel Aviv to Jerusalem is puzzling as well. There is the practical consideration that most of the other embassies are located in Tel Aviv, as is Israel's international airport. While the Israeli government is based in Jerusalem, all other embassy interlocutors are not, and it seems doubtful whether closer proximity to the Israeli government compensates for the greater distance from all others. What is more, the US decision seems to be fanning further conflict between Israel and the Palestinians. Instead of mediating, or using its influence to help create an atmosphere of trust and the possibility of co-existence, the US decision is doing the opposite: fanning the flames of the conflict, which has proved intractable at any rate thus far. The US government justified the move by saying it would enhance the chances for peace, but this seems highly questionable, and unrest surrounding the inauguration of the new (albeit temporary) premises resulted in some 60 people being killed.[16]

15 See James Crawford, 'The Current Political Discourse Concerning International Law', (2018) 81 *Modern Law Review* 1, at 20.

16 https://www.vox.com/2018/5/14/17340798/jerusalem-embassy-israel-palestinians-us-trump (visited 28 June 2018).

It is difficult to see what the US stands to gain by relocating its embassy. The practical advantages must be close to zero, or perhaps even negative: surely, the relocation will entail a loss of contact with diplomatic life in Israel generally. It may send a symbolic message of support to some Israelis, but simultaneously upsets scores of others. And judging by the initial responses, it has managed to upset much of the broader world community. If there is an instrumental rationality to the relocation decision, it has remained very well-hidden, and the suspicion arises that the rationality behind it is actually not particularly instrumental. The relocation decision, it seems, cannot be justified in instrumental terms (i.e. as a necessary or desirable step on the way towards some larger goal), no matter how hard one tries. In effect, things would seem to work the other around: by fanning the conflict, the prospects of peace in the Middle East recede rather than approach, and with it, so one might hypothesize, the prospects of new generations of individuals who may well come to present national security threats – whether the national security of Israel or of the US. The only remaining explanation then is that by relocating the embassy President Trump wants to gain brownie points with parts of his constituency – but this, it would seem, is rarely a good basis for policy, and especially not if it can only be done amidst huge controversy.

III. ON POLITICS

Harold Lasswell once famously defined politics as 'who gets what, when, and how', and it is no exaggeration to state that this has become the dominant working concept.[17] On such an understanding, politics is about the struggle for power; it is conceived as an arena where actors have to fight for their place, for scraps of food, in total neglect of what binds them together. This applies within states, but applies even stronger, so the suggestion goes, between states. While within states the Hobbesian social contract has been concluded for all intents and purposes, creating bounded political communities, in the world between states life is still 'nasty, brutish, and short'.

This conception of politics underlies the two dominant traditions of theorizing about international affairs. Both so-called 'realists' and liberal institutionalists work on the assumption that politics is essentially a power game.[18] They may differ on

17 Note however that Lasswell's own analysis was far more sophisticated than the label would suggest – this seems to be very much a case of the slogan starting to lead a life of its own. Even the abridged, seven-page version of the original book-length publication from 1936 is brimming with subtlety: see Harold D. Lasswell, 'Politics, Who Gets What, When, How', as reproduced in Dwaine Marvick (ed.), *Harold D. Lasswell on Political Sociology* (Chicago Il: University of Chicago Press, 1977), at 108-114.

18 Key realist texts include Hans J. Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, 2nd edn. (New York: Knopf, 1955); key institutionalist texts include Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton NJ: Princeton University Press, 1984).

what they think the various actors are after and how precisely power is defined and how it can be exercised, with realists keen to stress security concerns, narrowly defined, and liberal institutionalists more broadly encompassing economic matters as among the goals and strategies of power and keener on identifying relative power differences than their realist colleagues, but both are fundamentally agreed on what politics is all about: the pursuit of power.

From this it follows that most explanations for concrete political acts will be cast in terms of the pursuit of power, and with many political acts, this may be persuasive on one level or another. Along these lines, several types of explanations can be identified. Some focus on the simple pursuit of power. These posit statesmen as highly rational actors, keen to improve their state's situations, keen also to see their detractors' positions deteriorating. Alliances can be concluded left right and center, and can always be explained out of the pursuit of power. Even if the immediate motivations remain unclear, there usually is some power motive identifiable, however distant perhaps. The upshot is that the explanation cannot be falsified: if we cannot immediately see the motivation, it can only mean that our eyesight is not good enough or that we should think harder. The good statesman can be assumed to work for the interest of his state, and thus all his actions must serve the interests of his state.[19]

Often enough, this kind of explanation has an intuitive appeal – although it might be useful to realize that the intuition here may have been shaped precisely by the widespread assumption that politics is about power. In much the same way as the man with a hammer may see nails everywhere, so power-prone political scientists may see everything as confirming their basic assumption that politics is, indeed, all about power. Thus, this perspective may offer a roughshod type of explanation for Russia's annexation of the Crimea: the annexation provides Russia with a maritime outlet. It may help to provide a roughshod explanation for the US cutting support to United Nations Relief and Works Agency for Palestine (UNRWA), as publicized in early 2018: doing so might pressure UNRWA into a reform process. It may help to explain why Erdogan's Turkey keeps getting away with serious human rights violations: it occupies a position of unique strategic relevance, allowing it to do pretty much as it pleases.

Of course, such rationalist explanations come in various shades of subtlety. Sometimes it may be the case that the statesman is forced to back the interest of one group within his state rather than another, also on the international level: this can usually be ascribed to the power of domestic pressure groups, with politics being conceptualized as a two-level game.[20] Sometimes there may be mention of external

19 The masculine possessive seems rather properly placed here, and will be retained.

20 The *locus classicus* is Robert D. Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', (1988) 42 *International Organization* 427.

influences, ranging from 'conditionality' to downright interference by others to help explain political events. The core proposition remains though: someone is looking to increase their power, at the expense of someone else.

Its initial and widespread appeal notwithstanding, this is a highly impoverished conceptualization of politics, as it leaves one important question unanswered: what would power be *for*? Why pursue power, at great expense? Actually, there is something of an answer often available, and that is the answer that power is not pursued for its own sake, but for the sake of national security. The minimal task of the state, so it is often said, is to provide security to its citizens: security from threats internal to the state (this helps to justify the state's monopoly on the use of force), and security from threats coming from the outside. It is for this reason, so the argument goes, that states need to acquire power: only the powerful state can protect its citizens against outside threats and, increasingly perhaps, against internal threats as well.[21] And those with a more expansive ide of the proper role of the state may nonetheless buy into the same logic: a state needs to be powerful to provide material well-being to its citizens, in addition to basic security. In short, all states always need power; if the state would be uninterested, it would renege on its obligations towards its citizens. The state uninterested in power would wither away, and its citizens would fall prey to someone else's power ambitions. Hence, states are forced to strive for power, and hence, all international politics is really about states aiming to increase their power. *Quod erat demonstrandum*.

And yet, the argument is at best only partly convincing. In part, this is because the underlying concept of power is a little simplistic. Power is dependent on so much factors, and is such a multivariate phenomenon, that it can hardly be captured adequately.[22] Sometimes a state's natural boundaries may render it relatively immune to conquest or interference, without it being overly interested in matters of power. It is also noteworthy perhaps that the most successful states – regardless of how exactly success is measured – tend to be small and rather more interested in cooperation than in conflict: think of the Nordic states, Switzerland or the Netherlands.

And in part, the idea of power suffers from a lack of analytical rigour: if everything can be explained in terms of power, then power loses its analytical utility. And when that is the case, the continued insistence on the importance of power for its own sake reveals an ideological attitude: a theory that stops explaining things in a

21 Strayer puts it very well: 'Men could not live a decent life – in fact, according to Hobbes they could not live at all – unless they lived in and obeyed the commands of a sovereign state. To weaken or to destroy the state was to threaten the future of the human race. Therefore a state was entitled to take any steps to ensure its own survival, even if those steps seemed unjust or cruel.' Joseph R. Strayer, *On the Medieval Origins of the Modern State* (Princeton NJ: Princeton University Press, 2005 [1970]), at 108.

22 Think only of the classic study by Steven Lukes, *Power: A Radical View* (London: MacMillan, 1974), identifying three different ways of looking at power. Likewise, the way Foucault conceptualized power would suggest that there is much more at play than mere military or even economic prowess.

meaningful way should be either discarded or at least amended if it aims to retain any explanatory force. A theory that lingers on while having lost its explanatory force is no longer a theory but, instead, a political philosophy or ideology, and where that is the case, the political philosopher or ideologue may legitimately be asked why his position is thought to be superior to other positions – and he no longer has access to arguments about explanatory force.

As an aside perhaps, much stock is placed on explaining some behavior in terms of populism: the people want something, and their leaders will give it to them, no matter what. Analytically, however, this is unpersuasive for several reasons. First, the people rarely speak with one voice: the populist politician may select a constituency whose wishes he or she follows, but this generally excludes other constituencies; as a result, even the populist politician will need to choose *whose* wishes he or she wishes to pursue. Second, the politician rarely knows what the people want; at best, he or she assumes certain things about what the people want. Third, and related, populist programs often stumble on means and ends. The people may want decent jobs and reasonable service in the public hospital, but may not, without further stimulus, connect the absence thereof to increased migration flows. Yet the politician, instead of guaranteeing decent jobs and improving hospital services, will find that shouting loudly about immigration is much easier to accomplish, or that all blame should be put on the EU, or that unemployment in Pittsburgh is the result of having signed up to an agreement on climate change. In short, the people may want things, but it is the politician who needs to tell how to get those things. Populism, therewith, is something of a misnomer: it will very rarely be the case that the politician is truly the mouthpiece of the people; usually, it will be the politician who first tells the people what they want. And if that is the case, populism may be a useful shorthand description of a certain style of politics, but is of little explanatory value.[23]

The point here is not to deny that there are populist politicians or that populism can be a particular style of politics; instead, the point is – more limited – to suggest that the label populism is ill-equipped to offer much of an explanation for irresponsible governance activities. This is so for the reasons set out above, and because on the heuristic level it runs the risk of being self-contradictory. Surely, if the people want something, it must be a half-way decent future for themselves and their children, even if they do not express it as such. If so, withdrawal from an agreement

23 Note also that many avowedly populist politicians are hardly 'men of the people' in any recognized sense of the term. Few Dutch men would be keen to imitate Geert Wilders' hairdo, and of Pim Fortuyn, assassinated in 2002, it has been noted that his baroque and theatrical style and his being openly gay may well have contributed to his aura: '... the mystique of a man who came from nowhere – from heaven, perhaps – to save his fellow countrymen.' See Ian Buruma, *Murder in Amsterdam: The Death of Theo van Gogh and the Limits of Tolerance* (New York: Penguin, 2006), at 55. The wealthy Trump, moreover (whose first steps were helped by inheriting a handsome amount from his father) will rarely be mistaken for a regular guy, and seems to take pride in nothing being all that regular. This opens up vistas into Weberian rule by charisma and its connections to populism. See generally Max Weber, *Economy and Society* (Berkeley CA: University of California Press, 1978, Roth and Wittich eds.), esp. at 1111-1157.

that costs little and may be hugely beneficial, is beyond rational explanation, even in populist terms. The people may want three cars and cheap gas, but they also want their grandchildren to live in a decent environment – the choice for which to prioritize is made on the people's behalf. This does not absolve the people (one should think a little before voting perhaps), but it does suggest that the idea of a politician merely following and voicing the people's will is not very persuasive.[24]

IV. RE-THINKING POLITICS?

If the pursuit of power for its own sake is considered as a rather sterile conception, it is arguable that power serves a purpose beyond the immediate welfare of a close-knit circle of citizens: as Hannah Arendt might have put it, power relates to taking care of our common world. On such a conception, power is not so much a privilege that requires no counter-achievement, but is rather a matter of assuming responsibility, not merely for one's next of kin or members of the same political group, but for the world at large, and there are by and large two ways to provide this idea with some hands and feet. First, one may (and this is quite popular these days) focus on a state's responsibilities across borders; second, one may focus on the self-interest of the state concerned. I will discuss these two models in succession.

First, obligations towards others. Even those who feel a political leader's first responsibility is towards his own citizens will be reluctant to suggest that this means that non-citizens can be treated indifferently, or that their moral status amounts to nothing. Take, e.g., this scenario. State A and State B both produce the same crops, and year after year both manage to make a decent living in doing so. Technologically, it becomes feasible for state A to influence the climate in state B – it can stimulate rain, it can stimulate droughts. Doing this means that the entire harvest of state B's crops gets lost, while the crops in state A remain unaffected. Due to the decreased supply on global markets, A makes a handsome profit, whereas B slides into abject poverty and famine.

Legally, it is difficult to capture this kind of behavior on the part of state A, but it seems clear that it is somehow acting wrongfully. Cynical (or seasoned) political scientists may not be surprised by state A's behaviour, but nonetheless the influencing of the climate seems wrong, precisely because it fails, in its pursuit of self-interest, to take the interests of B into account. Admittedly, there is, at present, no international legal rule clearly prohibiting the behavior: A is not strictly speaking engaged in an invasion, let alone annexation, and the label 'act of aggression' seems ill-suited as well. And while a famine may result in mass starvation and numerous

24 For a fine study, see Margaret Canovan, *The People* (Cambridge: Polity, 2005).

deaths, it would be difficult to conclude to the existence of genocide in the absence of a 'special intent' to target the citizens of B as citizens of B. At best, one could accuse A of violating something like a principle of 'good neighbourliness', or suggest the application of the 'abus de droit' doctrine; both, however, are not particularly well-defined elements of international legal thought.[25]

Equally though, there is no clear legal justification for the behavior. State A cannot invoke its sovereignty in order to justify itself, for that would mean that sovereignty can justify anything, and surely that cannot be the case. For one thing, for all its vagueness, there actually is compelling case law that at the very least, states ought to respect principles of good neighbourliness[26], and influencing the neighbour's weather patterns does not fall into that category. It is arguable that sovereignty means that others are not allowed to bully you, but sovereignty cannot be a license to bully. The only circumstance where, perhaps (and it is a big perhaps) A's behavior could be justified would be if it were engaged in to fend off a severe threat of famine in A itself. Perhaps (and again: it is a big perhaps), perhaps in such a circumstance A might be justified in driving B to famine rather than experiencing famine itself. Few people would say such is commendable behaviour on A's part, but if the state has a duty to protect its citizens, then it might follow that one is allowed to protect one's citizens at the expense of others. Note however that this is an extreme case, coming close to notions of self-defense or what international lawyers sometimes refer to as the doctrine of necessity: sometimes necessity can justify behavior that would be otherwise be unlawful.

Beyond this, however, it seems that A's behaviour in incapable of being justified – there is, quite literally, no justification imaginable that would allow A to play fast and loose with the interests of B. From this example one may well generalize and suggest that state A has certain obligation towards state B that it ought to respect, and the recent literature reveals various attempts to further develop this idea.

Perhaps the most well-known example thus far among international lawyers resides in the work of Eyal Benvenisti, who has been running a large research project on 'sovereignty as trusteeship' for the last couple of years. The core of the project consists of a re-consideration of sovereignty, not as a license to do as one pleases, but as coming with responsibilities towards humanity at large.[27] As an international lawyer, Benvenisti is keen not only to suggest that sovereignty can be (and ought to be) re-conceptualized in terms of trusteeship or stewardship, but that positive international law already contains examples of what may be referred

25 On *abus de droit*, see, e.g., Michael Byers, 'Abuse of Rights: An Old Principle, A New Age', (2002) 47 *McGill Law Journal* 389.

26 One example is the Trail Smelter Arbitration (USA/Canada), 11 March 1941, reproduced in (1941) 3 *Reports of International Arbitral Awards*, 1905.

27 Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', (2013) 107 *American Journal of International Law* 295.

to as 'community obligations'.[28] He explicitly warns against discarding sovereignty altogether, and probably wisely so; instead, he aims to infuse sovereignty with a sense of 'other-regardingness' – a sense of responsibility towards not just the own political community, but also to strangers. The idea is further developed by legal philosopher David Luban, concentrating on the dilution of the monopoly on the use of force which has always been characteristic of the modern state, and which now prompts the introduction of what he refers to as R2H: a responsibility to humanity. Since states alone can no longer guarantee the security of their citizens, it is up to them to take care of this together.[29]

If Benvenisti and Luban both seem to derive their idea from a cosmopolitan mindset, two Canadian international lawyers start out, or so it seems, from a more localized idea. In an early article, Evan Criddle and Evan Fox-Decent have posited the idea that states in international law can have fiduciary obligations towards one another: '… the state and its institutions are fiduciaries of the people subject to state power, and therefore a state's claim to sovereignty, properly understood, relies on its fulfillment of a multifaceted and overarching fiduciary obligation to respect the agency and dignity of the people subject to state power.'[30] Put differently, 'a fiduciary principle governs the relationship between the state and its people…'.[31] Hence, the fiduciary obligations flow from the state's population.

In a later work, they introduce slight-seeming but possibly vital amendments. Individual states, they claim, are fiduciaries of their populations, but collectively states are fiduciaries of humanity at large. Moreover, with some aplomb they also proclaim that international institutions can be captured under their fiduciary model, and again it seems that while individual international organizations owe fiduciary duties to those under their authority, international organizations in general derive their fiduciary obligations from humanity at large.[32]

Two aspects strike as problematic. First, it would seem that fiduciary obligations derived from a state's own population may not be identical to fiduciary obligations derived from humanity, and may perhaps even be in conflict. It could be argued, e.g., that fiduciary obligations deriving from humanity entail a strict prohibition of discrimination on the basis of nationality. Yet, quite a few fiduciary obligations

28 Eyal Benvenisti and Georg Nolte (eds.), *Community Interests across International Law* (Oxford University Press, 2018).

29 David Luban, *Nationalism, Human Rights, and the Prospects for Peace: An Essay on Sovereign Responsibilities*, Working Paper, Global Trust Project, available at http://globaltrust.tau.ac.il/wps-2018-02-nationalism-human-rights-and-the-prospects-for-peace-an-essay-on-sovereign-responsibilities/ (visited 5 June 2018).

30 Evan Criddle and Evan Fox-Decent, 'A Fiduciary Theory of Jus Cogens', (2009) 34 *Yale Journal of International Law* 331, at 347

31 *Ibid.*

32 Evan Criddle and Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (Oxford University Press, 2016).

stemming from a state's own population may demand that the state does precisely that: engage in acts of discrimination on the basis of nationality. Indeed, the very derivation of fiduciary obligations both from the own population and from humanity comes across as an attempt at having one's cake and eating it too. Elsewhere, the scope is broadened further still: the right to refuge, so they suggest, flows from a mixture of obligations derived from humanity, and from 'sovereignty over the people within a certain territory', a notion that is broader still than that invoking the own population.[33] This begs the question though, at least with respect to an obligation to provide refuge: typically, the question at issue with asylum applications is precisely to what extent the asylum seeker ought to be considered as a member of the political community to which he or she seeks to be admitted. Normatively commendable as their position is, it would seem that Criddle and Fox-Decent here step into the classic trap of wishful thinking.

The second problematic aspect relates to international organizations. Criddle and Fox-Decent are right to suggest that individuals can be under direct authority of international organizations, and consequently, it would be useful to have some device to ensure that they do not abuse their authority. Where it becomes problematic, however, is that their concept of international organizations neglects the intermediary role played by states in the creation of international organizations. It may or may not be plausible to claim that states are founded on the basis of a social contract of some sort between individuals; but it is less plausible to make the same claim with respect to international organizations, who are created on the basis of some sort of social contract between states.[34] One might say, of course, that when setting up international organizations states ought to respect their fiduciary obligations, but one cannot jump over the role of those states – and to claim that international organizations derive fiduciary duties directly from individuals or from humanity at large does precisely that.

Criddle and Fox-Decent claim that generally, international organizations are best seen as 'indirect' fiduciaries. They rarely exercise direct authority over individuals, but usually exercise their authority mediated by their member states. Indeed, their authority over their member states seems nigh-on unlimited. In a statement seriously at odds with most received thinking about international organizations, they claim that '… their dominant purpose is to facilitate and supervise an international legal order that benefits all humanity by ensuring that states fulfill their basic fiduciary responsibilities.'[35] Again, this may be a desirable conclusion to reach, but it can only

33 *Ibid.*, at 244.

34 Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law', (2015) 26 *European Journal of International Law* 9.

35 Criddle and Fox-Decent, *Fiduciaries of Humanity*, at 290.

be reached by distorting the relationship between international organizations and their member states.[36]

There is an additional issue here, relating to the membership of international organizations. A broad reading of the fiduciary idea would suggest that international organizations can act, as fiduciaries of humanity, wherever they please, yet this might be problematic: surely, one should think twice before giving NATO license to act in Afghanistan, or before giving the Shanghai Cooperation Organization license to intervene in Denmark in the name of humanity.[37]

These efforts are all of recent origin, but thinking in such terms has a considerable pedigree. Criddle and Fox-Decent invoke Hobbes and Kant in (partial) support, while Benvenisti quotes James Madison with approval. And two decades ago Abraham Chayes and Antonia Handler Chayes posited what they referred to as a 'new sovereignty', with sovereignty being considered conditional on whether the state behaved reasonably well, and would qualify as an 'actor in good standing' within the international community of states. Nice liberal democracies would easily qualify; other regimes less so.[38] And the same sentiment, with different emphases, could be found in the work of lawyers like Thomas Franck[39] or philosophers like John Rawls[40], published toward the close of the millennium.

This then suggests there might be some traction in looking elsewhere. The notions of trusteeship or stewardship or fiduciary obligations, however sympathetic and well-done, tend to try to accomplish too much. And in some sense, that is understandable: it is difficult to justify standing by idly in the midst of large-scale human rights violations or genocide. It is, quite possibly, no coincidence that Criddle and Fox-Decent started their work in international law by aiming to ground *jus cogens* in fiduciary theory: the idea must have been to start with the serious matters, and work their way downwards, so to speak. Luban makes a similar move, commencing with notions of state security and the monopoly on the use of force.

Benvenisti, by contrast, proceeds on a different basis, by identifying certain basic obligations that states may owe to the international community by virtue of being sovereigns. He is not out to justify interventions and military action, but instead proceeds carefully and in minimalist fashion by suggesting that states may have an obligation to take the interests of others into account when making their decisions;

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36 See further my 'Theorising International Organisations', in Anne Orford and Florian Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 618.

37 The same problem applies to the fine study by Carmen Pavel, *Divided Sovereignty: International Institutions and the Limits of State Authority* (Oxford University Press, 2015).

38 Abraham Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge MA: Harvard University Press, 1995).

39 Thomas M. Franck, 'The Emerging Right to Democratic Governance', (1992) 86 *American Journal of International Law* 46, and Thomas M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (Oxford University Press, 1998).

40 John Rawls, *The Law of Peoples* (Cambridge MA: Harvard University Press, 1999).

have minimal deliberative obligations; have an obligation to accommodate the interests of others when they can do at no cost (this he refers to as the restricted Pareto criterion); and some minimal responses to catastrophes, including natural disasters and the situations giving rise to large numbers of refugees.

It may, to some extent, be a matter of temperament, but it seems that much thinking about these issues is usually done with great ambition and in the form of ideal theory: under ideal circumstances, humanity would strive to X, Y or Z. This has its uses, of course: it can be very illuminating to make abstract deductions from basic principles operating under ideal conditions. But it should not always stop there. Precisely because regular politics and morality are messy affairs[41], it might be just as useful to devise ways of thinking that can be applied in non-ideal circumstances, as Benvenisti aspires to do.

Philosophically, Benvenisti's thesis is reminiscent of the writings of Israeli philosopher Avishai Margalit, who in several works has aimed to create a minimalist, non-ideal way of organizing life together in ways that would respect the position of others. In a relatively recent study, he defends the proposition that usually, in politics, compromise is necessary and acceptable. Instead of suggesting, as so many political thinkers do, that we develop principles and stick to them, Margalit endorses the idea that we should 'be judged by our compromises more than by our ideals and norms… compromises tell us who we are.'[42] After all, as he has it, 'the fundamental problem of human political life is how to address the tension between cooperation and competition', and here it transpires that 'compromise is an essential element in relieving this tension.'[43]

Margalit's work, therewith, is not geared towards the creation of some or other utopia but, instead, aimed at making collective life a little bit less miserable. This chimes nicely with his earlier work endorsing a 'decent society', elaborating the proposition that the institutions of society ought not to humiliate people.[44] Nothing more, but certainly nothing less either. And instead of decisively grounding this in rights or human dignity or some such construction, Margalit is happy to observe that his 'story' (as opposed to theory[45]) of the decent society is a matter most of all of sensibilities, which suggests (he does not spell it out) that decency is not something

41 The messiness of everyday politics and morality has been accepted by thinkers from a variety of traditions, including Hilary Putnam, *Ethics without Ontology* (Cambridge MA: Harvard University Press, 2004); Raymond Guess, *Philosophy and Real Politics* (Princeton NJ: Princeton University Press, 2008); C.A.J. Coady, *Messy Morality: The Challenge of Politics* (Oxford: Clarendon Press, 2008), and Friedrich V. Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge University Press, 2014).

42 Avishai Margalit, *On Compromise and Rotten Compromise* (Princeton NJ: Princeton University Press, 2010), at 5.

43 *Ibid.*, at 38.

44 Avishai Margalit, *The Decent Society* (Cambridge MA: Harvard University Press, 1996, Goldblum transl.)

45 *Ibid.*, at 288-289.

that can be caught in rules and injunctions, but is dependent on attitude, on the mindset of political actors.

It is here then that the decent society is connected to the idea of responsible governance. Both are a matter of sensibility, and both are mostly a matter of the same sensibility: the sensibility not to pursue one's own short-term advantages at all costs, the sensibility not to push through one's own vision of the world and one's own 'values', the sensibility to realize that one's action may have unpleasant implications for others. This is not a grand political design, but instead a rather modest appeal for something like 'peaceful co-existence'. It does not strive for a perfect world; instead, it is built on the realization that appeals to achieve the perfect world are often fig leafs for domination.

Margalit is not the only one to have embarked on such a project. Some ethicists have prioritized a concept of goodness, though without necessarily specifying how it can be applied to politics or generally to social affairs.[46] Others have developed a notion of preciousness, not unlike Margalit's decency – an example is Raimond Gaita's work[47], while Martin Luther King's insistence on *agape* strikes a similar chord.[48] Some might think that a concept of civility could represent much the same[49], while Swanton defends a virtue-inspired dialogic ethics, therewith reaching beyond individual virtue.[50]

V. TO CONCLUDE

The United Nations, so Dag Hammarskjöld once famously quipped, was set up not to bring heaven to earth, but to save us from hell.[51] He had a point: grand and grandiose ideal conceptions of what heaven on earth would look like tend to be incommensurable; as a bare minimum, we can only hope for some responsible governance on the part of our political leaders in order to save us from hell. While Hegel famously, with bursting romanticism, suggested global progress was the work of 'world-historical individuals' or 'soul leaders', who have a sense of direction for what the world should come to look like, his prescription is of questionable value.

46 Iris Murdoch, *The Sovereignty of Good* (Abingdon: Routledge, 1970).

47 Raimond Gaita, *A Common Humanity: Thinking About Love and Truth and Justice* (Abingdon: Routledge, 1998).

48 Robert K. Vischer, *Martin Luther King Jr. and the Morality of Legal Practice: Lessons in Love and Justice* (Cambridge University Press, 2013).

49 Civility is treated somewhat dismissively (the title of the book notwithstanding) in John A. Hall, *The Importance of Being Civil: The Struggle for Political Decency* (Princeton NJ: Princeton University Press, 2013).

50 Christine Swanton, *Virtue Ethics: A Pluralistic View* (Oxford University Press, 2003).

51 The exact quote can be found in Brian Urquhart, *Hammarskjöld* (New York: Knopf, 1972). Hammarskjöld's ethics have been discussed with insight and understanding in Manuel Fröhlich, *Political Ethics and the United Nations: Dag Hammarskjöld as Secretary-General* (London: Routledge, 2008).

It may exercise some romantic appeal (and absolve the rest of us from taking responsibility), but is no recipe for the successful creation of decent institutions, filled with decent individuals who will take decisions and allocate resources in a decent manner.

On the other hand, it is sometimes suggested that governance should invariably result from expressions of what the people want, and that even ostensibly irresponsible governance can be legitimized under appeal to the popular will. By this logic, US president Trump's pandering to the former US heartland, and the Brexiteers' insistence on leaving the European Union no matter the consequences, are merely the inexorable outcome of democratic politics, as are the xenophobic policies coming to the fore in Hungary, or Poland, or Slovenia, or Italy, or even the Netherlands. The people have spoken, and their will should be followed.

This, however, quite apart from the misgivings about populism as an analytical tool discussed above, rests on a misconception of democracy. As Philip Pettit once put it, democracy does not entail doing whatever the people wants, but rather ensuring that what the government does can be contested: 'the important thing to ensure is that governmental doings are fit to survive popular contestation, not that they are the product of popular will.'[52] The popular will should be able to control the government, not replace it. By this logic, the organization of referenda in most places[53] is not a matter of democratic politics, but of an abdication of responsibility.

We live and act by and through our concepts – it could hardly be otherwise, and it is not too far-fetched to suggest that the governance crisis of the 2010s, characterized as it is by irresponsibility, selfishness, and brutality, owes something to the concepts that have been in vogue for decades now. Put differently, if we all believe that politics is a matter of the pursuit of power for selfish reasons, then it should not come as a surprise that political leaders dodge whatever social responsibility they may have, and limit themselves to pursuing power for selfish reasons. The much-maligned populist surge, on this note, personified by the likes of Trump, Erdogan and Boris Johnson, is not an aberration, but merely the continuation of politics as usual. And that is not a happy prospect.

52 Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1997), at 277.

53 An exception may apply to political systems where referenda are embedded in what comes close to direct democracy, such as Switzerland.

CHAPTER 2
A LESS ELEVATED COSMOPOLITANISM: VICTOR HUGO, FRANCIS LIEBER, AND THE FRANCO-PRUSSIAN WAR OF 1870

Ville Kari[1*]

I. INTRODUCTION

International lawyers love old men. The history of the discipline, in all its glory and regalia, is typically portrayed as a succession of great minds, mostly men and mostly white, who each in turn caressed and developed their legal patrimony and then passed it on to their intellectual heirs.[2] To be sure, such mythology is basically understandable; how else does an intellectual tradition survive and transmit itself than through a chain of influential minds and canonized writings?[3] Its Eurocentrism and the maleness are, likewise, recognized as omnipresent shortcomings in the entire discipline that also reflect the broader global and societal constraints prevailing in the period.[4] Hence any great-man story is evidently only an inherited ideal self-image, or maybe a ritual of self-congratulation between the prospective and anointed members of 'our' profession. We stand on the shoulders of giants, we are touched by the aura of angels, we, the heirs of prophets. In reality, we of course know that behind every great man there is a woman rolling her eyes, and we have seen enough

1 *This chapter has been made possible by the Emil Aaltonen foundation, the Ella and Georg Ehrnrooth foundation, the Niilo Helander foundation, and the March the 25th foundation. Parts of it were written during a visiting fellowship at the Laureate Program in International Law at Melbourne Law School. Also thanks to Jarna Petman for inspiring sources and background materials.

2 The definitive statement being the Carnegie Endowment for International Peace series of the Classics of International Law, edited by James Brown Scott. See the series of biographies portrayed in Bardo Fassbender and Anne Peters (eds.) *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012), as well as in the *Max Planck Encyclopedia of Public International Law*. Histories that seek to avoid the great-man emphasis by exploring the teachings of such men in their academic, professional or political contexts, may arguably nonetheless perpetuate the great-man story (or at least some form of 'man-story') in the broader sense. The present author, including in the present text, is not above this limitation. See Martti Koskenniemi and Ville Kari, 'A More Elevated Patriotism: The Emergence of International and Comparative Law (Nineteenth Century)' in Heikki Pihlajamäki, Markus D. Dubber, and Mark Godfrey (eds.), *The Oxford Handbook of European Legal History* (Oxford University Press, forthcoming).

3 On law as tradition, see H. Patrick Glenn, 'A Concept of Legal Tradition' (2008) 34 *Queen's Law Journal* 427. More generally, Susan Blackmore, *The Meme Machine* (Oxford University Press, 1999).

4 E.g. Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005); Anne Orford (ed.), *International Law and its Others* (Cambridge University Press, 2006).

depleted careers to know that a real person's life is a long business, that the ups of life come with plenty of downs in between.

This essay was written to remind the reader (and its author) that the 'great men' were not always great, and that even their greatness came in surprising shapes under various circumstances. This is not a radical statement and certainly not rocket science, but it is a truism which deserves to be spoken out aloud every now and then. The chapter does this by juxtaposing the lives of two world-famous cosmopolites in the mid-to-late nineteenth century, the formative era of the international legal disciplines.[5] The two individuals in question are Victor Hugo and Francis Lieber, one a father of literary romanticism, a utopian poet and pacifist politician, the other a venerated founding father of humanitarian law who nonetheless had a bluntly matter-of-fact attitude towards war, shaped by personal experience and loss. While neither of the two men was originally educated as a lawyer in the precise sense, and neither was (apart from Lieber's final arbitral years) in any direct office of international power, there should be little doubt about each one's overall influence for the emerging *esprit d'internationalité*.[6]

The lives of Hugo and Lieber paralleled and mirrored each other around certain important formative historical events. The Europe of their childhoods was born from the cannon of Napoleon Bonaparte, whom Hugo's father served as an officer, whose armies marched into Berlin when Lieber was a boy, and whom Lieber then fought back in the ranks at Waterloo. They were a Frenchman and a German living their years of fame abroad, each publishing their definitive works in the early 1860s. And most importantly, their homelands clashed fiercely in 1870–71. This experience, the Franco-Prussian war, is the crux of the story. For while both Hugo and Lieber in broad terms served compatible ideals of international liberalism and the peaceful advancement of civilization, the war between their nations pitted them on the opposing sides of the European rift. Although neither let go of their desire to speak in the name of the broader humanity and justice, their interpretations of that universal justice were strongly based on their sentiments towards Paris and Berlin.

Of these two characters, Victor Hugo shall be explored in somewhat more detail than Francis Lieber, since Lieber is already well established in the canon of international law and needs less introduction. Hugo, on the other hand, is less known in this context. Given the tendency of his talks to be full of hot air and artistic license, this is perhaps justly so. But Hugo the politician was nonetheless a visible and persistent member of the international peace congresses in Europe between 1849 and 1875. His pen and voice offered a significant platform for the ideas of civilization and humanity that were ever so essential also to the rise of international

5 For this context, see Koskenniemi and Kari, 'A More Elevated Patriotism'; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001).

6 On this esprit, see Koskenniemi, Gentle Civilizer, at 12–19.

law. And surely there is no denying the iconic value of his works to the progressive forces and popular mass movements of the era.

Human lives are contingent and complex affairs, and a lifetime of virtue is a long business. By studying the lives of two famous historical cosmopolitans in a longer-than-usual and sometimes not-so-flattering perspective, we may pay attention to the dynamic nature of their individual characters. The questions that arise are essential. When and what *is* the individual whose virtue or character we might assess? What is the context, the role, the scope of such individuals in the various points of their lives? How and why are they to be framed, and by whose decision? And by whose standards should we assess them when they turn out to have been slave owners and ageing womanizers? Such questions shall remain open here – hence the term 'essay' – but it will be suggested that asking these kinds of questions constitutes precisely the foundation of any effort to meaningfully connect any theoretical views on virtue or virtuousness with the inherently imperfect human condition in the real world. That said, at the end of the day, merely talking about the merits and limits of 'great men' by simply re-examining such men cannot really alter the traditional focus. For that to happen, alternative points and persons of interest should be discovered for representation. This chapter, however, remains more modest in its reach.

II. ON VICTOR HUGO[7]

Victor Hugo was a self-declared man of contradictions and critical oppositions.[8] In his famous romantic manifesto (the preface to his tragedy *Cromwell*) he asserted the need for poetry and literature to explore the grotesque besides the beautiful, the frightening besides the ideal, so as to fully embrace the potency of human experience and to cultivate a both rational and emotional yearning for enlightenment.[9] To Hugo, any 'whole thing' was always made of antithetical positions: "let us observe that this saying, *totus in antithesi*, which pretends to be a criticism, might be simply a statement of fact."[10] His romanticism signified a revolution in artistic freedom, the breaking of established distinctions and hierarchies – "simply, all things considered,

7 The principal biographic sources used here have been Jean-François Kahn, Victor Hugo: Un révolutionnaire suivi de L'extraordinaire métamorphose (Paris: Fayard, 2001); Graham Robb, Victor Hugo (London: Picador, 1997); A. F. Davidson, Victor Hugo: His Life and Work (London: Eveleigh Nash, 1912); and Alfred Barbou, Victor Hugo and His Time (London: Sampson Low, Marston, Searle and Livingston, 1882, Frewer trans). Hugo's own Actes et Paroles have also been used. Kahn's work is probably the most detailed, and Robb's the most observant, the two having thus been the most useful.

8 Frederick Brown, 'Et tu, Hugo', The New York Review of Books, 17 January 1985.

9 Victor Hugo, Cromwell (Paris, 1827). See also Albert W. Halsall, Victor Hugo and the Romantic Drama (Toronto: University of Toronto Press, 1998), at 52–71; Rene Coulet du Gard, 'Victor Hugo's "Cromwell"', (1976) 3 Literary Onomastics Studies, Article 9.

10 Victor Hugo, William Shakespeare 8th edn. (Chicago: A. C. McClurg and Co, 1911 [1864], Anderson trans), at 204–205.

and that is its real definition, *Liberalism* in literature".[11] As the poet and the author, Hugo saw himself as a bridge-builder between such disparate perspectives, a teacher of empathy and compassion in the hearts of people. Apart from being a poet, he was also a visible member of the French elites, a member of the *Académie française*, and a representative of the people in various national assemblies. A popular public figure with increasingly leftwing sentimentalities, he was often at odds with his bourgeois allies and colleagues as he defended his radical views on issues such as universal suffrage, criminal justice, and the abolition of the death penalty.[12] His life was fundamentally marked by his protest and exile in 1851 after Louis Napoleon seized supreme control in France. For two decades, Hugo would reside on the Channel Islands and produce some of his most influential works as well as a stream of anti-monarchical opinions, beginning with *Napoléon le Petit* in 1852.

For Victor Hugo there was no distinction between the roles of the author and the social reformer. The arts of the *belles lettres* were as essential a tool in the improvement of the world as any legal treaties, ballots or bills. He saw literacy and education inextricably linked with the advancement of civilization. This meant in the domestic sphere above all the reduction in the brutality and extensiveness of the criminal justice system, and in the international sphere the abolition of standing armies and borders as well as the advancement of free liberal intercourse between private citizens. "Literature secretes civilization, poetry secretes the ideal," he wrote in exile, "That is why poets are the first instructors of the people. ... That is why there must be a vast public literary domain."[13] Poverty, crime, and wretchedness were thus questions of lack of education and lack of equal opportunity, while the weapon with which to combat these was liberal enlightenment. The disaster of 1848 was brought about by the failure of the Republic to set aside 'politics' and focus on 'social questions'. Once the *ancien régime* had been cleared away, it was the task of the thinking and progressive men to construct a new, better world. "Up, now, O intelligences!" urged Hugo, "to construct the people" in the spirit of "progress", and progress through enlightenment.[14] Their century was a century born of the French revolution: "The triple movement – literary, philosophical, and social – of the nineteenth century, which is one single movement, is nothing but the current of the revolution in ideas."[15] At the heart of this progressive revolution was no other character than the poet, the enlightener of the enlighteners, the one ultimately responsible for people's souls; as his own rule of life put it, *le poëte a charge d'âmes*.[16]

11 Cited in Halsall, Hugo and Romantic Drama, at 68.

12 An early key work of course being Le Dernier Jour d'un condamné (Paris: Ch. Gosselin, 1829).

13 Hugo, William Shakespeare, at 295–296.

14 Hugo, William Shakespeare, at 294–295. I have adjusted the translation.

15 Hugo, William Shakespeare, at 373.

16 Victor Hugo, William Shakespeare (Paris: Librairie Internationale, 1864), 410. The original is in Victor Hugo, Lucrèce Borgia (Paris: Michel Lëvy, 1881 [1833]), at X–XI.

Victor Hugo's political tendencies had grown gradually ever since 1832 when he was allegedly caught in the crossfire as a passer-by at Les Halles during the June revolt.[17] But his actual emergence as a French politician coincided with the revolution of 1848, 'the central event' in his life.[18] When Louis-Philippe was overthrown in February, Hugo found himself in the circles of Lamartine's new republicans and was then elected into the National Assembly. However, the political turmoil in Paris left him confused between the pressures of the popular revolution and the moderate bourgeois ideals of republicanism. When the workers and the guards of the republic confronted one another on the barricades that summer, Hugo found himself at the Assembly, cut off from his home and family who were enclosed behind the barricades.

What happened next depends on the perspective chosen. In Kahn's telling, the story unfolds as a situation where the republican Assembly, which stood for democracy and universal suffrage, was forced to defend itself against overwhelming mobs of anarchy. In this grim and desperate defense, Victor Hugo showed 'admittedly' a great deal of courage by leading a charge on the barricades at Saint-Denis and elsewhere.[19] In Robb's telling, Hugo submitted to a traumatic phase of desperate dedication for a cause which he knew was not the 'good'. He took part in the ad hoc conferral of emergency powers to General Cavaignac – "Victor Hugo, the people's friend, had voted for a temporary dictatorship"[20] – and then actively led a troop of guardsmen with cannon for three days from barricade to barricade, decimating the resistance in blood.[21] The evidence seems to support both interpretations, and one thing known for sure is that these days were the origin of the intimate knowledge of the life on the barricades which we may read in *Les Misérables*. In this context, one cannot miss the fact that in Hugo's novel the sympathies of the narrative are on the side of the revolutionaries; the manic dedication and cold sense of duty belong to the people's adversary Javert. The June massacre was a pivotal moment in Victor Hugo's metamorphosis from a modest *pair de France* to an increasingly public dissident.[22] Later, when a new centralized constitution had been passed and Louis Napoléon began to represent a disappointment and disaster for the new Republic, Hugo regained his bearings. He once again began to speak out against the powers that be and finally sided with the currents of social reform. Whatever had happened to him and his worldview in the June massacre, it may have been this experience that caused him to emphasize the themes of penitence and redemption

17 Robb, Victor Hugo, at 173.

18 Robb, Victor Hugo, at 269.

19 Kahn, Métamorphose, at 736–756.

20 Robb, Victor Hugo, at 269.

21 Robb, Victor Hugo, at 275–276.

22 This is the theme of Kahn's L'extraordinaire Métamorphose. See also Robb, Victor Hugo, at 280–289.

in his coming masterpieces. It would have been his political original sin. Be as it may, this newfound alliance with the Left also led Hugo to contacts with the socialist cause as well as the emerging liberal internationalism.

In 1849, Victor Hugo presided over the third International Peace Congress of the Friends of Peace.[23] His speech, certainly crafted to please the audience, recounted a vision of international progress through technology, trade, and civilization. On the podium, Hugo welcomed the hundreds of foreign visitors to Paris "to proclaim the brotherhood of mankind."[24] He had in his mind nothing less than his project for a United States of Europe. Although it was "quite clear that all will call it utopian", he assured that the route to universal peace was predetermined in the inevitable enlightened progress of mankind: "A day will come when you nations of the Continent will, without losing your distinctive qualities and your glorious individuality, be blended into a superior unity, and constitute a European fraternity. A day will come when the only battle-field will be the market open to commerce and the mind opening to new ideas." The ultimate product of this European unity and free market would be the end of war and prosperity throughout the Western world, when "the United States of America and the United States of Europe, shall be seen uniting, for the good of all". And then "a cannon will be exhibited in public museums, just as an instrument of torture is now, and people will be astonished how such a thing could have been."

This Western civilization would then become universal. Hugo described a world shrinking faster and faster with technological progress, and called for an immediate

23 The International Peace Congresses of the Friends of Peace were a series of public unofficial congresses of liberal pacifist thinkers which began in London in 1843. Their origins were partly in the Anglophone peace societies that had been instituted since the fall of Napoleon, and partly in French Saint-Simonianism and moral societies such as the Société de la Morale Chrétienne. The international congresses were meetings with broad attendance of people of various walks of life, academics, politicians, clergymen, publicists and businessmen, among them men such as the British free trade magnate Richard Cobden, the Belgian lawyer and philanthropist Auguste Visschiers, the American 'learned blacksmith' Elihu Burritt, and many of the founding fathers of the ICRC. In the 1860s a succession of similar events was organized as an international Ligue internatioanle et permanente de la Paix at the initiative of the economist Frédéric Passy. These were rivalled by French pacifists such as Charles Lemonnier who sought to institute more profound changes and push for the United States of Europe. After another rift with the establishment of the workers' International, members of the International were admitted in the bourgeois peace conferences in private capacity. On the conferences generally, see André Durand, 'Gustave Moynier et les sociétés de la Paix', (1996) 78 International Review of the Red Cross 575; 'Note sur le mouvement en faveur de la paix' in Compte-rendu de Congrès des Amis de la Paix Universelle Réuní à Paris en 1849 (Paris : Guillaumin et Co, 1850), at iii–viii ; Vanessa Fabius Lincoln, Organizing International Society: The French Peace Movement and the Origins of Reformist Internationalism, 1821-1853 (PhD thesis, University of California, Berkeley, 2013), at 90–109. The Congress of 1849 was to be the first of many in which Victor Hugo presided, participated, or sent written greetings. Hugo's membership of the various peace congresses has not been a point of much attention; some biographies omit these connections altogether, while others see them as part of a more mundane rhetorical correspondence. He himself included some of these speeches in his Actes et Paroles. Hugo also wholeheartedly supported the project for a United States of Europe, and there allegedly still remains an oak planted by Hugo in the name of the cause at the Hauteville House.

24 Victor Hugo, 'The United States of Europe. Presidential Address at the International Peace Congress, Paris, August 22, 1849', (1913-1914) 3 World Peace Foundation Pamphlet Series 3, at 3; original in Compte-rendu de Congrès des Amis de la Paix Universelle Réuní à Paris en 1849, at 3–5.

project of mutual disarmament. Calculating the funds spent on militaries in Europe over the last decades, he asked what could be achieved had it all been spent on development. "The face of the world would have been changed", he answered. Isthmuses would be cut through. Railroads would cover the two continents. "Asia would be rescued to civilization; Africa would be rescued to man; abundance would gush forth on every side, from every vein of the earth, at the touch of man, like the living stream from the rock beneath the rod of Moses." And ultimately, with misery banished, the final reward would be the disappearance of revolutions themselves. "In place of conspiring for revolution, men would combine to establish colonies! In place of introducing barbarism into civilization, civilization would replace barbarism." Thirty-five years before the Berlin Conference, the way to come was already known among the pacifists.

When Hugo concluded, a jubilant mood erupted, and upon Richard Cobden's signal the American and English members of the Congress stood up and erupted in cheers. The final resolution of the Congress bore a resemblance to the agenda that would emerge among international legal scholars twenty years later. It called for an obligation on all governments to submit to arbitration in the face of disagreements; a system of disarmament; the perfection of the international means of communication; postal reform; the generalization of weights and measures; and the multiplication of likeminded societies – "the formation of a Congress of nations whose sole objectives shall be the drafting of international laws and the constitution of a supreme Court to which questions touching the rights and obligations of nations shall be submitted".[25]

III. ON FRANCIS LIEBER[26]

Francis Lieber was not a poet. He was an academic German American émigré with a tumultuous past in Europe, a man with a temper and no inherited privilege. He had seen war and suffered in it himself, and his experience of it was grim, practical, and sometimes anecdotal. He had shot a man in the face in battle. He had robbed a Belgian peasant at gunpoint for a piece of bread. He noted once how it was "one of the most peculiar situations a man of reflecting mind can be in, when he casts his balls for battles near at hand", and he could remember being "called upon to assist in getting a cannon over the mangled bodies of comrades or enemies, leaping in agony when the heavy wheel crossed over them".[27] When, much later in his days,

25 Compte-rendu de Congrès en 1849, at 62–63.

26 See generally Elihu Root, 'Francis Lieber', (1913) 7 American Journal of International Law 453, at 459–461; Silja Vöneky, 'Francis Lieber (1798–1872)', in Fassbender and Peters (eds.), History of International Law.

27 Lieber's memories of Waterloo in Daniel C. Gilman (ed.), The Miscellaneous Writings of Francis Lieber, Volume I (Philadelphia PA: J.B. Lippincott and Co, 1881), at 153, 156, 157, 160.

he promoted the idea for the codification and amelioration of the laws of war, he did it not so much out of sentiment as out of practical opinion: "There is no sickly philanthropy in this; you know that I have no morbid feeling about war; what I wish, I wish as an earnest publicist, and in the name of international statesmanship."[28]

Lieber was born in 1798 in Berlin and grew up in an age when the liberal flames kindled by the French Revolution were also felt in strictly traditional Prussia. But at the same time, the fruit of that Revolution – Bonaparte himself – was sweeping lands near and afar, instilling fears of conquest, and entrenching the conservative order. Francis Lieber was but a boy when Napoleon marched into Berlin, and the memory affected his entire life. In 1815, after Bonaparte broke his exile on Elba, Lieber signed up, as a young teenager, to fight him as a rifleman at Waterloo. He fought at Ligny and was then wounded in the neck in a battle near Namur, which brought him the experience of laying on the battlefield in a long expectation of death, praying and begging for the end or for help, even getting robbed by corpse looters – very much as described in Hugo's *Les Misérables* or Dunant's *Memory from Solferino*.[29] After Waterloo, Lieber returned home and joined the revolutionary causes opposing the monarchy at home, for which he was arrested and banned from imperial universities. He eventually managed to study briefly at Jena and to complete a degree in mathematics.

After volunteering briefly once more for the cause of revolution in Greece, he finally found himself in Rome as a family tutor of the Prussian Ambassador, Barthold Georg Niebuhr, a world-famous scholar of classical history and historiography. It was with Niebuhr's benevolence, mentorship and contacts that Lieber was gradually able to establish himself in the life of a man of letters abroad.[30] Finding no peaceful return to Germany, Lieber emigrated in 1827 to Boston, where with the help of Niebuhr's contacts he gradually became a translator and correspondent between American, French and German learned circles (including Alexis de Tocqueville's network). He became a professor of history in the University of South Carolina in 1835 and a professor of political science at Columbia University in 1857. In that capacity he would become one of the most renowned scholars of international law in his day, revered by the men who set up the *Institut de Droit International* in 1873, and one of the intellectual originators of the discipline of international law.

While Victor Hugo was living his public progressive life in Europe, Francis Lieber was still in the long formative phase of his academic career. He was sometimes struggling for acceptance in the American establishment, publishing writings on the American politics and constitutional questions. In private, he was enduring a less

28 Lieber to Sumner, 27 December 1861, in Thomas Perry (ed.), The Life and Letters of Francis Lieber (Boston: James R. Osgood and Co., 1882), 323–325, 325.

29 Gilman (ed.), Miscellaneous Writings, Vol I, at 162-167; Perry (ed.), Life and Letters, at 16–22.

30 Lieber's reminiscences of Niebuhr are in Gilman (ed.), Miscellaneous Writings, at 82–148.

satisfactory period in South Carolina, where he had to seriously grapple with one of his most important private sensibilities: the question of slavery. Lieber became himself a slave owner who for two decades in South Carolina held domestic slaves for allegedly mundane reasons or even because of the local expectations that excluded the use of free servants.[31] Studies into his writings, letters, and journals suggest that a certain public acquiescence into the legality of slavery was a condition for his ability to hold his chair; he had to repeatedly disown abolitionism in public, but was known in private to disprove and to loathe the "nasty, dirty, selfish institution" of slavery.[32] His pursuit of a pragmatic lawyer's middle ground, and maybe partly also his foreignness, led him to lean on the formal validity of the slavery laws and instead to seek to argue against them on economic grounds; he tried to portray slavery as counterproductive to the economy when compared to the benefits of liberalism, civil rights, and free trade.

Explanations aside, for the most part Lieber's instinct for professional self-preservation tended to surpass his conscience. For example, he momentarily broke his ties with his favorite pupil Charles Sumner when the latter had become a firebrand abolitionist in the Senate and had sent Lieber his materials in anticipation of public support.[33] But when the faculty in South Carolina finally made Lieber's life unbearable and pressured him to resign, it lost its leverage over his public opinion. After that, Lieber's voice changed. At Columbia University, he opposed the practice of slavery on the very grounds of it being a violation against the law of nations. He claimed that "the Law of Nations knows no distinction of color", he paid tribute to John Brown when it was the time, and when war later had broken out, he argued on jurisprudential grounds that all slaves coming into Union territory must *ipso facto* be free: "That mixture of the two ideas, *man* and *thing*, … is a forced one, – forced by municipal law or violence, – and ceases, I take it, by the inherent character of war, which, by its physical contest of men with men, reduces men again to their simple status of men. … The law of nature does not acknowledge the difference of skin, and war is carried on by the law of nature."[34]

When the American civil war broke out in 1861, Lieber was among the participants in the public debate concerning the legal status of the seceded states. His views favoured humanitarian perspectives. He had good reason: he had sons fighting on both sides, and one of them even fell while another got maimed. When in the beginning of the war the crew of the Confederate privateer *Jefferson Davis* were brought to trial in New York, *The New York Times* published below its account of

31 See Lieber's guilty list of motivations explaining the first purchase in Hartmut Keil, 'Francis Lieber's Attitudes on Race, Slavery, and Abolition', (2008) 28 Journal of American Ethnic History 13, at 13–14.

32 Perry (ed.), Life and Letters, at 108.

33 Frank Freidel, 'Francis Lieber, Charles Sumner, and Slavery', (1943) 9 Journal of Southern History 75.

34 Lieber to Sumner, 19 December 1861, in Perry (ed.), Life and Letters, at 322; Keil, 'Francis Lieber's Attitudes'.

the trial a report of a lecture given by Lieber on the Laws and Usages of War.[35] In his lecture, Lieber did not teach pacifism but a civilization of warfare. The world had just entered a new period in the history of ideas regarding wars, he claimed. The "anti-war period", which had begun at the battle of Waterloo and ended with the Crimean war, was now ending. The anti-war period had been "distinguished by the almost universal opinion that war was inadmissible under any circumstances, that it brought nothing but misery to man". But now, concluded Lieber, the time had come to recommence the study and development of the laws of war: "The history of this law is really one of the histories of human progress, and it is a blessed thing that even in a time when men are arrayed against one another to kill and destroy, that humanity cannot be perfectly rejected." For Lieber, the days of peace were over but a civilization of war might still be possible.

In 1862, Lieber received general Halleck's approval to prepare a concise compilation of the laws of war for the use of the Union armed forces. The result was in 1863 the *General Orders No 100: Instructions for the Government of Armies of the United States in the Field*, which would go on to have a life of its own in the history of international law as the Lieber Code. It remains often remembered as the first modern codification of international humanitarian law, although of course in a more precise sense it only represented the American *opinio juris* on the laws of war in its time.[36] Lieber himself was specifically careful not to overstate his achievement, but together with Henri Dunant's work and the Geneva and Hague Conventions, it became a canonical origin story of humanitarian law.[37]

IV. THE FRANCO-PRUSSIAN WAR OF 1870

The Gathering of the Clouds

In 1869, Europe was at the brink of war. Bismarck's Prussia was sealing its influence over the rest of Germany, and its brief conflict in 1866 with Austria and Italy had, especially by French accounts, shifted the European balance of power off its rails. When the relatives of the German Hohenzollerns had briefly been offered the crown of Spain, Napoleon III had protested gravely, and was now seeking guarantees and commitments from Prussia to stand down. But Wilhelm had little incentive to comply, and his armies had been modernized, trained and furnished to enable Bismarck and Moltke to operate with considerable ambition. (For this army, Johann

35 'Lecture by Dr. Francis Lieber on the Laws and Usages of War', The New York Times, 27 October 1861.

36 See, e.g., Patryk I. Labuda, 'Lieber Code' in Max Planck Encyclopedia of Public International Law (online edition, September 2014), paras 1, 7, 23-25.

37 Elihu Root, Francis Lieber; Emily Crawford and Alison Pert, International Humanitarian Law (Cambridge University Press, 2015), at 5–8.

Caspar Bluntschli had produced *Das Moderne Kriegsrecht der Civilizierten Staaten*, which was openly an adaptation of Francis Lieber's code and which would in the future be furnished with the original Lieber Code as an appendix.) At the same time, Napoleon III's own autocratic seat was shaking, and under the lid, Paris was once again boiling the fumes of revolution.

Under the gathering stormclouds, European intellectuals and pacifists sought to continue their meetings and exchanges. In 1869, the League for Peace (as these groups were then known) arranged another peace congress in the Swiss city of Lausanne. Victor Hugo was again invited and was offered an honorary presidency, which he gladly accepted. By now, Hugo's commitment to the idea of a European union had become firm and overt. In Lausanne, the year before the invasion of Germany by France, his dream stood as firm as ever. "Citizens of the United States of Europe", began his address, "please permit me to give you this name, for the federal European republic is founded in law in anticipation of its foundation in fact. You exist, and therefore it exists." This Congress of peace was to be more than a meeting of intellectuals, it was "a kind of preparatory committee for the future tables of law."[38] It was the duty of this elite in session to represent the masses. The immediate tasks to be taken care of included the abolition of borders between the European nations and the allowing of free circulation and commerce between all civilized peoples. For achieving perpetual peace, Hugo again called for immediate disarmament.

But there was now a darker lining to his message. The rulers were not likely to abandon their armies and their borders, Hugo warned. "That one last war were necessary, alas!, I sure am not one to deny it. … This deliverance calls for an ultimate strike of revolution, and perhaps, alas! a war that shall be the last. Then all will be achieved." It was a desperate tone for a pacifist, but the price seemed worth paying: "We want a great continental republic: we want the United States of Europe; and I shall end with this word: liberty is our goal, and peace is the result."

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Across the Atlantic, these developments were followed by intellectuals just as in Europe. By 1866, Francis Lieber was in close correspondence with Johann Caspar Bluntschli, who was to Lieber more than a professional correspondent. Their discussions often touched on the goings-on in Germany, and the prospects of a German unification under Prussia seem to have kindled some fond feelings in the elder man regarding the fatherland. However much Lieber admired the American democratic institutions and had published influential works of the principles of

38 'Adresse de Victor Hugo au Congrès de la Paix', Bruxelles, in Bulletin Officiel du Congrès de la Paix et de la Liberté (Lausanne, 1869).

progressive liberalism, in his elder days he remained open to the possibility of Germany choosing a different path. In 1866 he confided:

> *With regard to Germany, I hold to my opinion that the beginning of all good for the nation must come from its union under one head, and the demolition of the many principalities. Perhaps this can only be effected by a revolutionary king. One thing is essentially true and of the greatest importance. The national polity is the normal type of modern government. And one of the greatest processes in all history is the process of nationalization…*[39]

As the relations between France and Prussia deteriorated in Europe, Lieber unflinchingly saw both history and justice on Germany's side. "Never, never was a great nation so cheated of her historical inheritance as the German", he complained: "France now demands that the constitution of the German Confederation shall not be changed without the consent of the other great Powers." Ominously, he added: "Prussia has never understood her great destiny since 1815."[40] The closer the war drifted, the more irritated Lieber became with the French demands. Ideals of universal progress became in his view linked to the necessary rejection of French ideological supremacy. Peace in Europe would follow from true sovereign equality and not from Latin leadership:

> *I do not see how war is to be avoided … simply for the reason that France will not give up her absurd and pretended leadership of civilization, and because the great question of this era is the coexistence of many of the leading races or nations, united by the same international laws, religion, and civilization, and yet divided as nations. Among the ancients one state always ruled; but we, the Cis-Caucasian race, are becoming more and more united in one great confederation, binding together all nations…*[41]

In 1870, Europe got its war. After Bismarcks's debacle with the Ems telegram, the French senate and *corps legislatif* voted in July 1870 for a declaration of war, "prepared to maintain the war which is offered to us, leaving to each that portion of the responsibility which devolves upon him".[42]

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39 Lieber to Bluntschli, 16 April 1866, in Perry (ed.), Life and Letters, at 362 (emphasis in original – VK). Compare also Friedrich von Savigny, 'Of the Vocation of our Age for Legislation and Jurisprudence', in John B. Halsted (ed.), Romanticism (New York: Palgrave Macmillan, 1969) 200.

40 Lieber to Bluntschli, 2 June 1866, in Perry (ed.), Life and Letters, at 364–365.

41 Lieber to Mittermaier, 26 August 1867, in Perry (ed.), Life and Letters, at 373.

42 Declaration of War by France against Prussia (Paris, July 15), The Times, 16 July 1870, p. 5.

The War of 1870

The war turned into a disaster for the French as soon as Wilhelm unleashed the relentless von Moltke upon them. In the first days of September, Napoleon III's army was decimated in the battle of Sedan, which cleared the way for a Prussian advance to Paris. As soon as the news reached the capital, a popular uprising overthrew the Second Empire and declared the Third Republic. This was the call for Victor Hugo to return to France. He arrived at the Gare du Nord on the evening of the day following the declaration of the Third Republic, and was received by a cheering crowd. Speaking from the balcony of a café right after his return, in a fashion which Lenin would imitate in 1917, he now explained his return as his duty, the duty to defend Paris:

> *To save Paris is more than to save France. It is to save the world. Paris is the heart of humanity itself. Paris is the sacred city. Who attacks Paris attacks all mankind. Paris is the capital of civilization, which is neither a kingdom nor an empire, but the entire mankind in its past and in its future. And do you know why Paris is the city of civilization? It is because Paris is the city of the Revolution.*[43]

Victor Hugo had returned to Paris to help save Europe from a war which Napoleon III had begun and which the Prussians had already decisively won. In his mind, France and the French *peuple* were innocent. But France was in chaos, with no lawful government at hand and an armed force still formally loyal to a captured emperor. The interim government called on the people of Paris to prepare for defending the city in the traditional Parisian fashion: arms were distributed to the public and men were recruited into ad hoc national guards and groups of guerrilla *francs-tireurs*.[44] This suited Moltke, who moved on to put Paris under siege. Seeing the enemy gathering around the capital – towards Villeneuve, towards Versailles – Hugo joined the struggle with his pen and published three open letters: one for the Germans, another for the French, and the third for the Parisians.

In the first letter, Hugo wrote almost as if there were not war at all. "Germans", called he, "this is a friend speaking". He welcomed the Germans to Paris, the "city of cities", which belonged to all mankind as much as it did to the French. But he asked them to arrive as friends between the two nations that had always made Europe. "What is it that we have done to you" asked Hugo, innocently. "It was the empire that wanted this war, the empire that made it. The empire is dead, and well

43 'Rentrée a Paris' in Victor Hugo, Actes et Paroles Tome V – Depuis l'Exil 1870–1876 (Paris: C. Lévy, 1876), 5-7.

44 'The Revolution in France', The Times, 8 September 1870, p. 9.

so. We have nothing in common with that cadaver." A moral undertone rang in the message: "You come to take Paris by force! But we have always offered it with love. … We are the French Republic; our motto is '*Liberté, Égalité, Fraternité*'; we write on our flag: 'The United States of Europe'."[45]

The words were as utopian as they tried to be magnanimous, and their reception varied from the insulted disbelief and anger of many of the Germans to the amused reports of foreign journalists and ambassadors, who saw in them the childish excitement of a celebrity author absent for nineteen years.[46] In hindsight, the words strike an oddly familiar tone: it appears as though Victor Hugo imagined himself as a sort of real life incarnation of his most beloved character, Bishop Charles-François-Bienvenu Myriel. In the critical juncture of *Les Misérables*, bishop Myriel wins the reader's heart by his magnanimity as he donates his silvers to Jean Valjean, who has just been caught by the gendarmes for stealing them.[47] Myriel's act of clemency is the most famous example of a very essential moral element in Hugo's writings which followed his works since at least his *Notre-Dame de Paris:* a notion of emancipation through the abrupt fusion between antithetical oppositions caused by acts of individual magnanimity and voluntary surrender: "The rebel magnanimously surrendering his inner self thereby dissolves the power of authority (tradition, law, religion) in a mystical union that suggests a vision of utopia."[48] But while Hugo's characters were creations of fiction, the man seemed now insistent on applying the same emotional device of surprising altruism to put an end to a war over Europe: as will be seen, this was not to be his only attempt.

To his fellow countrymen, Victor Hugo had little to offer but blood, toil, tears, and sweat. In a letter published the day Von Moltke marched into Versailles, he urged all of France to save Paris, "not for Paris, but for the world".[49] Like Winston Churchill one lifetime after him, Hugo demanded: "Let us make war day and night, a war on the mountains, a war on the plains, a war in the woods." Simple now was the advice of the poet of peace, calling his people to dedicate themselves to a "universal" cause: "Defend France heroically, desperately, tenderly. Be terrifying, O patriots!" In his third letter to the people of Paris, Hugo could only call his people to the barricades: "What is the task for today? To fight. What is the task for tomorrow? To win. What is the task for all days? To die. … There are no more personalities, there are no more ambitions, there is nothing left to remember except the word,

45 Victor Hugo, 'Aux Allemands', (Le Rappel, 7 Septembre 1870), in Hugo, Actes et Paroles – Depuis l'Exil, 8-14.

46 Barbou, Hugo and his Time, at 332–333; Robb, Victor Hugo, 449–450.

47 Victor Hugo, Les Misérables (1862) Book II, Ch. XII.

48 Brown, 'Et tu, Hugo', paraphrasing Victor Brombert, Victor Hugo and the Visionary Novel (Cambridge MA: Harvard University Press 1984).

49 Victor Hugo, 'Aux Francais', (Le Rappel, 18 Septembre 1870), in Hugo, Actes et Paroles – Depuis l'Exil, 15-20.

salut public … There is only one citizen which is you, I, all of us. I no longer know my name – *je m'appelle Patrie*."[50]

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Victor Hugo was not the only one to have found his patriotic spirit because of the Franco-Prussian war. News of the war travelled across the planet in a matter of days. Lieber wrote to Bluntschli: "The telegraph makes one nervous. It is exciting to read on the blackboard of the newspaper publishers: 'This morning a battle began near Metz which will probably be serious and important.' I should not wonder if we get the news from the battle-field quite as soon as you do."[51]

Having become an American citizen and intellectual, Lieber enjoyed in New York a reputation of rationality and impartiality, a certain professional coolness in the face of institutional biases. That very year 1870, Secretary of State Hamilton Fish appointed him as the umpire in the US-Mexican arbitral proceedings on the ground of his expertise at law and his professionalism, thus granting him an honour which would usually belong to foreign dignitaries or heads of state.[52] But when the news of victory arrived, the old man was quite jubilant, as if here he was experiencing one last rise of the silent ambitions of his youth, concerning his land of birth instead of that of his domestication. "When you thank God that you have lived to see this rising or resuscitation of Germany, you can imagine what must be my feelings," he wrote to Bluntschli, "We will sing a still louder *Te Deum* when the German nation places the imperial crown on William's head. It is the first step which should be taken after all the bloodshed is at an end. William I., Emperor of the Germans!"[53]

The Prussian cause also crept into Lieber's close affairs with Fish and the important arbitrations that the US was participating in. When he learned that a shipment of arms had been collected by the Americans to be sent to France onboard *La Ville de Paris*, he wrote to the Secretary of State a letter of warning in which he pointed out the high stakes in the ongoing Geneva arbitrations and the *Alabama* affair: "If it be true that the government of the United States, directly or indirectly, sold or handed over arms to the French, it will be a very serious impediment in all our 'Alabama' transactions, not to speak of the fact that it will be deplored by all who love a lofty, and, for this very reason, a truly practical law of nations."[54] On the surface it was an appeal to the American principle of neutrality, but a Frenchman

50 Victor Hugo, 'Aux Parisiens' (Le Rappel, 3 Octobre 1870), in Hugo, Actes et Paroles – Depuis l'Exil, 21-26.

51 Lieber to Bluntschli, 21 August 1870, in Perry (ed.), Life and Letters, at 398.

52 Tzvika Alan Nissel, A History of State Responsibility: The Struggle for International Standards (1870-1960) (Doctoral thesis, University of Helsinki, 2016), at 85–87.

53 Lieber to Bluntschli, 21 August 1870, in Perry (ed.), Life and Letters, at 398.

54 Lieber to Fish, 8 October 1870, in Perry (ed.), Life and Letters, at 399.

reading the letter might have seen in it an attempt to obstruct a voluntary shipment of arms to the enemy of Prussia. Meanwhile, in the US-Mexico claims tribunal, where Lieber acted (not always consistently[55]) as umpire, he opined among other things that the Mexicans were waging a "just war against France" or battling "an atrocious invader",[56] and that "In all equity Mexico must be supposed cheerfully to avail herself of an opportunity to pay off debts incurred for the purpose of repelling the odious and arrant invasion whose object it was to subvert its entire government."[57]

Lieber's exalted memory also harkened back to his childhood and his own "patriotic consecration", when "sixty four years ago, I was lying in the window looking at the French marching into Berlin, – so attracted by the sight that I could not move, and so grieved at the disgrace that I sobbed aloud."[58] As the siege of Paris drew on and the American public was grieving over the loss of French pride, Lieber defended Prussia as the fair and lawful victor and conqueror under the law of nations: "The simple question is, do the Germans want Alsace and Lorraine? If they do, they have the right to keep them. I do not see why not."[59] When half a year later the French provisional government had lost control of Paris to the Communards, Lieber viewed the events through a lens of justice being done. Only when the Commune razed the statue of Napoleon, he paused with surprise: "I do not believe in a 'spirit of the people,' per se, existing as a thing in itself, apart from the people, and I consider Hegel's 'spirit of history,' as an independent, separate entity, to be nonsense; yet, the manner in which the tables have been turned is not without significance."[60] But when peace was finally made, the Frenchmen had earned little respect or forgiveness from Lieber. He wrote to Bluntschli:

> *Jacquemyns has written another letter to the "Evening Post," in which he describes the French as he found them in Paris. They would not acknowledge their defeat. So, when I went to Greece by way of France, a few years after Waterloo, the French always insisted that Napoleon was not beaten by the enemy at Waterloo, but that treason caused the defeat. This they maintained especially when they heard*

55 Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad or the Law of International Claims (New York: Banks Law Publishing Co, 1919), at 297–298.

56 Case of Manasse & Co., Opinion of Dr. Lieber (19 July 1871) in John Bassett Moore (ed.), History and Digest of the International Arbitrations to which the United States Has Been a Party (Washington: Government Printing Office 1898), Vol IV, 3462 at 3463-4.

57 Case of Iturria, Award of Dr. Lieber (19 July 1871) in in John Bassett Moore, History and Digest of the International Arbitrations to which the United States Has Been a Party (Washington: Government Printing Office 1898), Vol IV, 3464 at 3464–5. For more on Lieber's positions, see Kathryn Greenman, Intervention, Arbitration and State Responsibility for Rebels (Doctoral thesis, University of Amsterdam, forthcoming).

58 Lieber to Thayer, 28 October 1870, in Perry (ed.), Life and Letters, at 401.

59 Lieber to Bluntschli, 5 November 1866, in Perry (ed.), Life and Letters, at 401.

60 Lieber to Bluntschli 23 May 1871, in Perry (ed.), Life and Letters, at 411–412.

that I was a Prussian, and had taken part in the battle. A Frenchman, though agreeable and polite in ordinary life, is nevertheless eminently ungentlemanly and cruel as soon as his boundless vanity has been injured … But we are all in fault ; not, indeed, you and I, – but the world in general is ever ready to forgive and extol the French, and even calls a grimace-maker like Victor Hugo a genius.[61]

The Fall of Paris

While Francis Lieber was following the telegrams from Europe with a sense of delight and patriotic rejuvenation, the besieged city of Paris went cold and hungry. Through the end of 1870, its people dined first on their stores, then their horses, then the city's rats, then the elephant from the menagerie of the Jardin des Plantes, and finally simply on 'the unknown'. The trees of the Champs-Elysées were burned in Parisian hearths. But Victor Hugo, now a sort of patron saint of the city, spent the time in relative comfort. While participating in the affairs of Paris through his writings, plays and fundraiser shows, he also enjoyed to the fullest his final triumph with his fame and celebrity: his unpublished siege journal records him throughout the winter engaging with great enthusiasm in sexual adventures with a considerable number of Parisian women.[62]

In January 1871, Paris yielded. While the peace negotiations continued in Bismarck's headquarters at Versailles, relief was allowed in the starving city. In early February, new elections were held and Victor Hugo secured for himself a landslide victory. Some weeks later, the Treaty of Versailles brought home the French defeat: France was to cede Alsace and Lorraine, to pay five billion francs in five years (precisely equivalent *per capita* to the Prussian indemnities to Napoleon in 1807), and the National Assembly was to move its seat from Paris to Bordeaux.[63] Victor Hugo's stay at Bordeaux turned out very short, however: whereas in Paris he had been a hero of the people and a venerated part of the establishment, at Bordeaux he was sitting across the table from conservative royalists and former men of Napoleon III. In these parts of France, he had less room to act as the magnanimous auteur and poet whose words could always carry a degree of artistic license. He resigned from the Assembly within the month in protest at the rejection of Garibaldi.[64]

61 Lieber to Bluntschli, 26 May 1871, in Perry (ed.), Life and Letters, at 412–413.

62 Robb, Victor Hugo, at 451–458.

63 The conclusive peace treaty would be the Treaty of Frankfurt, 10 May 1871, in which the Franco-German border was defined, Alsace and Lorraine ceded, and the payment of the indemnities adjusted.

64 'Victor Hugo : Contre l'invalidation de Garibaldi (8 mars 1871)', available at www.assemblee-nationale.fr. See also Hugo, Actes et Paroles – Depuis l'Exil, 76-84.

Before his resignation, however, he gave the Assembly a bellicose, revanchist speech against the terms of the Versailles Treaty. Here his familiar sense of drama took a more aggressive form, but at the same time parts of his speech strike in retrospect as a kind of European prophecy. Hugo began by reciting the heroic struggle of Paris and the significance of the city to all of Europe as "the capital of the continent". He then warned that new conflict would come should Alsace and Lorraine be ceded to Germany: "If this inexorable peace is concluded, Europe will never sleep again. An immense insomnia for the whole world shall begin. Thenceforth will there be two fearsome European nations; one because it is victorious, the other because it is vanquished." The destiny of Alsace and Lorraine between the two nations would become the kernel of a new war, warned Hugo; Germany would have its Empire and divine right (*le droit divin*), France its enlightenment and the right of humanity (*le droit humain*). And finally Germany could not truly keep the provinces. "Conquest is nothing but rapine," said Hugo, "right does not arise from fact. Alsace and Lorraine want do remain French; they shall remain French despite everything, because to France belongs the republic and the civilization".[65]

Then he really got carried away. "France shall not perish! No!" he thundered, "my country does not succumb!" Instead of accepting a defeat, he promised a "*revanche prodigieuse*". After signing the peace, France would have only one goal; rearmament and a new struggle, which would culminate in the retaking of Lorraine and of Alsace. And it would not stop there, but France would conquer "the entire left bank of the Rhine" – and then came Hugo's final twist:

> *And we shall hear France cry: It is my turn, Germany, look at me! Am I your enemy? No, I am your sister. I have taken everything back, and I return it all to you, on one condition: that from now on we make but one people, one family, but one single republic. … Let us become the same republic, let us become the United States of Europe, let us become the continental federation, let us become the European liberty, let us become universal peace! And let us now clasp hands, for we have each done one another a service; you have freed me of my emperor, and I free you of yours.*[66]

This, then, was Hugo's attempt to seize the imagination of his people: he laid out a vision of a terrifying victory over Germany, but this time – *this* time – France would treat Germany the way the Prussians should have treated the Parisians. The United States of Europe would arise from the ashes of total war through the victors'

65 Victor Hugo, 'Pour la Guerre dans le Présent et pour la paix dans l'avenir', in Hugo, Actes et Paroles – Depuis l'Exil, 51-59.

66 Ibid., 58-59.

mercy. Here the author was reusing his old Myriel trick which had already failed to turn into reality in the siege of Paris. If Prussia had then rejected his magnanimous words, Hugo dreamed of the future armies of France *forcing* it to appreciate them. As a speech in the parliament of a defeated country, the parole might have been as dangerous as it was fantastical. But it also went literally unheeded: among the listeners was one young Parisian representative by the name of Georges Clemenceau, the future convener of the Versailles conference in 1919, who turned out to be no forgiving Myriel when he had his chance to set the terms for a German surrender.

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When Victor Hugo was preparing to leave Bordeaux, his son Charles died. As it happened, the Commune of Paris broke out while he was in the city for the funeral. Hugo's presence was eagerly welcomed by the communards, but the writer himself hesitated to support the new revolution. Perhaps this was due to the memory of 1848 in his mind, or maybe he simply calculated that in the inevitable purges ahead he might well end up shot or worse. On the pretext of attending to his son's estate in Brussels, which was at least half a truth, he left France once more. Soon after his departure, blood and fire flowed in the barricades and streets of Paris. The Third Republic extinguished the Commune once and for all in brutal executions and bombardments, finding only smoldering ruins in the place of the Palace de Tuileries and the Hôtel de Ville.

When the retaliations began, communards fled near and afar, and the French government called for them to be detained and handed over. Victor Hugo had one more opportunity to seek the moral high ground. He called in his writings for clemency and patience. When in one last re-enactment of Bishop Myriel he declared his home in Brussels open to all communard refugees – thus challenging Belgium's compliance with French extradition requests – he was expelled from there as well.[67] At the ripe age of nearly seventy years, Victor Hugo found himself in one last exile, this time a rather pleasant one spent in Luxemburg with a young mistress.[68] When the executions had finally waned, he returned to France and Guernsey.

V. CONCLUSION

What came of the two great men after the *année terrible*? They both moved on. Francis Lieber only lived until 1872, but he seems to have spent his last days mostly in a good mood. "Seated in your library, with a case involving millions of

67 'Victor Hugo on the Communists', The Times, 30 May 1871, pg. 10.

68 Robb, Victor Hugo, at 468–471.

dollars depending on your decision, thermometer at 88° Fahrenheit, is no trifle!" he bragged to Bluntschli. But since good news had just come from the Geneva arbitration, he added: "Were I near you I should invite you to take a glass of wine with me, probably iced champagne, to the weal of international law."[69] He also spent time pontificating on the advantages of Milton's *Faust* over Goethe's, and at times whistling "O Strasburg, du wunderschone Stadt" from his youth. A book of old Alsatian children's tales and stories should be compiled again, he mused, like back in the good old days, when "every schoolboy had his poems by heart."[70]

After his death, Francis Lieber was remembered as one of the most renowned international lawyers of the nineteenth century. His most famous work, the Lieber Code, remains famous to the present day, and his particular efforts to humanize the treatment of the sick, wounded, and captured became one of the permanent spearheads of humanitarian law. He was also credited as a sort of godfather for the *Institut de Droit International*, as the constitution of that organ partly originated from his correspondence with Bluntschli and other jurists.[71] His brief but prominent role in the world of international arbitration cannot be ignored either, as the pacific settlement of disputes and the arbitration movement represent a central banner around which the liberal international jurists continue to rally until this very day.

Victor Hugo lived until 1885. Beginning again with the successful *L'Année terrible* in 1872, he picked up his pen with relative ease and went on to experience one more creative season in his twilight years. Although his political career in France was over after the war, he dwelt his last years in comfort, celebrity, and the company of young women whom he never ceased to pursue. He also completed the final tomes of his *Actes et paroles* and took his time to carefully curate his public personality into the quasi-divine form in which Auguste Rodin sculpted him after his death. Jean Cocteau may have had a point when he later quipped that "Victor Hugo was a madman who thought he was Victor Hugo".[72] In the view of the present examination, the same observation might be drawn from much of his political activities since his return from exile. As Robb points out, despite all his distress and patriotic duty in 1870-1, Hugo seems to have again surfaced like a cork on the waves of his time; the disastrous capitulation of France had in a way been just another career success for the celebrity author. The language he used for the events – 'epic', 'farce', 'tragedy', 'comedy', might as well suggest that "the whole *année terrible* had been a writer's dream."[73] Retrospective cynicisms aside, the great-man Victor Hugo was finally

69 Lieber to Bluntschli, 28 June 1872, in Perry (ed.), Life and Letters, at 426.

70 Lieber to Bluntschli, 30 May 1872, in Perry (ed.), Life and Letters, at 425–426.

71 Root, Francis Lieber, at 462–465; Koskenniemi, Gentle Civilizer, at 39–41.

72 E.g. Brown, 'Et tu'.

73 Robb, Victor Hugo, at 470. In Hugo's defense it must be noted that in his private life he also followed his principle of magnanimity in successful ways, such as when during his exile he repeatedly invited the poor to dine at the Hauteville House and maintained a spare room exclusively for the use of struggling writers in need of shelter and hope.

buried in the grandest of great-man fashions: he was laid to rest in the Panthéon of Paris ("*Aux grands hommes, la patrie reconnaissante*") before a crowd of two million people – twice the actual population of Paris – and with newspapers pouring glory over his memory the world over.[74]

A sort of epilogue for Hugo's political thoughts on peace and humanity may be found from the addresses which he wrote in response to invitations to the peace congresses in Lugano (1872) and Nancy (1875). In both texts he referred back to the view which he had adopted during the war; that Europe now faced a choice between German imperialism and French republicanism, and that through great calamities its destiny was to be united. Only one of the two models would eventually prevail. On his own behalf, Hugo put his faith in the ultimate triumph of republicanism. "We shall have these great United States of Europe that crown the old world as the United States of America crown the new", he wrote; the path to that end was inevitable but it ran through either war or revolution, depending on actions of Germany and the other remaining monarchies.[75] France had been both liberated from its Empire and dismembered by the loss of Alsace and Lorraine and the occupation of Paris. This was not a mere French tragedy but a disaster for all mankind, as there could be no return to normal growth without restitution.[76] Yet one day, Hugo politely predicted to his audience of pacifists, peace would prevail:

> *... when borders vanish between nation and nation, and arise instead between good and evil; when each man makes of his own sincerity a realm in his heart; then, like a day dawns, dawns peace; the day by the rise of the star, peace by the ascension of the law.*
>
> *Such is the future. I salute it.*[77]

By the end of the Franco-Prussian war, the traditional peace movement was in shambles, and Hugo's absence in person from Lugano and Nancy may have not have been entirely due to adverse circumstances. The pieces of that movement were soon picked by Lieber's disciples when Gustave Rolin-Jaequemyns, John Westlake, Tobias Asser, Johann Caspar Bluntschli, and their colleagues mobilized to bring into fruition their project for a permanent body of international law. In 1873, when both the *Institut de droit international* and the International Law Association were born, Rolin-Jaequemyns declared that "the time has come to move on to something more

74 e.g. Le Figaro, Le Petit Marseillais, The Times, The New York Times, The Manchester Guardian and Åbo Tidning on 23 May 1885; The Washington Post and Le Rappel 24 May 1885.

75 'L'avenir de l'Europe', in Hugo, Actes et Paroles – Depuis l'Exil, 216-219.

76 'Au congrès de la paix', in ibid., at 272-275.

77 Ibid, 274-275.

tangible than vaguely worded wishes and diatribes against warfare".[78] The *Institut* grew rapidly beyond its roots, and before long also the French jurists returned to the common table. All were aboard again in the Berlin Conference of 1884, when the great men of Europe united once more in the common cause of the partition and exploitation of Africa.

78 Gustave Rolin-Jaequemyns, 'De la nécessité d'organiser une institution scientifique permanente pour favoriser l'étude et les progrès du droit international', (1873) 5 Revue de Droit International et de Législation Comparée 463, 466.

CHAPTER 3
CHINA, INTERNATIONAL RESPONSIBILITY AND LAW

Guilherme Vasconcelos Vilaça

I. INTRODUCTION

Global governance is quite in a dire state. After much energy spent and endless academic production, recent world events show national entrenchment and the rise of strong leaders putting their nations and values first. To some extent, protectionist, populist and nationalist discourses alike (from Trump and Brexit to Orbán, Erdogan and more recently the 2018 Italian elections) are a healthy reminder that the idea of the emergence of a world society with a cosmopolitan mentality, transnational norms and spontaneous functional systems, was more the product of enthusiastic conceptual, rather than well-established empirical, changes.[1]

Be that as it may, these developments put pressure on the international order and existing institutions as we know them. They also upset the idea we were just settling upon, that global governance was something in excess of the world of international relations, i.e. a focus on norms and rules rather than actors[2] – a liquid, fluid and networked world replacing the old one of discrete units and typified patterned interactions, agents and structures.[3] These shifts seem to be telling us that we are back to states but states are retreating in their intention to manage the world together while global problems remain to be dealt with. From refugees to climate change, from terrorism to poverty. Against this background, one wonders, who will take care of our common world?[4]

That China is the principal candidate for the job should not surprise us as today all roads lead no longer to Rome but to Beijing. China has recently become the staunchest supporter of globalization and the classical liberal idea that trade brings peace and mutual prosperity. Quite surprisingly, given that until recently

1 Guilherme Vasconcelos Vilaça, 'Transnational Law, Functional Differentiation and Evolution', (2015) 2 *E-Pública* 40.

2 Klaus Dingwerth and Philipp Pattberg, 'Global Governance as a Perspective on World Politics', (2006) 12 *Global Governance* 185.

3 For the full statement of the metaphor, see Zygmunt Bauman, *Liquid Modernity* (Cambridge: Polity, 2000).

4 In the Arendtian sense of responsibility recovered by Jan Klabbers elsewhere in this volume, acknowledging the need both to manage common interests at stake and to adapt one's position to protect them.

(economic) globalization was rejected by Chinese leaders and commentators alike[5], President Xi went so far as to claim, in the opening speech of the 2017 World Economic Forum in Davos, that globalization "is a natural outcome of scientific and technological progress, not something created by any individuals or any countries."[6] And China is clearly drawing a connection between the need for further globalization and economic interdependence if the world is to grow more stable.[7] It emerges unequivocally from the different policy papers and official documents that China indeed is taking responsibility and acting as a responsible power to govern the globe. The hallmarks of such views can be found in an ever-expanding foreign policy that includes, to focus simply on the most recent examples, grand opening-up economic and infrastructure visions of potential universal membership for common development (i.e. the One Belt, One Road/Belt & Road Initiative with announced Chinese investment in the range of 1 trillion USD) and regional institutional designs (i.e. Asian Infrastructure Investment Bank and New Development Bank). What is going on then? Does this turn epitomize the mere arrival of Adam Smith in Beijing[8] or does China's affirmation as taking responsibility for the world come with a different view of international responsibility and its main components?

Throughout this article, I submit that it is worth looking at China precisely because it articulates a conception of global governance premised on the idea of strong sovereign states while at the same time proposing different conceptions of *relationality* and the *role of law* than are characteristic of the Western state system. As we shall see, first, China combines an endorsement of state relations based, however, on a *liquid worldview* in which politics and contingent deals play a more important role than the formalized legal vocabulary (which actually confirms the choice of the term 'responsibility').[9] Second, this only holds for some areas, as there is a great divide between China's behaviour and strategies on private and public law issues both domestically and internationally – a divide that China is trying to export to the international order. And, third, the concept of politics and contingent deals

5 Yu Keping, 'From the Discourse of 'Sino-West' to 'Globalization': Chinese Perspectives on Globalization', (2004) 4 *Institute on Globalization and the Human Condition* 1.

6 Xi Jinping, 'Jointly Shoulder Responsibility of Our Times, Promote Global Growth – Keynote Speech at the opening Session of the World Economic Forum Annual Meeting 2017', available at http://www.china.org.cn/node_7247529/content_40569136.htm.

7 *Ibid.*: "We must remain committed to developing global free trade and investment, promote trade and investment liberalization and facilitation through opening-up and say no to protectionism."

8 This refers to an important book by Arrighi in which he argues that, if properly read, Adam Smith's conceptual work on the varieties of market-based development can illuminate the nature of China's model: see Giovanni Arrighi, *Adam Smith in Beijing: Lineages of the Twenty-First Century* (London: Verso, 2008).

9 Koskenniemi develops the value of formalism in international law in Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization', (2007) 8 *Theoretical Inquiries in Law* 9. For an elaboration of Koskenniemi's 'culture of formalism' across his work using it as a springboard for a discourse of virtues in international law, see Jan Klabbers, 'Towards a Culture of Formalism? Martti Koskenniemi and the Virtues', (2013) 27 *Temple International and Comparative Law Journal* 417.

premised upon *relations* that are configured according to the specific problem at stake, is a peculiar one that is best understood according to the metaphor of contract.

The article proceeds as follows. In section 2, I examine the uses of the concept of 'responsible power' and how China has been judged on such account. This presupposes a consideration of the way in which China has defined itself vis-à-vis the international legal order as well as the content of its normative principles. Section 3 discusses and overcomes the thesis that Chinese traditional thought does not contain resources to ground a cosmopolitan global governance approach. I then (section 4) turn to examine the ways in which China is deploying a pragmatic approach to domestic and international law and relations according to the issue-area at stake which gives a more prominent role to contracts, politics and platforms for regional interstate dialogue than to law and a model of rule-based governance. Section 5 continues this discourse by showing how China's assumption on human rights and the rule of law openly postulate the priority of the political over the legal. Section 6 concludes.

II. RESPONSIBILITY AND 'RESPONSIBLE POWERS'

Talk of great powers' responsibility or 'responsible powers' is common in the field of international relations. Echoing the existentialist maxim that best transpires in the Amazing Spiderman comic series, 'With great power comes great responsibility'[10], so academic commentary maintains that great powers ought to fulfil a special role in contributing to and maintaining a healthy international order.[11]

After a period of deep-seated criticism against the international legal and political order, largely based on what China perceived to be an unfair denial from taking up its legitimate seat at the United Nations Security Council as well as refusal to be accepted as member of many international organizations, China started to engage rapidly with the international order, signing treaties, endorsing multilateralism, and entering a host of international organizations after the adoption of its open-door policy.[12] Different commentators have noted how in the past thirty years China has started not only to uphold the existing international order but also to actively contribute to it in a myriad of ways. However, and predictably, whether China

10 This is a sentence uttered by the Spiderman narrator after Peter Parker realizes his uncle died due to his inaction and pride setting the tone for the whole comic series. Peter Parker struggles constantly due to an obsessive sense of responsibility for possessing exceptional powers.

11 The idea that great benefits and risks justify greater responsibility can be found in the law too as evinced by the widespread doctrine of strict liability. However, in international law, strict liability remains very marginal, limited to some nuclear activities and the sending of satellites into orbit. I owe this point to Jan Klabbers.

12 Marc Lanteigne, *Chinese Foreign Policy: An Introduction* (London: Routledge, 2009), ch. 3.

is perceived to be a responsible power remains in the eye (or geography) of the beholder.

Mainland Chinese commentators typically praise China as a responsible power basing themselves on its commitment to go beyond national interests, to consider seriously its international obligations and to contribute to international rule-setting.[13] Examples include China's deep pledge towards sovereign equality and independence as the core values of the UN Charter (including the 1984 seven principles on UN peacekeeping operations), its role on nuclear disarmament discussions and negotiations, the development of food standards[14], growing engagement with international environmental law (e.g., the Paris Agreement)[15], and the active participation in international trade and investment law among many other.

Conversely, Western and diaspora Chinese commentators are often more sceptical of such claims. For instance, Wang and French argue that China has 'underparticipated in global governance' when compared to the other BRIC countries mostly due to limited human resources, interest (focus was national development), lack of ideas for global governance as well as, on the demand side, a general ambivalent attitude towards a greater participation in world affairs by China.[16] Otherwise, commentators are more prone to emphasize that the substantive content implicit in the idea of responsible power has evolved and now also includes the pursuit of human rights and democracy (domestically and in international institutions) as well as concerns for human security within domestic borders (legitimating for instance humanitarian interventions and other forms of domestic interference).[17] It goes without saying that, according to such a benchmark, China not only fails to qualify now as a responsible power but is basically excluded

13 Enthusiastically Xue Hanqin, *Chinese Contemporary Perspectives on International Law: History, Culture and International Law* (The Hague: Hague Academy of International Law, 2012). Other authors speak of conditions to make China a responsible great power which however are typically framed as external constraints and perceptions against China that ought to be removed: see Xia Liping, 'China: A Responsible Great Power', (2001) 10 *Journal of Contemporary China* 17. For a sharp comment, stressing how China is no mere essentialist object portrayed by outsiders therefore demanding consideration of the impact of its own actions and ideas on world perceptions and the international order, see Bates Gill, 'Discussion of 'China: A Responsible Great Power'', (2001) 10 *Journal of Contemporary China* 27.

14 For instance, the 'Green Food' certification that has been successfully exported. See John Paull, 'Green Food in China', (2008) 91 *Elementals – Journal of Bio-Dynamics Tasmania* 48.

15 Though one should not forget that, contrary to the Kyoto Protocol, the Paris Agreement does not involve the heteronomous imposition of abatement standards. This may help to justify the support of the Paris Agreement when in 2013, China and Russia blocked a resolution on climate change as international security threat. See http://www.climatechangenews.com/2013/02/18/china-and-russia-block-un-security-council-climate-change-action.

16 Wang Hongying and Erik French, 'China's Participation in Global Governance from a Comparative Perspective', (2013) 15 *Asia Policy* 89, at 91.

17 Foot notes the shift, academic and practical, from a pluralist to a solidarist view of international society which emphasizes shared values and a vision of common good against the multilateral view of states cooperating to advance their common interests. See Rosemary Foot, 'Chinese Power and the Idea of a Responsible Power', in Yongjin Zhang and Greg Austin (eds.), *Power and Responsibility in Chinese Foreign Policy* (Canberra: ANU E Press, 2013) 21.

by conceptual fiat from qualifying in the future too. After all, China's ideological, political and legal model – 'Socialism with Chinese Characteristics' – is at odds with the Western blueprint.[18]

More importantly though, is that China believes that its style of international normative leadership and interaction is distinctive because more explicitly moral. As Wang Yi, Minister of Foreign Affairs, wrote:

> *We emphasize both morality and interests in our exchanges with other developing countries and we put morality before interests. This is an important reason why China's diplomacy has gained extensive support.*[19]

Wang Yi is obviously relying on China's longstanding position as a firm defender of developing countries' sovereignty, freedom from non-interference in domestic affairs and the right to adopt whichever model of development is deemed to be adequate. We shouldn't forget that China's approach to international law is constructed historically as being *anti-hegemonic* and *anti-colonialist*, finding its roots in the humiliation[20] the country experienced after the Opium Wars and the various Unequal Treaties.[21]

China's main guiding principles in international law and international relations date back to the 1955 Bandung Conference and the so-called Five Principles of

18 This Chinese ideological model has recently witnessed a new official iteration with the Communist Party of China officially recognizing and articulating Xi Jinping's 'Thought on Socialism with Chinese Characteristics for a New Era' which 'builds on and further enriches Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, the Theory of Three Represents, and the Scientific Outlook on Development'. For the main points, see 'CPC Rolls Out Thought on Socialism with Chinese Characteristics for a New Era as Guideline', *Xinhua*, 18 October 2017, available at http://www. Xinhua.net.com/English/2017-10/18/c_136688423.htm.

19 Wang Yi, 'Exploring the Path of Major-Country Diplomacy with Chinese Characteristics' available at http://www.fmprc.gov.cn/mfa_eng/wjb_663304/wjbz_663308/2461_663310/t1053908.shtml. There is a recent turn in Chinese International Relations scholarship arguing that Chinese ancient philosophy distinguishes morally legitimate leaders (*wang*) from hegemons (*ba*) and that China ought to pursue the former path, unlike the US. See Yan Xuetong, *Ancient Chinese Thought, Modern Chinese Power* (Princeton NJ: Princeton University Press, 2011, Ryden trans.).

20 It is worth noting that this particular historiography omits the fact that Mao Zedong's materialist dialectic views on contradiction, according to which "external causes become operative through internal causes" (also in war), partially puts the blame on China for its defeats against foreign powers. See Mao Zedong, 'On Contradiction', in *Selected Works of Mao Tse-tung* (Peking, Foreign Languages Press, 1937).

21 For detailed histories of China's attitudes towards international law, see Xue, *Chinese Contemporary Perspectives*, and Phil Chan, 'China's Approaches to International Law Since the Opium War', (2014) 27 *Leiden Journal of International Law* 859. For an analysis of how international law clashed against and eventually replaced the Confucian world view, traditionally hierarchical and eschewing sovereign equality, see Yang Zewei, 'Western International Law and China's Confucianism in the 19th Century: Collision and Integration', (2011) 13 *Journal of the History of International Law* 285. But see Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842-1933* (Cambridge University Press, 2016), tracing the uses of international law made by non-Western, including Chinese, officials and their transformative impact on the making of international law.

Peaceful Coexistence.[22] The latter affirm the supremacy of state sovereignty, non-interference in domestic affairs, equality, peace and mutual benefit. While these largely repeat the principles laid down in the UN Charter, Chinese official documents and commentators like to emphasize the practical and political uniqueness of such Chinese approach.[23]

From that moment onwards, China has articulated a position that was largely system-challenging, pointing out that the international legal and political order was based on a legacy of colonialism and Western practices that fostered inequality and injustice, and compromised the right of the newly formed countries to develop freely. These principles gained expression in several key texts adopted by the United Nations General Assembly and effectively granted China the reputation of being the champion of the developing countries. Paramount here are the Declaration on the Permanent Sovereignty over Natural Resources (1962), the Declaration on the Establishment of a New International Economic Order (1974) and the Declaration on the Right to Development (1986). To this we should probably add the Bangkok Declaration (1993) which together with statements by Lee Kuan Yew, Singapore's venerated leader, triggered much of the Asian Values debate[24] and its message of Asia's singular tradition of forms of government, social ordering and the priority of national development and social welfare over political freedoms.

To gauge the distinctiveness of the Chinese idea of responsibility of the described era, it is perhaps enough to evoke here how permanent sovereignty over natural resources, according to article 1 of the abovementioned resolution, "must be exercised in the interest of their national development and of the wellbeing of the people of the State concerned". For China as well as for the declaration, natural resources and control over them are fundamental for a country's independence. By contrast, current normative liberal philosophers like Thomas Pogge advance proposals such as a global resource dividend placing the use of natural resources at the service of cosmopolitan justice.[25]

22 Rigorously, the principles were affirmed in the 1954 Panchsheel Treaty signed between Jawaharlal Nehru and Zhou Enlai and for some authors result from Sukarno's earlier formulation (within the *Pancasila*) of a social order based on consensus, not competition.

23 Xue, *Chinese Contemporary Perspectives*. Admitting that they were never distinctive and their origin is not Asian but goes back to traditional Westphalian concepts, see Lo Chang-Fa, 'Values to be Added to an "Eastphalia Order" by the Emerging China', (2010) 17 *Indiana Journal of Global Legal Studies* 13, at 20-21.

24 Leigh Jenco, 'Revisiting Asian Values', (2013) 74 *Journal of the History of Ideas* 237. We could say the Asian Values debate was at the core a refusal to accept Fukuyama's end of history with the concomitant victory of liberalism and individualism.

25 Thomas Pogge, 'Eradicating Systemic Poverty: Brief for a Global Resources Dividend', (2001) 2 *Journal of Human Development* 59.

III. CHINESE RESOURCES ON THE IDEA OF RESPONSIBILITY: 'SELF-GOVERNANCE' OR 'GLOBAL JUSTICE'

For some commentators, such as Shih and Huang, it is the nature itself of traditional and modern Chinese thinking, both philosophical and socialist, to anchor a view of "self-responsibility" or "self-governance" as the contribution of China to global leadership.[26] In a recent article, they argue that Confucianism promotes the display of 'selfless benevolence' by leaders and socialism builds on this by adding 'persuasion' and 'national collectivist ethics' rather than intervention as a distinctive *modus operandi*.[27] China's global leadership would therefore consist in providing an image of 'self-governance' that could be imitated both regarding self-restraint in meddling in international affairs, avoiding all sorts of interventions without local agreement, and focus on developing nationally in a responsible way. As Shih and Huang put it:

> *For China, global governance is no more than dividing duty into national shares according to the capacity, the causes, and the national conditions through a multilateral process.*[28]

But there is something more to Shih and Huang's views worth mentioning since they go as far as to claim that Chinese philosophical and socialist traditions of thought do not contain the resources or the vision of a Chinese conception of global governance prescribing state duties beyond national borders.[29] Thus, if these authors are right, we will not witness a change in China's reactive stance towards global governance, global justice and international law.

Such a claim is, however, largely indefensible and may help to detract from the distinctive fact that in Chinese *thought cosmopolitanism does not imply equality or preclude hierarchy*. Indeed, it can be argued that Confucian texts speak of a cosmopolitan frame of mind.[30] For instance, the *Mencius* prescribes the principle of 'extending affection' from one's own parents and children to parents and children throughout the world:

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26 Shih Chih-Yu and Huang Chiung-Chiu, 'Preaching Self-Responsibility: The Chinese Style of Global Governance', (2013) 22 *Journal of Contemporary China* 351, at 351.

27 *Ibid*., at 355 ff.

28 *Ibid*., at 354.

29 *Ibid*., at 351. Perhaps one of the most famous instances is Chapter 80 of the *Daodejing* (Oxford University Press, 2008, Ryden trans.).

30 See Sor-hoon Tan, 'Nationalistic *Guo*, Cosmopolitan *Tianxia*? Possibility of World Order Based on Confucian Relational Ethics', in Sungmoon Kim and Hsin-wen Lee (eds.), *Reimagining Nation and Nationalism in Multicultural East Asia* (London: Routledge, 2018) 59, for a survey of the recent debate between Confucian cosmopolitanism and nationalist agendas.

> *To have filial affection for one's parents is humaneness, and to respect for one's elders is righteousness; that is simply because of extending these feelings to the whole world.*[31]

Confucian ethics based on the key idea of caring for others, being benevolent or humane (*ren*), would then justify and prescribe a form of *gradated love*, starting from the family with maximal intensity and subsequently potentially radiating with diminishing intensity towards the whole world or all under heaven (*tianxia*). While it is true that such a view does not dissolve the problem of knowing which duties have priority – familial or cosmopolitan ones[32] – this does not entail that it cannot be seen as a form of cosmopolitanism. Doing this would reduce cosmopolitan duties to a set of dilemmas thereby foreclosing the attention that Chinese philosophy places on self-cultivation and moral development (especially that of leaders).[33] An approach that can be found in the Great Learning (*Daxue*) and that illustrates how world order stems from individual cultivation is this:

> *Only once one's moral character has been cultivated can one's family be put into proper balance;*
>
> *Only once one's family has been put into proper balance can one's kingdom be brought to a state of orderly rule;*
>
> *And only once one's own kingdom is in a state of orderly rule is it possible for the entire world to enjoy enduring peace*[34]

Most radically, and leaving less room for doubt, the Mohist school of thought upheld what is probably the earliest consequentialist cosmopolitan ideal of universal and impartial love. In a series of interconnected arguments, the *Mozi* argues that if we

31 *Mencius* (London: Penguin, 2004, Lau trans.), 7A:15.

32 To be sure, some argue that Confucian cosmopolitanism can neither work theoretically nor practically because familial piety is incompatible with treating everyone else equally. See Qingping Liu, 'Is Mencius' Doctrine of 'Extending Affection' Tenable?', (2004) 14 *Asian Philosophy* 79.

33 Following Davies, this statement would be a direct reflection of Western philosophy's focus on philosophical truth opposed to the Chinese 'practice-centered' approach that is 'predisposed to understanding the true (*zhen*) in terms of the morally authentic.' See Gloria Davies, 'Knowing How to Be: The Dangers of Putting (Chinese) Thought in Action', in Leigh Jenco (ed.*), Chinese Thought as Global Theory: Diversifying Knowledge Production in the Social Sciences and Humanities* (Albany NY: SUNY Press, 2016) 29, at 31.

34 *Ta Hsueh and Chung Yung (The Highest Order of Cultivation and On the Practice of the Mean)*, (London: Penguin, 2003, Plaks trans.)

put ourselves in others' shoes[35] and love without distinctions (e.g. based on family or state ties) we will 'promote the world's benefits and eliminate the world's harms.'[36]

> *This being so, what are the methods of universal mutual love and exchange of mutual benefit? Master Mo said: 'People would view others' states as they view their own states; they would view others' households as they view their own households; they would view other people as they view themselves. As a result, the feudal lords would love one another and there would be no savage battles. Heads of households would love one another and would not usurp one another. Individual people would love one another and would not injure one another. Rules and ministers would love one another and there would be kindness and loyalty. Fathers and sons would love one another and there would be compassion and filial conduct. Older and younger brothers would love one another and there would be accord and harmony … Speaking generally, because there was mutual love, there would be nothing in the world to cause calamity, usurpation, resentment and hatred to arise.*[37]

According to the *Mozi*, however, such a normative ethics requires 'unifying principles', that is, overcoming disagreement stemming from human nature. How can this be achieved? The short answer is through the injection of a *hierarchical* element into the consequentialist cosmopolitan argument.

While at first it seems that everyone ought to perform the cosmopolitan consequentialist calculation, chapters 11 – 13 (on 'exalting unity') elaborate the view that ultimately each class of agents ought to follow the standards as applied by their superiors. This chain of 'identifying upward'[38] ultimately comes to an end with the Son of Heaven or the sovereign whose judgments on what harms and benefits the community and thus the world ought to be followed for the sake of attaining greater social welfare.

The *Mozi* then prescribes a few conditions to the sovereign's behaviour in order to ensure that the latter's standards are followed both by the bureaucratic apparatus and the people at large.[39] In any case, the fact remains that there is a

35 Adam Smith would later perform the same manoeuvre in his *Theory of Moral Sentiments* (London: Penguin, 2009 [1790]) through the figure of the 'impartial spectator'.

36 Mozi, *The Book of Master Mo* (London: Penguin, 2013, Johnston trans.) 16.1. For a comprehensive discussion of Mozi's philosophy and ethics, see Chris Fraser, *The Philosophy of Mozi: The First Consequentialists* (New York: Columbia University Press, 2016).

37 Mozi, *Master Mo*, at 15.3.

38 For details, see Fraser, *The Philosophy of Mozi*, 87ff.

39 Mozi, *Master Mo*, at 13.11.

clear distinction between the substantive cosmopolitan vision and the authority and political arrangement deemed desirable to determine, apply and bring about the moral ideal that neither needs to be cosmopolitan nor premised on equality.

All in all, there are no a priori reasons to prevent the emergence of a new style of Chinese global leadership. If that is the case, one would do better to analyse contemporary practices and try to excavate and contrast these with the prevailing values of the international order. Before moving forward onto such an analysis, however, a caveat must be adduced. We should not judge the goals of China's global governance model and conception of responsibility according to our own Western standards or the outcome of our evaluation will be hardly surprising. As Timo Kivimäki has shown with respect to soft power, while most Anglo-American scholarship deems China's use of soft power a failure – little spread of China's values and culture – the truth may lie elsewhere. Indeed, he argues that because China is an anti-hegemonic, relational, power it aims 'not to sell the Chinese way but *to sell cooperation with China*'.[40] This should be enough to keep us on guard against easy conclusions according to which even if China's idea of responsibility would not be cosmopolitan based on Western values of democracy and human rights there would be no important aspects worth examining affecting the structure of the international legal order and that otherwise would evade our radars.

IV. TWO ATTITUDES: PRIVATE AND PUBLIC LAW QUESTIONS

In similar fashion to what happens at the domestic level, China's international outlook can best be understood by keeping in mind a divide in the attitude cast towards private and public law values and contents. Domestically, and in contrast to the Western experience of post-WWII constitutionalism in which both private and public law came to be under the purview of constitutional primacy based on judicial review and actionable human rights,[41] China has adopted to a large extent liberal Western private laws[42] while simultaneously maintaining authoritative ideologies and public laws establishing party leadership, limiting political freedoms and national-level democracy, judicial independence, human rights lawyering, opportunities for challenging the constitutionality of laws as well as maintaining still rather violent practices within criminal law and police work.[43]

40 Timo Kivimäki, 'Soft Power and Global Governance with Chinese Characteristics', (2014) 7 *Chinese Journal of International Politics* 421, at 430 (emphasis added – GVV).

41 Guilherme Vasconcelos Vilaça, *Law as Ouroboros* (doctoral thesis, European University Institute, 2012).

42 Many changes were required by China's accession to the World Trade Organization in 2001. In any case, due to China's 'state capitalism' and 'party-state' ideological and government setup, the state always lurks beneath private laws and companies.

43 For a comprehensive trenchant critique by an insider, see Zhang Qianfan, *The Constitution of China: A Contextual Analysis* (Oxford: Hart, 2012).

Internationally, I submit, we see the same pattern shaping a twofold attitude. On the one hand, and in matters pertaining mostly to trade, commerce and foreign investment, China has largely co-opted the existing Western discourse. On the other hand, in matters of public law concerning sovereignty, authority, political and economic ideologies and modes and values of social ordering, China projects a clear alternative to the existing Western legal order.

In the realm of trade and international investment, China presents itself as a peace-loving country that is respectful of civilization diversity, seeks global harmony and wants to promote further economic and monetary liberalization and exchanges to secure win-win cooperation and international stability.[44] In these realms, China's discourse appears as one of 'sweet discipline' as if what was supposed to be the end of the old 'philosophy of struggle' and enmity mentality' that Liu Xiaobo (2009) so powerfully described in his last statement *I Have No Enemies* had impregnated Chinese Foreign Policy.[45]

Indeed, from the 'Harmonious World'[46] vision and the 'Path of Major-Country Diplomacy of with Chinese Characteristics'[47] to the more recent initiatives of the 'Belt and Road Initiative' also known as 'One Belt, One Road' (OBOR)[48], the creation of new regional (Asian and BRICS) international banking institutions[49] and the worldview of a 'World Community of Shared Future'[50]; China has repeatedly elaborated the ideals mentioned in the previous paragraph.[51]

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44 For a detailed analysis of the discourse, see Guilherme Vasconcelos Vilaça, 'Strengthening the Cultural and Normative Foundations of the Belt and Road Initiative: The Colombo Plan, Yan Xuetong and Chinese Ancient Thought', in Shan Wenhua, Kimmo Nuotio and Zhang Kangle (eds.), *Normative Readings of the Belt and Road Initiative: Road to New Paradigms* (Dordrecht: Springer, 2018) 7.

45 Liu Xiaobo, *I Have No Enemies: My Final Statement*, available at https://www.nobelprize.org/nobel_prizes/peace/laureates/2010/xiaobo-lecture.html.

46 Hu Jintao, *Building Towards a Harmonious World of Lasting Peace and Common Prosperity*, available at http://www.un.org/webcast/summit2005/statements15/china050915eng.pdf.

47 Yi Wang, *Exploring the Path of Major-Country Diplomacy with Chinese Characteristics*, available at http://www.fmprc.gov.cn/mfa_eng/wjb_663304/wjbz_663308/2461_663310/t1053908.shtml.

48 See Vilaça, 'Strengthening the Cultural and Normative Foundations', for a comprehensive analysis.

49 For details and background, see Guilherme Vasconcelos Vilaça, 'China and Global Governance: 'One Belt One Road', the New Development Bank and the Concept of Market State', (2017) 22 *Kultura Historia Globalizacja – Culture History Globalization* 241.

50 Wang Yi, *Work Together to Create a Community of Shared Future for Mankind*, available at http://www.fmprc.gov.cn/mfa_eng/wjb_663304/wjbz_663308/2461_663310/t1369269.shtml. This sometimes becomes an *Asian* rather than World community. See, e.g., Liu Zhemnin, *Laying the Foundations of Peace and Stability for an Asian Community of Shared Destiny*, available at http://www.ciis.org.cn/english/2015-02/15/content_7696762.htm. For a reading of the different Chinese foreign policy and domestic agendas as building up 'China's Asia Dream', see William A. Callahan, 'China's "Asia Dream": The Belt Road Initiative and the New Regional Order', (2016) 1 *Asian Journal of Comparative Politics* 226.

51 But it is enough to approach the issue of sovereignty and territory and the discourse changes quickly. See Foreign Minister Wang Yi's reaction to the award of the 'So-Called Arbitral Tribunal in the South China Sea Arbitration': "… the South China Sea arbitration is completely a political farce staged under legal pretext. Such a nature must be exposed for everyone to see." Available at http://www.chinaconsulatesf.org/eng/zgxw/t1380429.htm.

The OBOR and the creation of the regional development banks, i.e. the Asian Infrastructure Investment Bank and the New Development Bank best exemplify China's new global way of conceiving responsibility for the world. The former consists of a USD 1 trillion initiative to re-activate the old land and maritime silk road(s) by funding the construction of transport, energy and communications infrastructure to improve the circulation of goods, currencies and people. Expected economic effects of the initiative are in the range of USD 21 trillion. As I have concluded elsewhere, the values are clearly those of comparative advantage, and that trade and currency liberalization make everyone better-off.[52] Yet China has reasserted the different ways in which its project contributes to a more just and fair international order. It refuses to attach 'conditionality clauses' prescribing domestic economic and political reforms of a given ideology in exchange for access to the initiative.

The latter two banks, and especially the New Development Bank, amplify the rhetoric of China as the champion of the developing countries since the bank has been defined by its president, K.V. Kamath, as 'South-South cooperation initiative' focusing on meeting the region-specific investment needs. Once again China is spearheading an institution that eschews the infamous 'structural adjustments' and 'conditionality clauses' as well as the unequal voting rights that are characteristic of the World Bank (WB) and the International Monetary Fund (IMF).[53]

Beyond the obvious problems behind the classical liberal ideas that trade and greater liberalization are politically neutral, there are a few issues worth discussing concerning the idea of China taking responsibility for the world. First, it is worth saying that China is leading the creation of institutions that are already putting competitive pressure on existing international financial institutions.[54] Whether these new institutions will compete, complement or try to oust existing ones is, of course, too early to tell. But given that international organizations and the Western values and mentality they have embodied are now considered to have been crucial in reshaping developing and newly formed states in the Western image[55], the very fact that new international organizations professing different values are being created is worth our attention.

52 See Vilaça, 'China and Global Governance'.

53 Though for the time being there is no Asian Monetary Fund on the horizon. Recall that Japan had proposed its creation after the 1997/98 crisis but the proposal was quickly blocked by the United States arguably fearing competition against the IMF but most importantly laxer application of 'conditionality terms'. See Phillip Lipscy, 'Japan's Shifting Role in International Organizations', in Masuro Kohno and Frances Rosenbluth (eds.), *Japan and the World: Japan's Contemporary Geopolitical Challenges* (New Haven CT: Yale University Council on East Asian Studies, 2008) 133.

54 Maria Adele Carrai, 'It Is Not the End of History: The Financing Institutions of the Belt and Road Initiative and the Bretton Woods System', (2017) *Transnational Dispute Management*, highlighting apparently less demanding infamous terms by the IMF and the WB.

55 Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press, 2017).

Second, while it is true that China (and these new institutions) reject 'conditionality aid', nonetheless it seems to be the case that Chinese foreign investment can be described as 'tied aid'.[56] China rejects any interference in the domestic political and economic structure but requires that investment contracts are signed in exchange for the use of Chinese materials, companies and labour force while at the same time often negotiating access to energy sources, new markets and liberalized currencies.[57] As we shall see below this puts forward a specific form of normativity in international law and international relations and ultimately revives the sombre spectre of dependency theory with the weaker countries' development and innovation being stifled by the opening-up of their economy to much more competitive external economic agents.[58]

Third, and as I have written elsewhere, it is revealing

> *that the BRICS partners have so far vigorously rejected China's proposal for a BRICS Free Trade Area. A further telling example is given by the "Contingent Reserve Arrangement". This is a USD100 billion liquidity mechanism for the BRICS countries, established in 2014 in Fortaleza and having entered into force in 2016, that would arguably overcome the IMF conditionality requirements. Paradoxically, one reads in the founding treaty that, for each party to access more than 30% of its maximum access, there needs to be evidence of the existence of an on-track arrangement between the IMF and the Requesting Party that involves a commitment of the IMF to provide financing to the Requesting Party based on conditionality, and the compliance of the Requesting Party with the terms and conditions of the arrangement. (Art. 5/d/ii, emphasis added – GVV).*[59]

But the bracketing of public law questions goes beyond China's affirmed non-interference in domestic political and economic affairs. It is indeed quite clear from the fact that despite a host of projects and contracts announced, the Belt and Road Initiative has not translated in any multilateral platform addressing migration and visa policies, labour and product standards across the Belt and Road, or urgent humanitarian dramas such as the current refugees' crises.

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56 James Reilly, 'A Norm-Taker or a Norm-Maker? Chinese Aid in Southeast Asia', (2012) 21 *Journal of Contemporary China* 71, at 76-77.

57 Niall Reddy, 'BRICS after the Durban and Fortaleza Summits', in Patrick Bond and Ana Garcia (eds.), *BRICS: An Anti-capitalist Critique* (London: Pluto Press, 2015) 274, at 277.

58 Something the Chinese commentators have always recognized as Russia's greatest mistake (to open up fully to capitalism), that China has carefully avoided by creating and sticking to its own brand of 'Socialism with Chinese Characteristics'.

59 See Vilaça, 'China and Global Governance', at 254 (emphasis in original – GVV). The Treaty for the Establishment of a BRICS Contingent Reserve Arrangement is available at http://www.brics.utoronto.ca/docs/140715-treaty.html.

Furthermore, and all in all, the Belt and Road Initiative has not gone beyond a set of bilateral contracts. There are no international institutions created to this effect and as such China is potentially free to exploit asymmetries of bargaining power due to its spectacularly large internal market, its sizeable reserves and willingness to invest in countries that so far have been largely ignored (the same conditions that led Stiglitz to denounce the injustices created by international investment law and Western states' foreign direct investment practices).[60] By the same token, there is as of yet very little law[61] beyond contract and it should be kept in mind that the metaphor of contract as the source of social order promotes unaccounted for externalities given that no systemic perspective is taken partially due to the exclusion of potentially affected constituencies. In other words, the publics created for contract-making are typically not all those affected by the decision. In this respect and recalling the BRICS countries one ought simply to remember the accusations of environmental and social damage left behind by them, including China, in South America and Africa.[62]

These risks are only exacerbated by China's preference for arbitration as the preferred means of dispute settlement, oblivious to all the opposition that the clauses subjecting investor-state arbitration exclusively to arbitration panels triggered concerning the Transatlantic Trade Partnership.[63] This is because together with contract as the source of law, deals and their dispute settlement become essentially private affecting publicity and as mentioned above commutative justice and correction of externalities making the exercise of great power responsibility more a matter of faith than monitorable behaviour. At the same time, arbitration has been attacked for failing to transcend the private interests of the parties and thus missing out important public values.[64]

In general China's attitudes towards international dispute settlement follows the public/private law divide identified above. China tends to accept the jurisdiction of trade institutions such as decisions by the Appellate Body of the World

60 Joseph E. Stiglitz, 'Regulating Multinational Corporations: Towards Principles of Cross-border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities', (2007) 23 *American University International Law Review* 451.

61 Despite the number of publications on the legal aspects of the Belt and Road Initiative, which identify legal risks or designs for legal frameworks but are not based on existing Belt and Road positive law. See, for instance, Lutz-Christian Wolff, Chao Xi and Jenny Chan (eds.), *Legal Dimensions of China's Belt and Road Initiative* (Hong Kong: Wolters Kluwer, 2016).

62 See Bond and Garcia, *BRICS*, for examples.

63 Interestingly the International Chamber of Commerce just announced 'the establishment of a commission to address dispute resolution potential in relation to China's Belt and Road Initiative', available at https://iccwbo.org/media-wall/news-speeches/icc-court-launches-belt-road-initiative-commission/?lipi=urn%3Ali%3Apage%3Ad_flagship3_feed%3BRkN%2BLsW4TFaHz4tsYjdSCA%3D%3D.

64 For an early statement, see Owen Fiss, 'Against Settlement', (1984) 93 *Yale Law Journal* 1073. For a contemporary discussion connecting arbitration and the concept of law and what the latter stands for, see Guilherme Vasconcelos Vilaça, 'Why a Theory of International Arbitration and Transnational Legality?', (2016) 29 *Canadian Journal of Law and Jurisprudence* 495.

Trade Organization while in general refusing to acknowledge the jurisdiction of international courts in most non-commercial matters. But even arbitration may be eschewed in issues closely related to sovereignty as China's firm position on the South China Sea dispute evinces.[65]

It is here that the combination of China's economic power, its contract-based new foreign policy, the creation of Asian-specific or South-specific borrowing institutions together with the rhetoric of Asian regionalism and the vision of an 'Asian Community of Shared Destiny', puts in place a highly political, contextual and flexible way of ordering international relations. This trend further fits China's involvement with ASEAN or the Shanghai Cooperation Organization[66], which are seen more as political platforms that create *fora* for multilateral discussions, rather than institutions establishing and enforcing clear-cut legal rules. But China's blooming economic power and the network of relations it has established may well make the reaction of such institutions to its, for instance, stance on the South China Sea rather weak. Indeed, China has been framing the South China Sea dispute as something that concerns the Asian region and not the world, accusing Western powers of trying to destabilize Asian relations and hinder the progress in mutual understanding achieved with countries such as The Philippines. It is very revealing here how China carved a *regional international law*, in the words of Foreign Minister Wang Yi, '… China's position of non-acceptance and non-participation is aimed at *upholding international rule of law and rules of the region*.'[67]

All in all, while China keeps affirming its commitment to respect and contribute to the existing international legal order, it seems that behind its new great power foreign policy agenda there is a preference for the use of politics over law or of legal means that allow for bilateral deals rather than third-party application of the law. This legal and political pragmatism, often taken to be the modern-day example of China's hierarchical 'tribute system'[68] is now being theorized as China's 'relational theory of politics.'[69] According to the latter, relational governance based on 'communications' and the development of 'reciprocal trust' over long-term relations is to be preferred to 'rule-based governance' which displays the Western individualistic, rationalist and egoistic paradigm of action theory.[70] Conversely, within the relational theory of governance, it is explicitly admitted that

65 See http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm. Not to mention, of course, the case of Taiwan.

66 Xue, *Chinese Contemporary Perspectives*, at 248ff.

67 Wang Yi, 'The So-called Arbitral Tribunal' (emphasis added – GVV).

68 For a vigorous historical debunking of the existence of such a well-ordered and stable 'system', see Peter Perdue, 'The Tenacious Tributary System', (2015) 24 *Journal of Contemporary China* 1002.

69 Qin Yaqing, 'A Relational Theory of World Politics', (2016) 18 *International Studies Review* 33.

70 *Ibid*., at 42-43.

> *[power] is a process of constantly manipulating and managing one's relational circles to one's advantages. An actor is more powerful because she has larger relational circles, more intimate and important others in these circles and more social prestige of these circles.*[71]

Starting from what is understood as Chinese relational epistemology in which things and persons cannot be conceptualized in abstract form, i.e. as separate from all other things and persons, relational theory lends academic sophistication to the Chinese views on international law as being falsely premised on sovereign equality. Instead, it paves the way for a view that sees hierarchy and dynamic changing relations and configurations of relations (according to the specific issue to solve), not rules and substantive sovereign equality, as possible alternatives principles for world-ordering.

V. POLITICS NOT LAW: CHINA, HUMAN RIGHTS AND THE RULE OF LAW

Another explicit affirmation of China's specific model of responsibility and its non-convergence with the existing international legal order can be found in its recent activity concerning human rights. China has recently hosted in Beijing (7-8 December 2017) the first South-South Human Rights Forum attended by more than 300 representatives from more than 70 nations. This event culminated in the Beijing Declaration[72] which recovers the language deployed by China when a system-challenger; only that now China is, and behaves like, a great power. This declaration delivers the core of China's uniqueness[73] by stating in article 1 (emphasis added – GVV): 'The cause of human rights must and can only be advanced in accordance with the *national conditions* and the *needs of the peoples*' and in article 3 (emphasis added – GVV) 'The right to subsistence and the right to development are the *primary basic human rights*'. Article 5 of the declaration deepens the model at stake by recognizing more grounds than usual for limiting rights[74] as well as identifying duties as correlated to rights:

71 *Ibid.*, at 42. This view feeds on the domestic importance of *guanxi* or social relations. For an introduction and application of the concept, see Bian Yanjie and Zhang Lei, 'Corporate Social Capital in Chinese *Guanxi* Culture', (2014) 40 *Research in the Sociology of Organizations* 417.

72 The full text is available at http://www.chinadaily.com.cn/a/201712/08/WS5a2aaa68a310eefe3e99ef85.html.

73 See Xue, *Contemporary Chinese Perspectives*, at 147-167, elaborating on China's views on human rights in such a way that it makes clear the Chinese origins of the content of the Beijing Declaration.

74 Similar emphasis on limits to rights albeit of very different nature (Islamic Shari'ah) can be found in articles 24 and 25 of the Cairo Declaration of Human Rights in Islam (1990). Contrast both with the absence of limits to rights and the a-historicity of the text of the 1948 Universal Declaration of Human Rights. Demolishing the latter kind of rights declaration though focusing on the French 1789 Declaration of the Rights of the Man and the Citizen, Bentham deployed the now famous expression 'nonsense upon stilts'. See Jeremy Bentham, 'Anarchical Fallacies: Being an Examination of the Declarations of Rights Issued during the French Revolution', in John Bowring (ed.), *The Works of Jeremy Bentham, Volume 2* (Edinburgh: William Tai, 1921 [1843]).

> *… Restrictions on the exercise of human rights must be determined by law, and only for the protection of the human rights and fundamental freedoms of other members of society (including freedom from religious desecration, racism and discrimination) and meet the legitimate needs of national security, public order, public health, public safety, public morals and the general welfare of the people. Everyone is responsible to all others and to society, and the enjoyment of human rights and fundamental freedoms must be balanced with the fulfilment of corresponding responsibilities.*

Pervasive throughout the text is the primary role assigned to states, the rejection of using human rights to promote humanitarian intervention or any other kinds of unauthorized domestic interference[75], the perceived priority of social rights over political and civil rights (despite the safeguard in article 4) as well as a very different understanding of the concept of 'rights' from the one usually adopted in Western constitutional and legal theory.

Regarding the latter aspect, a perusal of the Beijing Declaration makes clear that it conceptualizes rights fundamentally as political *goals* to be pursued by states and the international community but always on condition that the stability of both formations is secured and the prosecution of other political goals remans unimpaired. In other words, this concept of human rights marks the opposite extreme of Unger's 'destabilization rights'.[76] Quite the opposite indeed as rights come only after, because and as long as there is a sovereign state. As an author has put it:

> *Respect for human dignity as viewed by the Chinese, lies in the integrity of harmonic and orderly social bonds and is meant to be exercised for the purpose of fostering collective welfare through moral exhortation internalized in the individual rather than by means of the legal formality of government power vis-d-vis individuals.*
>
> *Against this background, the proposition that individuals have finally become subjects of international law after World War Two is ruled*

75 See article 8: 'The politicization, selectivity and double standards on the issue of human rights and the abuse of military, economic or other means to interfere in other countries' affairs run counter to the purpose and spirit of human rights.' The 'unauthorized' proviso mentioned in the text is crucial because China is the largest troops' contributor to UN peace-keeping operations among the permanent members of the Security Council. On China's non-intervention legal and policy action, see Pang Zhongying, 'China's Non-intervention Question', (2009) 1 *Global Responsibility to Protect* 237, and Xue, *Contemporary Chinese Perspectives*, at 89ff.

76 Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge MA: Harvard University Press, 1983), 23.

> *out on all counts in Chinese international law literature and policy pronouncements.*[77]

This is largely at odds with the Universal Declaration of Human Rights and Western contemporary legal and constitutional theory, which conceptualizes rights from the point of view of individuals as subjective positions and social claims: a technology of social-ordering particularly suitable for pluralistic societies.[78] This is not to say that domestically China does not recognize rights (the Constitution is rich in this respect) and fails entirely to make them justiciable.[79] But fundamental rights are still not directly applicable and there is no judicial review of legislation.[80] Incidentally, it is worth recognizing that the recent Beijing Declaration does not mention the right to access courts and due process.

In other words, the problem is not so much the historical or static questioning of whether China has a tradition of human rights, the concept of human rights or in any case whether the latter can still be valid in the Chinese setting.[81] Instead, the point is to understand what rights do (and can do), how to do things with rights and to which system, the political or the judicial, they are primarily attached. The answers to this question allow us to distinguish a model in which rights are social claims, i.e. claims against someone, and therefore dynamic and enforced by courts, from another model in which rights are mainly political directives that are to be satisfied without being framed as individual legal entitlements to obtain something. They are essentially static legislative instructions that the political system should realize through politics as the *art of the possible*; in other words, from governments to citizens according to local conditions and the needs of the people. Xue Hanqin summarizes China's approach as essentially falling within the second model defined above:

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77 Li Zhaojie, 'Legacy of Modern Chinese History: Its Relevance to the Chinese Perspective of the Contemporary International Legal Order', (2001) 5 *Singapore Journal of International and Comparative Law* 314, at 324.

78 Andrei Marmor, 'On the Limits of Rights', (1997) 16 *Law and Philosophy* 1. With more detail, identifying the costs and the transformations that rights help to bring about regarding the relationship between law, politics and other normative orders, see Vilaça, *Law as Ouroboros*.

79 For example, the Administrative Litigation Law passed in 1990 which was at the centre of 'The Story of Qiu Ju' directed by Zhang Yimou. For a discussion, see Jerome Cohen and Joan Lebold Cohen, 'Did Qiu Ju Get Good Legal Advice?', in Corey K. Creekmur and Mark Sidel (eds.), *Cinema, Law and the State in Asia* (New York: Palgrave MacMillan, 2007) 161.

80 China experienced what could have become a *Marbury v Madison* style of constitutional revolution but the case *Qi Yuling v Chen Xiaoqi* (2001), the only one in which a court applied directly constitutional rights, was removed from the casebook in 2007 and its effects declared void by the Supreme People's Court in 2008. For an overview of the case, see Samson Yuen, 'Debating Constitutionalism in China: Dreaming of a Liberal Turn?', (2013) *China Perspectives* 67.

81 For such discussions, see e.g. Julia Ching, *Human Rights: A Valid Chinese Concept?*, available at http://www. religiousconsultation.org/ching.htm, and Chad Hansen, 'Chinese Philosophy and Human Rights: An Application of Comparative Ethics', in Gerhold K. Becker (ed.), *Ethics in Business and Society: Chinese and Western Perspectives* (Heidelberg: Springer, 1996) 99. Also, because China has signed most international human rights treaties.

> *In China's practice, human rights are not taken as one issue or the issue. Rather, they are pursued in conjunction with legal and institutional building as well as economic and social development of the country, because in the final analysis, human rights are, foremost, domestic issues.*[82]

Even when reading descriptions of China's remarkable feat of lifting a substantial part of its population from poverty, around 200 million people, in twenty years as an example of China's concern for human rights, it is quite clear that that was an essentially political feat – the product of a system in which politics is prior and paramount to law[83] and where the latter is a tool of government and not the engine of social reform deployed by norm-users of different kinds and institutions.[84]

Fundamentally, and despite the complex Chinese domestic discourse on the rule of law[85], the official version ought to be understood more as *rule by law* than what we have come to understand by rule of law in the West.[86] In the latter tradition, law is considered to subject all private and public behaviours to the test of legality. Over time, and with the rise of constitutionalism, the rule of law came to include also democracy, judicial review and fundamental rights.[87] But in mainstream Chinese legal and political thought law is not portrayed as an autonomous system[88] since a sharp mentality of legal pragmatism exists. According to Yu Xingzhong:

> *The Chinese approach to legal pragmatism bears little or no direct relation to Western or American legal pragmatism, as defined below. Instead, as used in this commentary, it describes a guiding concept peculiar to the Chinese legal system and Chinese legal philosophy. This concept is manifest in a number of aspects of the current legal system in the PRC, including: the resort to ad hoc legal measures,*

82 Xue, *Chinese Contemporary Perspectives*, at 166 (emphasis added – GVV).

83 *Ibid*., at 157, 'It is a virtue that in pursuing social harmony in peace and order, collective and communal interests, if necessary should prevail over individual interests.'

84 It is worth reminding that I am not judging the Chinese conception of rights. And in any case, despite the global triumph of new constitutionalism, Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge MA: Harvard University Press, 2007) shows how the record of enforcement of social rights remains very poor and thus that new constitutionalism has largely served to protect and further entrench liberal rights.

85 Samuli Seppänen, *Ideological Conflict and the Rule of Law in Contemporary China: Useful Paradoxes* (Cambridge University Press, 2016).

86 Linguistically, *fazhi*, the term used to denote rule of law is often translated as rule by law.

87 For a history, see Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2006).

88 Zhang Mo, 'The Socialist Legal System with Chinese Characteristics: China's Discourse for the Rule of Law and a Bitter Experience', (2010) 24 *Temple International and Comparative Law Journal* 1.

> *the separation of legal doctrine from practice, the overemphasis on instrumental facets of law, and the placement of policy before law.*[89]

And:

> *Thus, through "actuality," all law is inextricably linked with CCP policy. The recent dramatic but smooth change from the view that law is an instrument of class struggle to the view that law is an instrument of economic development illustrates this link. The CCP first determines "actuality," then, through the medium of policy, promulgates appropriate laws and regulations. Scholars and political leaders have frequently debated the relationship between policy and law, but the dominant view still holds that CCP policy is the soul and foundation of law and contains the guiding principles for legislation.*[90]

All this to say, that China's understanding of human rights and its action at the international level is not premised upon the same bedrock despite the common language. This is important to keep in mind because this mentality and different values may well be deployed transnationally. For instance, as when China last year demanded Cambridge University Press to remove 300 articles previously published at *The China Quarterly* under the threat of blocking access to all the journal's contents to Chinese scholars. But above all, it is important to make us aware that China is proposing a set of values and a specific understanding of the relationship between law and politics that privileges the latter and thus goes against the grain of much recent international legal developments.

VI. CONCLUSION

I have tried to show throughout the article different features behind China's recent stance on international relations and international law as well as how they can be seen to articulate a distinctive way of taking international responsibility.

The main points identified point towards *pragmatic* global leadership exercised more through politics than law with preference for contracts and economic rationality (thus opposite to the further legal and political integration as provided by the EU example), arbitration and non-judicial means of dispute settlement, regional platforms for dialogue and political consensus, concepts of rights that are

89 Yu Xingzhong, 'Legal Pragmatism in the People's Republic of China', (1989) 3 *Journal of Chinese Law* 29, at 30.

90 *Ibid.*, at 47.

dependent on sovereignty, prioritize development and social welfare while targeting the legislative power rather than norm-users, and a conception of the rule of law that sees law as necessarily historical and contextual serving broader political and social needs.

This is particularly interesting because on the one hand, it comes after a few decades of longstanding debates on the nefarious effects of the legalization and juridification of international relations[91], while on the other hand, China's rise and the distinctiveness of its model based on politics raises many eyebrows. Perhaps this is to be expected precisely because the root metaphor seems to be that of the contract and not of the return of politics as creating the relevant publics (now missing) affected by the different decisions at stake and thus emphasizing the necessarily collective nature of the decision on how to live together.[92] That this is indeed at odds with the Chinese model, can best be grasped by the recent revival of interest in classical Chinese philosophy that highlights the virtues of the leaders for the stability and harmony of the international system.[93]

91 Vilaça, *Law as Ouroboros*.

92 Friedrich V. Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge University Press, 2014).

93 Yan, *Ancient Chinese Thought*.

CHAPTER 4
RESPONSIBLE RHETORIC

Lorenzo Gasbarri

I. INTRODUCTION

With the words 'Argument is everywhere, argument is unavoidable, argument is interminable, argument is all we have' begins Stanley Fish's latest book, *Winning Arguments*, in which the author brings to a broader public his academic research on interpretative communities.[1] He argues that, as happens in natural sciences as much as in social sciences, argumentation plays a major role in the historical path of a discipline. Human beings cannot escape from persuasion. Since we need a language to communicate knowledge, we always recreate a fictional reality that reproduces observed facts. He uses the allegory of the platonic cave to persuade of the correctness of this hypothesis:[2] The condition of humanity is to struggle with the shadows produced by itself against a wall of a deep cave. Objective facts exist and are behind our shoulders, but we can create knowledge and communicate it only by the means of shadows. Knowledge and communication would be easier if we could do without language. Like in the Royal Academy of Lagado (Swift's *Gulliver Travels*), professors could avoid miscommunication by substituting words with objects to carry around for the purpose of showing objective facts.[3] As George Orwell suggested, we could think 'wordlessly' and then look for the perfect word in a process of subtraction, cleaning the vocabulary until arriving at a neutral observation language.[4] We could try to avoid abstract words that do not point to any concrete thing. This is the kind of objectivism that legal formalism tries to achieve, and from its failures flourish rhetoric. To assert that the law should be kept safe from rhetoric is itself rhetoric. In global governance as much as in ancient Greek polis, the language of law is a means to persuade and shape our common future.[5]

1 Stanley Fish, *Winning Arguments: What Works and Doesn't Work in Politics, the Bedroom, the Courtroom, and the Classroom* (New York: Harper, 2016).

2 Plato, *Republic* (New York: Barnes and Noble Classics, 2004, Jowett trans.), 514a–520a.

3 Jonathan Swift, *Guliver's Travels* (Oxford World Classics, 1986, reprint 2008), part III, ch 7.

4 George Orwell, *Politics and the English Language* (Peterborough: Broadview Press, 2006).

5 'Language is humanity's first self-ordering': Philip Allot, *Eunomia* (Oxford University Press, 1990) at 11, para 1.25.

Opposing Fish's focus on winning an argument[6], this paper develops the notion of responsible legal rhetoric: a form of rhetoric that is not aimed at getting more, at obtaining a better deal for limited interests, at 'victory' against an opponent, but that is aimed at 'taking care of our common world'. The language of international law cannot address the challenges of contemporary global society if it is only aimed at defining a winner. For instance, in addressing climate change there is no state or entity that can claim victory over another one. While in many cases it is ontologically impossible to obtain 'a better deal', the need for victory is embedded in international law and triggers the conflict between institutions. Rhetoric is the subject to study for understanding, and eventually changing, the language of international law. The next sections will comment on three arguments made in different contexts pertaining to global governance: legal responsibility of international organizations, social responsibility for climate change, and individual responsibility and the creation of the first peacekeeping mission.

Each situation will focus on a particular notion of rhetoric, defined by Aristotle's *Art of Rhetoric* as the 'three means of persuasions'.[7] The utterance 'means of persuasion' does not find an easy translation. The ancient Greek term is '*pisteis*', while a commercial edition of Aristotle's work speaks of 'three kinds of proofs that are furnished through the speech'.[8] These are the three constituent elements of rhetoric: the speech, or *logos*; the disposition of the audience, or *pathos*; the character of the speaker, or *ethos*. One of the purposes of this paper is to show their interrelations in the realm of global governance. Despite its fragmentation in different academic traditions, the constituent elements of rhetoric do not have internal hierarchy and they all take part in shaping legal debates. This paper aims at describing how there can be a responsible rhetoric without privileging one element over the other. The purpose is to identify a form of rhetoric that it is not only aimed at 'winning' an argument, but to obtain cooperation towards global common goods. As Aristotle pointed out, the art of rhetoric is not about defeating an opponent, but it is the ability 'to see the available means of persuasion'.[9]

6 For a strong criticism of Stanley Fish work (for the reason I mention, and many more), see T. Eagleton, 'The Estate Agent' in (2000) 22 *London Review of Books* 10, available at https://www.lrb.co.uk/v22/n05/terry-eagleton/the-estate-agent (accessed 3 July 2018).

7 G.A. Kennedy, *Aristotle On Rhetoric: A Theory of Civic Discourse* (Oxford University Press, 2007), at 27.

8 Aristotle, *The Art of Rhetoric* (London: Penguin Classic, 2004, Lawson-Tancred trans.), at 74.

9 Kennedy, *Aristotle on Rhetoric*, at 37.

II. THE FORM: LEGAL RESPONSIBILITY AND THE UN RESPONSE TO THE CHOLERA CRISIS IN HAITI

The academic field of rhetoric that only deals with the speech is concerned with the study of logical arguments, strictly related to syllogism and dialectic.[10] In legal practice, legal formalism shapes this logical demonstrative means of persuasion.[11] Formalism represents the establishment of a grammar over which the creation and the communication of knowledge pretend to be objective. It is an attempt to isolate and marginalize forms of rhetoric that produce ungrounded beliefs. Within legal practice, human beings create the illusion of being objective. However, pretending the existence of objective knowledge is only an argumentative attempt to claim the superiority of the method.

The limits of relying exclusively on this means of persuasion are evident when looking at the international responsibility of international organizations. Despite academic scholarship dealing with the development of an elaborate system to attribute legal responsibility, what happens in practice is the use of an unclear form of rhetoric that merges a number of unrelated themes. Logics create the illusion that an argument can be found which is objectively better than another one. Like if, in every possible context, the same reasoning would always provide the best answer.

For instance, the responsibility that the United Nations bears for the cholera outbreak in Haiti clashed against a wall of 'political and policy matters'.[12] This has been considered a 'moral and legal failure'[13], attributable to a specific misuse of the language of international law that can be tracked analysing one of the fundamental legal texts in which the UN refused to provide compensation for the victims, in particular, the communication of 21 February 2013 addressed to Mr Concannon, Director of the NGO Institute for Justice and Democracy in Haiti.

The letter comprises eight paragraphs. The distribution of the words in the text shows the preeminent use of positive terms, such as 'support', 'initiative', 'improving', 'providing'. Technical expressions appear more frequently in the middle of the letter, while the beginning and the end of the letter alternate formal legal reasoning and emotional involvement. It is useful to divide the text in three sections: the introduction consisting of two paragraphs, the body of the text containing

10 Stephen E. Toulmin, *The Uses of Argument* (Cambridge University Press, 2003 [1958]).

11 Duncan Kennedy, 'Legal Formalism', in Neil Smelser and Paul Baltes, *Encyclopedia of the Social and Behavioral Sciences* (Amsterdam: Elsevier, 2001) 8634.

12 I will not recall in detail the legal battle to give redress to the victims of the cholera outbreak. Among the large number of references on the case, see M. Buscemi, 'La codificazione della responsibilità elle organizzazioni internazionali alla prova dei fatti. Il caso della diffusione del colera ad Haiti', (2017) *Rivista di Diritto Internazionale* 989.

13 Alston Report, Extreme poverty and human rights, UN Doc. A/71/367, 26 August 2016, para. 3.

four paragraphs, and a conclusion of two paragraphs. The letter is a patchwork of different themes, merging empathy concerning the catastrophe, the United Nations' role in alleviating the sufferance of the population, and formal legal arguments, to dismiss the claims. These three themes are not orderly divided but tend to appear in competition with each other. The analysis will focus on the form of the letter and its capacity to persuade the audience as being logically sound. From this perspective, rhetoric is the capacity to rationally persuade an audience: "a sound argument, a well-grounded or firmly-backed claim, is one which will stand up to criticism, one for which a case can be presented coming up to the standard required if it is to deserve a favourable verdict".[14] It is here reproduced in full in italics, with my commentary between the above-mentioned sections.[15]

> *21 February 2013*
>
> *Dear Mr Concannon:*
>
> *I refer to your letter of 3 November 2011 to the Secretary-General, transmitting claims against the United Nations related to the cholera outbreak in Haiti. With respect to these claims, you seek compensation for individuals affected by the cholera outbreak and an agreement with the Government of Haiti in order to establish and fund a nationwide program for clean water, adequate sanitation and appropriate medical treatment to prevent the further spread of cholera.*
>
> *The United Nations is extremely saddened by the catastrophic outbreak of cholera, and the Secretary-General has expressed his profound sympathy for the terrible suffering caused by the cholera outbreak. The cholera outbreak was not only an enormous national disaster, but was also a painful reminder of Haiti's vulnerability in the event of a national emergency.*

The first paragraph is rather formal, and in plain legal language recalls the reason for writing. From the outset, the letter appears as a private communication, which was not intended to have unexpected publicity. The second sentence contains two relevant omissions. Besides compensations and actions of relief, the petition included the request to establish a standing claim commission pursuant to the

14 Toulmin, *The Uses of Argument*, at 8.

15 The original can be found at this link: http://www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf.

Status of Forces Agreement (SOFA) between the UN and Haiti to hear claims in a fair, impartial and transparent manner. Secondly, it asked for public apologies, including an acknowledgment of the facts and an acceptance of responsibility.[16] These omissions in the reply are particularly relevant. From a legal standpoint, the reply explicitly ignores the obligation included in the agreement concluded with the government of Haiti. Here is a failure of logic motivated by a contextual factor which is, for the moment, unknown to the reader.

There is no logical connection between the first and the second paragraphs. The tone of the language of the two paragraphs is different, and the second paragraph includes a form of diplomatic empathy for the victims. However, the last sentence is brutal in clarifying from the outset that the petitioners will not obtain anything except pity. Indeed, it blames the general situation of the state for the specific allegation of the cholera epidemic. The only rhetorical effect of this sentence is to infuriate the reader. If this is the line of defence, the audience needs to be prepared, maybe discussing first the conclusions of the 2011 panel on the causes of the outbreak and not waiting for the fifth paragraph.

> *From the very early stages of the epidemic, the United Nations, along with its partners, has expended considerable effort and resources in combating cholera and improving Haiti's water and sanitation facilities, as well as on training, logistics and early warning systems.*
>
> *To date, the United Nations has expended $118 million in support of such efforts, including, for example, by (i) providing over 9 million critical items (aquatabs, soap, medical equipment, etc.) to the Ministère de la Santé Publique et de la Population (MSPP); (ii) assisting in the expansion of the community-based health network by establishing and upgrading cholera treatment facilities and oral rehydration points across the country, as well as mapping health partners and medical stocks in each commune; (iii) providing latrine sewage management in nearly 1,500 sites, improving handwashing and toilet facilities in 240 schools and constructing the first two human waste treatment plants at Croix-des-Bouquets and Morne-à-Cabrit; (iv) assisting in establishing nearly 700 water points and temporary chlorination points, improving water supplies to the most vulnerable areas in Port-au-Prince and Petit Goave, including by installing 4,000 small and four large filtration systems in public institutions, and improving water, sanitation and hygiene conditions in remote rural*

16 Available here: http://www.ijdh.org/2011/11/topics/law-justice/chief-claims-unit-minustah-log-base-room-no-25a-boule-toussaint-louverture-clercine-18-tabarre-haiti-ijdh-bai/. See Section VII, Request for Relief.

areas; (v) providing technical support to the Direction Nationale de l'Eau Potable et de l'Assainissement (DINEPA) to develop a water quality monitoring system for health institutions in the Port-au-Prince metropolitan area, as well as in 140 municipalities in Haiti; (vi) implementing over 70 projects to improve flood mitigation and watershed institutions in the Port-au-Prince metropolitan area, as well as in 140 municipalities in Haiti; (vi) implementing over 70 projects to improve flood mitigation and watershed management in vulnerable areas; (vii) supporting the completion of the 2012 cholera contingency plan in collaboration with the Pan-American Health Organization (PAHO); (viii) supporting community-based hygiene campaigns which have trained over I ,400 trainers and 5,200 community workers and that has reached approximately 700,000 families; and (ix) providing logistics support to move personnel and supplies, including 400 metric tons of health, water adduction and sanitation materials.

Additionally, in January 2011, the Secretary-General formed an independent panel of four independent experts (the "Panel") with a mandate to investigate and seek to determine the source of the 2010 cholera outbreak in Haiti. In its report dated 4 May 2011, the Panel concluded that the outbreak was caused by a confluence of circumstances and was not the fault of, or deliberate action of, a group or individual.

Most recently, on 11 December 2012, the Secretary-General launched his Initiative for the Elimination of Cholera in Haiti. The Initiative, developed through a partnership between PAHO, UNICEF and the MSPP, which aims to strengthen Haiti's own National Cholera Elimination Plan and to mobilize significant new resources and support for the Haiti component of the Hispaniola Cholera Elimination Plan. The Initiative will support prevention and treatment measures, water and sanitation projects, as well as the vaccination campaign being led by the Government of Haiti. Linked to the Initiative, bilateral and multilateral donors are contributing significant funding to support the implementation of ongoing immediate and long-term elimination efforts. Moreover, the United Nations has committed a further $23.5 million in support of the Secretary-General's Initiative.

This is the body of text, in which the author should lead the reader from the premises to the conclusions. Here the effect is the opposite. There is no relation of causal logic between the claims for compensation and what the UN has done after the

commission of the harm. However, the letter reveals an implicit internal coherence, based on a particular concept of the United Nations which prevents it from "doing harm". This is the main argumentative flaw from a logical standpoint. What the organization does is to perform attributed functions, and these functions cannot do harm. As Jan Klabbers commented, this tragic episode illustrates the limits of functionalism: "Under functionalism, organizations only perform lawful tasks – otherwise, how could they have possibly been created?"[17] This is the contextual factor that induced the Office of Legal Affairs to ignore the request for a claim commission that would have been the first of its kind. Indeed, the larger part of the argument is used to list UN actions that have taken place after the cholera outbreak. Coherently, under functionalism the only defensive strategy of the Legal Adviser is to show all the lawful tasks in which the organization is involved, but this can only constitute an answer to a different question. There is not logical connection between the premises of the first paragraph and the body of the text. The UN looks like a broken machine only capable of repeating standard affirmations in response to new questions.

The only attempt to address the causes of the outbreak and to defend the organization from the frontal attack is in the third paragraph of this section. In two sentences the letter dismisses the proofs put forward by the petitioners concerning UN responsibility. There is no motivation that could explain the position of this paragraph in the text, since it is clearly unrelated to the actions of relief provided by the organization. It copy-pastes lines from the conclusion of the 2011 panel[18], inserted in the text between past actions and future intentions.

> *With respect to the claims submitted, consideration of these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946.*
>
> *The United Nations is dedicated to continuing its efforts to take concerted action to eliminate cholera from Haiti and to assist the Government of Haiti in building an adequate public health system which will reduce the risks posed by any future catastrophic events and will ensure the well-being of the Haitian population.*

17 Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law', (2015) 26 *European Journal of International Law* 9, at 73.

18 "… the Haiti cholera outbreak was caused by the confluence of circumstances as described above, and was not the fault of, or deliberate action of, a group or individual". See http://www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf (2011 UN Panel).

After the body of the text, the last two paragraphs should contain a consequential conclusion. However, there is not a syllogistic relation between all the sections of the letter and the sudden conclusion does not appear as logically sound. This is not only a problem of legal reasoning concerning the distinction between public and private claims.[19] What is lacking is a motivation that could persuade the audience and a clear understanding of the context in which the argumentation was performed. Only one year and a half before, the same legal counsel signed a similar letter to dismiss claims of compensation for damage to health suffered by lead contamination in certain internally displaced persons camps in Kosovo.[20] The legal reasoning was the same, founded on the distinction between private and public claims, considered in section 29 of the Convention on the Privileges and Immunities of the United Nations. However, the form of the letter and its context was completely different. In the absence of a public campaign in support of the victims, the tone of the letter is strictly legal and successful:

> *25 July 2011*
>
> *Dear Madam,*
>
> *I refer to previous correspondence to this Office and to the Special Representative of the Secretary-General, UNMIK, in respect of the above-mentioned claim. I regret the delay in responding to you.*
>
> *In your letters, you assert certain claims against the United Nations for damage to health suffered by your clients as a result of lead contamination in certain Internally Displaced Person (IDP) camps in Mitrovica. Kosovo. With respect to these claims, it is asserted that your clients are entitled to compensation and other remedies pursuant to General Assembly resolution A/RES/52/247.*
>
> *The existing legal framework for the Organization to receive claims is set forth in Section 29 of the 1946 Convention on the Privileges and Immunities of the United Nations (the "General Convention"). Section 29 of the General Convention provides that the Organization shall make provisions for appropriate modes of settlement in disputes either arising out of contract or disputes of a private law character to which the United Nations is a party. General Assembly Resolution A/*

19 Riccardo Pavoni, 'Choleric notes on the Haiti Cholera Case', (2015) *Questions of International Law*. Available at http://www.qil-qdi.org/choleric-notes-on-the-haiti-cholera-case/.

20 Available at http://www.sivola.net/download/UN%20Rejection.pdf.

RES/52/247 sets forth parameters regarding third- party liability and compensation in disputes of a private law character.

As you are aware, the IDP camps came into existence as a result of a major population displacement during the Kosovo conflict in 1999 and are located in the proximity of long-established residential areas in Northern Mitrovica. As noted in your previous communications, the Mitrovica region has a long history of major industrial pollution, including lead contamination from the Trepca mine.

While the UN acknowledges the concerns raised by your clients, after having carefully reviewed and considered the claims advanced in your letters, we note that the claims asserted involve alleged widespread health and environmental risks arising in the context of the precarious security situation in Kosovo. The claims do not constitute claims of a private law character and, in essence, amount to a review of the performance of UNMIK's mandate as the interim administration in Kosovo. Based on the framework established by the Member Slates, therefore, the claims are not receivable under Section 29 of the General Convention or General Assembly Resolution A/RES/52/247. Accordingly, we are not in a position to accede to your request to receive these claims.

Notwithstanding the above, we would note that, while having no legal obligation to do so, UNMIK has taken substantial steps to improve the condition of the IDP population. Notably, in 2000, when the Trepca mine unilaterally resumed operation, UNMIK closed the smelter down. Moreover, since 2000, UNMIK and the international community, in consultation with IDP representatives, as well as representatives of the local structures in Kosovo have expended considerable resources in the protection and assistance of the IDP population, including the relocation of camp residents to Osterode camp and to newly constructed housing in the Roma Mahalia.

Nothing in this communication shall be deemed a waiver, express or implied, of the privileges and immunities of the United Nations, including its subsidiary organs, which are hereby expressly reserved.

The difference in persuasive force is striking. The legal reasoning is the same, but the logical form of the argument is completely different. Knowledge and truth do not precede the argument, but, rather, they emerge from it and it is valuable for a

particular context. Formalism, among which legal formalism, cannot achieve what it promises and other means of persuasion will always disrupt its endeavour.

The indeterminacy of language is what characterizes human condition. In law, there is a presumption that subjectivism is negative, something to avoid for the sake of justice. On this view, if we leave too much space to rhetoric, it will misconceive reality and it will make us believe that, for instance, climate change does not exist or that state X is the enemy of the day. Thus, better to keep the law far from rhetoric and believe that it is in the text. Protected by the shield of technical and professional roles provided by formalism, jurists can foster any kind of value or political agenda underneath their opinion.

III. THE VALUES: SOCIAL RESPONSIBILITY AND CLIMATE CHANGE

The second category of rhetorical means of persuasion concerns the ability to provoke emotions through the manipulations of the values recognized by the audience.[21] This is the realm of rhetoric understood as the capacity to manipulate reality to serve the purposes of the speaker. The traditional bias against rhetoric is described by Plato in the dialogue *Gorgias*, in which Socrates distinguishes between the persuasion that produces knowledge, offering reasons for holding a belief, and the persuasion that imposes on the audience a psychological pressure which produces an ungrounded belief.[22] Gorgias contends that rhetoric is a means that can be used either for good or bad purposes. On this conception, rhetoric becomes the art of modifying reality for the purposes of the speaker. The work of the rhetorician is to study the audience in order to find a common background over which one can look credible, and to slowly persuade this audience of her new truth. Often, what a rhetorician does in this context is to sell doubts to dismantle a previous belief.

Among various examples, it is interesting to read the debates surrounding the adoption of legal measures to tackle climate change. The speech given by the President of the Czech Republic, Václav Klaus, addressing the UN Climate Change Conference on the 24th of September 2017 is a remarkable example:[23]

21 Chaim Perelman and Lucie Olbrechts-Tyteca, *Traité de l'Argumentation. La Nouvelle Rhétorique* (Brussels: Éditions de l'Institut de Sociologie de l'Université Libre de Bruxelles, 1971).

22 Plato, *Gorgias* (London: Penguin Classic, 2004, Hamilton trans.).

23 Available at http://www.un.org/webcast/climatechange/highlevel/2007/pdfs/czechrepublic-eng.pdf.

Distinguished colleagues, ladies and gentlemen,

As responsible politicians, we know that we have to act when it is necessary. We know that our duty is to initiate public policy responses to issues that could pose a threat to the people of our countries. And we know that we have to form partnerships with colleagues from other countries when a problem cannot be confined to national boundaries. To help us doing it is one of the main reasons for the existence of institutions such as the United Nations.

The beginning is aimed at building trust between the speaker and the audience. It recalls what they have in common and how to face common challenges. Speaking at the UN Climate Change Conference, President Klaus is in the lion's den. Everyone knows already that he is going to speak against the UN efforts to tackle climate change with a legal framework, and he starts by creating a common background: we are all responsible politicians who care about their own constituents.

However, the politicians have to ensure that the costs of public policies organized by them will not be bigger than the benefits achieved. They have to carefully consider and seriously analyse their projects and initiatives. They have to do it, even if it may be unpopular and if it means blowing against the wind of fashion and political correctness. I congratulate Secretary General Ban Kimoon on organizing this conference and thank him for giving us an opportunity to address the important, but until now one-sidedly debated issue of climate changes. The consequences of acknowledging them as a real, big, imminent and manmade threat would be so enormous that ***we are obliged to think twice before making decisions. I am afraid it is not the case now*** *[Bold in the official Transcription].*

'However': this is the first doubt. We know that we all are responsible politicians, but what does a responsible politician look like? What if our efforts are not aimed at the goal we all share?

Klaus builds his argument in three steps:

Let me raise several points to bring the issue into its proper context:

1. Contrary to the artificially and unjustifiably created worldwide perception, ***the increase in global temperatures has been – in the last years, decades and centuries – very small in***

> ***historical comparisons and practically negligible in its actual impact upon human beings and their activities.***
>
> ***2. The hypothetical threat connected with future global warming depends exclusively upon very speculative forecasts, not upon undeniable past experience and upon its trends and tendencies.*** *These forecasts are based on relatively short time series of relevant variables and on forecasting models that have not been proved very reliable when attempting to explain past developments.*
>
> *3. Contrary to many selfassured and selfserving proclamations, there is* ***no scientific consensus about the causes of recent climate changes****. An impartial observer must accept the fact that both sides of the dispute – the believers in man's dominant role in recent climate changes, as well as the supporters of the hypothesis about their mostly natural origin – offer arguments strong enough to be listened to carefully by the nonscientific community. To prematurely proclaim the victory of one group over another would be a tragic mistake and I am afraid we are making it.*

Klaus' first step is to ask: What if scientists are wrong? The paragraphs above form a perfect example of the fight between the two forms of rhetoric we have encountered insofar. On the one hand, there are the scientists, pretending to provide objective truths in a world of uncertainties – to provide the logical thought that seeks to overthrown subjectivism. On the other hand, there are the values that we all share, we, the common people, who have the right to be able to define truth without imposition from self-proclaimed authorities. He plays as a 'merchant of doubts'.[24]

> *As a result of this scientific dispute, there are those who call for an imminent action and those who warn against it.* ***Rational behaviour should depend on the size and probability of the risk and on the magnitude of the costs of Its avoidance.*** *As a responsible politician, as an economist, as an author of a book about the economics of climate change, with all available data and arguments in mind, I have to conclude that* ***the risk is too small, the costs of eliminating it too high and the application of a***

24 Naomi Oreskes and Eric Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* (London: Bloomsbury, 2010).

fundamentalistically interpreted "precautionary principle" a wrong strategy.

The second step is the substitution of authority. Klaus calls rationality on his side, showing himself to be a different kind of scientist from the ones mentioned above. Not only does he know better, he is a responsible politician. He artificially – and artfully – creates an opposition between good science and bad science.

> *5. The politicians – and I am not among them – who believe in the existence of a significant global warming and especially those who believe in its anthropogenic origin remain divided: some of them are in favor of mitigation, which means of controlling global climate changes (and are ready to put enormous amounts of resources into it), while others rely on adaptation to it, on modernization and technical progress, and on a favorable impact of the future increase in wealth and welfare (and prefer spending public money there).* ***The second option is less ambitious and promises much more than the first one.***
>
> *6. The whole problem does not only have its time dimension, but a more than important spatial (or regional) aspect as well. This is highly relevant especially here, in the UN. Different levels of development, income and wealth in different places of the world make worldwide, overall, universal solutions costly, unfair and to a great extent discriminatory. The already developed countries do not have the right to impose any additional burden on the less developed countries. Dictating ambitious and for them entirely inappropriate environmental standards is wrong and should be excluded from the menu of recommended policy measures.*

Finally, in the third step Klaus proposes his solutions to the problem. The irresponsible politicians who believe in climate change are divided and do not know how to tackle a problem that, in reality, does not exist. The core of his argument is presented as a direct consequence: the measures that the UN wants to adopt to tackle climate change are too costly. Suddenly, the audience is no longer sharing the same values, but they all have different exigencies concerning different levels of development. Good science versus bad science is here reproduced as developed versus less developed countries.

> *My suggestions are as follows:*

> *1.* ***The UN should organize two parallel IPCCs and publish two competing reports.*** *To get rid of the onesided monopoly is a sine qua non for an efficient and rational debate. Providing the same or comparable financial backing to both groups of scientists is a necessary starting point.*
>
> *2. The countries should listen to one another, learn from mistakes and successes of others, but* ***any country should be left alone to prepare its own plan to tackle this problem*** *and decide what priority to assign to it among its other competing goals.*
>
> *We should trust in the rationality of man and in the outcome of spontaneous evolution of human society, not in the virtues of political activism. Therefore, let's vote for adaptation, not for the attempts to mastermind the global climate.*

Conclusions: first, it is necessary to include other perspectives in the debate. Ignoring his pledge for saving resources, Klaus proposes to double the effort. Second, freedom. Each country should be left alone. This is the aim of the speech: to prevent the adoption of new legal instruments. The speech started from endorsing the common value of international cooperation and ended in its exact opposite, claiming that any country should be left alone.

This story tells a lot about the power of this form of rhetoric in shaping political discourse. Values do not have the pretence to be objective and create truths, and they are a powerful weapon against any use of rationality and logical forms that pretends to create true knowledge. Argumentation is a value-oriented activity. Chaim Perelman has examined the distinction between the persuasion of an ungrounded belief and the persuasion that produces knowledge in his *Nouvelle Rhétorique*, in which he considered that "le domaine par excellence de l'argumentation, de la dialectique et de la rhétorique, est celui où interviennent des valeurs".[25] In *Nouvelle Rethorique*, Perelman focuses on *les valeurs* as the common background over which argumentation plays its role. Justice, one of the most powerful human feelings, shapes the moral acceptance of the argument. It is the 'rhetoric of justice', under which acceptance of interpretation is obtained through the appeal to common values: "They appeal to a sense of justice and seek to find acceptance for interpretations by inducing a belief in the rightness of their interpretations".[26] This notion of rhetoric is

25 Chaim Perelman, *Logique juridique. Nouvelle rhétorique* (Paris: Dalloz, 1976).

26 Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press, 2012), at 198.

limited by a fight between values. What matters is how to persuade of the rightfulness of a belief.

IV. THE VIRTUES: INDIVIDUAL RESPONSIBILITY AND PEACEKEEPING MISSIONS

Finally, I will address the third element that constitutes rhetoric, concerning the ethical quality of the speaker and the speaker's capacity to be 'worthy of credence'.[27] Aristotle describes the character of the speaker in terms of the theory of virtues described in the *Nicomachean Ethics*.[28] Virtues are certain dispositions of character that enable an agent to reach a certain good. However, this is not an objectively good end. Even if the number of different theories on virtue ethics are equal to the number of virtue ethicists, the present paper is based on an anti-foundationalist approach that refuses to accept the existence of natural predispositions towards objective ends. Aristotle's *eudaimonia*, as the aim of human beings, has to be relativized and seen in the context of the ancient Greek society.[29] Individuals can 'flourish' in different social contexts, and flourishing may actually entail opposite virtues. Achieving sainthood in Christianity or being a 'sincere Nazi' are the products of different virtues.[30] Legal practice may consider as virtues some qualities that are not considered as virtues in political practice or in managerial practice within corporations.[31]

Consequently, I cannot describe the role of virtue argumentation in abstraction from the context in which the argumentation takes place.[32] What seems to be a virtue in one argumentative situation could very well be a vice in another. Ethical choices are made in the context of values and logical arguments, developing a unique field of research. A good argumentation strengthens the belief system and the practice in which the virtues are created. One of the reasons to turn to ethics for describing global governance is that positive rules are 'not good enough'. Rules have a difficult job in constraining the interpreter, regardless of whether they are perceived as formal law or as argumentative instances, accumulated trends of past decisions, or coercive techniques of violence that reproduce social hierarchies. Scholarship on legal interpretation has described the process and the extent by

27 Recently, a new academic field has been suggested under the label 'Virtue Argumentation'. See Andrew Aberdein and Daniel H. Cohen, 'Introduction: Virtues and Arguments', (2016) 35 *Topoi* 339.

28 Aristotle, *Nicomachean Ethics* (London: Penguin Classics, 2004, Johnson trans.).

29 Alasdair MacIntyre, *A Short History of Ethics* (Abingdon: Routledge, 1998 [1966]).

30 Euan MacDonald, *International Law and Ethics after the Critical Challenge* (Leiden: Martinus Nijhoff, 2011), at 194.

31 Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles* (Cambridge University Press, 2001), at 21.

32 David Godden, 'On the Priority of Agent-Based Argumentative Norms', (2016) 35 *Topoi* 345.

which the indeterminacy of law becomes a source of norm-creation.[33] These analyses conclude that the study of the international society only by means of its rules is not enough to describe, and eventually prescribe, the behaviour of international actors. From this starting point derives the attempt to describe legal choices also in terms of ethical choices, and to expose how the functioning of international law is inextricably linked with the individual capacity to perceive and act on what is right and what is wrong.[34]

Normative ethics, and in particular virtue ethics, has the merit of putting individuals at the centre of the investigation.[35] Indeed, another reason to approach global governance from an ethical perspective concerns the Copernican revolution that puts individuals at the centre of the investigation.[36] Virtue ethics does not focus on doing but on being. The aim of the virtuous legal agent is not the legal decision but the virtue argumentation.[37] It is not about winning an argument but being a good arguer. It is concerned with the creation of a model or an ideal observer.[38] Actors internalize a 'regulative ideal', a certain concept of correctness or excellence to be used as a comparison and conform to this standard.

> *Consider this speech:*
>
> *1. Yesterday morning – on the basis of the information then available – I would have used my right to call for an immediate meeting of the Security Council, had not the United States Government in the course of the night taken the initiative.*
>
> *2. Yesterday afternoon – on the basis of reports of the Anglo-French ultimatum to Egypt – I would have acted likewise, had not the substance of the matter already been under consideration as one new aspect of the item proposed by the United States.*
>
> *3. This morning, under my special mandate from the Security Council, which still is formally valid, I would have directed an appeal*

33 See e.g. Venzke, *How Interpretation Makes International Law*.

34 Martti Koskenniemi, "'The Lady Doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law', (2002) 65 *Modern Law Review* 159.

35 G.E.M. Anscombe, 'Modern Moral Philosophy', (1958) 33 *Philosophy* 1, is usually considered as the starting point of a new interest in virtue ethics. See Roger Crisp and Michael A. Slote (eds.) *Virtue Ethics* (Oxford University Press, 1997).

36 Hersch Lauterpacht, 'The Subjects of International Law', in Elihu Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht, Volume I: The General Works* (Cambridge University Press, 1970) 136, at 149.

37 Katharina Stevens, 'The Virtuous Arguer: One Person, Four Roles', (2016) 35 *Topoi* 375.

38 Oakley and Cocking, *Professional Roles*, at 11.

to the Governments of Israel and Egypt to the effect of the second draft resolution of yesterday, had not the most recent developments rendered my mandate and such an initiative pointless.

4. This afternoon. I wish to make the following declaration: The principles of the Charter are, by far, greater than the Organization in which they are embodied, and the aims which they are to safeguard are holier than the policies of any single nation or people. As a servant of the Organization, the Secretary-General has the duty to maintain his usefulness by avoiding public stands on conflicts between Member nations unless and until such an action might help to resolve the conflict. However, the discretion and impartiality thus imposed on the Secretary-General by the character of his immediate task may not degenerate into a policy of expediency. He must also be a servant of the principles of the Charter, and its aims must ultimately determine what for him is right and wrong. For that he must stand. A Secretary-General cannot serve on any other assumption than that – within the necessary limits of human frailty and honest differences of opinion – all Member nations honour their pledge to observe all Articles of the Charter. He should also be able to assume that those organs which are charged with the task of upholding the Charter will be in a position to fulfil their task.

5. The bearing of what I have just said must be obvious to all without any elaboration from my side. Were the members to consider that another view of the duties of the Secretary-General than the one here stated would better serve the interests of the Organization, it is their obvious right to act accordingly.

This speech was given by the Secretary General of the United Nations Dag Hammarskjöld at a meeting of the Security Council on the 31st of October 1956.[39] Two days before, Israel had attacked Egypt, followed by the pre-conceived Franco-British ultimatum to both parties. In this speech, Hammarskjöld is defending the role of the United Nations, confronted with a flagrant violation of the Charter. In a moment in which the UN was set aside, he imposed its role, recalling all the steps that the organizations can take without the initiative of member states. This was the first speech that led to the first application of the 'United for Peace' resolution,

39 Available at http://repository.un.org/handle/11176/84005.

and, eventually, to the creation of the United Nations Emergency Force (UNEF) and other peacekeeping missions.[40]

Hammarskjöld's speech is a good example of how a crisis offers potential to exploit a scope for action. The absence of a legal framework on which to establish an argumentation based on logical arguments left space to the qualities of the speaker of being 'worthy of credence', which ends up reinforcing the values and the system of belief he represented. Offering resignation is a rhetorical means to persuade of the rightfulness of the purposes of the UN Charter which he is representing. Hammarskjöld strengthened its system of beliefs by presenting himself as a standing example opposing un-virtuous behaviour. Focusing on the arguer instead of the argument means to accept the importance of the context in argumentation and reduces the need to find a winner or an objectively good argument that can defeat any opponent. The scope of virtue argumentation is to strengthen the belief system enabling the agents to make the best informed and justified choice.[41]

Virtuous arguers are particularly important in global governance, where the belief system is in continuous development and influenced by the interactions of different cultures. In this context, the virtue arguer is the one who seeks to define the common good. She knows that it is not an objectively common good, but it is the arguer's individual responsibility in that particular situation.

V. CONCLUSION

Meet three hypothetical judges of the International Court of Justice: Oliver, Johanna and Marsha.[42] They had to decide whether the Court has jurisdiction to hear the claims submitted by the Marshall Islands against United Kingdom, India and Pakistan, in the case *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*.[43]

Oliver believes in law as the apolitical application of rules derived by reason. His only focus is on formalist arguments to strengthen the international legal system and the role of the World Court. He knows what is a strong and a weak argument in law, and his aim is to find a winning argument that can be as objective as possible in order to set a precedent and contribute to the development of cooperation among

40 Manuel Fröhlich, *Political Ethics and the United Nations: Dag Hammarskjöld as Secretary-General* (Abingdon: Routledge, 2008), at 148.

41 Stevens, 'The Virtuous Arguer'.

42 The example is taken from H. Jefferson Powell, *Constitutional Conscience: The Moral Dimension of Judicial Decision* (Chicago Il: University of Chicago Press, 2008), at 20. The names of the judges are the same; the Court and the issue at stake is adapted to the needs of the present discussion.

43 *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands v. United Kingdom), Preliminary Objections, [2016] ICJ Reports 833.

nations. In the context of the Marshall Islands case, he is convinced that the best logical argument is in favour of dismissing the case for the absence of a dispute between the parties. He supports his argument with logical means of persuasion, believing that it will enhance the confidence that States have for the Court.

Johanna is the flag-bearer of a progressive political movement that seeks to bring international law closer to individuals. She sees judging as a means to advancing whatever political outcome she thinks is the best. Her judging is often a fight between states and individuals, trying to reinforce a system of values that protects human beings. She knows that any application of the law is political, that even Oliver has a political agenda, and that he cannot escape from that. She believes in the morality of law and in her role to use logical arguments to reinforce her values. In the context of the Marshall Islands case, she is convinced that the best logical argument should be used in favour of upholding jurisdiction and dismiss the preliminary objection on the absence of a dispute between the parties. This is a way to be in peace with her conscience to do the outmost to develop her ideal system of law, which is engaged in a perennial fight against an enemy seen as 'formalist arguments'. The authority of the Court and its respect by states can only guaranteed if values are at the centre of its endeavour.

Finally, Marsha represents the third means of persuasion, developed in accordance with ethical training on the substance of what it means to be a virtuous judge. She realizes that the pure bureaucratic mind-set and the pure value-based mind-set cannot be discerned from one another and that legal argumentation must be the composition of three sources of persuasion: the speech/text reflects the idealism based on the grammar established by legal formalism; the audience reflects political realism based on the relevant values; and the speaker reflects the ethical component of the virtues. She accepts the role of both perspectives in argumentation, but she adds a third fundamental element which concerns the person who takes the decision. In the context of the *Marshall Islands case*, she is convinced that there is no argument that can be objectively better than another one; the matter is only a question of perspective. Rhetoric shapes any argument on the basis of the points of views and there is no real winner before the Court. She believes that the fight between logical arguments and values is pointless. Putting at the forefront her capacity to take a good decision justified by her being a good person she intends to initiate a dialogue with the aim of strengthening the common belief system.

CHAPTER 5
THE ETHICS OF THE INTERNATIONAL CIVIL SERVICE – THE HUMAN STORIES

Diliana Stoyanova

I. INTRODUCTION

On November 13, 1952, Abraham Feller, general legal counsel for the United Nations Headquarters office in New York, committed suicide by jumping out of a window. The UN Secretary-General Trygve Lie had resigned just three days earlier following a long campaign of attacks by the US and Soviet governments on the UN administration – an institution that was just a few years old at the time. In a statement by Lie, Feller's suicide was contributed to the stress from defending UN employees 'against indiscriminate smears and exaggerated charges' by the US Grand Jury and the US Senate Subversive Activities Control Board. The Board was mandated to investigate the possible 'subversive' activities of US civil servants during the 'Red Scare' at the height of the Cold War hostilities between the US and the USSR.

Feller's was certainly an extreme case, but it provides an insight into the history of the international civil service, the moral dilemmas facing the individuals working for intergovernmental organizations, and the pressures applied by national governments to achieve their international political agendas – pressures that may be illegal, immoral, and most often unchallenged. The environment created by this bullying still affects the UN's activities, the mentality of the UN bureaucrats, and their relationship with the global society.

In the period between Lie's resignation and the appointment of Dag Hammarskjöld in April 1953, the same nations took drastic measures that severely undermined the independence of the United Nations that they created in 1946. In December 1952, following mounting pressure from the US government, several US citizens serving at the UN were dismissed from the organization for refusing to answer questions about their political allegiance to the Communist Party at the US Senate Committee. The UN administration had hired prominent legal scholars who wrote a report justifying the decision to separate the staff members from service. The dismissed staff then appealed the measure to the UN Administrative Tribunal as an illegal act based on 'arbitrary and political considerations'. The Tribunal, presided over by Dr. Suzanne Bastid, refused to pronounce on the legality of the discussion between

a national government and the Secretary General. But, in a series of judgements the Tribunal found that the 11 staff members who were employed on permanent contracts were not dismissed according to procedure, and awarded them damages for breach of due process rights.

In an attempt to circumvent the authority of the Tribunal, the UN General Assembly – the parliamentary organ of the UN, staffed by representatives of Member States – requested a review of the Administrative Tribunal's decisions by the International Court of Justice, in the form of an Advisory Opinion. The ICJ upheld the judgements in the *Effect of Awards* Advisory Opinion, where the court found that the power to establish a judiciary body that bound the organization (including the General Assembly and the Member States) with its verdict,

> *was essential to ensure the efficient working of the Secretariat and… of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.*[1]

The Advisory Opinion is considered one of the tenets of functionalism, the leading theory that unifies the field of the law of international organizations around the objectives of the institutions as bestowed by the founding nation states, and that bases the capacities of the organization on that same function. The decision reiterates the necessity for an efficient international Secretariat, built around the principles of the UN Charter, as well as the necessity for a judicial body that abides by the rule of law. The function of the organization is also at the core of the law affecting the UN bureaucracy – as inscribed in the internal Staff Rules and Regulations, as well as the oath of loyalty that all UN staff make upon assuming office:

> *I solemnly declare and promise to exercise in all loyalty, discretion and conscience the functions entrusted to me as an international civil servant of the United Nations, to discharge these functions and regulate my conduct with the interests of the United Nations only in view …*

The organizational function and interests are all determined by the Member States who created the UN through the signing of the Charter, and who have voting power in the General Assembly and, sometimes, the Security Council. The UN Secretariat does not have direct law-making power in the organization. However, the UN Charter speaks of the purposes (Articles 1), and principles (Article 2) of the organization as

1 *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, advisory opinion, [1954] ICJ Reports 47, at 57.

a unit that addresses global issues with the support of geographically diverse civil service with an 'international character' (Articles 100 and 101). Aside from the public international legal character of the UN, there is also an internal dimension, the people dimension, which is drawn together and driven forward by organizational culture and morality and epistemic inputs, in addition to the legal function.

As an institution, the UN[2] civil service is obligated to uphold "the aims, principles and purposes of the United Nations"[3]. The UN staff is also immune from prosecution in domestic courts for acts committed in pursuit of those purposes – the so-called notion of functional immunity. Therefore, the inscribed legal and moral rights and responsibilities of the bureaucracy are based on an institutionalized loyalty to goals that are beyond the reach of individual governments, or even the collective of governments. This is also supported by the *Reparation for Injuries* Advisory Opinion, where the ICJ found that,

> *The functions of the Organization are of such a character that they could not be effectively discharged if they involved the concurrent action, on the international plane, of fifty-eight or more Foreign Offices…*[4]

The influence of nation-states in the organizations is a significant consideration in the context of global governance and in the practical functioning of the bureaucracy, but the collective of states' interests does not equal the interests and goals of the organization. The legal and ethical culture of the UN civil service is based on two pillars that follow logically from functional immunity – independence from national governments and international responsibility[5]. The examples in this chapter will illustrate how hollow those pillars are in real-life situations that involve human beings and powerful governments, and how individual civil servants respond to the contradictions between cosmopolitan ideals and diplomatic power play.

2 The UN has no legal supremacy over either its Member States or other international organizations. However, as the largest in number of Member States, with the widest mandate, the largest civil service, and with the centralization of coordination powers in the hands of the UN Secretary-General (who chairs the UN Chief Executive Board for instance), it is representative of other global institutions at least. The above principles are also part of the Code of the International Civil Service promulgated by the International Civil Service Commission, and many organizations have adopted them as binding.

3 See Staff Regulation 1.2 (e), ST/SGB/2017/1.

4 *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion, [1949] ICJ Reports 174, at 180.

5 See UN Charter Articles 100 and 101.

II. OBSTACLES

There are both methodological and substantive difficulties in analyzing the ethics of the UN public administration in particular, which also apply more generally to the staff of other intergovernmental organizations. First, the topic of international civil service ethics is not a separate discipline, and since the ethics is contained in internal legal documents like the Staff Regulations, it could be addressed through legal or socio-legal approaches. However, there have been no legal studies on the topic of international civil service ethics, even though the institution of the global bureaucracy has existed for almost a century. The ethical core of the UN bureaucracy is contained in Article 101(3) of the Charter, which establishes the centrality of the qualities of the individuals, as well as the international character of the civil service:

> *The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.*

These same principles are reiterated in the Staff Rules and Regulations, especially Article 10(1)(a), which formulates the Charter principle, the internal rules and the standard of conduct as the defining measure of misconduct:

> *Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.*

Therefore, in the internal legal system of the UN, misconduct is not defined as a breach of an obligation, but as failure to live up to a standard of behavior that is framed as an ethical code. In addition to the internal binding rules, there are common ethical norms for most of the large global institutions, as defined by the International Civil Service Committee (hereinafter ICSC), an independent advisory body created by the UN General Assembly. The ICSC harmonizes the conditions of service for the international administrators, including the ethical principles of behavior. The first dedicated ethical mandate of the staff of intergovernmental organizations was contained in the Report on the standards of conduct in the international civil service by the International Civil Service Advisory Board (later renamed as ICSC) from

1954. The ICSC code of conduct dates back to the 1970s and was updated for the first time in 2013, but its legal force is controversial since it is neither a binding international treaty, nor an internal administrative issuance.

The second large impediment to scholarly analysis is a chasm between theory and practice. While it is possible to analyze the mandates and the politics using one of the leading philosophical approaches – deontology, consequentialism, virtue ethics – doing so does not offer practical insights in real-life situations. The UN Ethics Office for instance deals with very practical issues – whistleblower protection, accepting gifts, financial disclosure – that do not benefit in an obvious way from a theoretical philosophical analysis. And while domestic public administration ethics studies can provide parallels, there is no analogy for the international character and geographical diversity, or for the role of Member States. In a domestic setting, administrative law governs the interactions between citizens and civil servants, but at the global level, the internal rules of global institutions only affect the labour relationship between individual bureaucrats and the organization. Individual citizens have no standing therein, even in questions of transparency and access to documents[6].

Third, the role of global bureaucracy in international organizations has been mostly the subject of political science analysis, which concerns itself with power and influence over the external activities of the organizations, rather than internal morality and ethical culture. On the other hand, some common elements can be established by going back through the history of the intergovernmental organizations of today.

III. THE INTERNATIONAL NATURE OF THE CIVIL SERVICE

The international civil service was created nearly a century ago by Eric Drummond, the first Secretary-General of the League of Nations – the predecessor organization of the UN. Drummond argued and convinced the Member States of the first universal intergovernmental organization, that an institution with such a broad mandate required a dedicated international civil service, rather than the seconded national civil servants that had serviced the needs of the technical organizations of the late 19th and early 20th centuries. Drummond later analyzed the work of the global bureaucracy he created thus,

> *The two great qualifications for these posts apart from general efficiency seem to me to be firstly a belief in the League and a desire to*

6 See Liisa Leppävirta and Diliana Stoyanova, *Access to Information in International Organizations: the EU and UN*, Jean Monnet Working Paper 2/2017, City University London, available at https://www.city.ac.uk/__data/assets/pdf_file/0006/357855/Stoyanova-and-Leppavirta.pdf.

> *serve it, and secondly the capacity of placing yourself in the position of the other man. It is by these qualities that the members of the Secretariat have been able to acquire the confidence of the fifty-four Governments whom it is their duty to serve impartially and to the best of their ability; if this spirit can continue to permeate the organisation, the Secretariat will, I think, remain one of the most important factors in the development of international life ...*[7]

It was very clear to Drummond that it is not simply the abilities of the international civil servants that mattered to the fulfillment of the purpose of the organization, but also their moral character as individuals and the independent international character as an institution. The United Nations bureaucracy inherited these core characteristics of the League of Nations civil service as demonstrated by Article 1 of the League of Nations Staff Regulations and the UN Staff Regulations:

> *The Officials of the Secretariat of the League of Nations are exclusively international officials and their duties are not national, but international." (1926 Secretariat of the League of Nations Staff Regulations, Article 1)*

> *Staff members are international civil servants. Their responsibilities as staff members are not national but exclusively international." (2018 UN Staff Regulation 1.1)*

The same national governments that created the League and the UN, also conceived the institution of the international civil service, as the invaluable element to achieving the purpose of the institutions and the furthering of the interests of humanity as a whole. The Convention of Privileges and Immunities of the United Nations (which was based on Article 7 of the Covenant of the League of Nations) states that

> *officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.*

Also, Article 100 of the UN Charter obligates the UN staff to remain impartial to political pressures,

7 See Eric Drummond, 'The Secretariat of the League of Nations', (1931) 9 Public Administration 228.

> *In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.*

The same provision puts a corresponding obligation to respect the institution of the UN bureaucracy on the national governments,

> *Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.*

These responsibilities, even as they originate in international treaties, however, are difficult to enforce – there never has been a case against a nation state for violating the Convention or UN Charter Article 100, even though there is more than ample evidence of breaches which ought to result in international responsibility. Between 1986 and 1998[8], the Secretary-General submitted a yearly report on the issues with privileges and immunities of the officials of the UN and the Specialized Agencies and related organizations. The reports documented violations of the privileges and immunities of international civil servants – hundreds of arrests and unlawful detainments[9] (sometimes for months with no indictment or convictions and deaths in prison), mostly in the Middle East (where the United Nations Relief and Works Agency for Palestine, UNRWA, is active) and East Africa; murders[10] and kidnappings; disappearances; restrictions on travel[11]; illegal taxation; departure fees (Iran); fees for work permits in Egypt for Egyptian nationals, or locally recruited staff forced to sign contract with the Ministry of Interior (Laos).

8 A/C.5/41/12, A/C.5/42/14, A/C.5/43/18, A/C.5/44/11, A/C.5/45/10, A/C.5/46/4, A/C.5/47/14, A/C.5/48/5, A/C.5/50/3, A/C.5/52/2, A/53/501.

9 It is noteworthy that 1987 was the beginning of the first Intifada in the Gaza strip and West Bank and the foundation of Hamas.

10 Examples include the 1985 kidnapping and execution of journalist Alec Collett (whose body was only discovered in 2009), and the abduction and subsequent murder of Lieutenant-Colonel William Higgins, a US officer serving as the Chief of the military observers of UNTSO. Both are usually attributed to Hezbollah.

11 A prominent example involves the case of Liviu Bota, a Romanian national who was the Director of the United Nations Institute for Disarmament Research. He was refused permission to exit the country and resume his duties, and was eventually only allowed to leave in 1988. The US has placed restrictions on travel of UN officials in the US – a 25 mile radius circle in New York City.

Between 1997 and 2015, the reports were focused on the safety and security of humanitarian personnel and the analysis shifted away from taxes, travel restrictions and other bureaucratic impediments. According to the newest evidence, in the 2001-2015 period, hundreds of UN personnel were killed as a result of violence or terrorism, hundreds were abducted, thousands arrested or detained without due process, and hundreds suffered aggravated or sexual assault[12]. No government has ever been brought to court, domestic or international, for these crimes. It is therefore not surprising that the UN civil service has little trust in the commitment of national governments to the protection of their rights and the rule of law inside intergovernmental organizations. The pillars of the UN ethical culture are cracked and hollow from their very bases, and have a profound effect on the interaction of the bureaucracy with the global society.

IV. A TRUST DEFICIT

The UN bureaucracy itself has many layers – of nationality and location, of job and contract type, of status and profession, of gender, et cetera. Each of these intersecting layers comes with conflicting loyalties, duties and moral obligations. The nature of the legal relationship pits the staff against the organization in legal disputes, and creates an 'us vs. them' mentality, even when it comes to amending the internal rules. One of the biggest internal divisions is between staff in headquarters and staff in the field. The key managerial powers are concentrated in the central offices – New York, Geneva, Vienna, the Hague – while those actively engaged with articulated goals like the Sustainable Development Goals are in the field – ending poverty and hunger; improving health, education and gender equality; building infrastructure and energy resources, et cetera. There is often but a limited awareness of the impact of decisions and their moral implications, if the recipients are thousands of kilometers and dozens of bureaucratic hurdles away. There is also a different shared morality among people who distribute malaria pills in refugee camps, those who prosecute war criminals, those who prepare budget proposals, and those who deal with worker compensation claims of individual staff members.

Since this chapter is focusing on the human stories of international civil servants as they relate to the global public, it would not be a lapse in methodology to include my own observations on the morality of international civil servants I have personally met. These observations do not constitute conclusive evidence of a mentality, but

12 A/70/383, see also A/69/406, A/68/489, A/67/492, A/64/336. A/63/305 is 2008 report, A/62/324 is 2007 report, A/61/463 is 2006 report, A/60/223 is 2005 report, A/59/332 is 2004 report, A/58/344 is 2003 report, A/57/300 is 2002 report, A/56/384 is 2001 report, but no consolidated statistics. Hundreds killed, detained, harassed, etc.

an anecdotal encounter of an outsider with the organizational ethics of the United Nations and similar organizations. Because those conversations were informal, names, affiliations and gender are redacted.

In 2017 I spent several months in New York, working as an intern at the UN headquarters. I saw my internship as an opportunity to speak to the people that I was writing about in private, and thus made an effort to get in touch with people from different departments, programs and organizations. In one such conversation, a staff member told me that since he/she only deals with internal documents that never reach the outside world, his/her work probably does not affect people on the outside. Simply put, his/her personal self-perception was that of a paper-pusher. But the way UN civil servants treat each other and people outside – students, interns, NGOs – forms the core of the impact that the UN has in the world. Some bureaucrats understand this, as another UN staff member told me – 'when I am at the office, I am the UN; when I go to the store, I am still the UN. It is everything I do, the dignity of the position and the respect I give to people.' Yet another long-serving bureaucrat shared 'I see people who have served together in the field, in war zones, and they call each other 'brothers'. It is a very deep bond – the commitment to the organization and the loyalty between the individuals.'

Several years earlier I interviewed another international civil servant at an organization, which has come under heavy criticism. When I asked him/her, how can he/she work for an organization that is so hated, he/she replied 'I wake up every morning and I know that I treat people fairly and that the organization's work is important'. It is unclear which is the prevailing self-image among the individual international civil servants – that of passive technical bureaucrat or that of an active moral agent. It would be nearly impossible to interview a large enough sample of people, especially considering the size of the UN bureaucracy today and the obligations to protect the image of the organization (see below). It is also difficult to cultivate this attitude if it does not exist from the start, and the on-line ethics training given at the UN at the moment is not conducive to humanized morality.

The international organizations of the 20th and 21st centuries have created a unique opportunity for individuals to participate in global governance. The global bureaucracy, an institution beyond traditional state structures of culture and power, supports the negotiations of diplomats and makes vital epistemic inputs in the final products – the instruments of international law. Unlike national public institutions and parliaments (in some countries), neither diplomats nor international civil servants are held legally accountable to the collective global society. There exists a system of moralized legality and legalized morality that holds the institutions together and directs them in the collective pursuit of global interests.

However, Member States hold all the financial and law-making power – through budget contribution and voting in the General Assembly and Security Council – and thus the tradition of secret international politics has not given much way to

transparent and accountable global governance. What is missing is an awareness of the global society beyond the member states. Trust cannot be built without this awareness, and there is already a trust deficit on the side of the bureaucrats because of the pressures and breaches of responsibility by the national governments described above.

V. THE IMAGE OF THE UN

Public trust is the moral core of public administration, and at the global level gives meaning to the purpose of the organization. However, because of the control exercised by the Member States and the physical distance between the bureaucratic management and the public, the trust link between the global bureaucracy and the international society is very tenuous and a matter of personal choice by the civil servants.

UN bureaucrats have a written legal obligation to act in a way that would preserve the image of the organization. Staff Regulation 1.2 states

> *(f) While staff members' personal views and convictions, including their political and religious convictions, remain inviolable, staff members shall ensure that those views and convictions do not adversely affect their official duties or the interests of the United Nations. They shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and, in particular, any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status;*

Also, according to the Standards of conduct of international civil servants, paragraph 33:

> *It is the clear duty of all international civil servants to maintain the best possible relations with Governments and avoid any action that might impair this. They should not interfere in the policies or affairs of Governments. It is unacceptable for them, either individually or collectively, to criticize or try to discredit a Government. At the same time, it is understood that international civil servants may speak freely in support of their organizations' policies. Any activity, direct or*

> *indirect, to undermine or overthrow a Government constitutes serious misconduct.*

As a result, the focus of accountability frameworks and transparency policies is on preserving the image of the organization and the interests of governments, rather than building and maintaining a dynamic of trust with the global public. In a very recent example, in 2017 UN staff members were advised to not participate in the Women's march because it could be perceived as a criticism of the US president.[13] And despite the rising publicity of sexual harassment cases[14], there is little movement in investigating or punishing those responsible.[15] The ethical culture of the UN is one where the highest echelon of political appointees – the heads of programs, the Deputy and Assistant Secretary-Generals – are immune from consequences even for egregious breaches of law and ethics. Following in the tradition of secretive diplomacy, and impunity of Member States for crimes against the international civil service, the problems at the UN are covered up, not resolved in a transparent way, as also evidenced by whistleblower cases.

VI. ON WHISTLEBLOWING

According to Francois Loriot,

> *Using the sacrosanct argument 'UN privileges and immunities', [the UN] senior management has often defended impunity as a political tool, rather than face justice on gross negligence, mismanagement, corruption, embezzlement and other types of abuses.*

The nature of the internal labour relationship and organizational culture puts the individual bureaucrat in opposition to the administration as whole whenever a wrongdoing comes to light. The decision of the individual to notify such situation, and the way the organization handles act like trace-dyes injected in a living organism, revealing cracks and weaknesses in the internal structure. Whistleblower retaliation cases reveal not only single cases of wrongdoing, but also deep-seethed internal conflicts and flaws of international organizations and the lack of will to fix them.

13 https://www.devex.com/news/un-employees-have-mixed-response-after-wfp-tells-staff-not-to-participate-in-women-s-marches-89496.

14 https://www.theguardian.com/global-development/2018/jan/18/sexual-assault-and-harassment-rife-at-united-nations-staff-claim; https://www.theguardian.com/global-development/2018/may/08/un-sexual-misconduct-chief-was-promoted-while-facing-harassment-claims.

15 https://www.independent.co.uk/news/uk/politics/unaids-un-agency-sexual-harassment-allegations-danny-graymore-british-bostrom-loures-sidibe-donovan-a8380431.html.

When a UN bureaucrat becomes aware of something unethical or illegal within the organization, he or she has a choice to report it, or to remain silent. This decision is influenced by a lot of factors, but ultimately it is a judgement of what is the right thing to do – both in terms of the personal virtues and moral imperatives, and with regard to the consequences for that person within the organizational culture. In the codes there is even a legal obligation to notify the wrongdoing, but it is only a part of the motivation for speaking up or not. The moral obligation is more complicated, because it arises from an organizational culture that is not characterized by a shared understanding of right and wrong – as it would in a domestic context. In some cultures, transparency and 'telling on' colleagues have a negative connotation and are discouraged. However, the institutional culture in intergovernmental organizations is not simply a patchwork of cultures, or the domination of Western values, or an extension of diplomatic convention, but a combination of all three.

Conversely, when a public organization becomes aware that one of its staff has committed misconduct, it has a moral and legal responsibility to sanction the individual, but also has the choice to not effect consequences – especially if the bureaucrat is a high-ranking political appointee. When such an institution is not embodying the rule of law, there is the option to resolve the conflict without a public punitive measure through informal mechanisms or by avoiding and hiding the problem altogether. On the other hand, when a wrongdoing becomes public, there is a choice to take responsibility publicly or to hide behind the organizational immunity from prosecution and to make cosmetic changes to policy, which would theoretically deter repeat behaviour through the threat of punishment. Intergovernmental organizations like the UN have taken the latter, consequentialist approach based on the impact of a potential scandal on the whole organization and its purpose, as demonstrated by several cases that have gathered media interest. This approach, in turn, affects the organizational values, as well as the moral integrity of individual civil servants and the likeliness of their reporting in the future. In essence, making the choice to report or to sanction based purely on consequentialist considerations, and basing the law only on punishment, takes the ethics out of the law and replaces it with politics.

The position and integrity of the international civil service has to be analyzed in the context of the cases where the conflict arises between the interests of the individual and the organization. A conflict reveals a dichotomy of loyalty, of interest, and of a perception of what the impact could be or what is the right thing to do. The resolution of the conflict reveals the level of integrity of the legal system that holds the organization together. In the past 15 years, several high-profile cases of whistleblowers have revealed those cracks, but very little has been done to seal them.

Perhaps the trigger case of whistleblower reporting was Dr Rehan Mullick, a Pakistani-American sociologist and analyst, who worked for the UN mission in Iraq. In 1995, the UN established its now-infamous Oil-for-food program, which allowed

the Iraqi government to purchase humanitarian necessities notwithstanding the embargo imposed on the country. In 2002 Dr Mullick attempted, through several different channels, to reveal far-reaching abuses of power and corruption in Iraq, but was ultimately informed that his contract would not be renewed.[16] The matter was investigated by the Independent Inquiry Committee[17], chaired by Paul Volcker, where Dr Mullick testified. The Committee concluded in its final report that over USD 1.8 billion was funneled through surcharges and humanitarian kickbacks. In the wake of this case Kofi Annan issued the whistleblower protection policy and created the UN Ethics Office, but subsequent cases proved that the ethical pillar of the organization is not so easily fixed.

Sometimes international civil servants fail to achieve change through the official channels, and then go as far as to take it on themselves to leak information of immoral and illegal behavior to the global public. Between 2012 and 2013, Aicha Elbasri was stationed in Darfur, as the spokesperson for the African Union-United Nations Mission (UNAMID). She became aware of instances of mass killings, and attacks on peacekeepers and humanitarian workers by government forces, which were not reported by the UN Department of Public Information or the spokespersons. Elbasri alerted the Office of Internal Oversight Services, but when no formal action was taken, she resigned and leaked information on the cover-ups, despite the obligations described above. She later wrote articles in Foreign Policy detailing her experiences, and the resulting publicity and pressure prompted Secretary-General Ban Ki Moon to initiate (limited) internal investigations.

It is certainly a recurring theme that whistleblowers in the UN are separated from the organization; they are also often retaliated against by their own colleagues for going against the 'safe' policy of keeping quiet. The policy instituted by Kofi Annan, and updated by the current Secretary-General, Antonio Guterres, is supposed to provide protection from retaliation through recommendations by the UN Ethics Office. However, two recent cases from the UN Dispute/Appeals Tribunals, illustrate that the internal justice system is not focused on creating an ethical environment, and the administration does not abide by principles of the rule of law. James Wasserstrom, an American official who exposed corruption in Kosovo, was repeatedly retaliated against by his colleagues and investigated for misconduct after reporting to OIOS. Wasserstrom filed a complaint with the UN Dispute Tribunal, where he was awarded damages. The Tribunal had ordered the Secretary-General to submit confidential documents for consideration, but was refused. Subsequently, the case was overturned by the second instance Appeals Tribunal, which ruled

16 http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1487049/The-man-who-tried-to-blow-the-whistle-on-the-UN-oil-for-food-scandal.html.

17 https://web.archive.org/web/20130823070841/http://www.iic-offp.org/documents/IIC%20Final%20Report%2027Oct2005.pdf.

that the Ethics Office actions were not within the Tribunals' jurisdiction; later the whistleblower policy was amended to exclude recommendations by the Ethics Office from judicial review. Subsequent whistleblower retaliation cases were adjudicated in a similar fashion. Caroline Hunt-Matthes, an investigator with UNHCR, had made numerous disclosures regarding rape, sexual harassment, and unlawful detention of refugees in 2006. She was separated from service, which she appealed and the Dispute Tribunal found in her favor in 2015, but the decision was again reversed by the Appeals Tribunal. UNHCR issued an apology in her case in 2018.[18]

Finally, the most (in)famous UN whistleblower case of the past 10 years is certainly the one of Anders Kompass. In 2013-2014, Kompass, a Swedish OHCHR official alerted the French authorities of a report recording a string of cases of child sexual abuse in the Central African Republic. He was consequently suspended pending an investigation in his 'leak' of confidential information without authorization. In addition to considerable media attention, the scandal also involved external official scrutiny, which concluded that his suspension was unlawful and was thus rescinded. Mr Kompass still resigned. In 2017, a panel of French judges decided not to bring charges against the French peacekeepers involved.[19]

Obviously not all cases have names because of the strict confidentiality rules. However, some public cases of anonymous accusations also merit attention from the perspective of ethics. The UN has had sexual harassment prevention policies since the late 1990s, but the punishments have only recently been dismissal. International civil servants attempting to expose sexual harassment by senior officials have been mistreated and even forced to resign.[20] The Secretary-General has the ultimate authority to dismiss senior officials at the Deputy- and Assistant-Secretary General levels, but has never used that discretion.

VII. TO CONCLUDE

It is certainly poignant that Abraham Feller took his own life when he saw the work of his life, the pride, the duty of protecting his colleagues in the pursuit of global peace, under attack by the very same governments that created the organization and were responsible for achieving said peace and protecting human rights and dignity around the globe. The stories told in this chapter do not amount to a problem

18 http://www.unhcr.org/news/press/2018/6/5b152d314/unhcr-caroline-hunt-matthes-reach-mutually-satisfactory-settlement-relation.html.

19 https://www.nytimes.com/2017/01/06/world/africa/french-peacekeepers-un-sexual-abuse-case-central-african-republic.html.

20 See R. Ratcliffe, 'Sexual Harassment and Assault Rife at United Nations, Staff Claim', The Guardian, January 18, 2018. Available at https://www.theguardian.com/global-development/2018/jan/18/sexual-assault-and-harassment-rife-at-united-nations-staff-claim.

that can be fixed by standards of conduct, or by a multiple-choice on-line training course; it is a case of an embittered body of people that face the largest issues in the world today in a shared sense of powerlessness and utter hopelessness. In short, the global society does not have trust in the international civil service, because the international civil service does not have trust in itself.

But it is the qualities of those individuals – abilities, dedication, integrity, impartiality, international character – that affect the work and the qualities of the output of the organization, as well as the meaning of the institution for the global public. These individuals leave their communities, their countries, and often their language behind, and take an oath to work for the benefit of humanity at large. Some of them have a keen understanding of the implications of their work and character and an impressive record of actions that uphold these principles. They are forced to remain silent, however, when those principles are tarnished by governments and individuals who occupy a post for political reasons, rather than merit. They cannot speak up, they cannot defend themselves, their colleagues, or those same principles, for fear of being fired; and so they become silent and passive.

In late 2017, I was sitting in the New York office of a UN official; I had never heard of Feller's name before that moment. This person turned to me and said, 'I wonder how many of my colleagues today would take their own life in the same circumstances.' The implication was that many current bureaucrats are jaded and accept passively much bigger affronts to the personal and professional dignity of the UN civil service than what drove Feller over the edge of that Manhattan window.

CHAPTER 6
TEACHING RESPONSIBLE GOVERNANCE

Tuomas Tiittala

I. INTRODUCTION: RESPONSIBLE GOVERNANCE AS AN EDUCATIONAL AIM

This is essay is concerned with moral education in university law schools and law faculties especially from a virtue ethics perspective. Despite particular traditions of the university institution and legal cultures in different parts of the world, especially today ideas travel fast, so what is going on in one place is soon a pressing issue in another place. For this reason, issues now more topical in North-America and the United Kingdom are discussed by a European author

Education of rulers is classic theme: Plato discussed it in the *Republic*. Other works on this theme also from a more distant past include Thomas Elyot's *Boke Named the Guvernour* and Erasmus of Rotterdam's *Education of the Christian Prince*, not to mention Machiavelli's *The Prince*. For all these authors education was an aristocratic affair limited to a select group of individuals — perhaps a member of a royal family due to inherit a position of power. Nowadays education is discussed more often in democratic terms in the sense that every citizen in a democracy is supposed to have an equal opportunity to attain positions of power, or at least owing to one's education be an informed voter.

Teaching responsible governance is the title of this text. Here it is understood as instilling in potential rulers a capacity and disposition to act in an ethical way. The potential rulers discussed in this essay are university graduates in general and law graduates in particular. New university students tend to have a desire and capacity to consider, understand and make connections between discussions and discoveries in science, humanities, and their practical application in the surrounding society. As a consequence, university graduates often end up in leadership or expert positions in various areas of the society — and, at least in Finland, a university degree often is at minimum a practical, if not legally-mandated, prerequisite for certain high positions in the public and private sector. Law students in turn have the interest and desire to understand and influence the society through law. Certain positions in the public sector, in Finland, are all reserved for law graduates; prosecutors for example. This means that lawyers govern certain parts of the society that have to

do with law and justice. What is the role of universities and law schools and law faculties in making sure that these people who govern our societies do so responsibly?

Nowadays, it is rare, except perhaps in institutions such as military academies, to hear exchanges on what kind of moral outlook university students, or students of professional schools, should develop during their studies as a necessary element of their preparation for practice outside the educational institution. Yet, graduates of even top-tier universities and professional schools are found to have engaged in selfish, socially irresponsible, cowardly, and harmful behaviour.[1] In the field of law, examples of this sort of behaviour that are often mentioned include the contribution of lawyers to the well-known Watergate scandal and the drafting of the so-called Torture Memos.[2] It is of course debatable whether moral education would have made a difference and would have prevented the antisocial behaviour.

Responsibility is associated with control, duties, and blame; as someone has control over a process, for example, he also has a duty to ensure that the process functions as it should and within the limits set by law and ethics, and if the process fails to achieve its aims or rules of law and morality are transgressed, the person responsible, at the outset, has to take the blame. In large, bureaucratic organizations it is often not easy to establish moral or legal responsibility. This has to do with the fragmentation of knowledge and division of labour and that most moral theories assume that an individual has sufficient understanding of the circumstances when making a decision.[3]

From a virtue ethics perspective, responsibility is not a stand-alone excellence but seems a composite comprising of different virtues. Being responsible entails such character traits as courage, diligence, carefulness, and practical wisdom. As with virtues, responsibility requires that the moral agent has free will. A person can be regarded as virtuous or responsible only if he has made a decision or taken action in a situation in which deciding or acting otherwise was possible. Conversely, a person can fail to be virtuous or responsible if there was a real opportunity to behave in a different way.

Governance is a somewhat vague term that overlaps with the concepts leadership, management, administration, and rule, at least. All of these concepts have their specific connotations and contexts of use. Leadership, for example, seems to refer to human interaction, whereas management and administration are often used

1 Alasdair MacIntyre, 'The Very Idea of a University: Aristotle, Newman, and Us', (2009) 57 *British Journal of Educational Studies* 347, 361.

2 John W. Dean III, 'Watergate: What Was It?', (1999-2000) 51 *Hastings Law Journal* 609; Clare Keefe Coleman, 'Teaching the Torture Memos: "Making Decisions under Conditions of Uncertainty"', (2012-2013) 62 *Journal of Legal Education* 81.

3 David Luban, Alan Strudler and David Wasserman, 'Moral Responsibility in the Age of Bureaucracy', (1991-1992) 90 *Michigan Law Review* 2348, 2363.

when talking about running processes and organizations and thus have a stronger bureaucratic flavour to them.

Next, the essay discusses the university as broader context, then turns to elaborate on perspectives on moral education, and ends with a look into the teaching of professionalism and ethics in legal education.

II. THE BROADER CONTEXT: ETHICS IN THE UNIVERSITY

Nowadays legal education is generally provided in a university setting. In Europe, for many students law is their first degree and the only field they study at the university. In the US, students generally are required to first complete a 2–4 year undergraduate degree before they apply for and start studies at a law school. Given that today legal education is so entangled with the university institution – in continental Europe it has always been so – before proceeding to micro-level issues of ethics in legal education, it is helpful to consider some challenges facing the university as a moral educational institution.

First is the issue of whether a modern university in the West, is or should engage in moral education in the first place. From a historical perspective, to ask this question seems strange. Ethics was an important part of studies in Greek academies and medieval universities.[4] Deborah Rhode recalls that in the US in the 19th century, college presidents taught ethics students as a capstone course.[5] And Johan Vilhelm Snellman, a Finnish philosopher central in forming the country's institutions and university education, stressed how important it is that university students develop a moral conviction.[6] Especially in the English-speaking world the student body and faculty nowadays comprise a variety of national, ethnic and religious backgrounds. How is one to teach ethics – values and virtues – in this kind of environment? It seems that ethics is either set aside or teachers and students are encouraged to exercise postmodern virtues such as sensitivity to incommensurability, indeterminacy, and non-foundationalism; dialectical awareness; empathy; hermeneutical sensitivity; openness to alterity; respect of plurality; a sense of irony and humor; a commitment to civility; a capacity for fairness and charity; compassion in the presence of suffering, with an antipathy toward violence; and humility.[7]

A second issue concerns threats to the idea of a liberal education, understood most often as learning for its own sake or the pursuit of truth. In countries drawing

4 Deborah L. Rhode, 'Ethics by the Pervasive Method', (1992) 42 *Journal of Legal Education* 31, 33.

5 Rhode, 'Pervasive Method', 34.

6 Johan Vilhelm Snellman, *Akateemisesta opiskelusta*, J. E. Salomaa (trans.), (Snellman-korkeakoulun julkaisuja 1/2005 [1840]), 6.

7 Robert J. Nash, *Answering the "Virtuecrats": A Moral Conversation on Character Education* (New York: Teachers College Press, 1997), at 11.

on the German university model, the concept of *Bildung* also stresses the non-utilitarian nature of university studies.[8] Universities are pressured to be relevant and to better cater to the practical needs of companies. One sometimes hears complaints from law firm representatives that law graduates need to be further trained in practice as the university law school or faculty does not provide sufficient practical knowledge and skills. The critique may be even hasher towards humanities faculties and departments. From a moral educational perspective it is problematic if university education increasingly moves from providing a liberal education into providing vocational training. The idea of a liberal education has been to inculcate knowledge, the development of skills, the capacity for deep and critical thinking, and a moral character that can be used for the good of the whole society. In other words, a liberal education has been a preparation for citizenship, rather than for a particular job.[9]

A third topic of debate is whether universities should prioritize teaching or research. This question is relevant because it seems to have been a dividing factor between continental European and Anglo-American universities since the 19th century. The question is also relevant for moral education as different university models are based on different philosophical and religious worldviews and a different conception of what an educated person is. First published in the mid-19th century, John Henry Newman's *Idea of a University*[10] is a classic contribution to the debate on the purpose of the university as a social institution. Newman stressed the importance of developing a broad and balanced mind. He held that universities are for teaching while research was to be done in institutions outside the university. This was so because research required specialization which was antithetical to acquiring a general and unified, holistic understanding of the world which in turn was the mark of an educated mind or person. Newman also discussed the centrality of theology; it would unite all the diverse fields of knowledge. For Newman, university education is to prepare students for life in the community.

In the 19th century in Germany, a distinct type of university emerged, one in which teaching and research were brought together. The German university model that emerged in the 19th century differed from the older universities in continental Europe and England. A distinctive feature of the new in the German model was the union of teaching and research, as well as the idea that students and teacher-researchers were at the university primarily to serve and advance science. The

8 Paul Standish and Lars Lovlie, 'Introduction: Bildung and the Idea of a Liberal Education', (2002) 36 *Journal of Philosophy of Education* 317.

9 On the idea of liberal education see: Bruce A. Kimball, *Orators & Philosophers: A History of the Idea of Liberal Education*, (New York: The College Board Publications, 1995); and R. S. Peters, *Ethics and Education* (London: George Allen & Unwin Ltd, 1966), at 43–44.

10 John Henry Cardinal Newman, *The Idea of a University: Defined and Illustrated* (London: Longmans, Green and Co., 1902).

intellectual origins of the German university are usually associated with Wilhelm von Humboldt. The emergence of the German university has affected how people understand the purpose of university education. For supporters of the research-university model students, teachers and scholars all can find their work and life meaningful if they in some way contribute to the advancement of knowledge in some particular area. In the older university-model, such as that endorsed by Newman, the university's aim was for teachers to strive for and maintain the unity of knowledge and hand it down as best as possible to students. Under the German university model, by contrast, students were treated in a more mature way, as independent persons.[11]

A fourth, more long-standing topic that strains the university is the existence of two cultures — a humanistic and a scientific one — as classically discussed by C.P. Snow in his article and subsequent book.[12] Snow tells how he has come to realize that often scientists and humanists do not and not care to understand each others' viewpoints, and he regards this a great loss to intellectual progress. Ethics, as an area of philosophy, is often placed among the humanities' side of the cultural divide, as ethics often concerns notion of good, right and just as determined through negotiation in human interactions or drawing lessons and ideals from literature. Yet, as ethical outlooks often are based on a conception of human nature, studying humans biologically can produce relevant information for moral philosophical purposes, and thus sciences and humanities are connected. It seems that these connections are not stressed enough. Rather, moral philosophers might regard sciences as only concerned with the human nature, or even worse might regard the sciences as using their discoveries for developing new technologies (such as automated vehicles), which cannot provide help in deciding on conflicts of value. Scientists in turn might view the humanists as refusing to properly consider the findings of sciences and how these help to establish what a human being is which in turn would help in solving moral conflicts.

The fifth and last topic brought up here is political correctness, a stance which has mostly affected the humanities. This has two sides; one regarding the contents of humanities courses and another concerning freedom of speech at the university.[13]

The demand for greater diversity in humanities courses and readings has a history dating at least from the 1960s and 1970s. As part of the protests of the time, students demanded that humanities courses would give more attention to texts and artworks created by others than members of the dominant class, race, ethnicity and gender. The established canon of great books and artworks of the West

11 On the rise of the research ideal: Anthony Kronman, *Education's End: Why Our Colleges and Universities Have Given Up on the Meaning of Life* (New Haven CT: Yale University Press, 2007), at 91–136.

12 C.P. Snow, *The Two Cultures* and *A Second Look* (Cambridge University Press, 1969).

13 Kronman, *Education's End,* 137–203.

was challenged on the basis of social justice. When reading about higher education in North America, it seems that that the demands for diversity and equality have not been met. This is an important topic from a moral education perspective; it manifests the tension between progressives and character educators as discussed below in section III.[14]

As for freedom of speech at universities, controversial topics are dividing people into different camps. What seems to be the setting now is that conservatives and libertarians want to organize events to discuss and criticize progressive ideas and reforms in social norms and laws. Progressives, in turn, have protested against such events taking place at the university. Protests have occasionally successfully prevented an event commencing or proceeding by causing a fire alarm, for example. There have been cases in which protests have turned violent. The tension in this phenomenon is between free speech and the limits of it. Conservatives and libertarians hold that basically free speech is everything else except direct incitement to physical violence, whereas the progressives maintain that some opinions are so extreme and hateful (politically incorrect) that to engage with them in a rational debate would unduly legitimize such views; therefore it is allowed to not tolerate such views.[15]

Roger Scruton comments on political correctness by first criticizing that studies at the university no longer encourage students think critically:"[m]ost students now graduate in soft subjects that require ideological conformity rather than intellectual growth".[16] In his view, academic freedom is in most fields of the humanities a thing of the past and he regards the acceptance of 'de-platforming' and hate speech claims as succumbing to some vocal minorities.[17] For him, the social and moral purpose of a university is to hand down a store of knowledge and a culture making sense of it. The cultivation of citizenship has been the aim of education since the ancient Greeks with their notion of *paideia*. Scruton points out that while one could regard that the modern university is more open and egalitarian and tolerant, it actually imposes a culture of political correctness: "The modern university tries to cater to students regardless of religion, sex, race or cultural background, even regardless of ability."[18] Students no longer are initiated into a community based on certain values.[19]

14 Anthony T. Kronman, *Confessions of a Born-Again Pagan* (New Haven CT: Yale University Press, 2016); Allan Bloom, *The Closing of the American Mind* (New York: Simon and Schuster, 1987); Justin Zaremby, 'A Higher Education', (2017/10) *The New Criterion* 20.

15 Herbert Marcuse, 'Repressive Tolerance', in Barrington Moore Jr. Robert Paul Wolff and Herbert Marcuse (eds), *A Critique of Pure Tolerance* (Boston MA: Beacon Press, 1965).

16 Roger Scruton, 'The Idea of a University', The American Spectator (September, 2010) 50–52, 51

17 Scruton, 'The Idea of a University', 52

18 Roger scruton, 'The End of the University', First Things (April, 2015) 25–30, 28

19 scruton, 'The End of the University', 28

III. ON MORAL EDUCATION

3.1 What is at Stake?

There exist a variety of moral outlooks based ultimately on different conceptions of human nature and society. Correspondingly there are a host of ways to instill in students a moral outlook. It seems that in ancient and medieval times it was more common for moral philosophers to discuss moral education as part of their moral philosophical project. In modern times, these tasks seem to have been divided between moral philosophers and philosophers of education.

Moral education is about teaching students or providing them with resources – reasoning processes, role models, ideals – about how to think and act in the world where they have to make choices having possibly serious consequences for themselves and others. In moments of choice moral agents have to ask themselves what is the right thing to do or what kind of person they want to become.

Morality is about deciding on what is good or right for humans living in a community with others and in the natural environment. Morality is political because some values take precedence over others in individual or communal decision-making. Morality conflates with politics and power especially from the perspective of those philosophers who do not believe that moral decisions or action can be based on an objective understanding about what human nature and society are or should be. When the possibility of objectivity in ethics is rejected, moral education too turns into a more overtly political education – it turns into an endeavour to transform the existing society.[20]

3.2 Progressive versus Character Education

A way to better understand the virtue approach to moral education is by comparing it to some other approaches. Drawing on the writings of Robert Nash and David Carr, I make comparisons between two approaches, respectively labelled 'progressive education' and 'character education' as well as the tension between reason and emotion in education.

Jean-Jacques Rousseau is often named an originator of progressivism. In his view, society had a corrupting effect on humans, and in his book *Emile* he provided an idea of education that would protect the child from this corrupting influence. The child who grows up in accordance with the educational ideas of

20 Frank Lentricchia, *Criticism and Social Change* (Chicago Il: University of Chicago Press, 1983), at 2.

Rousseau would become a pure and thus ethically good adult. Rousseau's ideas give support to more contemporary educational views that see formal schooling having an indoctrinating effect. For example, when entering a law school or law faculty, a new student is innocent and idealistic, as he has not yet been corrupted by the teaching, readings, assignments, and the social environment. It is due to the formal curriculum, professors and fellow students that this student gives up the earlier idealism and adopts the habitus of a law student and later a lawyer.

John Dewey is someone who is also sometimes called a progressive. His educational philosophy grew out of the child-centered movement. Dewey did not want to teach particular virtues but preferred teaching democratic habits such as instrumentalism, sociality, practicality and cooperation while rejecting the old, puritan virtues.[21] For Dewey, children or pupils solving problems together and participating in democratic processes were developing moral virtues that they might have been taught in classroom intellectually.[22]

Perhaps a most recent form of progressivism is critical pedagogy, or sometimes called postmodern or liberationist pedagogy. It includes views that emphasize that even if it seems that we live in a democracy, people do not have equal opportunities to attain positions of power. There are various systemic biases that benefit some groups in society at the expense of others. Critical pedagogues do not always share epistemological and ontological presuppositions, e.g. whether objectivity exists in ethical matters, even though they would support similar political causes. Critical pedagogues seem to have the same shared goal of challenging moral conceptions of the capitalist social order. Some of the critics are more inclined to offer an alternative to capitalism, while others want to keep the field open to everyone's contributions, but especially of those previously marginalized in society. Sometimes postmodern education is discussed in virtue ethical terms; Robert J. Nash, for example, in critiquing both supporters of character education (traditionalists and communitarians) as well as critical pedagogues (whom he calls liberationalists) has offered his own postmodern approach to education which calls for students' to develop and exercise the postmodern virtues of sensitivity to incommensurability, indeterminacy, non-foundationalism and of dialectical and hermeneutical awareness.[23]

Turning to character education. The progressives go against moral educational thinking which they regard as authoritarian, discriminating, and narrow-minded. In Robert J. Nash's words:

21 Nash, Answering the *"Virtuecrats"*, at 7.

22 Nash, Answering the *"Virtuecrats"*, at 8.

23 Nash, Answering the *"Virtuecrats"*, at 163.

> much character education is unnecessarily apocalyptic and narrow in its cultural criticism, inherently authoritarian in its convictions, excessively nostalgic and premodern in its understanding of virtue, too closely aligned with a reactionary (or a radical) politics, anti-intellectual in its curricular initiatives, hyperbolic in its moral claims, dangerously antidemocratic, and overly simplistic in its contention that training and imitation alone are sufficient for instilling moral character.[24]

Indeed, Nash captures the essence of character education by casting it in negative and dismissive terms. Character educators maintain that education is a means to instill in students virtues and values of a good citizen and a community leader. Those who view that a central goal of education is to improve the character of students are described as advocates of character education. It as an umbrella term covering various outlooks that differ from each other to different degrees.

Nash has drawn a distinction among character educators by dividing them into the camps of neo-classicals and communitarians. What seems to be common to all character education supporters, and the reason why they stand out from the progressives, is that they regard human nature as raw upon birth and that it is through upbringing, education and social participation that the child matures into an ethically good person. So, in their view, society can have a positive effect on human development. Supporters of character education have been and are concerned about cultural decline as this causes problems for education; children or pupils can no longer look around and see artifacts, institutions and behaviour that have in the past been considered ethically and aesthetically valuable. [25] Yet, the positive effect of socialization depends on what kind of education the child or pupil receives – in what kind of society the child grows up. According to character educators, the way to raise or educate a child is to introduce him or her to the best ideas and literature in the culture concerned.

Nash distinguishes neo-classical supporters of character education from communitarians on the basis that the neo-classicals seem to stress the importance for all Western people of ancient Greece and Rome when we consider where to draw our moral guidance and examples from. Communitarians in turn seem to urge us to pay more attention to the variety of cultures we have now, each with their own histories and traditions. Communitarians stress that the manifestation of virtues, such as courage, may vary between different cultures. Yet, each culture is to draw moral values and examplars, not without critique though, from its own history. An example of a communitarian thinker is Alasdair MacIntyre who has argued that in Western pluralist countries we should allow the establishment and existence

24 Nash, Answering the *"Virtuecrats"*, at 10.

25 Nash, Answering the *"Virtuecrats"*, at 33.

of schools and universities based on different values. Having a variety of different institutions, which are internally consistent in terms of values and practices, is in his view better than the current multicultural and pluralist schools, colleges and universities.[26]

3.3 Reason versus Emotion

Another feature that divides commentators of moral education is to what extent moral development should be considered an intellectual (or cognitive) and to what extent it should be regarded as an emotional endeavour. The same issue has divided moral philosophers; David Hume is often named as someone who viewed sentiments being primary in moral attitudes, and Immanuel Kant and Plato are labelled as philosophers who stressed rationality. Aristotle is often located somewhere in between.

It has been said that in the 20th century, approaches that strive for scientific precision and objectivity have had the greatest influence on educational thinking and institutions. These approaches include behaviourism, but also Jean Piaget's and Lawrence Kohlberg's respective theories about children's moral development. David Carr summarizes Piaget's outlook by saying that in Piaget's view, moral progress is an individual's development "from an indiscriminate egocentricity to a rational, independent and flexible attitude to moral issues which is rooted in a respect of the moral law and driven by an altruistic concern for the good of others".[27]

The concept of moral psychology is often associated with Lawrence Kohlberg. He drew from Jean Piaget and Emile Durkheim in devising his theory of moral development. Following Piaget, Kohlberg argued that moral development proceeds through different stages which are associated with age. The three main levels of moral development are pre-conventional, conventional, and post-conventional. For Kohlberg, moral development was a journey towards greater rationality and understanding of universal principles. From Durkheim, Kohlberg took the idea that community matters. Kohlberg noticed that in a favourable environment students more easily proceed from one level to the next, and this prompted Kohlberg to apply his theory in practice by establishing so-called Just Community Schools.[28]

26 Alasdair MacIntyre and Joseph Dunne, 'Alasdair MacIntyre on Education: In Dialogue with Joseph Dunne', (2002) 36 *Journal of Philosophy of Education* 1, at 12.

27 David Carr, *Educating the Virtues: An Essay on the Philosophical Psychology of Moral Development and Education*, (Abingdon: Routledge, 1991), at 158–59.

28 John Snarey and Peter L. Samuelson, 'Lawrence Kohlberg's Revolutionary Ideas: Moral Education in the Cognitive-Developmental Tradition', in Darcia Narvaez, Larry Nucci and Tobias Krettenauer (eds.), *Handbook of Moral and Character Education* (Abingdon: Routledge, 2014), at 77–79.

The case Kohlberg used in his testing of children's moral reasoning was that of woman dying of cancer. The question was whether the woman's husband or a family member could steal a drug that would save the woman's life or alleviate her suffering from the drug's discoverer or manufacturer.[29] The main goal of moral education under the Kohlbergian model is that students acquire a capacity for rational self-legislation; it encourages students to live by self-imposed rules.[30] Kohlberg rejects the virtue approach calling it 'a bag of virtues'; for him relying on virtues is too unsystematic.

Kohlberg's theory has been criticized for being too rational, abstract and universal. Carol Gilligan for example says that Kohlberg's theory does not accurately describe how especially women think and act in terms of ethics. Gilligan contrasts an ethic of justice with an ethics of care. In ethics and moral education, advocates of so-called care ethics, including Gilligan, have criticized Kohlberg's theory of moral development for its focus on rationality and exclusion of emotions. Another proponent of care ethics, Nel Noddings, defines moral education as a

> *"community-wide enterprise and not a task exclusively reserved for home, church, or school. Further, it has for us a dual meaning. It refers to an education which is moral in the sense that those planning and conducting education will strive to meet all those involved morally; and it refers to an education that will enhance the ethical ideal of those being educated so that will continue to meet others morally."*[31]

Noddings stresses that rationality has an important place in her approach.[32] But she clarifies that caring, not rationality, is the basis for all ethics and moral education. Noddings rejects the proposal that different institutions are responsible for training the intellectual and emotional sides of humans.[33] Educational institutions can differ in their secondary aims; their first aim is to advance the caring attitude.[34] Noddings agrees that the aim of life is happiness, but specifies that this too is connected to caring.[35] Obeying moral principles is not how caring works, rather there is commitment and choice to care. For Noddings, mother and teachers are not roles but they are about entering special caring relations.[36]

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29 Carr, *Educating the Virtues*, at 160.

30 Carr, *Educating the Virtues*, at 164.

31 Nel Noddings, *Caring: A Relational Approach to Ethics & Moral Education* (Berkeley CA: University of California Press, 2013), at 171.

32 Noddings, *Caring*, at 171.

33 Noddings, *Caring*, at 172.

34 Noddings, *Caring*, at 172-73.

35 Noddings, *Caring*, at 173.

36 Noddings, *Caring*, at 175.

Hopefully this brief elaboration on the main distinctions of moral educational thinking in general helps to understand challenges in universities and law schools and faculties, the latter of which we will look at next.

IV. ETHICS IN LEGAL EDUCATION

4.1 Ethical Awakenings in the Profession

Everywhere in the world, legal education seems to be offered in a university setting and law schools and faculties are organizationally, financially, and physically embedded in the broader university framework. Therefore, the problems besetting the contemporary Western university (discussed above in section II) — commercialization, the two cultures, research vs teaching, and political correctness — play out in different guises also in law schools and faculties.[37] Yet, in this section these issues will remain in the background while more particular, or micro-level, issues of ethics in the study and practice of law are discussed.

How should ethics be taught to law students? This seemed to be the central question asked by many in the American legal community after it was revealed that many of the persons involved in the break-in at the Democratic National Convention headquarters at the Watergate hotel were lawyers working in President Richard Nixon's administration. This Watergate scandal caused at least the American public to develop a negative view of the ethical aspect of lawyers' professionalism. Also the legal profession became concerned about both the phenomenon as such and the public's negative view of the profession.

As a consequence of Watergate, the American Bar Association (ABA) started to pay special attention to lawyers' ethics and the teaching of professional responsibility. But already earlier, in the 1960s and early 1970s, an interest in professional ethics emerged due to a general moral malaise and loss of faith in professional leaders. Moreover, political activism raised issues of ethics.[38] Arguably the main reason for the rise of legal ethics was Watergate. In 1974, the ABA mandated courses in legal ethics.[39] The ABA ordained that the bar examination will have an ethics section, and law schools are to provide a certain amount of teaching as preparation for this. Legal ethics nowadays is part of the continuing legal education requirements that all lawyers are to meet annually. So, courses on legal ethics and professional

37 Harry H. Wellington, 'Challenges to Legal Education: The "Two Cultures" Phenomenon', (1987) 37 *Journal of Legal Education* 327; Arlynn Leiber Presser, 'The Politically Correct Law School', (1991) 77 *The American Bar Association Journal* (1991) 52.

38 Rhode, 'Pervasive Method', at 38–39.

39 Rhode, 'Pervasive Method', at 39.

responsibility appeared on the curricula of law schools. A particular issue was how to make it possible for lawyers to resists orders and instructions from a superior or client when those orders raise concerns of lawfulness. It seems however that much of the attention to legal ethics has been rule-focused or code-focused, meaning that to tackle the issue of lawyers' morality bar associations have promulgated new rules or elaborated existing ones. Law schools have then put their efforts in teaching these rules and codes.

From a virtue ethics perspective, promulgating new rules or elaborating on existing ones is often not the best approach to solve moral problems. Also part of the Watergate aftermath has been a renewed interest in professional virtues. It is a renewed interest because it has been argued that prior codes of conduct for lawyers were more aspirational in nature in the sense that they were less detailed, and contained more ideals than injunctions.

Europe or other parts of the world have so far not had their Watergate moment, at least not of the same magnitude. Instead, other countries have tried to draw lessons from the American experience. In the UK, for example, the journal *Legal Ethics* was launched for the discussion of national and international issues pertaining to legal ethics.

A somewhat similar case to Watergate is that of sanctioning of enhanced interrogation methods, including waterboarding, by lawyers at the Office of Legal Counsel of the U.S. Department of Justice. John Yoo, at the time Deputy Assistant Attorney General in the Office of Legal Counsel of the U.S. Department of Justice, and other staff members were asked to take a stand in memoranda whether the country was at war.[40] The memos were drafted by Yoo and signed by his superior, Assistant Attorney General Jay S. Bybee. The first memorandum defines what torture does not mean: in essence, if it remains without serious physical consequences an act will not be considered torture under the federal anti-torture act. The second memorandum in turn considers certain techniques in light of this definition of torture.[41] In the Office of the Legal Counsel, as reported by Assistant Attorney General Jay S. Bybee's successor Jack Goldsmith, there had been tensions between a duty to define the borders of executive power and trying to find a way to sanction the president's actions.[42]

The question arises how government lawyers could see themselves merely as enablers of government policies rather than also as guardians of the constitution and of international law. It seems the Torture Memos and Watergate were similar at least in the sense that lawyers in both cases did not alert or caution their their superiors' about venturing beyond established interpretations of the law. So, Torture Memos

40 Coleman, 'Teaching the Torture Memos', at 82.

41 Coleman, 'Teaching the Torture Memos', at 103-104.

42 Coleman, 'Teaching the Torture Memos', at 105.

was another moment of awakening in the legal (ethics) community in the US and around the world.[43] At least one commentator has attempted to draw educational lessons from Torture Memos ; focusing on ways judgement can be taught to law students.[44] Earlier, David Luban and Michael Milleman in turn have discussed legal education and the virtue of judgement as the ability to choose between moral principles in particular circumstances.[45]

4.2 The Lost Question and Challenges in Teaching Professionalism and Ethics

What is the purpose of law school? According to Bethany Rubin Henderson, law teachers and professionals should strive more often to ask, and find answers to, this lost question. Asking this question and trying to find answers to it might make one consider also the purpose of other social institutions, such as the university.

Henderson maintains that we should ask this question because dissatisfaction with legal education seems to be quite widespread among law students. Yet, she asks whether there really is reason to be concerned about legal education, if many of the graduates go on to have successful careers. She answer in the affirmative: there is reason to worry, and she refers to Anthony Kronman who has depicted the crisis of legal education to be one of morality. In Kronman's view, a career in law can no longer provide people with a sense of fulfilment. This lack of satisfaction manifests itself in the circumstance that law students and lawyers feel that they are not connected to their own values and ideals when practicing law. In Henderson's view, law schools should acknowledge their role in providing students the first point of contact with ideals concerning professional excellence.

Discussing the ideals and reality of the law school curriculum, Henderson suggests that "there is little systematic effort to inculcate a sense of professional responsibility among students", even if students are required to attend and pass a course on professional responsibility. Often in professional responsibility courses the focus is on individual lawyers' duties to the client rather than macro-level issues of the role of law and lawyers in society.[46] Speaking of required courses, Henderson says that "[t]he required curriculum in most law schools does not provide students the background knowledge of history, sociopolitical context, doctrine, and the

43 Sanford Levinson and Jack M. Balkin, 'Law and the Humanities: An Uneasy Relationship', (2006) 18 *Yale Journal of Law and the Humanities* 155, at 185.

44 Coleman, 'Teaching the Torture Memos', at 88.

45 Michael Millemann and David Luban, 'Good Judgement: Ethics Teaching in Dark Times', (1995–1996) 9 *Georgetown Journal of Legal Ethics* 31, at 39.

46 Bethany Rubin Henderson, 'Asking the Lost Question: What Is the Purpose of Law School?', (2003) 53 *Journal of Legal Education* 48, 69.

professional culture that they need in order to exercise sound judgement, legal reasoning, and communication skills when approaching legal problems."

To teach legal ethics and professionalism is difficult because, compared to other subjects in the law curriculum, students are required to study laws and regulations that often limit their freedom; people have a natural resistance to material and viewpoints that limit their freedom. Students enter law schools full of enthusiasm but leave disillusioned and with an instrumental approach to legal practice. Duncan Kennedy would add that legal education in the US trains students for hierarchy, forces them to abandon social justice ideals, and leaves them with few other options than to work for large law firms to pay back student loans.[47]

Additional problems include that students tend to see legal ethics as a public-relations add-on which does not really matter;[48] some critics of legal ethics teaching argue that it amounts to indoctrination;[49] and it is sometimes complained that professional responsibility is taught in isolation from other subjects.[50]

4.3 On (Professional) Virtues

Virtue is a common concept in moral philosophy and it seems most ethicists use it one way or another. So, very broadly understood, all moral philosophies employing the concept of virtue could be called virtue ethics. Yet, not all moral philosophies have virtue at the center. According to Carr, virtue is classically understood as something "deliberatively and freely chosen in the light of practical reason".[51] Modern virtue ethicists have argued over whether virtue is a characteristic of an act or of the moral agent.[52] Aristotle's view seems to have been that it was a characteristic of the moral agent. For the purposes of this essay, virtue and virtue ethics is understood in Aristotelian terms although his outlook, too, has been subject to scholarly debate. What matters here is Aristotle's classification of virtues into intellectual and moral, and that the (intellectual) virtue of practical wisdom is to find means to ends and find the appropriate way to exercise the moral virtues in particular circumstances.

Aristotle's conception of virtue cannot be understood separately from the idea of natural aims. His idea of goal-directedness, or teleology, means that all things,

47 Duncan Kennedy, 'Legal Education and the Reproduction of Hierarchy', (1982) 32 *Journal of Legal Education* 591.

48 Rhode, 'Pervasive Method', at 32.

49 Rhode, 'Pervasive Method', at 48.

50 Henderson, 'The Purpose of Law School', at 77.

51 Carr, *Educating the Virtues,* at 155.

52 Douglas N. Walton, *Courage: A Philosophical Investigation* (Berkeley CA: University of California Press, 1986); David Carr and Jan Steutel (eds.), *Virtue Ethics and Moral Education* (Abingdon: Routledge, 1999).

humans included, naturally strive for some end. For humans this end is happiness or flourishing which comprises intellectual, material, moral, social and emotional elements. Yet, while the goal of humans is a natural one, it is not obvious that humans are always taking steps in the direction of attaining this goal. To achieve this, a right kind of upbringing, education and social environment is required.

How do humans strive for their goal also rendered as a virtuous life? In Aristotle's view the moral virtues — which include justice, courage, liberality, temperance — are developed in practice. One must imitate the actions of those who are regarded as virtuous, thereby habituating the doing of virtuous deeds. Initially doing such deeds might feel uncomfortable and forced, but over time and after a significant number of repetitions acting in a virtuous way becomes a second nature. A challenge for every individual is to recognize when a situation is similar to an earlier one calling for the same virtuous action. The ability to discern between similar and dissimilar situations, or the virtue of practical wisdom, also requires exercise. An Aristotelian virtue ethics approach allows for errors to be made in discerning situations as long these errors are regarded as lessons to be learned.

Under the Aristotelian virtue ethics approach, whether the consequences of the action or choice are positive does not determine the virtuousness of the action. It also matters that the moral agent takes pleasure in acting virtuously, and that the virtuous action results from virtuous intentions. Here, Aristotle's thinking differs from Immanuel Kant's and Lawrence Kohlberg's who both stressed that a moral agent is to decide and act in accordance of universal rules graspable through reason, irrespective of how they feel about doing it. Kant in fact seems to have defined virtue as the ability to obey a universal rational rule when doing so would be uncomfortable to the moral agent.

Anthony Kronman has strived to describe what lawyers do from an Aristotelian perspective. According to Kronman, lawyers should see themselves as pursuing internal goods of legal practice. External goods, which should not be one's main reasons to embark on a career in law, are money and honour, and public-spiritedness.[53] The internal good that Kronman has in mind, his preferred reason why anyone should start and continue practicing law, is the exercising of good judgement, or practical wisdom. Elsewhere, Kronman has argued that the American legal profession has lost it ideals over the course of the 20th century.[54] Kronman seems to look at problems besetting the American legal profession and legal education from a virtue ethics angle. He sees law schools partly as complicit in this failure of ideals. These ideals were manifested in the ideal and examplar of the

53 Anthony Kronman, 'Living in the Law', (1987) 54 *University of Chicago Law Review* 835, at 838–846.

54 Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge MA: Harvard University Press, 1995).

lawyer-statesman who stood out because of his superior ability to exercise practical wisdom.

Also discussing lawyers' virtues Amy Gutmann has criticized Kronman's ideal type of law practice, which Gutmann refers to as the 'character conception' of a legal virtue. She has also criticized two other types of legal virtue: the standard conception (a firm commitment to the client's interests) and the justice conception (a strong commitment to a political agenda). All of these conceptions undervalue the significance of deliberating with the client. When criticizing Kronman's conception of legal virtue, Gutmann says the virtue of practical wisdom should be supplemented with a disposition to deliberate with the client about what is a just aim in the case. In this way, the lawyer could possibly get fulfilment from both exercising practical wisdom and commitment to a political cause.[55]

4.4 Teaching Methods

The dominant way of teaching legal ethics and professionalism seems to involve a separate seminar or lecture course where the focus rests on codes of conduct for lawyers; on the rules these codes contain, and on commentaries on them. From the virtue ethics perspective however, the following alternative methods could be employed.

The first method is setting a proper example. It is important to recognize a continuum from a time even before the start of legal education to the time after graduation.[56] Teachers in the law school or law faculty, just like senior lawyers in the practice environment, should set an example for the newcomers on how to make decisions and act as a lawyer. It is actually not really possible to not set an example; the question is more about the kind of example. It is said that "[t]he skills and values of the competent lawyer are developed along a continuum that starts before law school, reaches its most formative and intensive stage during the law school experience, and continues throughout a lawyer's professional career."[57]

Second, and related, is to provide more clinical training. When serving real clients under the supervision of law teachers or practicing lawyers, students learn to make choices, take responsibility, and clarify their own values as well as those of the wider legal profession. If the central aim of the clinic is students' learning they are free to ask advice, consult colleagues and supervisor, and make errors learning

55 Amy Gutmann, 'Can Virtue Be Taught to Lawyers?', (1992–1993) 45 *Stanford Law Review* 1759.

56 Bruce A. Green, 'Teaching Legal Ethics', (2006–2007) 51 *St. Louis University Law Journal* 1091, at 1091.

57 Robert MacCrate and Others, *Legal Education and Professional Development: An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (Chicago Il: American Bar Association, Section of Legal Education and Admissions to the Bar, 1992), at 3.

from them. It has been said that "[c]linics have made, and continue to make, an invaluable contribution to the entire legal education enterprise. They are a key component in the development and advancement of skills and values throughout the profession."[58]

A third method is to connect law to the humanities. The main point here is to move away from the notion that law is merely a collection of doctrines and statutes. Supporters of approaches involving both law and the humanities maintain that engaging with great works of literature and art will enhance students' imagination and ability for empathy, and thus develops them morally. James Boyd White has argued that legal practice and scholarship is actually very similar to the study of humanities. Both are about giving meanings to texts and events by looking at them from different angles and placing them in different contexts. In studying or practicing law or studying the humanities one is also translating ideas from one language to another. White considers that translating and placing texts and events in different context builds or reinforces relationships and is an act of respect.[59]

Martha Nussbaum in turn has argued that the humanities have a central place in her project of cultivating humanity in legal education.[60] Her views on education are influenced by writings of the ancient Greek and Roman Stoics as well as her experiences in international organizations working on poverty and development. In her view, it is a good thing that before entering law school American students have received a few-years undergraduate education which is ideally a general, liberal arts program that encourages students to see themselves as citizens of the world. While Nussbaum acknowledges that law school is to prepare students for the profession of law, she argues that also legal education should facilitate students' maturing into responsible citizens and leaders. In fact, she regards lawyers as quite influential citizens who have the power to affect policy.[61]

For Nussbaum, the three core values in the cosmopolitan liberal education starting at the undergraduate level and continuing in law school are, first, Socratic self-examination and critique in an effort to bring about a truly deliberative and self-aware democracy; second, world citizenship as the need to get beyond distinct identities, and third, the narrative imagination.[62] Ways to help students embody these values include the encouraging of deep reflection by assigning papers for students to write and providing detailed feedback on the papers. Also debates are

58 MacCrate and Others, *MacCrate Report,* at 238.

59 James Boyd White, *From Expectation to Experience: Essays on Law and Legal Education*, (Ann Arbor MI: University of Michigan Press, 2000), at 89–111.

60 Martha C. Nussbaum, 'Cultivating Humanity in Legal Education', (2003) 70 *University of Chicago Law Review* 265.

61 Nussbaum, 'Cultivating Humanity in Legal Education', at 271.

62 Nussbaum, 'Cultivating Humanity in Legal Education', at 269–71.

useful and important.[63] Nussbaum calls for more teaching on comparative and international law as well as including global perspectives in the teaching of subjects that are traditionally more national.[64] Additionally, legal ethics and professionalism can be taught by permeating them through the whole curriculum. In other words, it is about embedding issues of professionalism and ethics in the teaching of other substantive courses of law.

A rationale for the pervasive approach is that ignoring ethical issues arising in the context of various fields of law, leads to marginalization of the ethical dimension in the everyday practice of lawyers.[65] Using the pervasive approach, it is emphasized to students that ethics and moral education cannot be separated into a distinct subject and that the teaching of other subjects include value judgements. In each area of substantive law, legal ethics issues come in different guises, and only an expert in that field can capture all the relevant nuances. The substantive legal rules or cases provide a context within which it is possible to more easily grasp professional values and virtues.

Current views supporting the pervasive approach say that it should supplement a separate ethics course.[66] Deborah Rhode agrees and argues for supplementing – not replacing — a course dedicated to legal ethics with pervasively addressing issues of legal ethics and professionalism.

V. CONCLUSION

This essay has aimed to bring together issues that are relevant for critically evaluating the state of, and ways to improve, moral education in universities, law schools and law faculties. An attempt has been made to bring attention to the larger context of moral educational discussion. Narrowing the discussion to for example pedagogical methods of teaching ethics to university students, and law students in particular, is not sufficient to shed light on the challenges involved in teaching responsible governance at the present time – broader philosophical, political, cultural, and institutional questions must also be addressed, if real advances in moral education are to be made.

Yet, the essay ended with some concrete recommendations, drawn from literature on the topic, about how to enrich the teaching ethics and professionalism in legal education. It is hoped that this groundwork can serve as a spark or basis for a more elaborate discussion.

63 Nussbaum, 'Cultivating Humanity in Legal Education', at 272-73.

64 Nussbaum, 'Cultivating Humanity in Legal Education', at 276.

65 Rhode, 'Pervasive Method', at 32.

66 Rhode, 'Pervasive Method', at 50.

CHAPTER 7
THE QUEST FOR *PHRONESIS* IN THE HOLY LAND

Maria Varaki

I. INTRODUCTION

On December 6, 2017, President Donald Trump announced that the United States of America (US) recognize Jerusalem as the official capital of Israel. In his speech President Trump did not make any reference to the status of East Jerusalem but insisted that the United States will continue their efforts for a durable peace solution in Middle East. On December 7th, the Security Council held an unsuccessful emergency meeting, where the United States vetoed the draft resolution that condemned the particular decision as a violation of international law. On 14 May 2018, several American officials attended the opening ceremony of the US embassy in Jerusalem at the site of the former general consulate. A considerable number of states expressed their dismay concerning the relocation move and emphasized the destabilizing effect this decision carried for the so-called peace process.

There is quite a number of complicated legal issues that could be addressed by an international legal scholar. The status of Jerusalem in international law has become the subject of series of articles and heated discussions in blogs and other fora.[1] In the same manner the use of force by Israeli armed forces against the Palestinian demonstrators has triggered another round of commentaries and legal analysis. However, this chapter is not intended to continue this discussion, despite its significance and scholarly interest. Instead, the main aim of this piece is to use the US decision as a case study of a discretionary dilemma that sheds light on the Aristotelian virtue of *phronesis* or practical wisdom, a virtue that enables deliberation and choice while judging. In this respect the initial decision by President Trump and the follow up commemoration in Jerusalem will be questioned from the angle of *phronesis*, as it is understood by the current author. Before I proceed though with the particular case study, I would like to situate briefly my own contribution within the current discussion on virtue ethics and decision-making.

1 Immediately after President Trump's announcement, Oxford University Press provided free online access to relevant legal scholarship regarding the status of Jerusalem since 1948, *available at* http://opil.ouplaw.com/page/Jerusalem-in-International-Law.

The phenomenon of decision making by international legal and policy experts has been addressed from various normative angles that range from legalistic propositions of narrow 'objective' rule application to more 'subjective' moral theories, usually either of deontological or utilitarian character. Within this framework the current paper purports to highlight an alternative formula of cognition, based on the Aristotelian philosophy of virtue ethics (*aretes*) that individuals in policy-making and judgment positions should or could bear. The contestation of values versus virtues and virtues versus pre-determined criteria will provide the particular perspective for a meta-ethical but less polarized apprehension of dilemmas pertaining to current controversial projects such the one of resorting into military force or judicial intervention. The latter has triggered a Manichean exchange of arguments by both apologists and utopians. The Aristotelian theory of virtue ethics and in particular the virtue of *phronesis* purports to provide an alternative channel of apprehension that does not condone the 'middle way' but requires fine judgment and choices in hard cases of indeterminacy and discretion, where solely references to either expertise or techniques appear to be unsatisfactory, perhaps even problematic. In this context, the decision by President Trump to recognize Jerusalem as the capital of Israel offers a revealing case study, challenging the potentials and limits of the Aristotelian proposition of practical reasoning that focuses on human agency and the quest for virtuous judgments. Moreover, it questions the role of a responsible or otherwise ethical leadership in formulating the future of so-called global governance.[2]

II. THE IMAGE

Before I proceed with the decision of President Trump, I would like to pause here and remind the readers of an image. It is the simultaneous image that was broadcast all over the world from Jerusalem and Gaza, on 14 May 2018. In Jerusalem, American diplomats, Israeli politicians and others attended the festivities surrounding the new embassy in an environment of high security and jubilation. In Gaza, around 65 demonstrators were killed by the Israeli armed forces while trying to approach the fences. They were protesting against the recognition of Jerusalem as the capital of Israel and demanded their right to return. The image was divided between smiley faces and bloody bodies. A simultaneous reality was taking place in Gaza, some 100 kilometers away, that could not reflect a more contradictory mood and emotions. Excitement and pride on one side. Despair, anger and humiliation on the other side.

2 In this regard see the extensive work by Jan Klabbers on an aretaic turn to global governance, e.g., his 'Controlling International Organizations: A Virtue Ethics Approach', (2011) 8 *International Organizations Law Review* 285, or his 'Law, Ethics and Global Governance: Accountability in Perspective', (2013) 11 *New Zealand Journal of Public and International Law* 309. A different conception of the virtues is offered by Jamie Gaskarth, 'The Virtues in International Society', (2012) 18 *European Journal of International Relations* 431.

While drafting these thoughts, this image made me wonder. What kind of political leadership was this one that defied repeated warnings regarding the detrimental effects of its action? Could that be considered an unethical or irresponsible leadership within the lines of the Weberian 'ethic of responsibility'?[3] And if this is the case, what kind of leadership could provide an alternative vision of empathy and consideration for the common good? In other words what kind of traits are we looking for in our leaders, who are supposed to exercise their judgment and take decisions that affect the life of many ordinary people? Can one suggest a series of required traits in the form of a pattern or should we approach this question in a more idiosyncratic way, depending on the type of leadership and its repercussions?

III. ON DISCRETIONARY JUDGMENT OR *KRISIS* AND VIRTUES

The indeterminacy of discretionary judgment and the perils it carries, has been addressed by several legal theorists especially in the field of judicial or prosecutorial discretion, both on the domestic and the international level.[4] H.L.A. Hart uses the term 'relative indeterminacy' to describe situations where vague expressions due to their 'open texture' leave a margin of discretion, but they remain relative, since they need to be assessed within the limits of law.[5] This doctrine also aims to preserve the objectivity of law and to differentiate it from politics and other considerations.[6] Ronald Dworkin has stated that

> *"Discretion like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept. It always makes sense to ask, 'Discretion under which standards?' or'Discretion as to which authority?"*[7]

For Dworkin there are three forms of discretion. There is an initial weak version, which covers situations where the standards to be applied require a form of judgment and thus, cannot be applied mechanically.[8] A second weak version of discretion empowers a final judgment that cannot be reviewed due to the position of the

3 See Max Weber, 'The Profession and Vocation of Politics', in Max Weber, *Political Writings* (Cambridge University Press, 1994, Lassman and Speirs eds.) 309.

4 See, for example, Maria Varaki, 'Introducing a Fairness Based Theory of Prosecutorial Legitimacy before the International Criminal Court', (2016) 27 *European Journal of International Law* 769.

5 H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994), at 128.

6 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (re-issue, Cambridge University Press, 2005).

7 Ronald Dworkin, *Taking Rights Seriously* (Cambridge MA: Harvard University Press, 1978), at 31.

8 *Ibid.*

incumbent person in the top of a hierarchy.[9] Third, the strong version of discretion governs cases of absolute lack of standards, where the judgment is not subjected to any authoritative review, yet is not totally immune to criticism.[10] The element of relativity that is fundamentally entrenched in the concept of discretion explains to a certain extent the amount of anxiety it has triggered among legal scholars, who adopt a rule-dominated understanding of problem solution. For Dworkin, the notion of discretion depends substantially on the context that surrounds it and it is shaped by policies and principles that identify the nature and function of the institution where it operates.[11]

Stepping away from the field of criminal justice, one could transplant the phenomenon of hard cases to situations where policy-makers and decision-makers are faced with dilemmas such as resorting to war, authorizing sanctions, applying particular migration policies or choosing to follow one or another foreign policy. In other words, when confronted with situations where they face a new crisis and subsequently a new dilemma, these decision-makers need to respond, via deliberation and choice.

The meaning of the word crisis originates from the Greek word *krisis* which means judgment and thus discretion.[12] In that sense every crisis could be a new beginning, as Hannah Arendt has demonstrated, but at the same time it requires the exercise of *krisis* or judgment.[13] So how can policy makers exercise their discretion and exercise judgment? Several options present themselves. One is for policy-makersto rely on rules laid down in political manuals. Alternatively, they can seek expert advise, or act out of passion which can fluctuate between what Weber calls 'sterile excitation' and passion for a 'cause' devoted to the common good.[14]

I argue in this paper that another way to embed judgment is by returning to virtue ethics.[15] Already the word 'virtue' carries its own dubious symbolism especially in the field of human rights and humanitarianism.[16] Yet, a renewed examination of the content and dynamic of victue ethics could provide another, less polarized avenue of deliberation. The reason I insist on the non-polarized nature of virtues is mainly justified by my hesitation to suggest universal moral duties or one-size-

9 *Ibid.*, at 32.

10 *Ibid.*, at 32–33.

11 *Ibid.*, at 31–45, where he analyzes the different normativity between law and principles as conceived by positivist lawyers.

12 Florian Hoffmann, 'Facing the Abyss: International Law before the Political', in Marco Goldoni and Christopher McCorkindale (eds.), *Hannah Arendt and the Law* (Oxford: Hart, 2012) 173, at 175.

13 *Ibid.*, at 173.

14 See Weber, 'Vocation of Politics'.

15 The current author belongs to the research group 'Towards a Credible Ethics for Global Governance', directed by Prof. Klabbers in Helsinki.

16 For example, David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton NJ: Princeton University Press, 2004).

fits-all formulas. Instead, I suggest that a contextual exercise of deliberation and action that can be produced by individuals who possess certain traits, minimizes the triggers of polarized contestation and conflict.

The normative theory of virtue ethics focuses on human agency and the particular traits a human being should carry.[17] Virtue ethics are distinct from deontological and consequentialist theories of ethics, as expressed by Kant and others.[18] In this regard, while focusing on ethics, we can distance ourselves from the controversy of values and concentrate on virtues. It can be reasoned of course that these are identical. They both carry the same 'moral' stigma. Still, a counter-argument could unfold along the lines, that virtue ethics does not speak on behalf of global common values but highlights the particular traits that, ideally, a decision-maker should carry.[19] This understanding provides a less polarized and more modest proposition than the langugage of values, therewith shifting the discourse from a universal project to a more agency-oriented work. This is a potential platform of compehension that might allow a timid but systemic exchange of ideas among policy makers, who frequently adopt a polemic argumentation that leaves no space for deliberation and dialogue.

Jan Klabbers has highlighted the significance that Arendt attributes to the notion of our responsibility to come together and communicate for the common good and future.[20] This is the kind of responsibility that can be diffused among decision makers such as politicians or judges. It is also a responsibility that academics carry, as intellectuals who create the path for future generations. This aggravated sense of responsibility derives from the human capacity to think, make judgments, be open and respectful towards the different opinion, act in good faith and the possibility of raising one's voice in times of darkness.[21] Policy-makers bear responsibility for their

17 Since the mid-1950s, there is a revival of interest in virtue ethics, see in particular G.E.M. Anscombe, 'Modern Moral Philosophy', (1958) 33 Philosophy (1958) 1; Alasdair MacIntyre, After Virtue: A Study in Moral Theory, (Notre Dame IN: University of Notre Dame Press, 1981); Rosalind Hursthouse, On Virtue Ethics (Oxford University Press, 1999); Lawrence B. Solum, 'Virtue Jurisprudence: Towards an Aretaic Theory of Law', in Liesbeth Huppes-Cluysenaer and Nuno M.M.S. Coelho (eds.), Aristotle and the Philosophy of Law: Theory, Practice and Justice (Dordrecht: Springer, 2013) 1. It is beyond the purpose of this pieces to present a thorough and comprehensive discussion of virtue ethics, yet other indicative articles and books include Colin Farrelly and Lawrence B. Solum (eds.), Virtue Jurisprudence (New York: Palgrave MacMillan, 2008); Roger Crisp and Michael Slote (eds.), Virtue Ethics (Oxford University Press, 2007; Jennifer Welchman (ed.), The Practice of Virtue: Classic and Contemporary Readings in Virtue Ethics (Indianapolis IN: Hacket, 2006); Julia Driver, Uneasy Virtue (Cambridge University Press, 2001), and Julia Annas, Intelligent Virtue (Oxford University Press, 2011), which describes virtues as not static but active and reliable dispositions of a person, like a 'practical skill'.

18 Amalia Amaya, 'The Role of Virtue in Legal Justification', in Amalia Amaya and Ho Hock Lai (eds.), *Law, Virtue and Justice* (Oxford: Hart, 2013) 51.

19 Michael Slote, 'Agent-Based Virtue Ethics', (1995) 20 *Midwest Studies in Philosophy* 83.

20 Jan Klabbers, 'Possible Islands of Predictability: The Legal Thought of Hannah Arendt', (2007) *20 Leiden Journal of International Law* 1, and Jan Klabbers, 'Hannah Arendt and the Languages of Global Governance', in Goldoni and McCorkindale (eds.), *Hannah Arendt*, 229, at 246.

21 Arendt throughout her work paid full attention to the importance of thinking, willing but also judging. Unfortunately the last component of her work was not fully articulated due to her death. In this regard see Elisabeth Young-Bruehl, *Why Arendt Matters* (New Haven CT: Yale University Press, 2006) at 159–210, discussing the 'standard of the self' and the importance of 'reflective judging' in relation to others.

action and inaction. And in this particular era (a populist era), these policy-makers should know when to raise their voice, where and towards whom, in other words they should act with (μέτρον), the quest for harmony and fine balance confronting the tension of their own beliefs with the beliefs of the others. While pursuing this refined exercise, leaders should act with a 'sense of proportion'[22] or with a sense of perspective. This requires a particular intellectual disposition that cannot be taught but is gradually developed throughout years of combined knowledge and relevant experience. This particular trait of practical wisdom will be further analyzed below, bridging our Middle East case study with the quest for responsible leadership.

IV. OF PHRONESIS

My main proposition here is that responsible leaders should demonstrate the virtue of *phronesis* or practical reasoning (prudence) while exercising their *krisis*, as it has been developed in Aristotelian ethics, in particular in book VI of Aristotle's *Nichomachean Ethics*, that analyses the intellectual virtues.[23] Aristotle argues that virtue is a 'state concerned with choice, lying in a mean relative to us, this being determined by reason and in the way in which the person of practical wisdom (*phronimos*) would determine it".[24] For Aristotle virtues implied emotions and in this way they are also sentimental dispositions.[25] The virtue of *phronesis* allows us to deliberate rightly (good deliberation, as Aristotle says) and guides us towards fair and contextualized decisions, while exercising practical wisdom.[26] The virtue of *phronesis* has been understood by scholars in several different ways.[27] Whether it is a virtue itself or the means of accomplising a virtuous judging, *phronesis* plays a pivotal role in the philosophical work of Aristotle and neo-Aristotelian scholarship. Russell clarifies that Aristotle in *Nicomachean Ethics* argues that "it is because of one's virtue that one has the right end and it is because of one's phronesis that one does the

22 Again, see Weber, 'Vocation of Politics'.

23 See Aristotle, *Nicomachean Ethics* (London: Penguin, 1976, Thomson trans.). See also Aristotle, *The Eudemian Ethics* (Oxford University Press, 2011, Kenny trans.); Daniel Russell, 'Phronesis and the Virtues', in Ronald Polansky (ed.), *The Cambridge Companion to Aristotle's Nicomachean Ethics* (Cambridge University Press, 2014) 203; Amalia Amaya, 'The Role of Virtue', and Gaskarth, 'The Virtues of International Society'.

24 Rachana Kamtekar, 'Ancient Virtue Ethics': An Overview with an Emphasis on Practical Wisdom', in Daniel C. Russell (ed.), *The Cambridge Companion to Virtue Ethics* (Cambridge University Press, 2013) 29, at 34-35, citing *Nichomachean Ethics*.

25 See generally MacIntyre, *After Virtue*, at 175.

26 Klabbers, 'Controlling International Organizations'; Jan Klabbers, 'Towards a Culture of Formalism? Martti Koskenniemi and the Virtues', (2013) 27 *Temple International and Comparative Law Journal* 417, claiming that the 'culture of formalism' and 'constitutional mindset' of Koskenniemi's scholarship can be taken to reflect a virtue ethics approach.

27 Russell, 'Phronesis and the Virtues'.

right thing towards that end".[28] He also claims that *phronesis* for some scholars is interlinked with all virtues that in return require the concept of *phronesis*.[29] I would like here to clarify my own understanding of *phronesis*, which is very much based on the notion of common sense. It has been argued that for Arendt also the exercise of judging was developed around the notion of common sense.[30] For her, common sense was the foundation of political reflection and final judgment. My perception of *phronesis* is this intuitive sense of judging that differentiates it from what is called *tekhni*, the required skills or knowledge.[31] *Phronesis* is the next step of intellectual wisdom, that asseses the entirety of the context and moves from the general to the particular and backwards, being in a dialectic mood with phenomena as Outi Korhonen has so wittly desrcibed.[32] For Korhonen, *phronesis* is 'dialogic' whereas *tekhne* is 'dogmatic knowledge'.[33] *Phronesis* could be argued to provide the means for deliberation and liberation while strengthening the capacity of the decision-maker to assess the particularities of a situation, before making a choice.[34] In exercizing this judgment to reach the particular choice, there are no predetermined criteria and rules.[35] Yes, we all carry our own preferences and prejudisms but when we exercise *phronesis,* ' a family of skills'[36], we can challenge deeply rooted ideas and presumptions, distancing ourselves from ourselves if possible.[37] In that sense one can act between passions or emotions and reason, exercising *orthon logon*, while deliberating on all the parameters of the specific dilemma.[38] It is here where the conflict between the particular and the global reaches its maximum and the 'mean' becomes the key element of *phronesis*.[39]

In practice that means that in their decision-making capacity, leaders retain open the path of communication with those they disagree with. They listen to them and talk to them. Second, they try to clarify among their audiences concepts which are elusive and result in normative misunderstandings. Third, they raise their voice

28 *Ibid*., at 205.

29 *Ibid*., on the 'unity of virtues', and MacIntyre, *After Virtue*, at 180-181, on the importance of *phronesis*.

30 Jonathan P. Schwartz, *Arendt's Judgment* (Philadelphia PA: University of Pennsylvania Press, 2016) 151.

31 See the seminal work of Outi Korhonen, 'New International Law: Silence, Defense or Deliverance?', (1996) 7 *European Journal of International Law* 1, on situationality.

32 *Ibid*., at 13.

33 *Ibid*.

34 Rosalind Hursthouse, 'Practical Wisdom: A Mundane Account', (2006) 106 *Proceedings of the Aristotelian Society* 1; Daniel Russell, *Practical Intelligence and the Virtues* (Oxford University Press, 2009), and Bronwyn Finnigan, 'Phronesis in Aristotle: Reconciling Deliberation with Spontaneity', (2015) 91 *Philosophy and Phenomenological Research* 674.

35 As Macintyre argues 'the exercise of such judgment is not a routinizable application of rules' (*After Virtue*, at 176) whereas later he attributes the lack of criteria to the interrelationship of virtues (*After Virtue*, at 182).

36 Russell, 'Phronesis and the Virtues', at 206.

37 This is the component of self-reflection.

38 Russell, 'Phronesis and the Virtues', at 206.

39 MacIntyre, *After Virtue*, at 180–181.

and try to communicate what they believe is right to the public with convincing and simple arguments. Fourth, they constantly doubt themselves. Fifth and most important, they know when and how to exercize constructive and not destructive critique. The privilege of ethical critique implies responsibility not to produce harm or unintended concequences that may jeropardize the entire foundation of those norms we used to consider robust enough.[40] As I am trying to indicate in this piece, even some of the so called peremptory norms of international law appear to be under unprecedented doubt.[41]

Phronesis should be accompanied by the virtue of courage. This second trait is an indispensable component of a responsible leader. Courage to challenge yourself, acknowledge your limits and wrongs and be ready to be disliked by your people if you think that this is a price you have to pay. Courage to be genuine, authentic, uncompromising and simultaneously ready to compromise.

Humility also should be a trait of a responsible leader. It is imperative to say, when appropriate, 'I don't know', 'I am still learning', 'I want to listen to what you think'. Humility protects us from unintended harm. Humility does not mean inaction. None of the traits above imply evenness and equanimity. Responsible leaders have to take sides and be clear when the danger of extremism, nihilation and polarization is imminent. Yet, this does not mean that they should adopt a polemic and futile argumentative rhetoric. Responsible leaders should know when to argue and when not to argue. They should work constantly and in deliberation with themselves and others. They should be open, indicate good faith and challenge themselves by leaving their safety-net of devotee followers momentarily. They should interact with those who raise a different opinion, indicating respect and civility. Arrogance and, even worse, contempt should be avoided. Responsible leaders should indicate those traits when they talk in public but mostly when they exercise their discretion and take their decisions. These are paradigms of excellence.[42] The future generations should be able to learn and be inspired by them.[43]

Phronesis requires imagination: imagination to place yourself in unprecedented situations, or to try to imagine the conditions affecting others. In this sense responsibility as depicted by Arendt means 'representative thinking'.[44] This thinking entails interest in the views and concerns of others. By situating yourself in the shoes of other people, the particularities of the context can accommodate an imaginary

40 In this regard see also Jeremy Waldron, 'Deep Morality and the Laws of War', in Seth Lazar and Helen Frowe (eds.), *Oxford Handbook on the Ethics of War* (Oxford University Press, 2018) 80.

41 It is beyond the purpose of this piece to provide an extensive discussion of peremptory rules. My comment refers to the revived debate on torture.

42 Amalia Amaya, 'Exemplarism and Legal Virtue', (2013) 25 *Law and Literature* 428.

43 *Ibid.*

44 See John Shotter and Haridimos Tsoukas, 'In Search of Phronesis: Leadership and the Art of Judgment', (2014) 13 *Academy of Management Learning and Education.*

deliberation that entails empathy, understanding and respect. This deliberation purports to constantly appease tension and consolidate bridges of communication and action.

V. IMAGE AND JUDGMENT BETWEEN JERUSALEM AND GAZA

Roland Barthes has argued that 'according to an ancient etymology the word image should be linked to the root *imitary*.'[45] His analysis develops the argument that images are not authentic representations of new messages but imitations instead of pre-existing signs and understandings.[46] Being inspired by this analogy, I question the effect of the hidden messages in the initial contradictory image I described above: the parallel realities involving Gaza and Jerusalem. If we use the depiction of the image as imitation, then what kind of effect has this particular image produced? To make it clear, the argument here follows the work of Amalia Amaya, who claims that leaders are paradigms of excellence and inspiration.[47] In this sense the parallel images from Gaza and Jerusalem reflect the kind of controversial leadership that may produce imitators or followers. This is the type of leadership that normalizes the image of violence and celebration at the same time. Additionally, this judgment manages to create a virtual reality where the pain of others appears to be an accepted 'collateral damage' of a long anticipated decision that corrects an 'injustice', the rehabilitation of the status of Jerusalem as the united capital of the state of Israel.

Susan Sontag in her own work on images of war and atrocities, has argued among others that the image creates a distance from suffering that prohibits genuine empathy.[48] If we combine these two insights concerning the image, as an imitation mechanism that can reduce empathy due to its distance, then the parallel images we took from Gaza and Jerusalem shed a different light on the importance of judgment and *krisis*.

The decision by President Trump to recognize Jerusalem as the capital of Israel triggered a binary reaction. For some people, it was considered a sample of unethical, irresponsible or even malicious leadership whether it was analyzed from a deontological or consequentialist approach. This decision destabilized the so-called peace process while at the same time causing the death of number of civilians. Repeated warnings had highlighted its potential devastating consequences and thus it could not be argued that the outcome was a product of misinformation

45 Roland Barthes, 'The Rhetoric of the Image', in his *Image-Music-Text* (New York: Farrar, Straus and Giroux, 1978, Heath trans.), at 32.

46 *Ibid.*

47 Amaya, 'Exemplarism'.

48 Susan Sontag, *Regarding the Pain of Others* (New York: Farrar, Straus and Giroux, 2003).

or miscalculation. For others, it was a courageous or even a moral political choice made by a leader to finally rectify a historical injustice, an act that was owed to a particular people. In this latter sense Trump's decision was considered just and fair with manageable side-effects. President Trump was seen as a brave man of ethos who honoured his campaign promise to the people of Israel. It remains a puzzle to what extent President Trump himself approached the entire issue from an apocalyptic or religious or ethical perspective, yet someone could claim that this judgment revealed also a cathartic dimension apart from the hard core cynical or realist one – at least for those who believe in a biblical mission.

In this context, the choice by President Trump to recognize Jerusalem as the capital of Israel and transfer the American embassy there, reflects deeper questions of fairness, humanity and empathy. Did the American president secure fairness or did he commit another injustice towards the Palestinian people? Did he indicate empathy or did he show indifference to the plight of the other people? What kind of leadership was it at the end?

Thomas Franck wrote in a different context, '[l]aw…does not thrive when its implementation produces *reductio ad absurdum*: when it grossly offends most persons' common moral sense of what is *right*.'[49] If we replace the concept of law with the concept of judgment, this *common moral sense of what is right*, prepares the ground for questioning the exercise of *krisis* from the perspective of virtue ethics Aristotle developed centuries ago. Moving away from the ideal of the ultimate goal (*Eudaimonia*), while focusing instead on the specific traits leaders should carry, a series of conclusions could be inferred regarding the decision of President Trump to recognize Jerusalem as the capital of Israel.

My central proposition claims that this decision functions in a multilayered dimension of ethical judgment and semiology. The former is related to the decision *per se*, its effects, utility and wisdom. The latter reflects the message it conveys. Both of them are linked to the responsible exercise of judgment and ultimately authority. As I have mentioned above, leaders bear responsibility for the way they exercise their duties. This exercise entails thinking and judging or else deliberation. They have to make choices and take decisions while exercising their discretion. This is the moment where I argue that *phronesis* is of indispensable importance as part of the desired intellectual kit of a leader. This is so, because *phronesis* functions as a liberating force that connects the general with the particular and accommodates the kind of deliberation that purports to promote the common good. In this exercise, the virtue of *phronesis* provides the necessary perspective of common sense that is representative of various views and dimensions.

49 Thomas M. Franck, *Recourse to Force* (Cambridge University Press, 2002), 178.

Was *phronesis* present in the particular deliberation? I would argue against this proposition. *Orthos lo*gos or common sense was missing and this shortage produced a volatile political context of polarization, animosity and lack of civility. At the same time, the lack of empathy added another level of bitterness, disappointment and even hatred. For some people, the particular decision reflected pure indifference to the sensitivities or even dignity of the Arab population and their fight for their right to return. As for the semiotics of the judgment, the fear of imitation the image triggers, as Barthes analyzed in a different context, carries the risk of consolidating a framework of political leadership that is immune to wisdom, empathy, consideration for the common good and courage to undertake responsibility. It could be argued that the judgment itself and the subsequent message of the image from Gaza and Jerusalem, reflect a *non-decent* political leadership, deaf to the cries of reason and empathy, keen to humiliate people, as Avishai Margalit has masterfully developed.[50] In other words, was President Trump's decision a decent one? I argue that it was not. Could it be a better decision? Yes, I also argue that he could exercise his *phronesis* and refrain from the particular judgment, while working on alternative channels of communication. It was a decision that did not reflect any imminent necessity. To the contrary, all relevant factors indicated the opposite – this was nothing but an unnecessary choice that triggered further tension in an already unstable situation.

But one should ask: what if the particular leader does not have the intellectual trait of the practical reasoning? Are we, common people, powerless and thus irresponsible, when faced with challenges and hard cases? In this regard, Albert Hirschman in one of his seminal works wrote of the three ways people respond to unsatisfactory situations within an organizational context: they exit, they raise their voice or they show loyalty.[51] In our dark times laymen can choose exit, voice or loyalty. In many countries, people are forced to leave when their dignity is abused by any kind of non-decent leadership. Others raise their voice and pay the price. There is also a part that expresses loyalty.

Aristotle, Arendt, Hirschman and other thinkers offer inspiration. Each of us has to consider the meaning we attribute to the concept of responsibility and what this entails for action or inaction. In this sense one possible scenario is that any crisis of non-decent leadership could be translated into *krisis* 'without a banister' for the common people. Every responsible citizen should and could exercise thinking, make choices and finally deliberate with his/her vote or with broader participation in the public realm, in *koina* (the public realm) as the ancient Greeks described. Another scenario is to defer responsibility to the leaders and retain an indifferent and irresponsible mindset and state of action. We could easily opt for this option. But

50 Avishai Margalit, *The Decent Society* (Cambridge MA: Harvard University Press, 1996, Goldblum trans.).

51 Albert Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge University Press, 1970).

then one should pause and consider the essense of being a responsible *zoon politikon*, a responsible political being. Being a free active citizen entails responsibility and judgment lies in the core of responsibility. The art of judgment implies a balance of thoughtfullness, passion, reason, creativity, reflection but also kindness, generosity and empathy. This is not a toolkit that fits everywhere. Still, these are important traits that not only leaders but also common people who elect those leaders should have. In our dark times, no one can stay without saying and mainly no one can claim that he or she did not know. It is our common responsibility to choose leaders that bear the traits I described above, leaders who do not take decisions that offend the common moral sense of what is right, as Tom Franck beautifully argued many years ago.

VI. CONCLUSION

There is a growing interest and literature on the so-called *aretaic* understanding of global governance that focuses on the traits of those who take decisions while exercising their authority. The current chapter, by focusing on the virtue of *phronesis*, purports to help build an argument in favour of an ethical re-assessment of practices that determine the fate of ordinary people. In this regard I concur with those who contest the magnanimity of a rule-oriented solution to problems, recognizing the existence of gaps that cannot be addressed solely by rules.[52] The case study of Jerusalem indicated the extent of this problem. I argue that a different leader, one endowed with the virtue of *phronesis* including imaginary deliberation, would have behaved differently: maybe with more empathy, taking into consideration the concerns of all people; maybe with less intransigence and arrogance; definitely without complacency about the greatness of the decision. *Phronetic* judgment and action can make a difference while shaping the future of global governance. This is a field to be further explored.

52 See, e.g., Jan Klabbers, *International Law*, 2nd edn. (Cambridge University Press, 2017), 337–348.

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