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LAW, ETHICS AND GLOBAL GOVERNANCE: ACCOUNTABILITY IN PERSPECTIVE

Jan Klabbers*

In his keynote address, Jan Klabbers argues that international law is incapable of addressing all manifestations of global governance, and ought to be complemented by an ethical approach. He suggests that the classic idea of virtue ethics may well be helpful here.

I INTRODUCTION

When John Austin wrote his classic *The Province of Jurisprudence Determined* in 1832, he famously posited that international law was not law "properly so called".[1] The reason for this, he suggested, was that the global order lacked a sovereign. Since he defined "law" as "sovereign commands backed by sanction", it followed that international law could not properly be seen as "law".

What Austin did not dwell upon (not much, at any rate) was the role of institutions such as courts, and notions such as responsibility, not in the domestic legal order, let alone in international law. Courts could turn customs into law, but that was pretty much all he said, and the reason why courts could do so was because they were empowered to do so by their sovereigns.

In the absence of a sovereign (and the non-existence of international courts), international law, to Austin, was "positive morality", and only called "law" by inept analogy – set, as he put it, by "general opinion". As he saw it, 180 years ago, this denoted not so much the sovereign command,

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1 John Austin *The Province of Jurisprudence Determined* (Cambridge University Press, Cambridge, 1995) at 124.

but rather that an "uncertain aggregate of persons regards a kind of conduct with a sentiment of aversion or liking."[2] As a consequence, it is likely that some members of this uncertain aggregate:[3]

> … will be displeased with a party who shall pursue or not pursue conduct of that kind. And, in consequence of that displeasure, it is likely that some party … will visit the party provoking it with some evil or another.

In other words, international law formed mainly, it seems, a vocabulary of opprobrium and approval, allowing states to voice their approval or disapproval with certain courses of action. The rules of international law could not be considered legal rules, but they could be used by states (and, perhaps, others as well) to signal approval or disapproval.

It may seem eccentric to start a public lecture in 2012 by referring to the work of John Austin, written almost two centuries ago. Austin has been much criticised, of course, and is usually easily cast aside as an extreme positivist, writing during the glory days of extreme positivism. And many international lawyers have seen fit to argue that Austin's views, if accurate in 1832 to begin with, are no longer valid: international law can now properly be called "law".

For all the critique, there is something worth exploring in Austin, and that is the idea of international law as comprising a vocabulary of opprobrium and approval. All the attention paid to the definition of "law" seems to have overshadowed Austin's point that international law, even if not "law" strictly speaking, nonetheless played a useful role in providing statesmen and others with a vocabulary to evaluate political action. This did not result in judicial enforcement (there were few, if any, international courts at any rate in 1832), and did not take place on the basis of sovereign commands, but was useful nonetheless. It will be my contention that international law today may benefit from a similar approach: focus less on its law-like qualities (the creation of ever more legal rules and ever more tribunals to enforce them), and more on the vocabulary of international law. In terms of this conference, doing so signifies a move to substance, but it does so with a twist: the substance I refer to is the substance of ethics or, as Austin might have continued to call it, positive morality. And then there is a second twist: the ethics I refer to are not deontological, but *aretaic*. I aim to sketch a virtue ethics for global governance.

As noted, Austin did not dismiss the usefulness of international law: he questioned whether it could be called law properly speaking, but did not qualify it as singularly useless. Quite the opposite, it seems: when discussing Mexico's independence struggle, he acknowledged that international law was often vague and imprecise, but hastened to add that the same applies to law proper: "law strictly so called is not free from like difficulties."[4]

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2 At 124 (emphasis omitted).

3 At 124 (emphasis omitted).

4 At 176.

This applies all the more so in the age of globalisation and global governance because, as we shall shortly see, our positive international law is not very adequate when dealing with global governance. Global governance presents us with foundational puzzles concerning both the doctrines of sources of international law and subjects of international law. To be sure, some exercises of global governance can be captured by international law without stretching anyone's credibility, but quite a few cannot. Hence, a different vocabulary may be needed than current international law has to offer – or at least, an additional vocabulary may be required to help us voice our approval or disapproval.

The tendency over the last century, and in particular the last decade or two, has been to strengthen the dispute settlement mechanisms of international law. There are now well over 100 international courts and tribunals functioning: some permanent or semi-permanent, some temporary. They range from the familiar International Court of Justice (ICJ) and the European Court of Human Rights to relative newcomers such as the International Tribunal for the Law of the Sea, from staff tribunals at international organisations to criminal tribunals, from the compliance procedures known to international environmental law to investment arbitration panels. And yet, for all this judicial activity, there are many relevant activities that we cannot seem to get a handle on.

What I hope to do in this keynote address is to discuss a possible way for expanding the vocabulary of evaluation at the service of international lawyers. I will argue that our current vocabulary is insufficient to deal with many exercises of global governance, and that if we think of international law not so much as law properly so called, but as a vocabulary for voicing approval and disapproval of acts of public power, there might be merit in resorting to the Aristotelian tradition of virtue ethics. Doing so in New Zealand is particularly appropriate, it seems, as many of the leading virtue ethicists are based either here or next door in Australia.

II OUTLINING THE PROBLEM

Let me start by sketching the problem: there are many exercises of global governance which affect people, but which do not come squarely within the realm of international law. Global governance is a nebulous notion, difficult to identify and even more difficult to control, but it seems reasonably clear that it exists in a way that goes beyond international law. In other words, there are manifestations of global governance beyond, say, the Kyoto Protocol,[5] or the latest appellate decision of the World Trade Organization (WTO)'s Dispute Settlement Body, or the first ever judgment of the International Criminal Court, although these also form part of global governance. Global governance can be said to exist, for example:

- when the Security Council imposes sanctions on individuals;

5 Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS 148 (opened for signature 16 March 1998, entered into force 16 February 2005).

- when Microsoft's operating system forces people to abandon their preferred word-processing programmes;
- when states and financial institutions are being downgraded by credit rating agencies;
- when states conclude large multilateral treaties, for instance, to combat organised crime;
- when President George W Bush proclaims the terrorist attacks of 11 September 2011 (9/11) to constitute an "attack on America";
- when the Basel Committee on Banking Supervision (Basel Committee) adopts a new set of guidelines;
- when the WTO approves a waiver to limit the trade in blood diamonds;
- when the United Nations (UN) and others decide not to intervene during the Rwandan genocide; and,
- when the Organisation for Economic Co-operation and Development announces the results of the Programme for International Student Assessment (PISA) tests.

Of these nine examples, only two can be seen to be legally unproblematic (and even then, this is partly due to the way I have framed them): the WTO has the authority to grant waivers,[6] and states can conclude multilateral treaties. That is not to say these are legally unproblematic: there has been some debate, for example, about the appropriateness of using the waiver procedure to limit the trade in blood diamonds,[7] and while states can conclude multilateral treaties, they do not always do so with great enthusiasm, and they cannot do so in order to violate jus cogens norms – itself a difficult concept.

Still, the remaining seven examples (and I hasten to add, obviously, that the list is far from exhaustive) all cause problems of a different, and deeper, kind:

- UN Security Council sanctions can be without limits: the discretion of the Security Council is often held to be unfettered;
- Microsoft, and companies generally, fall outside the scope of international law. They can at best be controlled by domestic antitrust law, but even then they can grow big and powerful;
- The credit rating agencies exercise enormous influence, but few people know what they do, how they work, and how (if at all) international law can reach them;
- Coining a phrase such as "attack on America" has large implications, but is not governed by law; if talk of an "axis of evil" could be considered hate speech (which is, to be sure, not very plausible), speaking of an "attack on America" is far more neutral – yet explosive;
- The Basel Committee is not generally considered a subject of international law, and its instruments are not generally considered to constitute sources of international law;

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6 Marrakesh Agreement Establishing the World Trade Organization 1867 UNTS 410 (signed 15 April 1994, entered into force 1 January 1995), art IX(3).

7 See for example Isabel Feichtner "The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests" (2009) 20 EJIL 615.

- Non-intervention by the UN in Rwanda was morally indefensible, but is difficult to condemn in legal terms; even if one holds there to be a duty to prevent genocide, binding on the UN, then surely the UN is not the only culprit and, arguably, not even the worst; and,
- The PISA rankings merely rank. They do not contain any explicit recommendation or guideline, yet exercise enormous influence on education policies.

These examples suggest that international law has difficulty in coming to control global governance along a variety of dimensions. A cursory analysis reveals at least five fundamental problems.

First, the actor problem: not all actors exercising global governance fall within the reach of international law. International law has, roughly since the 1960s, aimed to expand its reach, but has fared markedly better in granting rights to non-state actors than in presenting them with obligations. Minorities, liberation movements, peoples, civil society organisations, industry organisations and even companies, all have certain rights under international law, but they cannot be said to be bound by international law in an unequivocal manner. The standard solution (if state X is bound by international law, so too are entities within it) is far too facile to be of much use. Hence, Microsoft can act with relative freedom, as can the credit rating agencies.

Secondly, there is the sources problem. International law traditionally recognises acts of consent by states and, more recently, international organisations, as giving rise to legal obligations, but has a hard time dealing with other manifestations of what relevant actors feel desirable. Normative utterances by industries, agreements between companies and other actors, even commercial practices such as the *lex mercatoria*, have a hard time being brought within the reach of classic sources doctrine.[8] The Basel framework is a decent example.[9]

Thirdly, there is the problem of indeterminacy. It was already noted that the Security Council's discretion under the UN Charter may be unlimited: even if the Council is *ex hypothesi* controllable through law, the control may not add up to much. Part of the problem here is that the exercise of discretion makes control very difficult, and does so by definition – at best, one can check for manifest errors of judgment. The more discretion is allowed, the more difficult control becomes. And discretion is inevitable, if only because not everything can be micro-managed. Something similar applies where the law creates a power but not a duty, as with UN inactivity in Rwanda: even if there were law applicable, it is by no means certain that the UN violated it.

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8 Elsewhere I have advocated recourse to a presumptive notion of law to help overcome this problem: see Jan Klabbers "Law-making and Constitutionalism" in Jan Klabbers, Anne Peters and Geir Ulfstein (eds) *The Constitutionalization of International Law* (Oxford University Press, Oxford, 2009) 81.

9 For a useful overview, see Howard Davies and David Green *Global Financial Regulation: The Essential Guide* (Polity Press, Cambridge, 2008).

Fourthly, there is what might loosely (very loosely) be labelled "the speech act problem". Words have ramifications, and can have important normative implications, so much so that for some situations there is no language available that would not already carry an evaluation within it. Those of us who feel that Israel has built a wall through its territory already start from different premises than those of us who call it a security fence. Similarly, calling 9/11 an "attack on America" frames the issue in a different way than calling it "large-scale murder". And something similar applies to the PISA rankings: praising the virtues of Finnish and Japanese students in standardised tests carries the suggestion that Finnish and Japanese educational models are worthy of emulation, even if that suggestion is never made explicit.

And fifthly, there is the "accountability fragmentation" issue. It is not so much the case that no accountability mechanisms exist at all: international organisations, for example, are typically considered to be accountable to their member states, and companies to their shareholders. But what is problematic is that those member states or shareholders have a different interest in holding the entity accountable than others may have: the call for accountability of the World Bank by the poor and dispossessed in Bangladesh is not likely to be satisfied by pointing out that the Bank is accountable to the United States Treasury, or that the credit rating agencies exercise a form of control. Moreover, the various different constituencies may apply different sets of standards: the United States Treasury is, presumably, keener on balanced accounts, whereas the poor and dispossessed may be more interested in seeing the World Bank adhere to human rights standards.

In short, global governance poses fundamental challenges to international law: challenges that cannot always be met by creating more rules or creating more tribunals. Whilst international law has grown out of the need to regulate relations between states, global governance is concerned, at least in part, with the exercise of public power.[10] It therewith symbolises something of the much-desired verticalisation of international law, but does so only in part, leaving out the concomitant control. In yet other words: global governance makes international law look more like domestic law (with its hierarchy and wider variety of relevant actors), but without the centralisation that makes accountability possible.

III ON RULES AND ACCOUNTABILITY

It has become a mainstay of political philosophy that public power needs to be kept in check. The days when it was acceptable for institutions to exercise public power without there being some form of control are long behind us, and disappeared with the demise of absolutism and the rise of democracy, in one form or another. In international law, such control largely takes the form of

10 Private power too plays an important role, as the examples of Microsoft and the credit rating agencies suggest, and may be even more difficult to get a handle on. While I mainly address public power in the remainder of this keynote address, this is without prejudice to the role of private power.

responsibility regimes: the discipline has well-developed rules on the responsibility of states, the responsibility of international organisations and, arguably, the criminal responsibility of individuals.

These regimes take the form of positing that the relevant actors should behave in accordance with a set of given standards. If their behaviour falls short, the actors may or will incur international responsibility. In being structured this way, responsibility regimes are typically retrospective and deontological: the relevant actors have duties. They are supposed to follow objectively cognisable rules, for example, rules laid down in treaties or rules that have been generally accepted as customary law. If they violate these rules, they commit an internationally wrongful act and can be held responsible: some tribunal, or perhaps the court of public opinion, can find that the actor concerned did not behave as it should have and ought to do something about it: restore the status quo ante, or provide compensation, or live with the shame of having been found in violation.

Regardless of the complicated details of these regimes (think only of the attribution of behaviour), they are not unproblematic even on this level of abstraction. Their retrospective nature, for example, is somewhat unsatisfactory: a state can do wrong on Monday, pay compensation and then do the same wrong on Tuesday. Clearly, this is not the intention behind the responsibility scheme, but it may be a strong side effect. It is no coincidence that the United States found itself before the ICJ on three different occasions in less than a decade for having failed to live up to its obligations under the 1963 Vienna Convention on Consular Relations,[11] and the possibility of paying compensation rather than withdrawing domestic wrongful measures is built in the WTO's dispute settlement mechanism even if, admittedly, compensation is posited as the lesser alternative.[12]

Likewise, the underlying deontology is problematic, for a variety of reasons. First, it is by no means clear which norms are binding on which actors. While with states this is not too much of a problem, it is decidedly less simple with international organisations, who are typically parties to few treaties, and who cannot without more be said to be bound by all rules of customary international law. The ICJ enigmatically held in 1980 that international organisations are bound by "general rules of international law",[13] but that is, quite possibly, not the same, and may refer only to secondary

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11 Vienna Convention on Consular Relations 596 UNTS 261 (opened for signature on 24 April 1963, entered into force on 19 March 1967). See *Vienna Convention on Consular Relations (Paraguay v United States of America) (Provisional Measures)* [1998] ICJ Rep 248; *LaGrand (Germany v United States of America) (Merits)* [2001] ICJ Rep 466; and *Avena and Other Mexican Nationals (Mexico v United States of America) (Merits)* [2004] ICJ Rep 12.

12 Understanding on Rules and Procedures Governing the Settlement of Disputes 1869 UNTS 401 (signed 15 April 1994, entered into force 1 January 1995), art 3(7).

13 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* [1980] ICJ Rep 73 at [37].

rules, such as those of the law of treaties. Either way, it must be noted that the rules are not the same for everyone: different actors are subject to different rules.

Secondly, and more important for present purposes, rules, even those of "law properly so called", are not always very certain in their contents, as John Austin already acknowledged. Modern jurisprudence teaches us that rules are inevitably under-exclusive and over-inclusive, and that rules often come with exceptions, prompting us to determine whether the rule applies or whether the exception should apply. Rules can also leave a lot of discretion, and can even, in the fragmented global order, be in conflict with each other. Moreover, which rule is to be applied is also a matter of how an issue is framed: many issues can be approached from radically different angles, leading to the possible application of radically different rules. A famous example concerns the AIDS crisis, which can be cast as a medical issue, a human rights issue, a trade and intellectual property issue or all of the above.

In other words, without dismissing rules, it is useful to realise that not everything can be captured in rules. International lawyers have of course started to understand this, and, as a result, much attention is paid these days to a second-order set of rules: the rules on interpretation. Again, without dismissing the utility of rules on interpretation, it seems clear that not too much can be expected of them. A focus on interpretation shifts the emphasis, and therewith the problem, but does little to solve it.

It might be useful then to come to a broader understanding of accountability, beyond international law's classic responsibility mechanisms for, as noted, the law of responsibility has a hard time addressing many manifestations of global governance. The good news is that public administration scholars have identified that there are several ways in which exercises of public authority can possibly be kept in check. In a classic study, *Controlling Bureaucracies*,[14] Judith Gruber identified five broad approaches:

- First, the participatory approach advocates participation of stakeholders in the decision-making process;
- Secondly, and more moderate, is the clientele approach. Here, the idea is to ask the clients of public power whether or not their needs are served well, and how things could be improved;
- Thirdly, there is the public interest approach: policies that are overly geared to the interests of specific groups should be re-directed to serve the general interest. This typically involves a greater role for politicians and less discretion for bureaucrats;

14 Judith E Gruber *Controlling Bureaucracies: Dilemmas in Democratic Governance* (University of California Press, Berkeley, 1987).

- Fourthly, there is what Gruber refers to as the "accountability approach" but what comes closest to the law of responsibility. This is, accordingly, the approach most familiar to lawyers, in that it typically refers to codes, judicial review and the like;[15]
- Fifthly, Gruber identifies self-control as an approach that relies on the bureaucrats' sense of professional responsibility or sense of personal fulfilment.

There may be merit in realising that judicial review, and the creation of norms and tribunals to apply them, is not the only way to exercise control. Indeed, somewhat hesitantly, there are signs visible in international law of some of the other approaches Gruber refers to. Thus, the participatory approach is at the heart of the Aarhus Convention on public participation in environmental decision-making and also informs much of global administrative law.[16] Self-control too is visible, in the form of the various inspection panels, auditing boards and compliance officers acting within international organisations.[17] Still, international law works mainly through what Gruber calls the accountability approach, and does so by upholding a narrow concept of accountability, usually referred to as responsibility.

IV TOWARDS POSITIVE MORALITY?

Those who study global governance for a living (mainly political scientists) have observed that a state-centric approach is bound not to be very fruitful, if only because, as we have already seen, much activity is done by actors other than states. What is more, though, it may well be that what matters is not so much the type of actor that participates in global governance, or the type of instrument by which global governance takes place, but rather the character of relationships between governors and governed, as well as between governors.[18] This may entail a lot of things. It may entail, for example, that the legitimacy of global governance derives in part from institutional authority; or it may entail that the legitimacy derives from recognised expertise.

It may also entail, however, that exercises of global governance derive their legitimacy in part from the virtues of the decision-makers. Take, for example, UN Security Council sanctions: it may matter a great deal whether Mr X is placed on a blacklist because he looks suspicious or because someone proposed his blacklisting and no one objected, or whether the Security Council has the

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15 At 22. Note that I have broadened Gruber's description to some extent.

16 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 2161 UNTS 447 (opened for signature on 25 June 1998, entered into force 30 October 2001).

17 See Jan Klabbers "Self-Control? International Organisations and the Quest for Accountability" in Malcolm Evans and Panos Koutrakos (eds) *The International Responsibility of the European Union: European and International Perspectives* (Hart, Oxford, 2013) 75.

18 See Deborah D Avant, Martha Finnemore and Susan K Sell "Who Governs the Globe?" in Deborah D Avant, Martha Finnemore and Susan K Sell (eds) *Who Governs the Globe?* (Cambridge University Press, New York, 2010) 1 at 3.

strong conviction that Mr X is funding terrorist activities, based on weighing whatever evidence it has gathered and considered in an honest, open-minded manner. Something similar applies to the financial regulations set by the Basel Committee. It may matter a great deal for our evaluation whether these result from the cynical desire of a handful of wealthy nations to keep their own wealth intact and protect friends and golf-buddies in the banking sector, or whether these stem from a serious, honest belief that they represent the best for the world at large. And likewise, the labelling of 9/11 as an "attack on America" is more acceptable if we feel that President Bush spoke out of a sense of empathy than if we think that his main impulse stemmed from blind revenge or an intention to mobilise domestic political support.[19]

In short, my claim is that there is room – or even stronger: that it is necessary – to complement the existing vocabulary of international law by appealing to the character traits of those in the position to exercise public power. There is room – and a need – to think of international law as "positive morality", in addition to its legal qualities, since otherwise much of global governance will remain unchecked.

V OPERATIONALISING VIRTUE ETHICS

How then to achieve this? How to operationalise virtue ethics and make it appropriate for the evaluation of manifestations of global governance? Perhaps the most appropriate way of doing so is to attach the relevant virtues to the professional roles, or the offices, of the relevant actors. This involves three steps. First, it demands an identification of the relevant professional roles in global governance. Without being comprehensive or exhaustive, at least a number of different professional roles can be identified. One can think of powerful statesmen; one can think of the leadership of international organisations; one can think of the leadership of civil society organisations; one can think of experts, engaged in policy-making or policy advice, ranging from UN Special Rapporteurs to the experts advising the Codex Alimentarius Commission or the central bankers gathered in the Basel Committee; one can think of the international judiciary.

Secondly, the relevant virtues must be identified. Here, obvious candidates would be virtues such as honesty, temperance, humility, courage, charity, empathy and justice – again, I do not claim to be comprehensive or exhaustive.

Thirdly, the relevant virtues must be attached to the relevant professional roles. While one would expect all individuals in positions of power generally to be honest, temperate, humble *et cetera*, there may be roles where more of one, and less of the others, is appropriate. To provide an example from other walks of life, the paediatrician can be allowed a little white lie when asked by a terminally ill child how long she has to live: it would be a harsh doctor who would honestly reply.

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19 I discuss this example in more detail in Jan Klabbers "Hannah Arendt and the Language(s) of Global Governance" in Marco Goldoni and Christopher McCorkindale (eds) *Hannah Arendt and the Law* (Hart, Oxford, 2013) 229.

By contrast, the public auditor has no room for little white lies when asked about the financial health of a company or agency she is investigating.[20]

All this may sound eccentric and hopelessly romantic. And perhaps it is. Perhaps it is about as eccentric and romantic as it was 30 years ago to ask people to separate their waste in order to help save the environment. Yet, there is some intuitive plausibility, and in fact, we do appeal to individual virtues on occasion. An example is that judges are typically sworn in: they are expected to promise that they uphold a certain attitude, rather than merely be technically skilful. Likewise, the political leaders of states are often expected to make a pledge upon commencing their terms in office. We also draw up codes of ethics for professional roles: a nice example is formed by the Draft Code of Conduct for UN Special Rapporteurs, promulgated a few years ago.[21] And clearly, the ICJ was less than impressed with the way one of those Special Rapporteurs had conducted interviews, as an advisory opinion issued in 1999 suggests.[22]

In the same vein, most observers would agree that the UN under Secretary-General Dag Hammarskjöld was a different entity than under, say, Kurt Waldheim, in ways that cannot be traced back to legal rules or institutional settings alone. Indeed, the prevailing opinion traces it back to Hammarskjöld's personal sense of ethics: he was a virtuous person aspiring to act virtuously in difficult circumstances. He would not, for example, make promises to a state if he expected that he could not keep them, even if such promises could have helped to nudge negotiations along in crisis situations.[23] This suggests that honesty is one virtue of relevance to the leadership of international organisations: do not make promises you cannot keep.[24]

Similar considerations may apply in other settings as well. UN Special Rapporteurs, for example, or other experts, for that matter, should be humble, and not try to change the law by reporting on situations not covered by their mandate. It is one thing to capture new developments under an existing mandate – that seems acceptable, in principle. But trying to stretch the legal

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20 See generally Justin Oakley and Dean Cocking *Virtue Ethics and Professional Roles* (Cambridge University Press, Cambridge (UK), 2001).

21 *Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council* adopted by Human Rights Council Res 5/2 (2007) reprinted in Human Rights Council *Report to the General Assembly on the Fifth Session of the Council* A/HRC/5/21 (2007) at 37.

22 See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights (Advisory Opinion)* [1999] ICJ Rep 62.

23 This is based on Manuel Fröhlich *Political Ethics and the United Nations: Dag Hammarskjöld as Secretary-General* (Routledge, London, 2008) at 141.

24 For a brief overview of how virtue ethics could be employed with respect to international organisations, see Jan Klabbers "Controlling International Organizations: A Virtue Ethics Approach" (2011) 2 Helsinki Review of Global Governance 49.

framework so as to bring it in line with the Special Rapporteur's personal views would be less virtuous.[25]

The international judiciary, likewise, should show some humility and temperance. Surely, in a way, this too is recognised: international courts and tribunals are not expected to make international law; they are expected to apply the law to the best of their ability, and resist the temptation to go much further than the settlement of disputes. We also expect our judges, typically, to be of a "high moral character", as art 2 of the ICJ Statute puts it, and we expect the judiciary to be impartial. This latter quality need not necessarily apply to other professional roles. Statesmen may be partial, and so may experts: confronted with gross human rights abuses, it will be difficult for UN Special Rapporteurs not to be partial. But the judiciary must be impartial and this, as the great Lauterpacht already wrote, "is a function of personality and of an elevated attitude of mind".[26]

VI CONCLUDING REMARKS

Let me conclude. I have briefly sketched how global governance has come to challenge international law, and how international law has a hard time coming up with answers. To the extent that global governance implies the exercise of public power, accountability forms a particular bottleneck, and the traditional responsibility regimes envisaged in international law are unlikely to be of much help.[27] Much the same applies, for much the same reasons, to more recent innovations and suggestions, such as the Global Administrative Law approach or the putative constitutionalisation of international law.

Hence, it appears inescapable to pay attention not just to what the rules say, but also to the character traits of those making and applying the rules. This may not result in technically better rules or in more court cases, but it will have the benefit of broadening the vocabulary of international law, and therewith allow us, the public at large, to come up with ways to either accept or reject some instances of global governance. If there is one lesson that John Austin taught us 180 years ago, but which we have collectively forgotten, it is the lesson that the effective evaluation of social and institutional practices need not necessarily take the form of "law properly so called": "positive morality" can play a role as well. While it would be fanciful to claim that Austin was

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25 See further Jan Klabbers "The Virtues of Expertise" in Monika Ambrus and others (eds) *The Role of Experts in International and European Decision-making* (Cambridge University Press, Cambridge (UK), forthcoming).

26 Hersch Lauterpacht *The Function of Law in the International Community* (Oxford University Press, Oxford, 2011) at 228.

27 This is largely because the law of state responsibility and the law on the responsibility of international organisations are modelled on a civil law paradigm. For an excellent discussion of responsibility in terms of civil law, criminal law and public law paradigms, see Peter Cane *Responsibility in Law and Morality* (Hart, Oxford, 2002).

thinking of virtue ethics, more recently, philosophers have suggested that virtue ethics may help to come to a system of "intelligent accountability", in Onora O'Neill's phrase.[28]

Finally, at the end of the day, global governance is not merely the responsibility of the global governors. It is not merely the responsibility of statesmen, directors-general of international organisations, the leadership of Amnesty International and Greenpeace or the international judiciary. All of us, as citizens, have a stake in global governance, and it follows that all of us have a responsibility here. What matters then is not just that those who govern us act with virtue, but also that we evaluate them and correct them if and when necessary: perhaps the most important aspect is "civic virtue".[29] The buck does not stop with the professional roles outlined above; instead, as Hannah Arendt would say, all of us need to assume the responsibility to "take care of our common world".[30] That is easier said than done given the long-standing crisis in politics, but if it is true that politics is in crisis because we have collectively lost our faith in our political leadership, then that leadership is the obvious place to start.

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28 Onora O'Neill *A Question of Trust* (Cambridge University Press, Cambridge (UK), 2002) at 58.

29 See also Edward Weisband "Conclusion: Prolegomena to a Postmodern Public Ethics: Images of Accountability in Global Frames" in Alnoor Ebrahim and Edward Weisband (eds) *Global Accountabilities: Participation, Pluralism, and Public Ethics* (Cambridge University Press, Cambridge (UK), 2007) 307.

30 See generally Jan Klabbers "Possible Islands of Predictability: The Legal Thought of Hannah Arendt" (2007) 20 LJIL 1.