



Institute for International
Law and Justice

IILJ International Legal Theory Colloquium Spring 2010
The Turn to Governance:
The Exercise of Power in the International Public Space

Professors Benedict Kingsbury and Joseph Weiler

NYU Law School

Straus Institute for the Advanced Study of Law and Justice

Wednesdays 2pm-3.50pm on dates shown

Pollack Colloquium Room, Furman Hall 9th Floor, 245 Sullivan Street
(unless otherwise noted)

(additional seminar for students et al is Thursdays 4pm-5.50pm, on GAL)

Topics are indicative and are subject to change.

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| January 20 | Andrew Hurrell, Oxford University
Topic: Emerging Powers, Global Order and Global Justice |
| January 27 | Richard Stewart, NYU Law School
Topic: The World Trade Organization: Multiple Dimensions Of
Global Administrative Law |
| February 3 | Robert Keohane, Princeton University
Topic: The Regime Complex for Climate Change (paper with David Victor,
UC San Diego) |
| February 10 | No Colloquium - Postponed due to weather conditions |
| February 17 | No Colloquium |
| February 24 | Gianluigi Palombella, University of Parma, Law Faculty
Topic: Rule of Law in Extra-National Governance |
| March 3 | Joseph Weiler, NYU Law School
Topic: On the Distinction between Values and Virtues (and Vices) in European Integration |
| March 10 | David Kretzmer, Hebrew University/Ulster
Topic: State Reports to the UN Human Rights Committee |
| March 11 | (SPECIAL SESSION, 4pm-5.50pm, Pollack Colloquium Room, Furman Hall 900)
Jan Klabbers, University of Helsinki
Topic: Controlling International Bureaucracies |
| March 17 | No Colloquium – Spring Break |
| March 24 | Marta Cartabia, University of Milan
Topic: Rights in Europe |
| March 31 | No Colloquium |
| April 7 | Grainne de Burca, Fordham Law School
Topic: EU External Relations: Foreign Policy or Governance? |
| April 14 | Beth Simmons, Harvard Government Department
Topic: Effects of Investor-State Treaty Regimes and Arbitral Processes |
| Thurs April 15- | (SPECIAL SESSION, 4pm-5.50pm, Furman Hall 214)
Daryl Levinson, Harvard Law School
Topic: Public Law: Constitutional and International |
| April 21 | Benedict Kingsbury, NYU Law School
Topic: Techniques of Global Governance |

NYU Seminar, February 10, 2010

Jan Klabbers (University of Helsinki/Straus Institute, NYU)

I. A Caveat

This paper is not really a paper, and it needs to be placed in context. I am trying to write a monograph on the topic of evaluating the acts of international organizations, which will consist of three parts. In part I, the paradigmatic theory of functionalism will be sketched and appraised – it will transpire that functionalism, for all its explanatory merits, is structurally unable to facilitate control or even evaluation; they have no place in it and, what is more, cannot have a place in it (unless functionalism be re-written so as to no longer be functionalism).

Part II will focus on the various forms proposals to control or evaluate the acts of international organizations have taken. I will distinguish four different strands: the creation of a (more or less) traditional responsibility regime; constitutionalism; Global Administrative Law, and self-control. Different as these are, they all share the same essential deontological structure: they all presume that the setting of (mostly external) standards will be sufficient.

In Part III, I will suggest that such deontological approaches, while relevant and necessary, will not be sufficient, but will need to be complemented by insisting on virtue on the part of the leaders and policy-makers within and around international organizations. These include secretaries-general and department heads, but also the political leaders of influential member states.

It is in the nature of writing a book (or, at least, of the way in which I tend to write books), that I cannot submit a more or less finished draft chapter: I tend to work on all chapters simultaneously. Since elsewhere I have written extensively on functionalism, on control generally, and on some of the weaknesses of deontological approaches, I thought it most fruitful to submit as the paper for this seminar an amalgam of the chapters introducing virtue ethics, and trying to integrate virtue ethics into a more deontological framework. This is preceded by a section on the rise of functionalism, while a telegram-style intermezzo will summarize the reason why deontological approaches are not

sufficient. I will be the first to concede that the paper is in very relevant ways unfinished – I still need to work on getting the argument solid (especially when integrating virtue ethics into a deontological framework); bits and pieces remain to be treated; the footnoting is unfinished, et cetera. Yet, in true seminar spirit, doing it this way might be beneficial in two ways. First, the reader may be confronted with an approach not often to be found in legal writings. Second, the author may receive far more useful feedback than when submitting a finished or almost finished paper.

In fact, while I use ‘control’ as convenient shorthand, my main interest is not so much with controlling international organizations, but rather with something that is closely related but nonetheless distinct: evaluating the propriety of their actions and omissions. The aim of the work is to try to develop a framework (or better perhaps, a vocabulary) for doing so, beyond the existing or developing legal frameworks. This does not cover the behaviour of low-level employees (typists, drivers, translators), or even the personal conduct of higher-level employees: things such as corruption or nepotism are not what drives this project.¹ Neither is the project driven by situations where international organizations are engaged in clear violations of legal rules. Should torture be committed in the dungeons of the UN Mission in Kosovo or at NATO Headquarters, it seems to me that UNMIK or NATO are clearly engaged in wrongful behaviour, and not allowed to get away with it. While there are all sorts of intriguing legal problems involved here (in particular relating to attribution of behaviour, perhaps, and when it comes to the source of the obligation at issue), these do not particularly occupy me in this study. After all, in terms of a general evaluation (and as I just defined the act), the situation is clear: there is no particular need for a further refinement or elaboration of the vocabulary of evaluation.

To make things clearer still, I am interested, predominantly, in three different types of situations, where I feel there is a need to present a more subtle and appropriate vocabulary than is currently in use. First, there is the situation where there simply is not much law to cover the situation. A good example forms the inactivity of the UN in Srebrenica, which is briefly discussed below. A good case can be made that neither the

¹ Which is not to say that such issues are not of general interest. Many an entertaining moment can be spent reading about personal misbehaviour at www.iowatch.org (last visited January 29, 2010).

UN nor the Dutch peacekeepers of Dutchbat did anything legally wrong. The UN had no duty to intervene, and Dutchbat actually acted in conformity with its mandate. And yet, there seems to be unanimous agreement that somehow, the UN and Dutchbat did something wrong. If this kind of doing wrong cannot be captured in legal terms, then how can it be captured? It might be tempting to say they did something morally wrong, but this requires further fleshing out – it is the fleshing out that has my interest.

Second, there is the situation of the policy dilemma where several legal rules, pointing in different directions, may apply. An example may be the sort of decisions that the World Bank has to make on occasion: how to act when a large development project is considered beneficial for the country concerned at large, but might come to affect the socio-economic rights of part of the population? What to do, e.g., when building a dam may result in the displacement of thousands of people? Assuming for the moment that human rights, including socio-economic rights, are applicable in such a situation, the organization may see itself confronted with a genuine policy dilemma, where the law pulls in different directions and thus does not provide an immediate way-out.

Third, I have an interest in situations where the law does seem to provide an answer, but that answer is not considered sufficiently satisfactory. What I have in mind is a situation such as that in which UNHCR found itself in the early 1990s in Cambodia. Confronted with hundreds of thousands of refugees living in shabby, semi-permanent conditions in Thailand and Vietnam, UNHCR decided to repatriate them, despite the circumstance that one of the fundamental norms of refugee law holds that repatriation of refugees may only take place on a voluntary basis. Not surprisingly, therefore, UNHCR received a healthy dose of criticism.² And yet, UNHCR's main responsible officer at the time, the revered humanitarian Sergio Vieira de Mello, defended the action by pointing out that the number of refugees had become so large that the situation had become untenable, and doing nothing would undermine the very possibility of refugee protection more generally.³ This then is the sort of policy dilemma where the law points in a direction which is deemed unsatisfactory, either because the situation is not of the kind for which the law was conceived to begin with (arguably, refugee law was never written

² See Pallis, NYUJILP

³ As reported in Samantha Power, *Chasing the Flame*

with millions of refugees in mind, or with refugees being condemned to semi-permanently live in camps) or because the law has become outdated or some such development. Needless to say, situations two and three may shade into each other, and much may depend on how exactly legal rules are interpreted, on precedent, et cetera. Still, regardless of such niceties, it will be clear that international organizations may sometimes be engaged in activities which are, in the relevant sense, not covered by the law. For those cases, my suggestion will be that organizations and their leadership would be well advised to find inspiration in virtue ethics.

Let me, for the sake of clarity, also further specify the things that this project is not directly concerned with. This applies, as alluded to above, to the personal affairs of organizational staff and leaders, including activities such as nepotism or corruption. Neither am I occupied with transgressions which would by and large be done by personnel in a private capacity: think of the peacekeeper engaged in drugs trafficking, or running a prostitution ring. Such issues may involve interesting legal issues (attribution, for one), but would seem to be clearly illegal, regardless of attribution.

I am first and foremost concerned with finding and expanding a vocabulary for telling right from wrong in policy dilemmas. This has some implications also on the more or less conceptual level. Thus, my prime interest resides not in issues of immunity. Nor does it reside in differentiating between those to whom international organizations may be accountable. I fully accept that it may make a huge difference whether the World Bank is asked to account to the US Treasury, or whether it is asked to account to the poor and dispossessed⁴; but I am not sure it makes much difference in terms of the vocabulary to be used, in that both audiences will have to find yardsticks to employ. They may use different yardsticks, but these are likely to be part of the same larger vocabulary.

II. Functionalism as Paradigm

The science historian Thomas Kuhn has become deservedly famous for developing the notion of paradigms: shared conceptions by groups of people in academia and elsewhere working in the same field and thinking along broadly similar lines. While paradigms are

⁴ The seminal piece is Grant & Keohane

prevalent in the natural sciences he added that in the social sciences, he could not think of any example of a true paradigm.⁵

Kuhn may have been right as far as the social sciences were concerned, but at least in law it would have been possible to identify a paradigm, even upon fairly strict criteria: the doctrine of functionalism in international institutional law. Perhaps as befitting a true paradigm, there is no single manifesto outlining what functionalism stands for: since for many decades all international institutional lawyers shared the same outlook, there was literally no need for a manifesto.⁶ As a result, any discussion of functionalism has to tease out the elements of functionalism from a variety of sources, a matter not made any easier by the circumstance that the leading textbooks typically went into comparative mode: the leading textbooks of the field consisted to a large extent of comparisons of discrete organizations, in the hope of finding common practices which could then be generalized into rules of law.

This hope, as I have suggested elsewhere, has been largely in vein: it is difficult to discern a concrete set of rules relating to international institutions in isolation from both general international law (these are the rules regulating the behaviour of organizations with third parties) and from the rules of individual organizations (the rules regulating the internal life of the organization).⁷ Still, this comparative approach, so characteristic of the earlier textbooks and monographs, turned out to be an inherent element of functionalism. What then is functionalism all about?

In this chapter I aim to flesh out a theory (but not a manifesto) of functionalism, sketch it as the dominant approach to international organizations, and investigate how it coincided with, and facilitated, the rise of international organizations. The chapter will end with something of a critique of functionalism, in order to pave the way for chapter 3, which address the changing image of international organization that has started to become visible since the 1980s.

⁵ See Thomas Kuhn, *The Structure of Scientific Revolutions*, 2nd edn (University of Chicago Press, 1970...).

⁶ Arguably the closest analogue is a classic article by Michel Virally, 'La notion de fonction dans la théorie de l'organisation internationale', in *Mélanges offerts à Charles Rousseau: la communauté internationale* (Paris: Pédone, 1974), 277-300.

⁷ See Jan Klabbbers, 'The Paradox of International Institutional Law', (2008) 5 *International Organizations Law Review*...

III. Functionalism: An Outline

International organizations are curious creatures: established by states, they have as their main task, typically, to do things those states are unable or unwilling to do individually, and for that reason they may have to tell those states what to do. Hence, the servant may well become the master; the sorcerer's apprentice may well take over.⁸

When organizations were first created in the form we can still recognize nowadays (leaving aside whether e.g. such entities as the Greek Amphictionic Council, or the Hanseatic League many centuries later, can be regarded as true predecessors⁹), roughly from the second half of the 19th century onwards, this special nature was still to be discovered. Writings from the later 19th and early 20th century tend to equate international organizations with their constituent treaties. As good an example as any can be found in the work of leading Dutch international lawyer Van Eysinga, who would later become a judge at the Permanent Court of International Justice. Addressing Dutch treaty relations, the many river commissions which had just been created in the decades before he wrote were simply treated under the heading of water treaties – there is no recognition in Van Eysinga's work of the institutional features of these river commissions, or that somehow institutional elements would set them apart from ordinary, non-institutional treaties.¹⁰

If Van Eysinga's writings did not focus on international institutions and he could thus, possibly, simply never have given much thought to their special features¹¹, nonetheless his approach is reflected in early writings that were specifically devoted to international administrations. The very first volume of the *American Journal of International Law*, published in 1907, contained a lengthy article by Paul Reinsch, discussing the new international unions. The way the article is structured would set the tone for much of the subsequent scholarship to follow for many subsequent years, and together with a sequel, it would provide a useful outline of functionalism.

⁸ These literary references occur with regularity in the literature

⁹ See e.g. Boak, AJIL

¹⁰ See Van Eysinga, ...

¹¹ Note that his later writings, including those as a judge, pay far more attention to the various forms international cooperation can take, and one could seriously claim that his use of constitutional terminology in the Oscar Chinn case was far ahead of its time. See Oscar Chinn case...

Reinsch started by extolling the virtues of internationalism, as practical responses to practical problems, and by putting his readership at ease: the new unions do not threaten national sovereignty: “It is not so much the case that nations have given up certain parts of their sovereign powers to international administrative organs, as that they have, while fully reserving their independence, actually found it desirable, and in fact necessary, regularly and permanently to co-operate with other nations in the matter of administering certain economic and cultural interests.”¹²

Having stated this, he systematically discusses a number of organizations, typically first outlining the issues with which they are concerned. Thus, the International Union of Railway Freight Transportation addresses such issues as the single bill of lading to secure continuity of transportation across borders, uniform standards with respect to dangerous or breakable articles, and the responsibility of railway administration for losses and delays.

It is only once their field of activities has been described that the institutional features are discussed: typically, the unions have an administrative organ (sometimes working under supervision of the host state), and typically, the tasks of these organs are presented as administrative in nature: collecting and disseminating information, preparing future meetings, *et cetera*. Even activities that carry political overtones are not singled out: thus, the central bureau of the same International Union of Railway Freight Transportation is to “give due form to suggestions”¹³ to proposed amendments to the constituent document, and even has a quasi-judicial function, but none of these are presented as other than administrative in nature. Even the quasi-legislative role of the Sugar Commission, while duly noted, is neutralized: here is a quasi-legislative task presented as administrative in nature, and as inevitably belonging to the tasks of this specific organization - the direct analogy with presidential involvement in the setting of tariffs is telling.¹⁴

And yet, there is something quite ambivalent in all this neutrality. This too is visible already in the opening pages of the article, where Reinsch explicitly juxtaposes

¹² See Paul S. Reinsch, ‘International Unions and their Administration’, (1907) 1 American Journal of International Law, 579-623, at 581.

¹³ Ibid., at 591.

¹⁴ Ibid., at 604.

the rise of international unions (internationalism) against nationalism. While he refrains from badmouthing nationalism directly, nonetheless internationalism is portrayed as commendable: internationalism “comprises those cultural and economic interests which are common to civilized humanity.”¹⁵ He quotes at length the Italian King Victor Emmanuel III’s convocation for the establishment of an international agricultural union (the International Institute of Agriculture, forerunner to today’s FAO) which should be “dégagé de tout but politique”, but which would nonetheless help contribute to peace.¹⁶

What should be noted from the outset is that Reinsch’s article is, by and large, comparative, albeit with a twist. The article contains a lengthy enumeration of many international organizations or, sometimes, aborted initiatives to establish one. There is some analytical division: the organizations are subdivided as dealing with communication, or economic interests, or sanitation and prison reform, or various other purposes. Towards the end, however, the mode of analysis shifts from topic to region, when Reinsch discusses ever so briefly the existing unions in the Americas. This is not systematically carried out though, and it is fair to say that the main division underlying the article is one relating to the field of activities of the organizations. As noted, though, it is comparativism with a twist: no general conclusions are drawn on the basis of the comparative survey, and somewhat feebly perhaps, Reinsch promises in the closing sentence that a synthetic overview of the functions of organizations and their relation to national administrations “is to be discussed in a future paper.”¹⁷

The ‘future paper’ Reinsch promised at the end of his 1907 article would be published two years later, in the 1909 volume of the *American Journal*, and indeed it elaborated on the first paper, fine-tuning some of the theoretical points, and concentrating on the commonalities. It is no accident, given Reinsch’s ambitions, that the opening sentence places international organizations as the harbingers “of a law common to the entire civilized world”, and a page later he speaks, without hyperbole, of “world law”.¹⁸

The first part of the article aims to place the international unions in their relationship to their member states, and the theory Reinsch develops would come to be

¹⁵ Ibid., at 579.

¹⁶ Ibid., at 605-6.

¹⁷ Ibid., at 623.

¹⁸ See Paul S. Reinsch, ‘International Administrative Law and National Sovereignty’, (1909) 3 *American Journal of International Law* 1-45, at 1 and 2 respectively.

enormously influential. International cooperation, so he suggests, is necessary in a number of fields. Thus, international cooperation is needed to prevent the importation of animal or plant diseases; it is needed to ensure that letters and telegrams are delivered across borders; it is needed to make sure that states do not benefit unduly from competitive advantages in their labour legislation. Hence, the world law thus arising is based on necessity and pragmatism: it is “the legal expression of positive interests and activities that have already developed in the life of the world”.¹⁹ In fact, much of the cooperation thus achieved is based on the “enlightened sense of self-interest” of the member states.²⁰ After all, should member states refuse to cooperate, they may be excluded from a union, and such exclusion could “be almost a national calamity”.²¹

As a result, there is no real conflict between state sovereignty and international organization, not, at least, if sovereignty is properly conceptualized as divided, as a bundle of rights.²² In fact, the two go hand in hand: the sovereign state “merely utilizes these international organizations for the benefit of its own citizens and subjects.”²³ There is an ethical duty to cooperate on the international level, reinforced by practical necessities. The resulting cosmopolitanism is not so much idealistic but rather, as Reinsch explains, “concrete and practical”.²⁴ The state remains necessary, because it is out of states that international unions are composed, in much the same way that states themselves are composed of towns and provinces and villages. Without using the word, then, this bespeaks of an underlying federal inspiration.

Having established the eventual harmony between state sovereignty and international organization, Reinsch continues by sketching what he calls ‘general principles of organization’. While organizations are created in response to concrete needs and grow spontaneously, nonetheless they display an “underlying unity”²⁵, or even a

¹⁹ Ibid., at 2.

²⁰ Ibid., at 8.

²¹ Ibid., at 9.

²² Ibid., at 10: “... the old abstract view of sovereignty is no longer applicable to the conditions in a world where states are becoming more and more democratic and where the organization of interests is taking on an international aspect. It is undoubtedly a mistake to look upon sovereignty as an irreducible entity including the sum of all political and social power.”

²³ Ibid., at 11.

²⁴ Ibid., at 17.

²⁵ Ibid., at 20.

“common law of international unions”.²⁶ Elements of this common law may include that admission is often granted freely, hemmed in only by geographical or functional concerns. It also includes a regular division between plenary, executive, and administrative bodies, and often unanimity when it comes to decision-making in plenary bodies. And most importantly, perhaps, Reinsch posits an equation between functions and powers: the terms are used, throughout the article, as synonyms. Those functions and powers stem from the member states, typically in response to some perceived need. While states have been reluctant to grant powers to organizations, in the end such could not be avoided: “... the needs of international intercourse have become so prominent that it has been found convenient in many cases to give a certain limited power of action, carefully guarded and well defined, to the international administrative organs.”²⁷

Reinsch’s two articles combined are among the first ever written on the law of international organizations as we know them, and set the tone for the further development of the ways in which international lawyers started to think about international organizations and the law relating to them. First, there is the matter of method: with international organizations being numerous, and with all them the result of different configurations of needs and interests, nonetheless some ‘underlying unity’ could be found by comparing them, by trying to distill a ‘common law of international unions’. While acknowledging the necessary degree of difference between the various unions and therewith respecting the autonomous existence of each individual organization, nonetheless Reinsch suggested, and demonstrated, that careful comparison could lead to useful understandings, valid across international organizations, however *mutatis mutandis* perhaps.

Second, the activities of international organizations are often portrayed as neutral, a-political, purely routine administrative work. True or false, as Reinsch rightly foreshadowed, there is a very strong perceived need to reconcile the activities of international organizations with state sovereignty, and in order to achieve this, their political nature has to be downplayed. The emphasis, instead, necessarily comes to rest on functions, tasks, and powers – always on the understanding that powers have been

²⁶ Ibid., at 26.

²⁷ Ibid., at 38.

granted to the organizations by their member states and continue to 'belong', so to speak, to those member states. Functions and powers came to be equated, and much of the work of international organizations was perceived of in a-political terms: it manifests itself most of all in the distinction between 'technical' and 'political' organizations, which can still be found in textbooks. Reinsch pioneered it, only for the distinction to be quickly picked up by other writers. A good example is the always outspoken Brierly writing a decade-and-a-half later on 'The Shortcomings of International Law', distinguishing between 'roughly' the economic and social field on the one hand, and the political field on the other, when discussing the activities of international organizations.²⁸

Third, in a neat rhetorical move, the political nature of international organizations is channeled away from their concrete effects on member states and instead linked to their contribution to world peace. It is not actually the case, in the end, that organizations are a-political; they are political, but they are political for a good cause; they contribute to world peace. Who in their right mind could possibly object to exchange of information or to data collection? Thus, organizations are presented as purely beneficial creatures: there are little or no costs involved in making them work (neither financial costs nor political costs in the form of a loss of sovereignty or decision-making power²⁹), whereas the potential benefit is nothing less than world peace. In doing so, moreover, the distinction between technical and political organizations came to be mobilized. As Brierly shrewdly pointed out, although the League of Nations could be seen as a political organization³⁰ and was partly active as such, it also promoted "very numerous conventions" on economic and social matters.³¹ Thus, the League was good from two angles: to the extent that it was political, it contributed to world peace: and to the extent that it was a-political,

²⁸ See J.L. Brierly, 'The Shortcomings of International Law', (1924) 5 *British Yearbook of International Law*, 4-16, at 11.

²⁹ Reinsch systematically makes a point of listing how much the organizations cost per year, at one point even outlining that they offer good value for money: the various intellectual property bureaus "have always stayed well within their modest budget, notwithstanding the volume and real importance of their published work." See Reinsch, *International Unions*, at 597.

³⁰ One contemporary author suggested that the League was political in the sense that it provide a different internationalist alternative to the internationalism of Bolshevism, and therewith helped protect the nationalism that was considered foundational of the League's member states. Hence, the League stood not for some cosmopolitan idea (like Bolshevism), but rather for a collection of national entities, safeguarding those national entities. See Sir Geoffrey Butler, 'Sovereignty and the League of Nations', (1920-21) 1 *British Yearbook of International Law*, 35-44, at 40.

³¹ Brierly, *The Shortcomings*, at 11.

it also contributed to world peace. Whatever the League would do, in other words, would be considered good; the League simply could do no wrong. And the same would apply to other organizations.

This too was already present in Reinsch's writings from the first decade of the 20th century: organizations were given functions or powers and would carry those out in the best possible manner and making great use of the best experts of the world, "operating as public agencies of international interests"³² and centralizing "the best experience of the world".³³ Member states could do wrong, of course: they could fail to live up to their obligations under the constituent documents of the organizations, but the unions themselves were seen as a higher form of being.

Thus, the contours of a functionalist theory of the law of international organizations become visible. The core of the theory can be summarized as follows. Organizations are created by states, expressing their sovereignty. Those organizations are given functions, carefully circumscribed, which they are expected to fulfill. These functions, in turn, coincide with their powers: they can not do anything which falls out of the scope of their functions, and can do everything that falls within that scope. Those organizations turn out to be organized in similar ways, with most of them having a plenary body, an executive body, and a secretariat. Decision-making too occurs in similar ways, with the interests of the member states being guarded by the circumstance that voting usually takes place by unanimity. Hence, the member states firmly remain masters of the treaty, but by exercising their functions nonetheless organizations help to overcome international problems, and help to make the world a better, more harmonious place. This, finally, is by no means considered as political: how could there be reasonable disagreement about the desirability of world peace, international cooperation, and the like? And if there is agreement on the ultimate end, there can hardly be disagreement on the means either.

IV. Functionalism and the PCIJ

³² Reinsch, *International Administrative Law*, at 1.

³³ *Ibid.*, at 16.

After somewhat hesitant beginnings, the Permanent Court of Justice, by the mid-1920s, would adopt functionalism as its approach to international organizations as well. In its early days, the Court still refused to see something special in international organizations. The various requests for advisory opinions that reached it concerning the scope of powers of the ILO were consistently dismissed as ever so many questions about treaty interpretation: if one wanted to know what the ILO would be empowered to do, all one had to do, in the end, would be to read the ILO's constituent document. Partly this dismissive attitude may have found its cause in the clear political background of those requests - it was abundantly clear to all concerned that these first requests were brought on French insistence: France attempted, by questioning the legality of ILO involvement, to limit the role of the ILO.³⁴ In those circumstances, the Court may have been reluctant to tell one of the Great Powers to stop pussyfooting; it may, indeed, have been reluctant to come up with a general answer which would have allowed the French to interpret it negatively therewith casting doubts on the legitimacy of a still very young and fragile international court.

Partly, conceptualizing questions concerning the powers of international organizations may also have been the result of not yet being able to think in different terms. Max Huber, probably the most influential judge on the bench during the first years of the PCIJ, has been quoted as privately suggesting that the first ILO questions involved "delicate problems of interpretation of treaties"³⁵; it may well be that his conceptual apparatus did not yet allow for a different approach, and that he was influential enough to make the Court adopt his perspective.

But in part, the Court's reluctance may also have owed something to its perception of itself as a dispute settlement body rather than as a body entrusted with the task of systematizing or clarifying the law. Indeed, in one of the early opinions, the Court makes this point fairly explicitly:

³⁴ Check: Morse??? Note also that the first three advisory opinions all dealt with the ILO, and were decided within the space of two weeks, the second and third even on the same day (12 August 1922; the first is dated 31 July of that year). Small wonder that the Court may have considered questions related to the powers of organizations a bit tiresome.

³⁵ Quoted in Ole Spiermann, 'Judge Max Huber at the Permanent Court of International Justice', (2007) 18 *European Journal of International Law*, 115-33, at 121 (Spiermann quotes here from his book, at 296).

“It was much urged in argument that the establishment of the International Labour Organisation involved an abandonment of rights derived from national sovereignty, and that the competence of the organization therefore should not be extended by interpretation. There may be some force in this argument, but the question in every case must resolve itself into what the terms of the Treaty actually mean, and it is from this point of view that the Court proposes to examine the question.”

Four years later, yet another question concerning the powers of the LIO would reach the Court, and again the Court tried to steer clear of abstract difficulties, but with markedly less conviction. Confronted with the question whether the ILO was competent to incidentally regulate the work of employers in addition to that of employees, the Court quoted verbatim its statement of four years earlier, extolling the virtues of treaty interpretation as a means of defining the scope of powers of international organizations. But the Court would go a step further and almost disdainfully pointed out that the Great Powers should not be bothered too much with niceties concerning the scope of powers of international organizations. The Court observed that “there appears to be no room for the discussion and application of political principles or social theories, of which, it may be observed, no mention is made in the Treaty.”³⁶

This statement served a dual purpose, or so it seems. First, it underlined that the ILO was not about politics or anything sinister like that: its constituent document occupied itself not with political principles or social theories, but simply was best seen as dealing with a technical, a-political matter. Second, these matters really were too trivial for the Great Powers to pay attention too; surely, they would have more pressing concerns. In doing so, the Court neutralized the effect of international organizations and, more importantly, paved the way for its own contribution to international institutional law theory.

The Court must have concluded from the three requests concerning the ILO, coming in quick succession, that at some point, it would have to come to terms with international organizations. In the literature, as noted, functionalism was making an appearance, and the creation of the ILO and especially the League of Nations in the

³⁶ Make note...

aftermath of World War I suggested not only that international organizations were here to stay and that their emergence would require some sort of principled legal stance³⁷, but also that they would come to address matters of high politics. This was no longer solely concerned with the price of sugar or the width of railroad tracks; this was starting to be about real interests, about countering Bolshevik internationalism and about war and peace. In short, the Court must have felt it could no longer justify treating international organizations as inconsequential and no different from regular treaties.

The occasion arose in 1927, when the Court was confronted with a question about the scope of the powers of the European Commission of the Danube under its constitutive document (the so-called Definitive Statute). The Court adopted the functionalist approach (this was, after all, the only approach available according to the literature, as manifested by the writings of Reinsch in particular), and provided it with the judicial imprimatur:

“As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfillment of that purpose, but it has the power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.”³⁸

Several observations need to be made in regard to the Court’s statement. First, there is a seeming distinction between functions and powers, but the distinction evaporates on closer scrutiny: the Commission has the power (singular) to exercise its functions, which in effect means that its powers (plural) and functions overlap completely. Second, these functions stem from the member states, and have been bestowed upon the Commission. The implication is, therefore, that the member states are in full control and can even, should they so desire, undo their earlier bestowal: functions, on this reading, can be revoked. Third, and in line with the point that the member states retain control, the only limit which the Court considered relevant consists of the constituent document: the

³⁷ Leading international lawyers experienced great difficulty in identifying the legal nature of the League of Nations, e.g. By way of examples, see L. Oppenheim, ‘Le caractère essentiel de la Société des Nations’, (1919) .. *Revue Générale de Droit International Public*, 234-245 (characterizing the League as *sui generis*); Corbett, Fischer Williams

³⁸ Danube opinion, Publ. PCIJ [1927] Series B, no 14, at 65.

Commission can exercise its functions fully, except where the Statute imposes restrictions.

In an important sense, the theory of functionalism was probably the only theory which could be developed by writers and the judiciary to begin with, since there was much debate over the legal status of international organizations. Much ink was devoted to analyzing whether the League of Nations could properly be considered a subject of international law, or a legal person for purposes of international law – and this in the realization that the League was by far the most relevant organization at the time.³⁹ Moreover, it was the very creation of the League which incited authors to start to think more or less systematically about the legal status of international organizations to begin with.⁴⁰

In other words, if it was not even settled that the League was best considered as an international legal person, much less would this be the case with respect to other international organizations. The implication was that if the law cannot yet conceive of international organizations as legal persons in their own right, at best it can come up with the conception of organizations as instruments in the hands of their member states.⁴¹ This would explain the focus on functions and powers, granted by member states, and this would help explain why international organizations could be conceptualized, as Reinsch had already done⁴², as instruments of state sovereignty rather than as threatening the sovereignty of their member states.⁴³

The Permanent Court, and its successor, would in later opinions (and the odd contentious proceeding) come to refine the theory of functionalism, with perhaps as the

³⁹ See, e.g. John Fischer Williams, ...; P.E. Corbett, 'What is the League of Nations?', (1924) 5 *British Yearbook of International Law*, 119-48.

⁴⁰ Corbett put it nicely when stating that "no study of the international life of the present, which does not establish and adhere to a definition of that institution [i.e., the League of Nations – JK] can be complete and clear, and no attempt at a legal definition can evade the question of personality." See Corbett, *League of Nations*, at 121.

⁴¹ Randall starkly proposed, at the eve of the creation of the League of Nations, that cooperation can take the form either of a partnership of nations, or of world government and global unity. Since the latter had been unthinkable since the Middle Ages, the only viable alternative left was to think of cooperation in the form of a partnership of nations. See H.L. Randall, 'The Legal Antecedents of a League of Nations', (1919) 28 *Yale Law Journal*, 301-13.

⁴² Make note...

⁴³ Baldwin suggests that sovereignty can be divided so as to reconcile statehood with membership of international organizations. See Simeon E. Baldwin, 'The Vesting of Sovereignty in a League of Nations', (1919) 28 *Yale Law Journal*, 209-18.

most important ingredient the recognition of the possibility of implied powers. This was already done, very carefully, a year after the *Danube Commission* in the *Greek and Turkish Populations* opinion, and broadened in the landmark 1949 opinion in *Reparation for Injuries*. These, however, stayed faithful to the core of functionalism: implied powers were always deemed to have been created ‘by necessary intendment’ of the member states, putting a premium on the overall control by those same member states. And while *Reparation for Injuries* broadened the scope considerably by deriving an implied power from the purposes of a constituent document (as opposed to deriving it from an explicitly granted power), nonetheless this too was compatible with functionalism, for still the functioning of the organization was at stake, the way in which it could give effect to the functions given to it by its member states.⁴⁴

Intermezzo

As noted earlier, four distinct approaches to control (or evaluation) can be discerned, in the literature and, to some extent, in diplomatic and legal practice. First, in traditional fashion, international lawyers are busy developing regimes concerning the responsibility of international organizations or their member states, or developing a more encompassing system of accountability. The latter applies to the International Law Association, while both the Institut de Droit International and the UN’s International Law commission have been, or still are, working on responsibility.

A second strand adopts the language of constitutionalism, sometimes ostensibly related to single individuals (as in: the WTO is constitutionalizing), suggesting that the organization is bound by, and derives legitimacy from, some form of constitution – and not merely in the sense of constitutive document. This, however, sometimes comes with an ambivalence written into the scheme: the constitutionalizing WTO should also be seen as the constitution of the international community. Either way, the basic idea holds that there are certain standards which are embedded in the organization’s documents and practices, and which are of thick constitutional nature, including such things as

⁴⁴ See in greater detail on implied powers, Jan Klabbers, *An Introduction to International Institutional Law*, 2nd edn. (Cambridge University Press, 2009), ch. 4.

fundamental rights protection. Hence, a constitutional organization can be held to account for instance on the basis of fundamental rights.

Third, in places such as Rome, Heidelberg and, indeed, this house, the idea of Global Administrative Law has been developed, the core of which would seem to be that since power is exercised in a global administrative sphere (typically by public entities, but without excluding private ones), it stands to reason that such exercises be subjected to scrutiny. While it may be difficult or impossible to develop or identify universal substantive standards, it is less onerous to identify procedural norms that most, or all, can agree on: from due process to transparency and participation in decision-making processes, to judicial review and proportionality.

Fourth, some organizations (typically, but not exclusively, the financial institutions) have taken the wind out of their critics' sails by developing forms of self-regulation. They have created or strengthened departments of internal oversight, published standards to which their processes should conform, or appointed compliance officers. In short, these organizations have established audit and accountability procedures relating to their own performance.

All these approaches share, to a greater or lesser extent, a general deontological outlook: they all work on the idea that there be standards (external or internal to the organization), objectively cognizable, and applicable as yardsticks to measure their behaviour against. And yet, I claim that while a deontological approach is necessary, it is not sufficient.

Various problems can be identified. Some of these are well-rehearsed, and relate to possible Western bias, lack of universal agreement on sources, et cetera. Others are more structural, if you will. Kant apparently already realized, that rules never themselves decide on their own application. Someone, somehow, has to figure out that situation X falls in the ambit of rule A, and act accordingly.⁴⁵ Another is, that rules come with exceptions (lest they be 'idiot rules', in Tom Franck's glorious term⁴⁶), which raises the problem of deciding when the rule applies, and the exception applies. Again, the rules themselves don't do the work – someone, somehow has to do the heavy lifting here. And

⁴⁵ This at least is Koskeniemi's reading of Kant: *Constitutionalism as Mindset*

⁴⁶ See Thomas M. Franck, *The Power of Legitimacy among Nations* (OUP 1990).

then there is the curious phenomenon that even the hardest of rules can be set aside if there is widespread agreement that doing so is somehow useful: the end is often thought to justify the means – any means, regardless of constitutional niceties.

Moreover, and relating this paper back to my prime interest: none of the approaches is capable of answering the question what to do if there is no legal rule covering a situation (think Srebrenica), or if applicable legal rules point in different directions (think of my somewhat contrived World Bank/ human rights example⁴⁷), or if the legal rule actually seems problematic in light of serious policy concerns (think of the UNHCR example). In short: it would seem that any rule-based approach is structurally incapable of resolving such policy dilemmas, and does not offer much of a framework for discussing and evaluating them either. Given this state of affairs, it might be useful to look elsewhere, for instance to virtue ethics.

V. Towards Virtue

Moral philosophers typically identify three main currents in western ethics. Probably the most popular at present, if only because it provides the basis of most human rights thinking, is the deontological approach: the idea that somehow, people and institutions have duties and are bound by standards that are external to them.⁴⁸ These can be regular laws and ordinances, but can also be special codes of conduct or guidelines, religious injunctions or codes of ethics: the precise source, force or strength of these standards is not all that relevant, but what is relevant is their more or less objective nature: we can know what those standards say, and our behaviour can be tested against them. Today this is often linked to the work of Immanuel Kant, but as a tradition it has far older roots.

The second main tradition is that known as consequentialism, of which utilitarianism is the most well-known variation. Here, the idea is not so much that people should be guided by standards telling them what to do, but rather should prioritize the greater good, or the idea of common welfare: somehow, there is some purpose thought to be of relevance (hence, this tradition is also sometimes referred to as the teleological

⁴⁷ The example is contrived because it is not self-evident that human rights are binding on the Bank as a matter of law.

⁴⁸ Indeed, the word deontology stems from the ancient Greek term for what one must do or has a duty to do.

tradition). Whereas deontologists typically prioritize rights over good, consequentialists typically prioritize good over right, claiming that what matters is that behaviour must have good outcomes, even if it is not in accordance with some rule, or even if it follows from bad intentions. The main debates about consequentialism tend to be about how these good outcomes should or could be seen: whether it should be the greatest good for the greatest number, or some variation thereon.

For a long time, these were the two main traditions, but that is only because a third one had drifted out of the picture. This is the tradition of virtue ethics which, as a tradition, goes back to Aristotle⁴⁹, and has as its defining element that what matters is neither external standards nor the good that comes out of an action. Instead, what matters is whether persons act virtuously. After Aristotle, Aquinas built on this tradition, and it was later, to some extent and arguably in different form, revived by Nietzsche⁵⁰, but slowly but surely it had drifted out of sight. The main reason for this was, in all likelihood, that in a world where objectivity came to occupy a prominent place, virtue ethics looked awkwardly subjective. Where external standards can be known to people, and where good outcomes can seem more or less measurable (or at least can be compared to alternative outcomes), virtue ethics seemed hopelessly out of date: an appeal to subjective sentiments, or not even sentiments, but character traits, giving rise to endless debates over what exactly the virtues are, how to recognize them, and how to recognize whether people actually act in accordance with virtue or simply do something which ends up looking virtuously.

Having been all but ignored, it was Elizabeth Anscombe who almost single-handedly resuscitated virtue ethics in the 1950s.⁵¹ Her pioneering work paved the way for a number of later efforts, most prominently perhaps residing in the work of Philippa Foot⁵², Alasdair McIntyre⁵³, and Rosalind Hursthouse⁵⁴, all of whom have aimed to

⁴⁹ In particular Aristotle, *Ethics*, rev edn. (London: Penguin, 1976). I have used the Penguin version with translation by J.A.K Thomson and revised by Hugh Tredennick. The same work is sometimes published as *Nicomachean Ethics*, named after Aristotle's son.

⁵⁰ See, e.g., Friedrich Nietzsche ..., in Jennifer Welchman

⁵¹ See G.E.M. Anscombe, 'Modern Moral Philosophy', as reproduced in Roger Crisp and Michael Slote (eds.), *Virtue Ethics* (Oxford University Press, 1997) 26-..

⁵² See Philippa Foot, *Virtues and Vices*, 2nd edn. (Oxford University Press, 2002): *Natural Goodness* (Oxford...)

⁵³ See Alasdair McIntyre, *After Virtue: A Study in Moral Theory*, 2nd edn. (London: Duckworth, 1985), and *Dependent Rational Animals: Why Human Beings Need the Virtues* (Chicago: Open Court, 1999).

bring virtue ethics back to attention and to provide it with hands and feet. In recent years a specifically legal branch has grown in the form of virtue jurisprudence, focusing on virtues and the judiciary.⁵⁵ As all accounts of virtue ethics can be traced back to Aristotle, it is only fitting to start with a very brief overview of Aristotle's conception of the virtues, and later elaborations and refinements. Subsequently, I will briefly discuss the strengths and weaknesses of virtue ethics, and how it can possibly be of use in relation to international organizations. That said, a more detailed elaboration of a virtue ethics regime will be provided later on.

VI. Aristotle on Virtue

Aristotle's *Nicomachean Ethics* is a long essay on how one should live: what constitutes a life lived in excellence? For Aristotle, this translated into an inquiry into the virtues, on the theory that the best way to live would be to live a virtuous life. The main virtue would be happiness⁵⁶, with a number of other virtues in its service. It would be a mistake, though, to regard Aristotle's concept of happiness as the happiness of selfish, profit-maximizing individuals. What seems reasonably clear is that Aristotle's *Ethics* must be read against the background of a public, political life. Man, as Aristotle famously wrote elsewhere, is a political animal⁵⁷, and his *Ethics* is explicitly introduced as being of a political nature, perhaps, as one of his later editors put it, as a "sort of introduction" to politics.⁵⁸

The virtues Aristotle discusses include courage, modesty, truthfulness, temperance, and patience. All are related to different walks of life. Thus, friendliness has a role to play in 'social conduct', truthfulness is discussed under the heading 'self-

⁵⁴ See Rosalind Hursthouse, *On Virtue Ethics* (Oxford University Press, 1999).

⁵⁵ The term virtue jurisprudence seems to have been coined by Lawrence B. Solum, 'Virtue Jurisprudence: A Virtue-centred Theory of Judging', (2003) 34 *Metaphilosophy*, 178-213, Colin Farrelly & Lawrence B. Solum, *Virtue Jurisprudence* (Basingstoke: Palgrave MacMillan, 2008). See also H. Jefferson Powell, ...; and an early forerunner is Steven Burton, *Judging in Good Faith* (Cambridge University Press, 1992).

⁵⁶ 'Happiness' is the somewhat crude translation of the Greek *eudaimonia*. It has been suggested that 'well-being' would better capture what Aristotle had in mind. See, e.g., Williams, *The Limits*, at 34.

⁵⁷ See Aristotle, *The Politics*, rev. edn. (London: Penguin, 1981). The edition I used contains a translation by T.A. Sinclair and was revised by Trevor J. Saunders. The famous quote holds that "man is by nature a political animal." At 59 (1253a1).

⁵⁸ See *Ethics*, 1094b12, and at 64, footnote 3. Note also how *Ethics* ends with the suggestion that now it is time to turn to a study of politics, at 342 (1181b12-23).

expression', and proper ambition (another of the virtues) comes in under the rubric 'honour and dishonour'. Here, though, immediately a complication arises, in that the precise quantity of the desired behaviour may influence its virtuousness. Someone who is overly patient may be accused of lack of spirit, whereas someone who is not quite patient enough may be called irascible; hence, virtue can easily turn into vice. Likewise, truthfulness finds its proper place somewhere in-between boastfulness and understatement. As a result, Aristotle felt compelled to develop what he referred to as the 'doctrine of the mean': the virtues typically rest on a continuum, where too much is not recommended, and neither is too little.⁵⁹

To many virtue ethicists, the virtues specify natural qualities and follow what would appear to be natural functions. Thus, a virtuous tiger is a tiger that hunts its prey ruthlessly, whereas a hesitant or even cowardly tiger would be, from this perspective, less than fully virtuous. Indeed, even an altruistic tiger would not be very virtuous; the tiger that willingly lets his prey escape is not much of a tiger, really. Likewise, a virtuous chicken would be a chicken that would produce plenty of eggs, presuming that the production of eggs is what chickens are for. By the same token, a virtuous human being is one who exemplifies what it is to be human. This raises obvious questions as to what exactly it is that we associate with being human: those with a bleak view of humanity might be tempted to include aggression among the virtues (courage, however, is almost universally accepted a virtuous), whereas those with a milder view might place greater emphasis on social qualities.

Aristotle, then, given his recognition of man's political nature, is more inclined to stress the sort of virtues required for living together, and is less strict on the natural or functionalist aspects, or rather, for him the functionalism resides in the connection to political life. Crucially, he states that "human excellence will be the disposition that makes one a good man and causes him to perform his functions well".⁶⁰ Where for some the emphasis would rest on the functionalist aspect, for Aristotle there is more: one also needs to be a good man, and this, in turn, would seem to point to qualities of character. Indeed, much of the *Ethics* is devoted to how one can be educated in the virtues.

⁵⁹ Williams acidly remarks that this doctrine is "one of the most celebrated and least useful parts" of Aristotle's system: see Williams, *The Limits*, at 36.

⁶⁰ Aristotle, *Ethics*, at 100 (1106a20 ff.).

The same transpires from his main general concept of virtue: a virtue is a disposition or, in other words, a propensity to act.⁶¹ It is not a faculty or capability, as in saying that someone is capable of sorrow or anger. Nor is virtue a feeling: while some feelings can also be virtues (friendliness comes to mind⁶²), merely to feel friendliness without acting upon it would probably be insufficient.

VII. Why the Virtues?

There are, it seems, essentially two main ways in which virtue ethics can conceivably play a role in relation to international organizations. First, one could find solace in virtue ethics and embrace it as a comprehensive stand-alone ethical theory; second, virtue ethics may come in to complement other approaches.

Those who are reluctant to accept any sense of duty or *telos* may well have no other choice but to embrace the virtues, and would typically hold that respect for the virtues goes hand in hand with a sense of community. It is surely no coincidence that one of the leading virtue ethicists, Alasdair McIntyre, is often also seen as a leading communitarian theorist, and that some theorists who have expressed some affinity for republican political theory or, closely related, deliberative democracy theory, tend to be friendly disposed towards the virtues as well. By the same token, it can hardly be an accident that many of the leading virtue ethicists are women, as it is often thought that women are more sensitive to notions such as caring and nurturing, and are less prone to think in the sort of abstractions that deontology presupposes. In short, there tend to be serious affinities between virtue ethics, republicanism and communitarianism; all of them imply a certain regard for others and place a premium on empathy.

Still, an argument could be made, and often is implicit in deontological approaches, that a society where everyone does their duty is sufficiently coherent and harmonious to allow people to live their own lives to the full; justice can be achieved,

⁶¹ Williams defines virtue as “an ethically admirable disposition of character”, observing that not all desirable human characteristics qualify as virtue (think of being sexually attractive), and that virtue is somehow more than skill alone. See Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge MA: Harvard University Press, 1985), at 9.

⁶² Aristotle, in the *Ethics*, lists friendliness both among the virtues (at 104) and among feelings (at 98, 1105b).

along these lines, by people coming together and voluntarily deciding what to do, whether they do so by taking their individual interests into account or whether, as Rawls had it, they would reach agreement on principles behind a ‘veil of ignorance’.⁶³

This position is countered by virtue ethicists. They do so partly by embracing the (by now) standard critique of liberalism, to the effect that thinking in deontological terms, where individuals have duties and corresponding rights, tends to alienate people from one another. It leads to a vindication of ‘the unencumbered self’, in Sandel’s felicitous term, to a society where everyone is an island and the idea of community has disappeared from view.⁶⁴ Where people are fighting for their rights or, less romantically, simply insist on getting what they feel they are entitled to, they might end up ignoring or, worse, undermining the reasonable claims of others, and might give up caring about those things that cannot be captured in terms of rights and duties.⁶⁵

Partly, however, virtue ethicists also go further, and claim that the very picture of man that is central to deontological approaches is flawed. Deontological approaches typically presuppose that man is a rational, self-determining, autonomous and profit-maximizing actor, coming together with his peers in order to conclude a social contract of sorts. The resulting rules need to rest on consent in order to do justice to this underlying individualism: without the need for consent, the very image of man as self-determining and autonomous would evaporate. This, however, creates an obvious problem: if people are self-determining and profit-maximizing, they are bound to fiercely defend their own interests; hence, social justice becomes difficult to imagine, for why should the rich agree to such things as, e.g., re-distribution of income? The ingenious response by Rawls was to imagine a setting whereby people do not know their economic and social positions, forcing agreement on abstract principles, but as a methodological device this engenders quite a few problems of its own.⁶⁶

⁶³ See John Rawls, *A Theory of Justice* (...)

⁶⁴ See Michael J. Sandel, in Avner & De-Shalit

⁶⁵ It is probably no coincidence that the discovery, in international law, of collective rights followed the surge in popularity of individual human rights.

⁶⁶ A recent sympathetic yet highly critical discussion is Amartya Sen, *The Idea of Justice* (Cambridge MA: Harvard University Press, 2009).

Instead, so virtue ethicists typically claim, man is really something of a social animal.⁶⁷ Perhaps the most far-reaching explanation has been proposed by MacIntyre. To his mind, there is no difference of principle between man⁶⁸ and what he refers to as ‘non-human animals’ and, like animals, man needs to learn how to cooperate. In much the same way as dolphins, e.g., learn to swim in groups and find fruitful hunting grounds, so too man learns all sorts of cooperative devices. Indeed, even market relations, often regarded as the paradigm case of methodological individualism, can only work if they are embedded in other, cooperative, relationships.⁶⁹ In order for man to function, even on the market, he needs to know all sorts of things (how to speak, e.g. or, in extreme cases, use sign language; how to calculate; how to make sense of his desires), and typically, those things are internalized from a young age onwards. Practical reasoning demands, as MacIntyre has it, that we need to learn from others how to “evaluate, modify, or reject our own practical judgments (...) and the ability to imagine realistically alternative possible futures (...) and the ability to stand back from our desires...”.⁷⁰

These qualities then have little to do with rules and rule-following, and instead owe a lot to the virtues. In short: our social settings demand that we live virtuously; merely following rules is not sufficient. Indeed, important as rules are for purposes of arranging and organizing everyday life, rules themselves, according to MacIntyre, never answer the question how to respond to any social situation: for this, the virtues are essential, and “[k]nowing how to act virtuously always involves more than rule-following.”⁷¹

I mentioned above that there might be two reasons to think of virtue ethics. The first of these was to embrace virtue ethics as a single and comprehensive theory. This might make some sense in respect of individual lives, but is bound to remain less effective with social and political institutions, if only because it is not immediately self-evident whether institutions can be deemed to be moral agents, capable of acting in their

⁶⁷ As Williams succinctly put it, the need to live in society with others “is certainly an inner need, not just a technological necessity”. See Williams, *The Limits*, at 45.

⁶⁸ Under apology to women: I use ‘man’ here in a generic sense, finding the alternatives a bit too cumbersome.

⁶⁹ MacIntyre, *Dependent Rational Animals*, at 117.

⁷⁰ MacIntyre, *Dependent Rational Animals*, at 83.

⁷¹ MacIntyre, *Dependent Rational Animals*, at 93.

own right on the basis of moral thought.⁷² Does it make sense, for instance, to wonder whether the World Bank behaves virtuously, or does such a question inevitably break down into questions whether its leadership behaves virtuously?⁷³

Answers to this question vary. Some see little problem in presuming collectivities to be moral agents – indeed, in an important sense, the entire edifice of international law, with its central role for states, is based on the assumption that states, collective actors as they are, are capable of moral agency. It is states who make promises, enter into treaties, violate their commitments, and can be held responsible. While individual responsibility is by no means excluded, and has increased in popularity in recent years with the emergence of international criminal tribunals and a corpus of international criminal law, nonetheless the system presupposes the moral agency of states. And if states can be moral agents, so too can other collective actors.

On the other hand, even if one accepts that, for purposes of international law, states possess moral agency, it need not necessarily follow that the same applies to other actors, or that the same applies outside the sphere of international law. The moral agency of states, on this view, may be little more than a legal fiction, conceived by the necessity of creating a workable legal order but of no particular ontological relevance. The fiction says that the behaviour of individual X shall be attributed to state B; it does not say that state B itself engages in such behaviour, independently from what individual X does.

This difficulty surrounding moral agency then leads to the second possible reason to embrace virtue ethics: not as a comprehensive theory, but rather as a complementary theory, one that might help a deontological, rule-based approach but has no ambition of replacing it. This might be more appropriate in the setting of international law and for the purposes of the present work which, lest it be forgotten, is to somehow reflect on the control of international organizations.

VIII. What are the Virtues?

⁷² An in-depth discussion of some of the philosophical problems involved is Elizabeth Wolgast, *Ethics of an Artificial Person: Lost Responsibility in Professions and Organizations* (Stanford CA: Stanford University Press, 1992).

⁷³ A useful collection of essays with a specific focus on international affairs is Toni Erskine (ed.), ...

The question as to what are the virtues is notoriously open-ended, and has given rise to many, many different answers. Aristotle lists twelve of them, ranging from courage to liberality, and from temperance to righteous indignation.⁷⁴ Other authors have come up with different notions and have accepted that conceptions of what counts as virtue may change over time. Thus, MacIntyre discusses such virtues as cunning and honour as having occupied an important role in heroic societies.⁷⁵ Many would accept that honesty, charity and justice are to be counted among the virtues. Also mentioned are such things as generosity, loyalty, patience, and solidarity – all of these, it seems, lend themselves to being applied in the context of international organizations as well, and some perhaps eminently so.

IX. How to Acquire the Virtues?

George, e.g. (education...), Arendt on education and civics, Williams on habituation (pp30-45, somewhere)

X. Virtue Ethics and Universality

One of the traditional critiques of virtue ethics has been that it is really too subjective to be of much use. While it would be useful, no doubt, if people were to behave virtuously, nonetheless given that virtue ethics appeals in the first place to individual dispositions, there is little about it that is truly universal. As a result, how can A suggest that B's acts are without virtue, if B himself claims to be acting virtuously?

There are a number of answers possible to this point, but none of them, perhaps, fully satisfactory. A first possible reply might be that even if virtue ethics is bound to remain subjective, so too are the alternatives. Rules often reflect particular values (their universal ambitions notwithstanding), and even then, the meaning of rules depends to a large extent on the interpretation they are given, and surely, any interpretation will often

⁷⁴ The *Ethics* contains a convenient table, at 104 (1107b).

⁷⁵ See MacIntyre, *After Virtue*, at 123, 125.

be coloured by local contexts and circumstances.⁷⁶ Hence, one and the same treaty provision may nonetheless mean subtly different things to different people.

While it is no doubt true that written rules may have diverging meanings (something which is recognized in judicial doctrines relating to, e.g., the margin of appreciation available to local interpreters⁷⁷), the answer is not a very satisfying way of coming to terms with the ‘non-universal’ critique: it simply is not a proper justification to say that A may be bad, but is not worse than B or C. Something more positive is required.

One such positive response could be to claim that actually, agreement on the virtues may be more widespread than is usually believed. While this is not the place to provide an in-depth defense of the universal appeal of virtue ethics, there is some room for accepting the proposition that virtue ethics are not solely in the eye of the beholder, and most assuredly not solely in the eye of beholders coming from the western world. For instance, those familiar with eastern philosophies (Confucianism, Buddhism) may recognize quite a bit in any discussion of virtue ethics.⁷⁸ Indeed, virtue ethics may lack the stigma of being all too Western at any rate. In the western world, after all, virtue ethics is looked at a bit suspiciously: it lacks the intuitive attraction of deontological approaches, perhaps precisely because it does not appeal to the same extent to abstraction, logic and coherence - Enlightenment values that have permeated the very ways in which we think.⁷⁹

The argument that moral universalism may be reasonably widespread is given a considerable boost by the sociologist Steven Lukes. Lukes argues that much of the premises on which moral relativism is built (the idea that different sets of values held by different cultures make judging each other impossible) are overblown: cultures are not

⁷⁶ See, e.g., Jan Klabbers, ‘The Meaning of Rules’, (2006) 20 *International Relations*, 295-301. On interpretation more generally, Stanley Fish’s work is seminal. See, e.g., Stanley Fish, *Doing what comes Naturally...*

⁷⁷ For an insightful account of this doctrine in its most familiar setting, see George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007).

⁷⁸ See, e.g., Richard Madsen, ‘Confucianism: Ethical Uniformity and Diversity’, and Peter Nosco, ‘Buddhism and the Globalization of Ethics’, in William M. Sullivan and Will Kymlicka (eds.), *The Globalization of Ethics* (Cambridge University Press, 2007), 117-133 and 75-92, respectively.

⁷⁹ Bernard Williams, unsurpassed stylist that he is, puts it thus: “The word “virtue” has for the most part acquired comic or otherwise undesirable associations, and few use it now except philosophers...”. See Williams, *The Limits*, at 9.

large monoliths, after all, and some acts are simply ‘not done’ wherever one is on earth.⁸⁰ Even Sir Isaiah Berlin, the political philosopher most often associated with value pluralism, would not go so far as to embrace relativism, remarking in an interview that the absence of common ground can easily be exaggerated: “A great many people believe, roughly speaking, the same sort of thing. More people in more countries at more times accept more common values than is often believed.”⁸¹

For those to whom this may sound a bit overly abstract, perhaps it pays to think in more concrete terms. Without downplaying cultural differences, there will be very few cultures that would not hold ‘friendliness’ in esteem, or would frown at ‘truthfulness’. Likewise, there can be very few cultures (the academic world may be an exception...) where modesty is not counted as among the virtues, or which would hold ‘courage’ to be a vice, let alone where ‘dishonesty’ or ‘injustice’ are seen as virtuous. Even bands of crooks tend to have their own, and fairly strict codes of honour which would not depart too much from what the rest of us hold to be virtuous. Thus put, and on this rudimentary level, agreement on what is virtuous may be more widespread, more universal, than would be obvious at first glance.

As noted, this universalism may exist on a very basic level only: as soon as we would need to flesh out what ‘friendliness’ means, or what ‘courage’ means, we might run into difficulties, and perhaps into unbridgeable differences of opinion. Now this would be a problem if we were to draft a code of virtue, but doing so would involve a classic categorical mistake: it would turn virtue ethics into deontology. The very point of virtue ethics, as I understand it, is not so much to set abstract standards for future behaviour, but is rather to make practical judgment possible, always taking the circumstances of the situation into account. In such a setting, the proper question is not ‘Did Mr X act in conformity with or in violation of the Code’, but rather, ‘Was Mr X’s behaviour unfriendly, or dishonest, or unjust?’ And sometimes it may just be the case that while the answer to the first question is elusive, the picture becomes crystal clear when we ask a question of the second type.⁸²

⁸⁰ See Steven Lukes, *Moral Relativism* (London: Profile, 2008).

⁸¹ See Steven Lukes, ‘Isaiah Berlin in Conversation with Steven Lukes’, 120 *Salgamundi* (1998) 52-134, at 119.

⁸² See Anscombe, *Modern Moral Philosophy*, ...

An example may help to illustrate things. As outlined in Chapter 1 above, in the mid-1990s, the UN authorized Dutch military troops ('Dutchbat') to protect a refugee camp in Srebrenica, in Bosnia-Herzegovina. Confronted with a Serbian attack, Dutchbat stood by idly, taking its legal mandate (only to use force in self-defense) very seriously indeed. As a result, some 8000 people lost their lives in one of the most gruesome slaughters of humans in post-World War II Europe. Clearly then, something went terribly wrong. It is far less clear, however, whether any legal wrong took place.

The lawyer, asked to analyze Srebrenica, might have a hard time trying to capture the event in legal terms, beyond Serbia's actions. Obviously, the Serbs did something terribly wrong and illegal, but does the same apply to the UN or to Dutchbat? There is, after all, no obligation in international law just yet to intervene for humanitarian reasons (this is what the currently popular Responsibility to Protect project aims to achieve). There is, likewise, no duty resting on the UN to intervene: interventions, it is generally acknowledged, are left to the discretion of the Security Council. Dutchbat, moreover, merely acted in accordance with its mandate, and thus could be said to have adhered to the law rather than acted against it. In short, Srebrenica presents the lawyer with a considerable puzzle.⁸³

And yet, what is clear, even if difficult to capture in legal terms, is that something went wrong. To say that the acts (or inactions) of the UN and Dutchbat in Srebrenica were, if not illegal, at least immoral, is tricky as well: what exact standard of morality was violated? If morality is conceived of in deontological terms, as a set of cognizable standards (analogous to legal standards), then the same set of problems emerges. Making such an argument would entail demonstrating the existence, and widespread acceptance, of a moral rule to the effect that, for instance, one shall not stand by idly when confronted with ethnic cleansing, not even if this is dictated by one's mandate.

Such a moral rule would have to be immensely sophisticated: it would have to contain a basic injunction (not to stand by idly), and would have to be able to override another injunction (to adhere to one's mandate). Asking for such a rule to be drafted *ex*

⁸³ And does so even without invoking standard legal notions about jurisdictional niceties, immunity from suit and enforcement, or circumstances excluding wrongfulness.

ante probably amounts to asking for the impossible⁸⁴: few people would agree without hesitation, being (justifiably) afraid that it could justify intervention or that overruling the mandate of peacekeeping forces – and on the basis of their own judgment, no less - could give rise to considerable abuse.

Hence, it is not only the case that no rule (legal or moral) could be said to exist which would have fully covered the Srebrenica scenario: it is highly unlikely that such a rule could even have come to into existence. In such circumstances, it may prove more fruitful not to think in terms of rules (deontology) at all, but rather to think in terms of what would have been the proper reaction: what would a virtuous person have done? And then the answer becomes a lot clearer: many people would agree that when confronted with a large-scale bloodbath, a virtuous Dutchbat leader would have ignored the limits of his legal mandate⁸⁵ and, arguably, virtuous UN leadership would have worked hard to overcome the political resistance of powerful states to provide support to the safe haven, and would have realized that its bureaucratic inertia, however understandable, was not quite justifiable in the circumstances.⁸⁶

XI. Complementing Deontology

If it is correct to say that a deontological approach to the control of the acts and omissions of international organizations is far from unproblematic, then the question arises whether a different approach can be found, one that either replaces the deontological approach, or complements it. In this part, I will argue that two different approaches can be identified which both have something to offer as a complement to deontology. This last point should be stressed: I am not proposing to do away with the deontological approach altogether: it would seem that in the complicated global society of the early 21st century,

⁸⁴ And this is without prejudice for the impossibility of legislating morality: morality grows organically, out of the everyday acts of people, but cannot be intentionally made in quite the same manner as law can be the product of legislation.

⁸⁵ And would most definitely have avoided sharing drinks with Serbian leadership...

⁸⁶ Barnett and Finnemore paint a highly plausible picture of the UN being paralyzed at the time of Srebrenica by having been engaged in unsuccessful work in Somalia and elsewhere not so long before. As a result, a culture of non-intervention and restraint had crept in. See Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca NY: Cornell University Press, 2004).

we cannot do without setting standards in more or less abstract fashion in order to govern the behaviour of people and institutions. It is no longer feasible (if it ever was) to decide everything on a case-by-case basis. As Lon Fuller convincingly claimed, a case-by-case approach would be incompatible with the very notion of law.⁸⁷ Hence, deontology cannot be dispensed with.⁸⁸

But deontology alone is unlikely to be fully satisfactory, for a number of reasons, briefly outlined in the Intermezzo above (and I do not claim to be exhaustive here). The two contending approaches which could possibly complement deontology mentioned above are, not surprisingly, consequentialism and virtue ethics; these make up, with deontology, the three great traditions of Western philosophy. Of these two, consequentialism would seem to be by far the more popular in legal discourse, in particular in the form of utilitarianism – the idea that the greatest good for the greatest number should be achieved. Within an overwhelmingly deontological approach this often takes two particular forms. The first of these is a balancing of rights: whenever two rights conflict, the favoured approach would be not so much to prefer one over the other, but instead to balance them. On this approach, my right to enjoy freedom of expression might be balanced by your right to be free from hate speech. Or, in the context of international organizations, an organization's right to decide on the scope of the privileges and immunities of its representatives may be balanced by a member state's right to see that such privileges and immunities are not applied frivolously – indeed, this is typically the way agreements on the privileges and immunities of international organizations are structured, providing that the privileges and immunities shall be granted only for the benefit of the organization's activities, and that the organization is supposed to waive them whenever this is deemed to be in the interest of justice.⁸⁹

The second way in which consequentialism manifests itself resides in the notion of proportionality. On this line of thought, the behaviour of an entity is acceptable if it is deemed to be proportional to, e.g., the goal to be achieved by that behaviour, or if it is

⁸⁷ One of the first elements of his 'inner morality' of law was, after all, that there must be law to begin with; leaving everything to case-by-case decision-making would make it impossible for the law's subjects to have even the dimmest awareness of what would be their expected behaviour. Note, incidentally, that the common law does not fall into this trap: it sets binding precedents and therewith creates some form or regularity and predictably, taking things far beyond a case-by-case approach.

⁸⁸ See also Onora O'Neill, ...

⁸⁹ The ICJ re-enforced the message in *Cumuraswamy*...

deemed proportional to the concomitant limits on other's freedom of manoeuvre. In the case-law, depending on the issue and setting concerned, proportionality has been given a wide variety of different applications. Budding international lawyers usually first hear of proportionality in the context of the right to self-defense, where proportionality was one of the requirements Daniel Webster set out in his famous letter. In trade law, the idea of proportionality is typically used in a manner judging whether a domestic measure to restrict foreign trade is proportional to the goal at hand, e.g. environmental protection or the protection of existing intellectual property rights. A possible problem, however, is that there is no particular yardstick available for doing so: proportionality remains highly flexible, depending considerably on common sense or, as some may have it, on the virtues of WTO panelists and Appellate Body members.

Proportionality also finds different applications. In the law of armed conflict, it often takes on the guise of the 'military necessity' doctrine: essentially, this justifies military action whenever (note how circular this sounds) military action is justifiable.⁹⁰ Yet a different application is to be found in the so-called 'margin of appreciation doctrine' developed by the European Court of Human Rights in the mid-1970s.⁹¹ Where the margin doctrine gives states considerable leeway in accommodating international rules to local standards, it is sometimes suggested that proportionality really helps to soften the impact of an all too rigid application of the margin of appreciation doctrine.⁹²

As this already makes clear, one of the key questions to be answered when invoking proportionality is 'proportional to what, exactly'? One option here is to claim that behaviour should be proportional to its ultimate goal, but this demands, first, that an ultimate goal can be identified and second, that the test can meaningfully be applied. A second question to ask is whether individual administrative measures should all separately be proportional, or whether sets of related measures cumulatively should meet the proportionality requirement.

⁹⁰ See Judith Gardam, 'Proportionality and Force in International Law', (1993) 87 American Journal of International Law, 391-413; Jan Klabbers, 'Off Limits?', (2007) .. Theoretical Inquiries in Law, ...

⁹¹ The first application was Handyside. A fine discussion of the doctrine is to be found in George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007).

⁹² See Julian Rivers, 'Proportionality and Discretion in International and European Law', in Nicholas Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives* (Cambridge University Press 2007), 107-131.

No matter how useful proportionality may be in some contexts, it is less than fully useful for my purposes. There are two main reasons why this is the case. First, applying a proportionality test presupposes the presence of tribunals or agencies able to apply the test. Yet, when it comes to the acts of international organizations, this is rarely the case: the occasions when international organizations can be made to appear before a tribunal, domestic or international, are few and far between. Hence, even if hypothetically the notion of proportionality may have much to offer⁹³, in practice it will be able to deliver but meager results.

But there is a second, deeper problem at work, and that is that as a philosophical matter the logic behind proportionality is difficult to reconcile with deontological thought. In other words, if the ambition is to introduce a complement to deontological thinking, matters would be greatly helped if the proportionality test could be easily inserted, as it were. The problem here is that deontology sets either absolute standards, which leave no room for consequentialist thinking (one cannot circumvent an absolute prohibition of torture by claiming that is justified if doing so in the greater good: if absolute, it's absolute, and closed off for consequentialist arguments), or it incorporates sophist elements, in which cases the legitimacy of looking outside the norm itself becomes dubious as well. The one remaining possibility, it would seem, is where the norm itself refers to consequentialist thinking. To be sure, this does occur (acting in 'the best interest of the child' might be an example), but should perhaps not be too lightly presumed. Either way, it appears doubtful whether many examples of proportionality as applied fit this category, and even then, consequentialist thought ought to invoke the question 'who benefits? – if something is to be accepted in the name of the greater good, it becomes legitimate to ask which conception of the greater good, and whose, are at issue.

By contrast, it would seem that virtue ethics can more easily be reconciled with prevailing deontology. Virtue ethics taps into the idea that human beings act out of a sense of virtue, that they will do what is just, or honest, or charitable, as the case may

⁹³ One of its more enthusiastic advocates even calls it the 'ultimate rule of law'. See David Beatty, *The Ultimate Rule of Law* (Oxford University Press 2004).

demand. There are (at least) three distinct senses in which this may be of relevance in a legal - deontological - context).

First, it is sometimes suggested that the law should encapsulate the virtues, and make them obligatory.⁹⁴ This, however, is unlikely to happen to any great extent, if only because what constitutes virtuous behaviour is so dependent on the context that it can hardly, in a meaningful way, be legislated. The law is well-placed to instruct people to buckle on their seatbelts when driving their cars, but cannot readily be expected to order people to act honestly, or justly, or charitably. Indeed, it is not unlikely that we partly use the law to further define and refine those notions to begin with: honesty e.g. is, to some extent, defined through the prohibitions of our criminal law, which makes clear that theft and larceny are not to be counted as honest activities or that, all things considered, we frown at insider trading. Thus, while law can be used, in part, to refine our senses of what is virtuous, it would be too much to ask the law to order people to be virtuous. As Hannah Arendt once remarked, moreover, the law is a lot better at telling people what not to do, than it is at telling people what to do.⁹⁵

Second, and perhaps most-well-developed so far as a matter of academic work, is the idea that courts and judges should be expected to behave to virtuously. This has, indeed, recently given rise to a sub-branch in the legal academic literature: the idea of virtue jurisprudence. It is probably no accident that the emergence of virtue jurisprudence coincides with globalization: given that judgments may have not only legal, but also social or economic effects (or even intellectual effects) across boundaries, a certain amount of modesty or humility on the part of judges would seem to be proper, as would a well-developed sense of justice.⁹⁶ However, for present purposes, virtue jurisprudence in the narrow sense of focusing on judicial behaviour is not the most useful approach, as my

⁹⁴ This is a strong Aristotelian position. See Aristotle, *The Ethics* (...). For a subtle contemporary re-statement of this position, see Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford: Clarendon Press, 1993).

⁹⁵ Make note....

⁹⁶ See, for a general overview, Colin Farrelly & Lawrence Solum (eds.), *Virtue Jurisprudence* (Basingstoke: Palgrave MacMillan, 2008). Note that Farrelly and Solum suggest that virtue jurisprudence may also be broader and encompass, e.g., a theory of virtue legislation; hence, their use of the term is different from how I use it here. See Colin Farrelly and Lawrence Solum, 'An Introduction to Aretaic Theories of Law', in Farrelly and Solum (eds.), *Virtue Jurisprudence*, 1-23, at 2. Without invoking the label virtue jurisprudence, a similar approach is articulated in H. Jefferson Powell, ..., and an early fore-runner, at least in part, is Steven J. Burton, *Judging in Good Faith* (Cambridge University Press 1992).

interest resides not in the virtues of judges, but rather in the virtues of decision-makers and political and organizational leaders. While important lessons can be learned and inspiration can be drawn from virtue jurisprudence, it is too centrally focused on courts and judges to be of direct help in other contexts.

Third, the way law and virtue ethics may come to work together is by broadening the insight behind virtue jurisprudence and allow virtue ethics to influence, or help evaluate, the way activities are chosen from a range of available and legally plausible options. Thus, simplistically put, when faced with the choice between the politically expedient option A and the more virtuous option B, we would hope our political leaders to forego their own short term political interests and choose option B. The onus is not on organizational leaders to be ‘holier than thou’; instead, the approach is more humble in asking organizational leaders to bracket their own personal interests and, instead, act in such a way as one might expect from a virtuous leader.

Humble as this may be, it is difficult enough in its own right. Appointed and elected officials typically have to balance a number of strong demands: they have to meet with the mandates of their jobs, in terms of performance, but they usually also aim to secure re-election or re-appointment – and the two do not always easily go hand in hand. And there may be other factors in the balance: inter-office turf wars and pressure exercised by strong-minded and vocal individuals within the same office; pressure exercised by donor states willing to see their pet projects go through or even making donations conditional upon certain types of policy decisions⁹⁷; past actions that ended up in failure⁹⁸, et cetera. In short, actors may experience ‘compliance pull’⁹⁹ in various, contradictory or even mutually exclusive directions. In such circumstances, much comes to depend on the personality of those taking the final decisions or, in a word, on their virtue.

⁹⁷ By way of example: it is no secret that in some organizations, the appointment of officials in high positions owes little to their resumé and past achievements and might more often follow from the wish to placate important donor states.

⁹⁸ Barnett and Finnemore suggest that much of the inactivity of the UN in the mid-1990s could be traced back to policy failures suffered in the early 1990s. See Michael Barnett & Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca NY: Cornell University Press, 2004).

⁹⁹ The notion of ‘compliance pull’, exercised by legitimate legal rules, was pioneered by Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990).

XII. Trust and Confidence

It could be thought that a focus on deontological approaches would be sufficient, even in the face of the shortcomings of these approaches. After all, so the claim could go, no single approach is likely to be perfect, and at least deontology carries the promise of objectively cognizable standards (there are only so many ways in which a treaty provision can plausibly be interpreted) and what one might call a real-life effect. Even in the absence of courts and tribunals, people make judgments on the behaviour of political and other leaders all the time. They do so privately or through the media, with a particularly vocal role being played by the media, and they can do so by establishing all sorts of institutions. Accountability, in other words, is not dependent solely on courts or tribunals; it can also take the form of parliamentary inquiries, auditing bodies, fact-finding missions, committees of wise men and women, et cetera. In these circumstances, so the argument might finish, deontological approaches may not be perfect, but still provide us, the audiences, with decent results: we can find fault with exercises of public power through such bodies and, what is more, the very possibility of utilizing a fact-finding commission or an audit mission might help keep officials in check by introducing a deterrent: surely, they will behave more responsibly, i.e. more in tune with external standards, if they know that they run the risk of scrutiny later on.

Yet, while seemingly attractive, such an approach has at least two negative sides that ought to be factored in. First, it fails to internalize those standards in the human beings concerned, running the risk that individuals end up respecting those standards not because they feel they are doing the right thing, but because they feel that otherwise they might somehow be punished. While this may not be something to immediately lose sleep over, in the long run it carries the risk that those individuals end up ‘pushing the envelope’ or ‘milking the system’, just because their experience suggests that there are activities they can get away with. What eventually becomes relevant is not the thought underlying the rule or standard, but how one can be seen to observe its letter while not quite living up to its spirit.

Examples from everyday life abound, but perhaps it is most instructive to invoke a sports example. Tennis is a game which relies on the linesmen and umpires having a

sharp eye: when the ball is hit out of play, it should be called; play should be interrupted, and a point should be awarded to one or the other player. When the ball is hit widely out of play, this poses no specific problems; but when the ball ends up close to the line, the sharp eye may not be sufficient. In such circumstances, if no call is made, it will often be seen as legitimate to continue play, even if doing so clearly violates the rules: it is considered not to be the individual player's responsibility to make the call himself if doing so would work to his detriment. Yet, this is actually what the spirit of sportsmanship would demand: where rules are absent or their application fails, it is up to the individual sportsperson to behave in conformity with the spirit of the game. This cannot be captured in regular rules, and the risk exists that an exclusive focus on rules undermines the appreciation for what exactly it is that the sport should stand for.¹⁰⁰

To take matters further: consider the behaviour of soccer players, often signaling that the ball has gone out of play via their opponents and thus they ought to be awarded a throw in or a corner kick, even if they know better; even if they know very well that they were the last to make contact, and thus the other side ought to be awarded a throw-in or a corner. These soccer players have come to think of the rules being there to be taken advantage of; they no longer recognize that the rule in question helps streamline the game in an orderly fashion, and that increased disrespect, or an increasingly selfish and unrealistic interpretation of the facts, helps undermine respect for the rule and therewith for the game at large. It was no coincidence that people were able to quip that rugby was thug's game played by gentlemen, whereas football was a gentlemen's game played by thugs. The statement, by now, has probably lost some accuracy, not because football has improved, but rather because rugby players have gone down the same road.

Either way, the point is that a deontological approach invites an instrumentalist approach to rules on the part of individuals, and an instrumentalist version of the rules ("the rules should be interpreted and applied so as to serve my best interest"), in turn, ends up undermining respect for those same rules. The resulting behaviour bears only a fleeting resemblance to the ideas which prompted the rules to be developed to begin with, and makes coexistence in a common world all the more difficult to achieve.

¹⁰⁰ This comes close, perhaps, to a Dworkinian position, except that I do not feel the urge to consider virtuous behaviour as legally mandated or as part of the legal order as such.

More important still – and partly resulting from the above - there is a second reason why deontological approaches, their seeming attractions notwithstanding, might be socially less than desirable. They help, indirectly, create a climate of mistrust and bad faith, as Onora O’Neill has pointed out.¹⁰¹ Where standards do not become internalized, they need to be scrutinized; where people aim to mislead the scrutinizing bodies, those bodies themselves need to be scrutinized; in short, there is an endless regression of bodies supervising each other, and all (understandably) starting from the point that other bodies cannot be trusted to do a good job. The linesmen in tennis can be overruled by the umpire; the umpire, in turn, is subject to scrutiny by some higher body which, in the end, may be subject to some higher body and ultimately to the court of public opinion.¹⁰²

Moreover, having to scrutinize other people’s behaviour and judging whether it was in conformity with external standards usually results in simplification. Often, both the test or standard and the behaviour to be evaluated will be simplified into measurable units; this applies all the more where at issue are fairly elusive political goals. A good example draws on the practice of the United Nations in respect of East Timor, a territory run for a few years by the UN by means of UNTAET.¹⁰³ Initially, UNTAET was given a dual mandate: to help the state-building process in East Timor, and to promote respect for human rights. The former turned out difficult to measure: how does one determine whether state-building today, or this month, is advanced when compared with yesterday or last month? As a result, ambitions concerning state-building were gradually conveyed in human rights language, up to the point where the promotion of state-building actually came to be conceptualized as the promotion of human rights. But this is not all, for human rights themselves are difficult to measure: how to determine achievements in, say, freedom of expression other than through formal parameters? Hence, such statistics as those dealing with the number of prosecutions for human rights violations came to be indicative of the human rights situation: more prosecutions meant an improvement in the human rights situation, regardless of whether, say, freedom of assembly had increased, or the right to education had progressed. This then allowed UNTAET officials to report

¹⁰¹ See Onora O’Neill, *A Question of Trust* (Cambridge University Press, 2002).

¹⁰² Not surprisingly, the US tennis Association published what it refers to as The Code, in order to fill in the blanks left open by the official rules and in order to provide guidance when matches are unofficiated. See www.usta.com (last visited 26 January 2010).

¹⁰³ This draws on Jan Klabbers, ‘Redemption Song?...’, (2003) .. *Leiden Journal of International Law*, ...

back to the UN at large but, needless to say, it did not tell much about what was actually happening and whether East Timor became a better place to live.

The point, for present purposes, is that norms and behaviour inevitably come to be compressed into bite-sized format. Anything else would be unworkable: one cannot send soldiers into battle carrying 600-page manuals on the law of armed conflict, and one cannot send humanitarians to provide refugees with food and shelter while carrying multi-volume instructions and rules on how to proceed. Not only would it ask the impossible to try to learn and understand all of them but, more importantly, no matter how detailed, situations would still arise that would not be covered by any instruction or rule.

Likewise, it is impossible to capture all the nuances of human behaviour, all the elements of calculation and intention and cost-benefit analysis that go into a single act or inspire a single omission by a single author. What is more, typically decisions of international organizations are not even traceable to single individuals but are, instead, the result of the interplay of many actors. A decision by the World Bank to sponsor a particular project in state X will involve the World Bank's officials, its various organs (and political leaders in its more powerful member states), possibly its Inspection Panel or some other form of audit, plus a host of officials and political leaders in the receiving state. Public administration scholars typically acknowledge the existence of the problem of 'the many hands'¹⁰⁴: where many contribute to decision-making, it becomes well-nigh impossible to apportion blame and responsibility.

The answer then is not, it would seem, to create yet another watchdog committee, or another ring of guardianship, or an additional layer of auditing. These will do nothing to alleviate the problem and, instead, will only generate further mistrust, in turn inspiring people to act not so much in accordance with the spirit of the rules concerned but rather to make sure to stay within the letter – on the morally impoverished theory that as long as one stays within the limits of the letter of a rule, one can deflect all blame and responsibility. Robert George summarizes the point eloquently, if somewhat plaintively, noting that “a good moral ecology benefits people by encouraging and supporting their

¹⁰⁴ A leading example is Mark Bovens, *The Quest for Responsibility*

efforts to be good; a bad moral ecology harms people by offering them opportunities and inducements to do things that are wicked.”¹⁰⁵

XIII. Virtue Institutionalized

In the wake of corporate scandals such as that involving Enron in the US, and the difficult life and times of the bureaucracy reforms of the 1980s collectively known as New Public Management¹⁰⁶, it is no accident that both in business life and in public administration, attempts have been made to institutionalize virtue ethics in one way or another. In business life, some scholars affiliated with respected business schools have pioneered the relevance of such notions as ‘moral intelligence’ and ‘quiet leadership’. The former concentrates “on the personal character, principles, and moral skills that must be baked into every leader and every organization that wants to sustain long-term sustainable results.”¹⁰⁷ Likewise, the idea of quiet leadership presupposes (and demonstrates) that effective leadership does not depend on pushing the envelope or milking the system but, instead, owes a lot to virtuous considerations.¹⁰⁸

Perhaps more illuminating though for present purposes is the introduction of a kind of virtue ethics in the public administration literature, as international organizations too exercise public tasks. The prime example perhaps is Larry D. Terry’s concept of the administrator as conservator.¹⁰⁹ The main idea in this work is that those who come to lead public agencies (be it musea or schools, fire departments or social security offices) should find their inspiration in part in the value of conserving the values of the agency concerned. Terry’s proposition has been summarized in almost slogan-like form: “Public agencies help form the public, and build its institutional capacities. This requires conservators, not entrepreneurs.”¹¹⁰

¹⁰⁵ See George, *Making Men Moral*, at 45.

¹⁰⁶ See generally Paul du Gay, ‘The Values of Bureaucracy: An Introduction’, in Paul du Gay (ed.), *The Values of Bureaucracy* (Oxford University Press 2005), 1-13.

¹⁰⁷ See Doug Lennick and Fred Kiel, *Moral Intelligence: Enhancing Business performance & leadership Success* (Upper Saddle River NJ: Wharton School Publishing 2005), at xxxvii.

¹⁰⁸ See Joseph L. Badarocco, jr, *Leading Quietly* (...)

¹⁰⁹ See Larry D. Terry....

¹¹⁰ See Richard T. Green, ‘The Administrative Conservator: Larry Terry’s Abiding Legacy’, (2007) 29 *Administrative Theory & Praxis*, 140-147, at 143.

While all this may sound a bit abstract, it stands to reason that, e.g., the director of a museum should not give in to the desire to raise attendance and sales figures by compromising the values underlying the museum in the first place: the Museum of Modern Art in New York should not become a tacky Museum of Sex through the Ages just because doing so might be commercially attractive.¹¹¹ Likewise, the director of the venerable BBC should not only program live football and reality TV shows in a bid to increase the ratings and therewith advertising revenue: he or she should remain faithful to the values (or ideology, if you will) of the BBC: to provide independent, impartial and honest reporting to a worldwide audience.¹¹² Not only would looking for cheap successes undermine the agency's public task, there is even some empirical support for the proposition that organizational stability (meaning here that its leadership consciously conserves the things the organization stands for) may help it to function in a better way.¹¹³ Moreover, the general gist of Terry's argument was that agencies conserving their values would help to contribute to a vibrant democracy.

And yet, as the very use of the word 'conservator' would suggest, Terry's approach seems inherently conservative, so much so that it might be seen to stifle any progressive form of politics.¹¹⁴ Indeed, in an earlier published co-authored article, he proposed the idea that the logic behind constitutions is to limit discretionary power on the part of government officials and even, if and when appropriate, to allow administrative discretion in order to limit the discretion of political leaders. Bureaucracy, then, would derive its legitimacy from this constitutional logic: the logic of limited government.¹¹⁵

¹¹¹ MoMa defines its mission as helping people "to understand and enjoy the art of our time", and sees itself as "a place that fuels creativity, ignites minds, and provides inspiration." See its website, at <http://www.moma.org/about/index> (last visited 26 January 2010).

¹¹² The words are taken from the BBC's mission statement, available at <http://www.bbc.co.uk/info/purpose/index.shtml> (last visited 26 January 2010). Among the BBC's values are listed quality and value for money, while the BBC's mission is defined as "[t]o enrich people's lives with programmes and services that inform, educate and entertain." Note that entertainment is mentioned last here.

¹¹³ See Laurence O'Toole, Jr. and Kenneth J. Meier, 'Public Management and the Administrative Conservator: Empirical Support for Larry Terry's Prescriptions', (2007) 29 *Administrative Theory & Praxis*, 148-156, at 152.

¹¹⁴ And matters are not exactly helped by the circumstance that Terry's book contains a quite lengthy section extolling the virtues of conservatism.

¹¹⁵ See Michael W. Spicer and Larry D. Terry, 'Legitimacy, History, and Logic: Public Administration and the Constitution', (1993) 53 *Public Administration Review*, 239-246.

How then to save Terry's conservatorship without necessarily buying into the concomitant conservatism? Terry himself suggested that conservatism embedded an evolutionary approach, and relied heavily on Burke in order to suggest that the preservation of tradition would not prohibit necessary change, but only work against unnecessary change.¹¹⁶

Perhaps a more satisfactory answer would suggest that reform – or rather, a progressive politics – is possible only when the goalposts are not constantly moved.¹¹⁷ To provide one example: developing states have a hard enough time adapting to the WTO as it is; the introduction of all sorts of changes in decision-making and access thereto, especially if these go against established laws and practices, will make it all the harder for them to participate. Put differently: a progressive politics demands, so to speak, that the core values of institutions remain fairly constant and do not change too radically overnight; in this light, it is precisely a 'culture of formality',¹¹⁸ which makes a progressive politics possible, and helps to dissipate the seeming dichotomy between conservation and progressiveness.

XIV. Virtue in International Organizations: Outline of an Approach

How then can virtue ethics contribute to the control of international organizations? It is one thing to suggest that virtue ethics may come to complement deontological approaches, but how exactly can this take place? There may be merit in trying to combine deontology with virtue ethics by adopting a modest account of ethical reasoning, one that does not quite strive for the achievement of paradise on earth, but accepts that paradise cannot be outlined in detail. The moral philosopher Onora O'Neill, with whose work such a strand is perhaps most obviously associated, speaks of a 'constructivist account of ethics', which is "inevitably down to earth" and will not allow for the creation of the Kingdom of Ends, but need not involve giving up on any ideals. Moreover, such an

¹¹⁶ See Terry, 35-36 (first edition!!!).

¹¹⁷ Apologies for the use of yet another sports simile here.

¹¹⁸ The term is Koskenniemi's: see Martti Koskenniemi, *The Gentle Civilizer...*

approach can provide guidelines without, however, offering “complete instructions for building lives or societies”.¹¹⁹

As a practical matter, there might be numerous ways which would help in such an effort, but it should come as no surprise that to some extent, a change in mentality will be required. Here, education needs to come in, especially perhaps at university level: future lawyers and economists should not only be trained to achieve professional competence, but should also receive some education in what it means to be good citizens.¹²⁰ This is not a matter for professional ethics courses; rather, it is a matter of instilling some form of responsibility for the common world into the minds of students. The good economist not only masters her mathematics, models and diagrams, but also ought to be taught to reflect on the consequences, distributional and otherwise, of economic policies. Likewise, the good tax lawyer ought to realize that competence is not only a matter of finding loopholes and tax havens, but also that tax income helps keep a society together. Et cetera.

A second way is by influencing the hiring policies of international organizations. A nice example is mentioned in the story (biography perhaps being too big a word) of UN official Sergio Vieira de Mello who, when moving around the world to start up yet another mission, would gather a small group of trusted individuals, whom he would value for their work, their brains, and their ethics, rather than have his mission filled by the dictates of seniority or geographical representation.¹²¹ Likewise, while there is no doubt that leading domestic politicians can play important roles also in leadership positions within international organizations, such is not guaranteed. Appointments ought to be based not on nationality alone, but also on merit and, importantly, on character. To some extent this takes place when we elect our leaders: we tend to look at their characters and often refuse to elect those whose character seems suspect to high office.¹²²

¹¹⁹ See Onora O'Neill, *Towards Justice and Virtue* (Cambridge University Press 1996), at 211-212.

¹²⁰ See generally Klabbers, in Klabbers & Sellers

¹²¹ See Samantha Power, *Chasing the Flame*... Note that he would not hesitate to include his girlfriends in his mission, but on condition that the women in question were actually supremely qualified. By contrast, Power mentions also that on one occasion the French government insisted in sending ill-prepared Tunisian and Cameroonian troops as peacekeepers to yet another mission for the sole purpose of boosting francophone participation...

¹²² The point is elegantly made by Richard Sennett, *The Fall of Public Man*. Anecdotal: some of my US friends were mortified when Bill Clinton was running for president in the early 1990s, not because they disliked his politics (they were Democrats at heart), but because they felt they could not trust him. Clinton

Third: moral evaluation. We not only evaluate behaviour in courts, but also in everyday life. Richard Kapuzinski (check the spelling...) once observed that in Africa, much political debate takes place in bars, and part of this political debate involves, more often than not, the evaluation of the acts (or omissions) of our political leaders. Much the same goes on elsewhere: in university seminars, in newspapers and, most assuredly, in the blogosphere also known as the internet. This is useful, no doubt, and can benefit from the availability of a vocabulary for such evaluations, and itself contribute to that vocabulary.

Fourth: by linking it to virtue jurisprudence:

may well have been exceptional though, in that he was elected despite his perceived character flaws. Many Republicans must, over the last decade, have doubted the wisdom of appointing Dick Cheney as vice-president, but then again, Cheney was appointed rather than straightforwardly elected.