

TOWARDS A CULTURE OF FORMALISM? MARTTI KOSKENNIEMI AND THE VIRTUES

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I. INTRODUCTION

May 20, 2006 was a historic day. Finland won the Eurovision song contest for the first and only time that day, and at the closing panel of the European Society of International Law's biannual conference in Paris, a discussion took place involving Iulia Motoc, Georges Abi-Saab, and David Kennedy. It turned out to be the day the music died—critical legal studies died by becoming, as the Germans say, *salonfähig*. The “new stream” became the mainstream; the “new stream” became the “new orthodoxy.”

I have no recollection of the debate's contents, other than a vague memory of (mostly) Kennedy and Abi-Saab speaking to a packed auditorium at the Sorbonne. What I do recall though is that afterwards, when people were leaving the auditorium, I ran into a younger critical scholar, who was almost foaming at the mouth with excitement. He told me and everyone else within earshot, “We won! We won!” I am not sure I was included in the “we”—probably not—but what I think he was getting at was that Kennedy spoke not only to fellow critical scholars, but also to the mainstream listeners in the audience, and perhaps even managed to convince some of them that it might be useful every now and then to look at international law through critical lenses. The younger scholar was giddy with excitement, much like a die-hard soccer fan after a successful cup final: “We won!”

Proclaiming victory struck me as out of place and rather sad. It is not only the case that scholarship, regardless of the theory or methodology espoused, should not be considered a question of winning or losing—at least not in the social sciences and humanities—but also any attempt to proclaim victory is an attempt to establish domination. More to the point though, by proclaiming the victory of critical scholarship, critical scholarship runs the risk of losing its critical bite—the new orthodoxy cannot be both critical and orthodox at the same time. As one might say, if the French Revolution ate its own children in the same streets of Paris, then the critical revolution in international law, spearheaded by Kennedy and Martti Koskenniemi in the late 1980s, was devoured by its own children—it fell onto its own sword.

A few months later, the *German Law Journal* marked the re-publication of Koskenniemi's *From Apology to Utopia* by devoting a special issue to it, and Kennedy's contribution, perceptive as always, makes much the same observation,

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albeit in guarded terms and somewhat between the lines. Kennedy writes, “[a]lthough often cited, Martti’s book is rarely challenged or deeply engaged.”¹ He also observes that “it has been tempting to treat the book as a given, a rock to be digested or maneuvered around, rather than a provocation to engage or revise.”² In other words, *From Apology to Utopia*, or Koskenniemi’s work in general, is treated as the gospel, the final word marking, as Fukuyama might be tempted to put it, “the end of history.”³ Where does that leave the critical bite?

In this essay, I aim to locate one of Koskenniemi’s key points—that international lawyers ought to adopt a “culture of formalism”—in his scholarship and, more broadly, to make it more explicit than it has hitherto remained. Doing so entails the risk that it departs from Koskenniemi’s own thinking, but that is hardly an objection. My interest resides not so much in a faithful exegesis of his work, but rather to take it as a source of inspiration.

II. WHO DECIDES?

Koskenniemi has probably always been aware of the risk of critical work becoming mainstream. Or, perhaps more accurately, he has always been aware of the need to navigate “between commitment and cynicism,” to invoke the title of his relatively little known essay published in 1999.⁴ It is one of the key hypotheses of *From Apology to Utopia* that legal rules are indeterminate by definition.⁵ Koskenniemi argues that the law is constantly and structurally oscillating between two poles—it needs to tap into state consent, yet, be normative at the same time.⁶ These two poles are structurally mutually exclusive, and, as a result, international law is little else but a “framework for deferring substantive resolution” into negotiations, equity, committees, interpretations, or decision-making generally.⁷

If this hypothesis is correct, then a lot depends on who applies the law and how. Koskenniemi has realized the relevance of focusing on the decision-making process and the individual roles in the grand discussion that is international law.⁸

1. David Kennedy, *The Last Treatise: Project and Person*, 7 GER. L.J. 982, 991 (2006).

2. *Id.*

3. See FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN 113 (1992).

4. See Martti Koskenniemi, *Between Commitment and Cynicism: Outline for a Theory of International Law as Practice*, in COLLECTION OF ESSAYS BY LEGAL ADVISERS OF STATES, LEGAL ADVISERS OF INTERNATIONAL ORGANIZATIONS AND PRACTITIONERS IN THE FIELD OF INTERNATIONAL LAW 495, 495 (1999) [hereinafter Koskenniemi, *Between Commitment and Cynicism*] (explaining Koskenniemi’s understanding of the delicate balance between critical scholarship and mainstream ideas).

5. See generally MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (Cambridge Univ. Press 2005) (1989) [hereinafter KOSKENNIEMI, FROM APOLOGY TO UTOPIA].

6. See Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT’L L. 4, 20–21 (1990) (discussing the interplay between state consent and normative law).

7. *Id.* at 28.

8. See *id.* at 31–32 (explaining how modern society’s approach to problem solving has switched from an emphasis on general principles and formal rules to flexible and contextually determined standards, and how this may reflect a similar turn in international law).

“Between Commitment and Cynicism” discusses the roles of judges, diplomats, and activists,⁹ and *From Apology to Utopia*, in its original 1989 version, contains a final chapter, entitled “Beyond Objectivism,” which to some extent aims to come to terms with the indeterminacy of international law¹⁰—if law is indeterminate, then what should lawyers do?

This particular question was initially picked up by Outi Korhonen, a trained philosopher working in the situationalist tradition and generally affiliated with critical legal studies. She published a piece in the *European Journal of International Law*, of which the core point was that individuals, including lawyers, are situated in the world in their individual ways and socialized to participate in certain practices, like the practice of law.¹¹ However, these practices are not closed, deterministic boxes; rather, they offer some room for escape. Thus, the lawyer is capable of applying intuition and creativity (*phronesis*), in addition to technical craftsmanship (*tekhne*), to real-life problems.¹² Unfortunately, the distinction Korhonen makes between *phronesis* in its three possible forms—power politics, naiveté, or escape from situatedness—is not very clear.¹³ It seems that the only acceptable way to escape the situation is by adopting the, then, new stream of scholarship. Apart from the difficulty in justifying the new approach to the point of excluding alternatives, no matter how often Korhonen emphasized the identity between theory and practice, it was never likely to appeal to those engaged in solving practical problems.

The shockwaves from the central message of *From Apology to Utopia* arguably overshadowed Koskenniemi’s attempt to reach beyond objectivism. Still, the same question was picked up, with perhaps more resonance this time in *The Gentle Civilizer of Nations*, Koskenniemi’s second major monograph in English.¹⁴ Here, he launches the idea of a “culture of formalism,” loosely defined as “a culture of resistance to power, a social practice of accountability, openness, and equality whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it.”¹⁵ This “culture of formalism” has little to do with black letter formalism, although it is sometimes, all too often perhaps,

9. See generally Koskenniemi, *Between Commitment and Cynicism*, *supra* note 4, at 514–21.

10. See generally KOSKENNIEMI, *FROM APOLOGY TO UTOPIA*, *supra* note 5, at 458–65.

11. Outi Korhonen, *New International Law: Silence, Defence or Deliverance?*, 7 EUR. J. INT’L L. 1, 6 (1996) (theorizing that individual international lawyers in their individual subjective nature and situations can practice and apply international law determinatively and not merely as a process).

12. See *id.* at 12–14 (examining *phronesis*, *tekhne*, and the law).

13. See *id.* at 12–15 (exploring *phronesis* and three themes).

14. See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* 3–6 (2002) (addressing the question of what role international lawyers should play) [hereinafter KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*]. See generally MARTTI KOSKENNIEMI, *KANSAINVÄLISET PAKOTEET JA SUOMI* (1994) (fitting between two other major works is this lengthy monograph, in Finnish, on sanctions).

15. KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 14, at 500.

seen as advocating precisely that. Koskenniemi's consistent use of the term "formalism" may have helped to invite such an interpretation. It is only towards the relevant chapter's end that he briefly sketches what it means to speak of a "culture."¹⁶

As the relevant chapter in *The Gentle Civilizer of Nations* already suggests, Koskenniemi's main source of inspiration is Kant, and he elaborates his reading of Kant through a succession of later articles, culminating in a piece published in 2007 which essentially reframes the "culture of formalism" as "constitutionalism as mindset."¹⁷ "Constitutionalism as mindset" has great potential for being misunderstood. In much the same way some interpreters of "culture of formalism" stressed the notion of "formalism," while ignoring the "culture" reference, so too some interpreters may have held "constitutionalism as mindset" to represent a move to "constitutionalism" at the expense of the reference to "mindset." As so often is the case, language has its limitations; novel conceptions have to be expressed in existing terms, unless one wants to invent new words and invite critiques of pretentiousness or opaqueness, or both.¹⁸

III. RESPONSIBILITY AND ETHICS

What is reasonably clear is that by advocating the "culture of formalism," or "constitutionalism as mindset," Koskenniemi is not advocating a particular legal or political position but, rather, an ethical one. The underlying idea is to provide international lawyers with an ethical position from which to start their investigations and participation in legal and political processes. This ethical position applies not only to lawyers, but also to all who are engaged in the formulation and execution of legally relevant decisions. In other words, Koskenniemi aims to provide political decision-makers with the ethical guidance—or at least hints thereof—with which they can give effect to their individual responsibilities.

This is an important point. The main thrust of the "culture of formalism," as I understand it, is that it refers to an ethical position rather than any particular political project. Moreover, it refers to the ethical positions of individuals in positions of power or, if you will, the ethical demands on individuals in positions of power. To make the point differently, Koskenniemi is not endorsing that all decision-makers collectively embrace the same position; instead, he addresses them in their capacity as individuals.¹⁹ It could hardly be otherwise because collectively speaking to decision-makers would amount to endorsing a collective project—turning a particular into a universal—and doing so would be extremely

16. *Id.* at 508–09.

17. See generally Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRIES IN L. 9 (2007) [hereinafter Koskenniemi, *Constitutionalism as Mindset*].

18. Hold this thought: it will return when discussing the vocabulary of virtue ethics, and Koskenniemi's reluctance to use that term. See *supra* notes 38–56 and accompanying text.

19. See Koskenniemi, *Constitutionalism as Mindset*, *supra* note 17, at 9 (addressing the individual's ethical position and role in international law).

difficult to reconcile with the main gist of his work, part of which expresses a strong suspicion of universalist projects.

Referring to the individual responsibilities of decision-makers is reminiscent of attempts from former days. Max Weber did much the same by pointing out, in his classic essay on politics as a vocation, that responsible leadership demands “ethical discipline and self-denial.”²⁰ Later in the same essay, Weber suggested that the three main qualities to look for in a politician are passion, responsibility, and judgment.²¹ It is not easy to reconcile these qualities with one another. Weber suggested the difficulty by stating: “[t]he problem is precisely this: how are hot passion and cool judgement [sic] to be forced together in a single soul?”²² In addition, he suggested later that someone only has a vocation for politics if he manages to combine an ethic of conviction with an ethic of responsibility.²³

With Weber, this famously culminated in his invocation of Luther, who spoke at the Diet of Worms in 1521 and proclaimed, “[h]ere I stand, I can do no other.”²⁴ Many, even among those of more or less critical persuasion, feel that this is an attractive position to take²⁵—a mix of passion and a sense of responsibility, under reference to either God or one’s own conscience.²⁶ Nevertheless, as Daniel Warner pointed out two decades ago, there is a problem here; by invoking Luther’s claim, Weber’s sense of responsibility ultimately remains elusive.²⁷ The actor who only accepts responsibility towards God or his or her own conscience is, in the end, not held responsible at all by his or her peers or constituencies.²⁸ That eventually erodes the very idea of responsibility which signified, at least to Warner, some kind of social relationship, in that responsibility does not only link to punishment or reparation, but also ought to cement social relationships.²⁹ The responsible decision-maker, in politics, is one who responds or is responsive.³⁰ Warner suggests that central to a notion of responsibility in politics is the dialogue; yet, dialogue is all but impossible following Weber’s ultimate invocation of Luther.³¹

20. MAX WEBER, *The Profession and Vocation of Politics* (1919), reprinted in WEBER: POLITICAL WRITINGS 309, 331 (Peter Lassman & Donald Speirs eds. 1994).

21. *Id.* at 352.

22. *Id.* at 353.

23. *Id.* at 368.

24. *Id.* at 367 n. 60.

25. *See, e.g.*, JARNA PETMAN, *HUMAN RIGHTS AND VIOLENCE: THE HOPE AND FEAR OF THE LIBERAL WORLD* (2012) (unpublished Ph.D. dissertation, University of Helsinki) (discussing leaders’ fundamental responsibility for their actions in the human rights arena).

26. *Id.*

27. *See* DANIEL WARNER, *AN ETHIC OF RESPONSIBILITY IN INTERNATIONAL RELATIONS* 15 (1991) (exemplifying the problem with such analysis as indeterminate or elusive).

28. *See id.* at 15–16.

29. Arguably, civil law or public law models of responsibility come closer to this ideal than a criminal law model. For the distinction, see generally PETER CANE, *RESPONSIBILITY IN LAW AND MORALITY* (2002).

30. *See* WARNER, *supra* note 27, at 20 (explaining an essential quality or social trait of the decision-maker).

31. *Id.* at 16.

Koskenniemi is sensitive to this point: being held accountable is not just a matter of defending one's actions and facing punishment or a duty to repair, but also engaging in conversations, debate, reconciliation, and reconstruction; otherwise, an essentially political process lapses into administration. Responsibility and accountability are inherently social relations, and a limited view of responsibility, taking place in a vacuum, ignores its social and political aspects. But, if responsibility is about conversations and social learning, then it needs a vocabulary. The legal vocabulary alone may be a useful starting point, but it will often not be conclusive, if only because the primary rules are too vague. Legal safeguards are necessary, as Koskenniemi wrote about state responsibility, and in particular about so-called solidarity measures,³² “[a] legally circumscribed solidarity measure should be taken in accordance with institutional procedures, principles of due process, transparency, and the possibility of administrative or perhaps judicial review.”³³ But if these are not available or, one may add, not respected, then “the redefinition of a political process as a law-applying process presents more problems than it solves.”³⁴

Hence, an ethic of responsibility—or, more broadly, an ethic of accountability—involves recognition of the circumstance that political action never takes place in a vacuum and it may require vocabularies beyond the one offered by law.³⁵ This, it seems, is where the “culture of formalism” and “constitutionalism as mindset” enter the picture.³⁶ As Koskenniemi stated in *The Gentle Civilizer of Nations*, a “culture of formalism” entails “that there must be limits to the exercise of power, that those who are in positions of strength must be accountable and that those who are weak must be heard and protected.”³⁷

Koskenniemi's notions of “constitutionalism as mindset” and a “culture of formalism” eventually show great affinity with the classic tradition of “virtue ethics,” even though he never uses that particular term, for which there may be several reasons. First, having reached his position through Kant, who was not known as a virtue ethicist, despite having provided a doctrine of the virtues,³⁸ it may simply not have occurred to Koskenniemi to think of his own work as a plea for “virtue ethics.” Second, and more likely, is that given the circumstance that all

32. These are measures taken by individual states (or groups of states) to correct harms done to others. See, e.g., ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT (2011) (analyzing the most discussed example of measures taken by states to correct harm, the humanitarian intervention or the responsibility to protect).

33. Martti Koskenniemi, *Solidarity Measures: State Responsibility as a New International Order?*, 72 BRIT. Y.B. INT'L L. 337, 355 (2001).

34. *Id.*

35. See ONORA O'NEILL, A QUESTION OF TRUST 41–61 (2002) (expressing the same concept with her notion of “intelligent accountability”).

36. See Edward Weisband, *Conclusion: Prolegomena to a Post-modern Public Ethics: Images of Accountability in Global Frames*, in GLOBAL ACCOUNTABILITIES: PARTICIPATION, PLURALISM, AND PUBLIC ETHICS 307, 330–31 (Alnoor Ebrahim & Edward Weisband eds., 2007) (linking responsibility to a version of virtue ethics).

37. KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 14, at 502.

38. See generally IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor & Jens Timmermann eds., Cambridge Univ. Press rev. ed. 2012) (1785).

terms present their own associations and connotations, the term “virtue ethics” may have connotations he would wish to avoid.³⁹ Third, it may even be that, with Martha Nussbaum, Koskenniemi might doubt the existence of “virtue ethics” as a separate category.⁴⁰ Nussbaum subsumes “virtue ethics” under both deontology (Kantians dissatisfied with too strong a focus on rules)⁴¹ and consequentialism (Humeans hoping to play down all too emotionist approaches),⁴² therewith denying the possibility of “virtue ethics” as a distinct and separate tradition of ethical thought.⁴³ Fourth, perhaps Koskenniemi, mindful of the tradition according to which international relations is often studied precisely in terms of international structures, with relatively little regard for the role of individuals,⁴⁴ other than perhaps in some examples of diplomatic history, avoids the term due to its focus on individual agency rather than international structures. Even with this tradition, the focus on ethics—individual ethics—has remained minimal, focusing on statecraft rather than the ethics of statecraft.⁴⁵

Still, at the risk of misappropriation, I will treat Koskenniemi’s plea for a “culture of formalism” like a plea for some kind of “virtue ethics” and discuss it accordingly. It would be difficult to interpret his calls for decision-makers to “take a momentary distance from their preferences,”⁴⁶ to “bracket their own sensibilities and learn openness for others,”⁴⁷ and to exhibit some “political wisdom, and a little courage”⁴⁸ in any other way.

Perhaps the point to make is this: for Koskenniemi, “virtue ethics” essentially serves two purposes. The first enables politics to take place, circumscribed by law and legal procedure. The “culture of formalism” helps to facilitate democratic politics, and does so by resisting the urge to be reduced “into substantive policy.”⁴⁹

39. By the same token, the term may have become tainted by its association with possible dark sides. *See generally* DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2005) (exploring the negative repercussions of humanitarian governance and intervention).

40. *See generally* Martha C. Nussbaum, *Virtue Ethics: A Misleading Category?*, 3 *J. OF ETHICS* 163 (1999) (arguing that different schools of ethical thought cannot be categorically separated from one another).

41. *Id.* at 169 (listing herself as an example).

42. *Id.* at 194–95.

43. *Id.* at 201.

44. I noted earlier that his appeal is an appeal to individual decision-makers; perhaps he envisages the difficulties of it. Incidentally, his more recent focus on the dangers of institutional bias takes nothing away from the individual decision-maker.

45. *See generally* ETHICS AND STATECRAFT: THE MORAL DIMENSION OF INTERNATIONAL AFFAIRS (Cathal J. Nolan ed., 1995) (demonstrating that some individual statesmen were either more or less ethical than presumed, rendering the contributions either hagiographical or *ad hominem*).

46. KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 14, at 501.

47. *Id.* at 502.

48. *Id.* at 503.

49. *Id.* at 504.

It is best seen as opening up ever-receding “horizons of possibility.”⁵⁰ This is not limited to the “low intensity” democracy so often endorsed by liberal international lawyers, but, more broadly, owes something to communicative action, republicanism, and deliberative democracy, without being very specific—nor does it need to be very specific. What matters is that a “culture of formalism” may contribute to an inclusive process of deliberation and decision-making and does not remain content with regular secret ballots.⁵¹

The second purpose of Koskenniemi’s reliance on virtue ethics is as one of the ways to channel and articulate his critical intuitions and, no less important, his critical inclinations.⁵² He is, to some extent, an iconoclast by temperament and needs to give a voice to his occasional anger. Kennedy, once again, made the point that *From Apology to Utopia* is in part an angry, anguished book.⁵³ And one only needs to read Koskenniemi’s biting critique of legitimacy of a decade ago,⁵⁴ or his more recent comment on the Court of Justice of European Union’s (CJEU) decision in *MOX Plant*,⁵⁵ to sense the smoldering anger underneath. Likewise, Koskenniemi’s more recent focus on the structural bias inherent in international law and in the work of international institutions, and the pitfalls of managerialism⁵⁶ is suggestive of a continued critical attitude.

IV. OPERATIONALIZING VIRTUE ETHICS: A FIRST ATTEMPT

But, how to move from critique to construction—for want of a better term—or operationalize the “culture of formalism” in more specific terms? Koskenniemi may be an iconoclast, but he is not only that; as with most of us, in his chest there are two souls waiting to be heard. Yet, it is a distinct aspect of his work that the constructive side is less clearly elaborated than the critical side, perhaps because he is well aware, more than most, that all political projects are particular, and may quickly lapse into domination and hegemony, whether domination is in the streets

50. *Id.* at 506–07.

51. See generally SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY* (2000) (examining the emerging international norm of democratic governance).

52. Another way of doing so is to resort to historical works. Martti Koskenniemi, *The Politics of International Law – 20 Years Later*, 20 EUR. J. INT’L L. 7, 18 (2009) (“As a style of legal writing . . . historical narrative liberates the political imagination to move more freely in the world of alternative choices, illuminating both its false necessities and false contingencies.”).

53. See generally Kennedy, *supra* note 1, at 991.

54. See generally Martti Koskenniemi, *Legitimacy, Rights, and Ideology: Notes Towards a Critique of the New Moral Internationalism*, 7 ASS’NS: J. FOR LEGAL AND SOC. THEORY 349 (2003).

55. Case C-459/03, *Comm’n v. Ir.*, 2006 E.C.R. 1-04635. See generally Martti Koskenniemi, *International Law: Constitutionalism, Managerialism and the Ethos of Legal Education*, 1 EUR. J. LEGAL STUD. 1 (2007) (explaining the dangers of new changes to public international law and the movement away from universalism).

56. See generally Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1 (2007) (criticizing the current trend of international law becoming overly technical).

or in the mind.⁵⁷ Maybe this also helps explain the attraction of “virtue ethics”—by insisting on the relevance of individual character traits of people, in this case decision-makers, it does not propose a specific blueprint for a better world. Indeed, it is sometimes held that precisely for this reason, “virtue ethics” cannot be turned into a political project or be applied to politics.⁵⁸

Without a doubt, it is fair to say that “virtue ethics” is rarely discussed in the same breath as law, and even more rarely in the same breath as international affairs. Part of the problem resides, no doubt, precisely in the question of operationalization; it is all well and good to argue that international affairs should be conducted virtuously, but how can this normative prescription be given hands and feet, other than perhaps in the form of laying down rules? This, arguably would be incoherent at any rate—a focus on rules derived from the virtues would suffer from all the familiar critiques of rules, so eloquently exposed in Koskenniemi’s writings—rules never apply themselves; they come with exceptions and tend to be over-inclusive and under-inclusive. Moreover, as Robert Jackson explains, political decisions are always situational, always contextual; no blueprints are available, and indeed they cannot be available.⁵⁹ Ultimately much comes to depend on the virtues of those making the decisions.⁶⁰

An earlier attempt to infuse the law with “virtue ethics” resides in the work of Lon Fuller, although he, like Koskenniemi, seems to shun the label.⁶¹ His classic work, *The Morality of Law*, starts with a discussion of the distinction between the “morality of aspiration” and the “morality of duty.”⁶² The latter is essentially a list of commands, usually in negative form—“thou shalt not kill”—and lays down the bare minimum for people to live together.⁶³ The “morality of aspiration” is different though. This is seemingly derived from Aristotelian “virtue ethics,”⁶⁴ and if duties make bare living together possible, the “morality of aspiration” elevates things to the good life. Ideally, the two work together. Fuller evokes examples

57. See Martti Koskenniemi, *International Law as Therapy: Reading The Health of Nations*, 16 EUR. J. INT’L L. 329, 341 (2005) (explaining that a revolution in the streets can only happen after a revolution in the mind is already taking place).

58. See generally Rosalind Hursthouse, *Virtue Ethics*, STAN. ENCYCLOPEDIA OF PHIL. (Mar. 8, 2012), <http://plato.stanford.edu/entries/ethics-virtue>. Hursthouse discusses this, inconclusively, in *Virtue Ethics*. It is worth pointing out, perhaps, in relation to the second point, that for Aristotle, there was a clear connection between virtues and politics: a virtuous person would, amongst other things, excel in public affairs. My reading of Aristotle owes something to HANNAH ARENDT, *THE HUMAN CONDITION* (2d ed. 1998).

59. See Robert H. Jackson, *The Situational Ethics of Statecraft*, in ETHICS AND STATECRAFT 21, 28–34 (Cathal J. Nolan ed., 1995) (explaining the importance of adopting a situational outlook when evaluating a given state-leader’s decisions).

60. See *id.* (discussing the importance of political virtues).

61. See generally LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

62. *Id.* at 5.

63. *Id.* at 5–6.

64. See *id.* at 5 (discussing the origins of the morality of aspiration in Greek philosophy). Fuller does not explicitly refer to “virtue ethics,” but refers more generally to ancient Greek thought.

from other walks of life to sketch the relationship. Thus, grammar allows for people to communicate, but poetry takes things further; in economics, exchange provides a basis, but marginal utility creates something above and beyond. The “inner morality of law” then embraces both, but Fuller suggests, “the inner morality of law is condemned to remain largely a morality of aspiration and not of duty. Its primary appeal must be to a sense of trusteeship and to the pride of the craftsman.”⁶⁵

Still, Fuller has a different focus in his approach than Koskenniemi. Koskenniemi is not terribly interested in whether the law reflects virtues, yet this is Fuller’s main concern, illustrated by his discussion of gambling, which, to his mind, the “morality of aspiration” would look at with some disdain—gambling is not considered particularly virtuous.⁶⁶ For Fuller, the question then is whether the law should regulate, or even prohibit, gambling or, in other words, whether the law should help to force people into “making men moral.”⁶⁷ The gist of Fuller’s argument seems to be that not too much should be expected.⁶⁸ Koskenniemi’s concern, however, lies elsewhere—it lies with the ways in which decision-makers go about their tasks, in particular when interpreting and applying the law. This presupposes that some law, however indeterminate, is in place; Fuller, by contrast, concentrated precisely on the making of law.⁶⁹

The only contributions that I am aware of in which something like “virtue ethics” is explicitly applied to international relations tend to focus on the rhetoric of statesmen. This concerns two recent articles by British International Relations scholar Jamie Gaskarth: one in the *Review of International Studies* and one in the *European Journal of International Relations*. Gaskarth suggests that traditional Westphalian diplomacy has always demanded some kinds of virtues.⁷⁰ For example, sovereignty entails respect for the sovereignty of others—thus enlisting respect as a virtue—and everyday balance of power politics and diplomacy

65. *Id.* at 43; *see also* Karen Knop, *The Hart-Fuller Debate’s Silence on Human Rights*, in *THE HART-FULLER DEBATE IN THE TWENTY FIRST CENTURY* 61 (Peter Cane ed., 2010) (suggesting Fuller might be of assistance in coming to terms with the relationship between different legal orders, in that public order concerns that are specific to discrete jurisdictions may be captured under the umbrella of the inner morality of law).

66. *See* FULLER, *supra* note 61, at 8 (analyzing gambling under the morality of aspiration).

67. *Id.* at 9. *See generally* ROBERT P. GEORGE, *MAKING MEN MORAL* 20 (1993) (defending the central tradition that politics and law should be concerned with making people moral and free from vice). George offers a highly conservative take on the issue.

68. *See* FULLER, *supra* note 61, at 6–9 (suggesting the best society can do is eliminate the grossest irrationalities from a man’s life). I hesitate to put it any stronger—Fuller at his best wrote exceedingly well, but in such a way as to sometimes sacrifice precision on the altar of readability.

69. *See* Jan Klabbers, *Constitutionalism and the Making of International Law: Fuller’s Procedural Natural Law*, 5 *NO FOUNDATIONS: J. OF EXTREME LEGAL POSITIVISM* 84, 95–108 (2008). *See generally* JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT* (2010) (discussing Fuller’s domestic focused legal theories and applying them to international law).

70. *See generally* Jamie Gaskarth, *Where Would We Be Without Rules? A Virtue Ethics Approach to Foreign Policy Analysis*, 37 *REV. INT’L STUD.* 393, 393–405 (2011) (discussing the role of virtue ethics in the analysis and interpretation of international policy decisions).

demands the virtues of prudence, moderation, and carefulness.⁷¹ In Gaskarth's mind, this is now undergoing change, with statesmen substituting different virtues for those earlier, Westphalian virtues.⁷²

Gaskarth's first article addresses this substitution by studying British Prime Minister Tony Blair's rhetoric in connection with the war in Iraq. Blair, as is well-known, sided with the United States, and did so, as Gaskarth states, by emphasizing a "rather idiosyncratic set of virtues."⁷³ The paramount virtue Blair relied on, it seems, was "political will," the will to act against despotism and injustice.⁷⁴ In addition, Gaskarth identifies "belief" and "foresight" as relevant virtues, derived from Blair's public speeches—belief in the United Nations, multilateralism, taking decisive action, and the foresight to act now in order to prevent bigger problems later on.⁷⁵

This now strikes Gaskarth as implausible. Blair emphasized the wrong virtues, which led to a mistaken decision. Had he concentrated instead on alternative virtues, he would have, quite possibly, reached a better decision. Instead of political will and belief, he should have relied on self-mastery, reflection, and caution. He should have applied "foresight" properly and he should have at least taken into account not only the possibility of Saddam Hussein attacking the West, but also the possible consequences of his action for the Iraqi people's plight.

Gaskarth's analysis invites several comments. First, it strikes as decidedly odd to designate such things as "political will" and "belief" as virtues. If virtues are, as many suggest, best seen as character traits, then at least these two would seem to be eccentric choices. Something similar may apply to "foresight" and "self-mastery." Virtue ethicists may capture some of this under "empathy" or "prudence," but might not be persuaded by a reference to foresight as a virtue in itself.⁷⁶ In addition, it is perhaps no coincidence that Gaskarth's language here suggests a slide into consequentialism.⁷⁷

A second point to note is the instrumentalization of the virtues. For Gaskarth, a better choice of virtues on Blair's part would have resulted in a better decision.⁷⁸ This has two aspects. On the one hand, it suggests—I think correctly as a general proposition—that people potentially possess a multitude of virtues and may feel the need to prioritize some of these over others depending on the situation. In other

71. See Jamie Gaskarth, *The Virtues in International Society*, 18 EUR. J. INT'L RELATIONS 431, 440 (2011) (providing a table of institutions and related virtues) [hereinafter Gaskarth, *Where Would We Be Without Rules?*].

72. See *id.* at 443–45 (discussing the fundamental changes in normative views of the relationship between order and justice).

73. Gaskarth, *Where Would We Be Without Rules?*, *supra* note 70, at 405.

74. See *id.* at 405–06 (discussing Blair's use of political will in his decision making).

75. *Id.* at 407–10.

76. See, e.g., Jackson, *supra* note 59.

77. Gaskarth, *Where Would We Be Without Rules?*, *supra* note 70, at 412.

78. *Id.* at 405–08.

words, people possess virtues that may be in conflict with one another. Should the doctor confronted with a terminally ill patient be honest and tell her she has only two weeks left to live, or should the doctor emphasize something like empathy or charity and not disclose the full extent of the disease to the patient? These are difficult situations for which there is no right answer in the abstract—much will depend on the patient in question and the doctor's assessment of the patient's state of mind. Yet, on the other hand, one may wonder whether virtues are really about achieving the better decision, even believing that it would be possible to discuss political decisions in terms of better or worse. This reduces virtues to a menu for choice—a smorgasbord of character traits from which to pick and choose dependent on the goal one wishes to achieve. As Kant or Koskenniemi might put it, this turns the moral politician into a political moralist.⁷⁹

Then again, Gaskarth arguably has to make this move, for third, he casts his net a bit too wide, perhaps. If Westphalian sovereignty can be captured in terms of the virtue of respect for other states' sovereignty, then everything can be captured in terms of the virtues; and if everything can be called virtuous, then the notion loses whatever analytical sharpness it may possess. On such a conceptualization, “virtue ethics” does indeed become a menu for choice.

Gaskarth's second article comes, in part, closer to what is commonly understood as “virtue ethics.” Yet, it still draws on two different ways of conceptualizing “virtue ethics,” or more accurately perhaps, shifts between different levels of abstraction. First, because virtues are about individual agency, he suggests, entities such as the International Criminal Court (ICC), with its focus on individual responsibility, are best seen as expressions of “virtue ethics.”⁸⁰ The ICC, in other words, is an attempt to make people more virtuous by creating legal rules for individual behavior. This is not an uncommon position—Aristotle himself already suggested that the virtues could be inculcated, in part, through legislation; as noted, Fuller seemed to think predominantly in this manner as well.⁸¹

Second, though, and arguably more in line with present-day versions of “virtue ethics,” Gaskarth discusses the character traits to be expected from the staff of the ICC; humility, modesty, sensitivity, adaptability, and courage are mentioned as essential virtues of prosecutors and investigators at the ICC.⁸² It might be said that much the same could apply to the judges at the ICC or international judges more broadly—a recent branch of jurisprudence posits that one may legitimately expect judges to display certain virtues, including modesty, temperance, and judicial wisdom (*phronesis*).⁸³

79. See Koskenniemi, *Constitutionalism as a Mindset*, *supra* note 17, at 30 (discussing the relationship of a moral politician and political moralists).

80. See Jamie Gaskarth, *The Virtues in International Society*, 18 EUR. J. INT'L RELATIONS 431, 442–48 (2011) (discussing the ICC's emphasis on individual accountability).

81. See generally GEORGE, *supra* note 67.

82. See Gaskarth, *supra* note 71, at 445–48 (discussing character virtues possessed by the ICC investigators and prosecutors).

83. See Colin Farrelly & Lawrence B. Solum, *An Introduction to Aretaic Theories of Law*, in VIRTUE JURISPRUDENCE 1–2 (Colin Farrelly & Lawrence B. Solum eds., 2008) (introducing a collection of essays which discuss a virtue-centered theory of judging). See generally STEVEN J.

V. VIRTUOUS GLOBAL GOVERNANCE: A BRIEF SKETCH

Gaskarth's work is interesting because he aspires to present a "virtue ethics" for international affairs. He must be one of the first to have done so in a concrete manner. One thing to take from him and elaborate on is a focus on which virtues may legitimately be expected from those in a position of power—those who make the decisions. This could be a first step in any operationalization of "virtue ethics" in international affairs and indeed reflects a common trope of applied "virtue ethics"—the virtues may be attached to professional roles, so to speak.⁸⁴ Which virtues it concerns may be a matter of debate and will depend on those professional roles, but as a general matter, virtues such as, honesty, prudence, temperance, humility, and courage may be of relevance, as well as charity and justice. By contrast, while wittiness may be a virtue for some professions, such as stand-up comedians, or perhaps even academics, it probably has less traction in the context of global governance.

A second step then would be to identify the relevant professional roles, or at least some of them. This is not easy, because international affairs take on many forms and, as the label "global governance" seems to suggest, it might include those who do not exercise power in any formalized way or whose power does not come in neat deontic packages. For example, think of the Organisation for Economic Co-operation and Development's (OECD) Programme for International Student Assessment (PISA) program, monitoring, and ranking student performance in a number of countries, without issuing any decisions or recommendations.⁸⁵ More mundane, the *Guide Michelin* exercises great and worldwide influence on the restaurant sector, yet, few know how its evaluations are done, by whom, how often, or according to which criteria.⁸⁶

Leaving this kind of issue aside, at least several professional roles can be identified. Relevant roles would include: the leaders of powerful states; the leadership of international or intergovernmental organizations; the leadership of internationally operating non-governmental organizations (NGO); policy advisors

BURTON, *JUDGING IN GOOD FAITH* (1992) (offering hints of an early ethics approach to judging); H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL* 6–7 (2008) (discussing the role of the individual conscience in constitutional decisions).

84. See JUSTIN OAKLEY & DEAN COCKING, *VIRTUE ETHICS AND PROFESSIONAL ROLES* 1–5 (2001) (discussing the application of virtue ethics to professional roles). See generally JOSEPH L. BADARACCO JR., *LEADING QUIETLY: AN UNORTHODOX GUIDE TO DOING THE RIGHT THING* (2002) (providing a virtue-influenced study in business ethics); LARRY D. TERRY, *LEADERSHIP OF PUBLIC BUREAUCRACIES: THE ADMINISTRATOR AS CONSERVATOR* (2d ed. 2003) (providing a virtue-influenced study in public administration).

85. See Armin von Bogdandy & Matthias Goldmann, *The Exercise of Public Authority through National Policy Assessment*, 5 *INT'L ORG. L. REV.* 241, 241–98 (2008) (proffering the classic analysis of the legal aspects of governance mechanisms through an analysis of PISA).

86. See A.A. Gill, *Michelin, Get Out of the Kitchen!*, *VANITY FAIR*, (Nov. 2012), available at <http://www.vanityfair.com/culture/2012/11/whats-wrong-with-the-michelin-guide> (presenting biting commentary regarding the way in which the Michelin Guide has affected the culinary industry).

and other experts, including U.N. special rapporteurs; and the international judiciary. This list will hardly suffice. It has been noted, for example, that the leadership of United Nations High Commissioner for Refugees (UNHCR) refugee camps has engaged in questionable activities, for instance, by suspending food distribution to refugees who had staged a protest against the UNHCR.⁸⁷ Nonetheless, the above list may provide a starting point for reflection on the possible role of the virtues in global affairs.

The next step then would be to further define the role of particular virtues in connection with particular roles. For example, it is one thing to insist on honesty or courage as relevant virtues, but the honesty or courage of an international organization's secretary-general need not be identical to that of an international judge or a U.N. special rapporteur.⁸⁸ Likewise, charity is bound to play out differently with the leadership of a humanitarian non-governmental organization than with the judiciary. Moreover, there is the matter of the level of virtue, so to speak. That is, humility may be a virtue, but political leadership also demands a certain amount of vision and inspirational leadership. In other words, too much humility, or humility at the wrong time or place, might not be commendable.⁸⁹

It is axiomatic to believe that complex social systems, including the global order, cannot function without a decent set of legal rules. Yet, legal rules hardly exhaust the moral universe and, as critical work, as well as other work, has suggested, they will rarely, if ever, provide the final answer; even leading positivists have acknowledged that rules will always leave uncertainty at the fringes.⁹⁰ As a result, perhaps, it is often suggested that acts or omissions, while legally justifiable, were nonetheless morally wrong or, by contrast, that acts or omissions, while legally wrong, may nevertheless sometimes be considered morally correct.

This is usually where the discussion stops. Many have held that the bombing of Belgrade in 1999 was illegal, yet legitimate;⁹¹ the non-activity of the United Nations in Rwanda or Srebrenica, in the mid-1990s, was legally difficult to condemn, yet morally wrong.⁹² It is here, broadly speaking, that "virtue ethics"

87. See GUGLIELMO VERDIRAME, *THE UN AND HUMAN RIGHTS: WHO GUARDS THE GUARDIANS?* 2 (2011) (noting that many of the human rights violations inflicted on refugees were caused by the conduct of the UNHCR).

88. See *Controlling International Organizations: A Virtue Ethics Approach*, 8 INT'L ORG. L. REV. 285, 285–89 (2011) (discussing the relevant values of the leadership of international organizations).

89. Compare ARISTOTLE, *NICOMACHEAN ETHICS* 44–49 (Martin Ostwald trans., Bobbs-Merrill 1962) (c. 384 B.C.E.) (asserting the "doctrine of the mean" as method by which to balance these interests), with BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 30–53 (1985) (offering a powerful critique of the doctrine of the mean).

90. See H.L.A. HART, *THE CONCEPT OF LAW* 14–17 (1961) (providing the famous statement about certainty at the core and uncertainty at the penumbra of rules).

91. See, e.g., Bruno Simma, *NATO, the UN, and Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999) (discussing the threat of armed force employed by NATO during the Kosovo crisis).

92. See GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 68–72 (1999) (asserting that inaction was legally wrong, but not providing

may enter the picture by fleshing out what we mean when we say action was either morally right or morally wrong. For without an additional vocabulary, it remains unclear why the act, or omission, was morally justifiable or unjustifiable, and simply pointing to a different morality than the one that prevailed will not suffice—doing so would merely reproduce the circumstance that people have different opinions on different topics. There is probably about as much discord among people engaged in international ethics about right and wrong, as there is among international lawyers. The Kantian may posit an absolute duty to intervene for humanitarian reasons, while the consequentialist may include success factors and fail factors in the analysis and therewith reach the conclusion that intervention is morally right in some circumstances and wrong in others.⁹³ Hence, to say that something is “morally right” or “morally wrong” ought to provoke further questions; instead, it all too often precludes analysis and debate.

In other words, “virtue ethics” may offer additional vocabulary to help evaluate political action, and in doing so, can maintain a possible critical bite. It is in this spirit that Koskeniemi’s “culture of formalism” and “constitutionalism as mindset” must be seen—not as replacing partisan political projects or appealing to black letter notions, but as endorsing a critical review of political action. Indeed, Koskeniemi would be unfaithful to himself if he were to endorse any other, more substantive vision; knowing fully well that all political projects are particular rather than universal, he is not in a position to offer any substantive project. The only position left is a position on the sideline, evaluating political action not on its conformity with some established political program, but judging it on its conformity with basic human virtues. Indeed, sometimes he has explicitly assumed this position, for example, when suggesting that a legal prohibition of genocide renders killing innocent people a bureaucratic process, dulling our sense of moral outrage.⁹⁴

VI. VIRTUES IN INTERNATIONAL LAW

The question remains regarding the proper place of that additional vocabulary—can the “culture of formalism” be deemed to have a place within the legal framework offered by international law, or is it best seen as remaining outside that framework, an external yardstick by which to judge international politics? International lawyers tend to get a bit disturbed at any mention of “virtue ethics” in connection with international law. Surely, so the argument goes, by concentrating on the character of the decision-makers rather than on their acts, it misses the target? Should we not be more concerned about the morality of action rather than the morality of actors, or, put differently, and somewhat flippantly, should we prioritize “whether the cat gets kicked, not whether it gets kicked

much argument).

93. See, e.g., PETER SINGER, *ONE WORLD: THE ETHICS OF GLOBALIZATION* ix–xix (2d ed. 2004) (demonstrating an outspoken example of the consequentialist position).

94. See, e.g., Martti Koskeniemi, *Case Analysis: Faith, Identity and the Killing of the Innocent: International Lawyers and Nuclear Weapons*, 10 *LEIDEN J. OF INT’L L.* 137 (1997).

charitably?”⁹⁵

Those critiques have considerable force and this is not the place to develop a full answer, but perhaps a few remarks may nevertheless be appropriate. A first, and fairly obvious, response would be to state that the virtuous person would not normally “kick the cat” to begin with, charitably or otherwise. More generally, the starting point for a discussion of the role of the virtues in international law and global governance is not that there are no rules in place, although sometimes no rule on point can be found, but rather that such rules invite diverging interpretations and applications. This is generally acknowledged—the lively and, by now, rather voluminous debate on the rules of treaty interpretation in international law suggests as much.⁹⁶

Second, we do generally express concern about the character of relevant actors. International officials—at least those employed by the United Nations—are expected to swear an oath upon taking office,⁹⁷ and, in many jurisdictions, the same is expected from lawyers newly admitted to the bar⁹⁸ and new members of a government. This signifies that those offices are not filled merely based on technical competence, but that something additional is demanded or expected—swearing an oath upon taking office suggests a duty to uphold not just the letter of the constitution or the law, but also its spirit.

Similarly, the international judiciary is expected to consist of individuals of “high moral character,” as Article 2 of the Statute of the International Court of Justice phrases it,⁹⁹ and the same or similar terms appear in the constituent documents of other international tribunals, such as the European Court of Human Rights.¹⁰⁰ The Statute of the International Tribunal for the Law of the Sea (ITLOS) is rather explicit—ITLOS judges must be “persons enjoying the highest reputation for fairness and integrity.”¹⁰¹ The World Trade Organization Dispute Settlement Understanding is a relative outlier because it remains largely silent about the qualities of panelists and Appellate Body members, except for requiring familiarity with trade and trade law. Even that provides that panelists shall be independent and

95. Thanks to Andrew Walton for the example, which I have adapted slightly.

96. See, e.g., Jan Klabbers, *Virtuous Interpretation*, in *TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON 17* (Malgosia Fitzmaurice et al. eds., 2010) (discussing the divergent interpretations and application of treaties in international law).

97. See U.N. ETHICS OFFICE & U.N. OFFICE OF HUMAN RESOURCES MANAGEMENT, *PUTTING ETHICS TO WORK: A GUIDE FOR U.N. STAFF*, at i, 1-3 (2012) (stating that U.N. staff members take U.N. Oath of Office when they begin with the United Nations).

98. See generally STEPHEN SHEPPARD, *I DO SOLEMNLY SWEAR: THE MORAL OBLIGATIONS OF LEGAL OFFICIALS*, at v (2009) (listing certain oaths that must be taken when being admitted to the bar and new members of government).

99. See Statute of the International Court of Justice art. 2, June 26, 1945, T.S. No. 993 (establishing the qualifications of the International Court of Justice judges).

100. See Convention for the Protection of Human Rights and Fundamental Freedoms art. 21, Nov. 4, 1950, 213 U.N.T.S. 221 (providing that the European Court of Human Rights judges shall be of high moral character).

101. See Statute of the International Tribunal for the Law of the Sea art. 2, Dec. 10, 1982, 1833 U.N.T.S. 561 (establishing requirements for the composition of the tribunal).

widely experienced,¹⁰² and that members of the Appellate Body shall be “unaffiliated with any government.”¹⁰³ Moreover, panelists and Appellate Body members are subject to rules of conduct, predominantly to guarantee their independence.¹⁰⁴

Additionally, U.N. officials, other than those working for the Secretariat, are governed by the *Regulations Governing the Status, Basic Rights, and Duties of Officials other than Secretariat Officials, and Experts on Mission*, promulgated in 2002 as a Secretary-General’s bulletin.¹⁰⁵ In part, these regulations stipulate the requirement of integrity, which “includes, but is not limited to, probity, impartiality, fairness, honesty, and truthfulness in all matters affecting their work and status.”¹⁰⁶ The instrument is complemented for holders of special mandates, such as Special Rapporteurs, by a code of conduct, which places emphasis on mandate-holders’ integrity, defining it as “meaning, in particular, though not exclusively, probity, impartiality, equity, honesty and good faith.”¹⁰⁷

Furthermore, many international organizations have established during the last two decades internal evaluation boards, integrity offices, or compliance officers, with a view to ensuring not only the efficiency of their operations, but also their propriety.¹⁰⁸ These typically take a deontological form—the execution of projects must conform to internally-set requirements, often drafted as legal rules.¹⁰⁹ Such measures suggest a concern about the ethics of international projects.

Finally, international law is replete with references to good faith. Treaties must be lived up to, as the *pacta sunt servanda* norm codified in Article 26 of the Vienna Convention on the Law of Treaties suggests, in good faith.¹¹⁰ They must be

102. See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 8 ¶ 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (requiring that selection of the Dispute Settlement Board panel members ensure the independence of its members and that the panel members have a background in trade policy and trade law).

103. See *id.* at ¶ 3 (establishing the qualifications of members of the Dispute Settlement Board Appellate Body).

104. See Appellate Body Report, *Working Procedures for Appellate Review*, ¶ 2, WT/AB/WP/6 (Aug. 16, 2010) (stating that each person covered by the rules shall be independent and impartial).

105. See generally G.A. Res. 56/280, U.N. Doc. ST/SGB/2002/9 (June 18, 2002).

106. *Id.* at ¶ 2.

107. See Human Rights Council Res. 5/2, Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council, 9th Sess., art. 3(e) (June 18, 2007) (requiring mandate-holders to uphold the highest standards of integrity).

108. See Jan Klabbbers, *Self-Control: International Organisations and the Quest for Accountability*, in *THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION* 75, 83–95 (Malcolm Evans & Panos Koutrakos eds., 2013) (describing internal evaluation, monitoring, oversight, and accountability mechanisms that recently developed within international organizations).

109. See *id.*

110. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

interpreted, as Article 31 of the same Convention suggests, in good faith.¹¹¹ Indeed, in his authoritative study of general principles of law, Bin Cheng concludes that good faith “governs treaties from the time of their formation to the time of their extinction,”¹¹² and even suggests that good faith should be “the fundamental principle of every legal system.”¹¹³ Concluding his discussion of the role of good faith in the law of treaties, Cheng explicitly connects good faith to the virtues, albeit without using the term—“[g]ood faith in contractual relations thus implies the observance by the parties of a certain standard of fair dealing, sincerity, honesty, loyalty, in short, of morality, throughout their dealings.”¹¹⁴

Good faith has other applications as well. It lies at the heart of the notion of estoppel and is manifested in the idea that no one shall benefit from his or her own wrong. It governs the exercise of rights amongst others through the notion of *abus de droit*. It might even be seen to explain the possible binding force of unilateral statements,¹¹⁵ although, as Elisabeth Zoller suggests, it is not entirely clear which good faith is at issue—that of the promisor or that of the promisee.¹¹⁶

In short, a sustained argument can be made that positive international law, in its various manifestations, already recognizes that interpreting and applying the law is the work of humans, and that those humans ideally ought to do so in certain ways rather than others. Mere technical competence, no matter how brilliant, is not enough, at least in this sense. International law too has, as Fuller would put it, an inner morality, although this is not the manifestation with which he was most immediately concerned.¹¹⁷

VII. BY WAY OF CONCLUSION

If it is correct to state that international law is already infused with references to the virtues, in one way or another, then fleshing out the contents of a “culture of formalism” along Koskenniemiian lines involves predominantly the systematization of those references. How can moderation, honesty, charity, or temperance, play out in particular situations? For example, the temptation to draft a blueprint in the form of a code of ethics, must be firmly resisted; such a code will inevitably present a series of rules and, in doing so, become vulnerable to the same critique of rules

111. *Id.* at art. 31, May 23, 1969, 1155 U.N.T.S. 331 (setting general rules for the interpretation of treaties).

112. *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 106 (1953) (describing the role of good faith throughout the course of a treaty’s existence).

113. *Id.* at 105.

114. *Compare id.* at 119, *with id.* at 136 (noting that good faith infuses the exercise of rights with qualities such as honesty, sincerity, reasonableness, and moderation).

115. *See* Nuclear Tests Case (Australia v. France), Judgment, 1974 I.C.J. 253, 268 (Dec. 20) (stating that an international obligation assumed by unilateral declaration is based on good faith).

116. *See generally* ELISABETH ZOLLER, LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC (1977).

117. *See supra* notes 58–68 and accompanying text for a discussion of FULLER, MORALITY OF LAW.

that Koskenniemi has so effectively put forward over the years—rules are open-ended and indeterminate. They necessarily come with exceptions that never apply themselves and they are inevitably over-inclusive and under-inclusive. This applies to rules generally, not only to formal legal rules.

Perhaps a better approach would be to adopt a more impressionist method. This would consist of carefully retelling examples of both virtuous and non-virtuous leadership in global governance. This could result in leading by example and might not only draw on real-life events, but it could also let itself be inspired by literature and other forms of art.¹¹⁸ If it is correct, as Robert Jackson suggests,¹¹⁹ that all political action is contextual,¹²⁰ then it is difficult to think of any other way to give hands and feet to the “culture of formalism.”

118. See generally MARTHA NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE (1995) (exploring the importance of literary imagining and storytelling in rational argument and democratic society).

119. See Jackson, *supra* note 59.

120. See *supra* notes 58–68 and accompanying text for a discussion of FULLER, MORALITY OF LAW.