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Introduction

1.1 Introduction

We live in a normative universe: a world of rules. Those rules can be legal rules, moral rules, sports rules, rules of the game. They can be formal or informal. On the road, we are subject to traffic rules. At home, we are embedded in frameworks set by rules concerning marriage, childcare, education. And when we tell our children how to behave, we tend to refer to rules. In Peter French's pithy formulation: "We teach rules, not lives."[1]

Some of those rules stem from the law. Others stem from social convention – such as the convention that within families, mothers are often the primary caretakers and are often blamed if things go wrong;[2] and some may be the result of negotiations with spouses ("When you cook, I do the dishes, and vice versa"). At work, there are professional rules we may have to abide by; there are rules on what to do in our professions, and there are more general rules about due diligence and the avoidance of negligence. When we give way to the playful person inside us (*homo ludens*), even then we nonetheless often do so with rules. Whether playing soccer, tennis, or chess, rules are everywhere; indeed, so much that the game is often constituted by its rules: playing on a chess board with chess pieces but with different rules is playing something other than chess. And even in our mundane everyday activities, there are rules to be observed: whether these are the rules relating to preparing a decent meal or how best to grow tomatoes in our backyard. Obviously, not all these rules are legal rules or ethical rules, but rules they are. Nick Onuf summarizes it nicely: "How can anyone whose great concern is the world as given not realize that rules are everywhere? Rules make their

[1] Peter French, *Responsibility Matters* (Lawrence: University of Kansas Press, 1992), 121.

[2] Indeed, as Lang puts it, "power structures create roles for individuals that lead to attributions of responsibility." See Anthony F. Lang, Jr., "Shared Political Responsibility," in André Nollkaemper and Dov Jacobs (eds.), *Distribution of Responsibilities in International Law* (Cambridge: Cambridge University Press, 2015), 62–86, 69.

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presence felt when we so much as look at the world, when we talk, when we judge, when we choose, when we act upon our own and others' choices, whenever and however we carry on."[3]

Despite all this – or because of it, as Onuf's words suggest – we also live in a world of judgment. It is reasonably clear that we cannot follow the rules blindly without regard for the context, without deciding to prioritize some aspects over others. Even the simplest act of classification, as Dewey realized in the late nineteenth century, involves a judgment of some kind.[4] While playing soccer, we may have to conclude that a call of "handling" is inappropriate if the player was shot against his hands and could not get out of the way. When cooking a meal, we may realize that following the recipe to the letter may still not result in very good food, or that an extra pinch of salt is needed to improve the dish. And when raising our children, we may (hopefully) come to realize that their needs include not only food and shelter but also things such as love and attention – things that cannot fully be ordained by commands. We live by rules, but we do not live by rules alone. Rules do not exhaust the moral universe; they do not and should not deactivate our sense of morality. In truth, we could not live by rules alone – we also have to exercise judgment concerning what the situation demands, and exercise judgment concerning what we think the rules propose we do. And sometimes, when a rule does not formally apply, it may still be appropriate to act in its spirit.

There are various reasons why we cannot live by rules alone, quite apart from the issue that capturing things in matters of rules, rights, and obligations tends to undermine the fabric of society.[5] One is that rules never apply themselves. Rules also tend to be both overinclusive and underinclusive; they capture more behavior than they were intended to, and less behavior as well.[6] Third, rules often come with exceptions, and indeed often need to come with exceptions precisely so as to limit their under- and overinclusiveness. Absolute rules ("Never under any circumstances do X") exist, and there may be settings where they are

[3] Nicholas G. Onuf, "Empirical Products: Response to Gavan Duffy," in Harry D. Gould (ed.), *The Art of World-Making: Nicholas Greenwood Onuf and His Critics* (London: Routledge, 2017), 40–42, 41.

[4] John Dewey, *Principles of Instrumental Logic: John Dewey's Lectures in Ethics and Political Ethics, 1895–1896* (Carbondale: Southern Illinois University Press, 1998, Koch ed.), 33–38.

[5] See, for example, Charles Taylor, *The Ethics of Authenticity* (Cambridge, MA: Harvard University Press, 1991). The problems with rules will be discussed in more detail in the next chapter.

[6] See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon, 1991).

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appropriate, but many settings require a more sophist approach.[7] Fourth, rules often create room for judgment at any rate when allowing for discretion. Additionally, discretion is a necessary element of any institutional design and any kind of representational relationship.[8] Since those who make the law cannot cover any possible contingency in explicit terms, they will have to end up delegating some measure of discretion.

Hence, no matter how well crafted our rules, they need to be applied, whether by judges, administrators, or other decision-makers, either on their own or through institutions comprising several of them (a court, a college of advisers, a *conseil d'état*). And precisely because our rules do not themselves specify how and when they should be applied, in what circumstances, and taking which precise elements into account, it transpires that when it comes to applying the rules we cannot rely on those rules alone – we also need to take something else into account.[9]

This is often enough recognized, in both the mainstream and more critical international legal literature.[10] It is not uncommon to read appeals for an "ethic of responsibility," calling on individuals to be aware of what they are doing, how they are doing it, and the possible ramifications. Likewise, the most prominent international lawyer of his generation has famously called for a "culture of formalism" to be adopted, or (related) a "constitutional mindset."[11] And yet, as Johns has perceptively observed, these and similar calls often remain somewhat abstract. As she writes under reference to some of David Kennedy's recommendations but possibly of much broader application, these

[7] Franck helpfully spoke of "idiot rules" when referring to absolute prohibitions of a general nature. See Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford: Oxford University Press, 1990).

[8] Elster suggests that in many cases, the role of institutions is to limit or harness discretion. Jon Elster, *Local Justice: How Institutions Allocate Scarce Goods and Necessary Burdens* (New York: Russell Sage Foundation, 1992), 163–167.

[9] A seminal critique of the idea that moral conduct can be a matter of rule following alone is Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, MA: Harvard University Press, 1986 [1964]).

[10] D'Aspremont in particular has done much work on law in the absence of determinacy. See Jean d'Aspremont, *Epistemic Forces in International Law: Foundational Doctrines and Techniques of International Legal Argumentation* (Cheltenham: Edward Elgar, 2015); Jean d'Aspremont, *International Law as a Belief System* (Cambridge: Cambridge University Press, 2018).

[11] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001); Martti Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization" (2007) 8 *Theoretical Inquiries in Law*, 9–36.

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seem "too noble and too generalised to connect to the mundane work in which many international lawyers see themselves engaged today."[12]

In this study, I propose that the call for an "ethic of responsibility" can be given some concrete operationalization by zooming in on the character traits of the individuals (individually and collectively) applying the rules. Often enough the choice is not between one solution that is absolutely right and an alternative that is hopelessly indefensible, but rather between two or more viable and defensible readings of the same rule. As Rosalyn Higgins, a former president of the International Court of Justice, once put it: "Legal submissions to a judge are rarely simply 'right' or 'wrong'. The judge is often deciding which of two perfectly decent alternatives is to prevail."[13] And what applies to the judge also applies elsewhere.

In other words: rules (and norms, and principles, and standards, and guidelines, and codes of conduct, and "best practices") always require some kind of judgment, both in interpretation and in application.[14] The philosopher Robert Audi puts it well: "ethical obligations are often matters of judgment that cannot be codified to the extent required for legislation and legal enforcement. Even if they could be codified, ethics asks of us more than the minimum it requires of us."[15]

The insight that judgment at some point will enter the picture is not a novel one – it goes back to ancient Greece, at least, and was forcefully formulated by thinkers associated with the Scottish Enlightenment, most specifically David Hume and Adam Smith. More surprising still, according to some, is that even Immanuel Kant included a doctrine of the virtues in his work. Kant is usually referred to as the most systematic and strict thinker of an ethics based on rules and duties (a deontological ethics, in jargon), and indeed posited some rules with rather absolute force: one should never, for example, tell a lie. And if one sticks to rules in

[12] Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge: Cambridge University Press, 2013), 18. Kennedy finishes an essay by suggesting: "When we make war, humanitarian and military professionals together, let us experience politics as our vocation and responsibility as our fate." See David Kennedy, *Of War and Law* (Princeton, NJ: Princeton University Press, 2006), 172.

[13] Rosalyn Higgins, "Cleveringa Lecture 2009: Ethics and International Law" (2010) 23 *Leiden Journal of International Law*, 277–289, 287.

[14] I make the distinction between interpretation and application for purely analytical reasons. In practice, it would be impossible, on any philosophy of interpretation bar the most mechanistic and implausible, to apply a rule without simultaneously interpreting it.

[15] Robert Audi, *Business Ethics and Ethical Business* (Oxford: Oxford University Press, 2009), 129.

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absolute form, then indeed there would seem to be no need for judgment. Surely, if one should never tell a lie, then one need not be able to tell the difference between the lie and the truthful proposition; nor does one need to be able to distinguish the situation that calls for a truthful response from one where a "little white lie" might be appropriate. This, however, as Kant realized, was too simple: one would still need to be able to recognize the sort of situation that might call for a lie, and this, so he suggested, required a sense of judgment.[16]

One of the reasons we often appeal to Kant (without necessarily invoking his virtue doctrine, and regardless of whether this is a plausible appeal or not) is the realization that in a complex society, we need to live by rules. As a bare minimum, we need to know what side of the road to drive on; how to trade the things we produce; how to treat and how not to treat our neighbors. We cannot rely on our neighbors doing what they should be doing, "doing the right thing" – after all, we often hardly know our neighbors, let alone people in distant countries with whom we do business, such as renting their apartment via Airbnb. We might think it obvious that the buyer insures products during transportation; others might hold that the seller should insure them rather than the buyer. We might think landlords should not expel tenants without prior notice; others might disagree.

In such situations, clear and explicit rules have several advantages. The most important of these is that we no longer have to rely on our neighbor understanding what is expected of them: the rule exists precisely to make this easier, regardless of the precise contents of the rule. This is why early theorists of the idea of the "rule of law," such as Max Weber, could endorse a rule of law that was normatively empty.[17] For Weber, it was far more important that there was some law, regardless of its contents; it was more important that law existed than what this law would actually say.[18] Sociolegal studies already confirmed this basic idea long ago: it is not so much the case that people look to the details of the law for each and every activity they aim to undertake, but rather that they are assured by

[16] See also Chapter 4. To claim that Hume, Smith, and Kant all resorted to the virtues should not be taken to imply that they all thought the same: their doctrines of virtue differed from each other, and differed from the Aristotelian account. The point for present purposes is merely to suggest that it seems that some account of virtue is indispensable in ethics.

[17] See Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Berkeley: University of California Press, 1978, Roth and Wittich eds.).

[18] Useful on the rule of law is Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004).

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the existence of some rules to fall back on: much bargaining, for instance, takes place "in the shadow of the law."[19]

If the rule is supposed to replace our "natural reliance" on our neighbors, it probably follows that this is better achieved if those neighbors realize the same rules also apply to us, and have the same effect on us. And this, in turn, is best achieved if the rule is externally set. If I tell my tenant to vacate the premises immediately because that is what I want them to do, then they may be tempted to argue that I am not a nice person. But if I can tell them that the law says so, and the law would apply to me in exactly the same way, then they cannot legitimately get mad at me – not in quite the same way, at any rate. The existence of a legal rule means that I can invoke the legal rule and that I can hide behind it. Either way, the argument entails that in a complex world, where we are forced to deal with many individuals we do not know personally and thus cannot trust, the existence of objective, neutral, and clear rules makes it possible to live side by side with complete strangers, sit with them on the bus, and buy their products and services.

But, as seen, those rules – legal or otherwise – can never capture all forms of behavior in all circumstances, and there can be disagreement over what they say or whether they apply. Hence, we place our trust in small and selective groups of individuals – courts and judges – typically people who have studied law.[20] These groups can be expected to apply the rules in a fair and equitable manner. Should they get it wrong, we can appeal to some who have studied a bit longer or harder and sit on appellate courts, or perhaps even to the best and brightest sitting in a supreme court. Here, though, typically, the buck stops.[21]

For this to work, though, we insist that our judges be trustworthy.[22] For that reason, we sometimes lay down a rule saying that a judge shall

[19] Stewart Macauley, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 *American Sociological Review*, 55–67. That said, it obviously is welcome if the law favors your position rather than that of the other party.

[20] Though not always: "judges of the peace" are an exception, as are "commissions of wise persons" and similar constructions, including the "Kadi justice" identified by Weber, *Economy and Society*, 976–978, and trial by jury does not rely on trained lawyers either.

[21] See also Jan Klabbers, "The Virtues of Expertise," in Monika Ambrus et al. (eds.), *The Role of "Experts" in International and European Decision-Making Processes* (Cambridge: Cambridge University Press, 2014), 82–101.

[22] A former president of the International Court of Justice seriously questioned the political judgment of many international lawyers: "frankly they are the very last people I would trust with a political decision," he wrote in a letter to law professor and former student Vera Gowlland-Debbas. See Christine Jennings, *Robbie: The Life of Sir Robert Jennings* (Leicester: Matador, 2019), 505.

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not, at the same time, be a member of government, for example, or the CEO of a large company; we have strict rules on how judges should be appointed and under what conditions they should serve – for instance, appointments for life after senatorial approval, as with US Supreme Court justices. We sometimes lay down a rule saying that we expect our judges to be of "high moral character," or words to this effect. Hence, even in our rule-based systems, the final word is often left to individuals whom we have no choice but to trust, and whom we need to trust because no matter how well crafted and detailed our rules, they will always leave room for different opinions.

And in the end, we do the same with most of our decision-makers. We elect those to whom we entrust stewardship of our countries, as presidents or prime ministers. We go to the polls every four years or so, and trust that whoever we vote into office will do a decent job – regardless of how each of us individually would define "decent." In some countries we also vote for sheriffs and prosecutors and other important public servants; in other countries we let those be appointed by people we have just elected, and much the same happens on the international level, where individuals get appointed to positions of leadership by the governments of states. There is much here that goes wrong in practice: sometimes positions of trust are given to individuals whose countries happen to be large donors of the particular organization the position is part of, without any serious screening of the candidate concerned. Additionally, sometimes – or rather often, perhaps, but usually outside the public view – states engage in horse-trading ("support my candidate here, and I will vote for yours there") and do so unashamedly: there is a huge market in votes operating behind the scenes, rarely discussed by international lawyers and others who should know.[23] Likewise, people are often only nominated or appointed if they belong to the right country or the right language group. Considerations of skill and merit are sometimes less prominent than they should be, and considerations of character seem to play no role whatsoever. And yet, while invoking ethics is by no means politically innocent,[24] the tradition of virtue ethics would seem to have something to offer to both the practice and study of global governance.

[23] For a fairly positive appraisal largely on utilitarian grounds, see Ofer Eldar, "Vote Trading in International Institutions" (2008) 19 *European Journal of International Law*, 3–41.

[24] Franco la Cecla and Piero Zanini, *The Culture of Ethics* (Chicago, IL: Prickly Paradigm, 2013, Cochrane transl.); Martti Koskenniemi, "'The Lady Doth Protest Too Much': Kosovo and the Turn to Ethics in International Law" (2002) 65 *Modern Law Review*, 159–175.

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1.2 The Plan of This Book and a Note on Terminology

There are, in principle, numerous ways to set up a study on the virtues in global governance. One might concentrate on the effects of the virtues – will they lead to trust, or will they not? Or one might focus on how the virtues serve particular individuals or institutions. A study on the virtues could be empirical in nature: to what extent do leaders or institutions actually behave virtuously? Such a study could zoom in closely on developing specific concepts that may be closely linked to the virtues, in particular perhaps accountability and responsibility.[25] It could concentrate on specific virtues: a study on humility in global governance perhaps, or on honesty in international politics. It could likewise analyze specific functions (statesman, secretary-general) or specific institutions (courts, nongovernmental organizations) from a virtue-inspired perspective, and indeed such works exist.[26] Or it could focus on the relationship between ethics and power, looking at how the virtues can be used for disciplining purposes or in order to exercise authority.

For all their merits and possibilities, however, such work would be bound to remain incidental, ad hoc-ish, and a little fragmented. It seemed to me that there might be mileage in the idea of trying to develop a more general framework, which could not just cover particular political roles, offices, or individuals but also allow for more general analysis; which would not just cover humility or honesty but also the virtues at large; which would not only zoom in on responsibility or accountability but also on the connections to the political world more broadly. In short, it seemed necessary to develop a framework for looking at the virtues in global governance, broadly conceived.

This has one important ramification, and that is that this study rarely goes in depth. I aim to accommodate this a little in Chapters 7–9, discussing concrete exemplars and examples of individuals or institutions facing ethical conflict, but at its core, this is a study aiming to be broad rather than deep. It aims to bring together insights from law, ethics, philosophy, international relations, leadership studies, and a handful of other disciplines, skimming the surface but hopefully, in

[25] Seminal, though without explicitly invoking the virtues, is Daniel Warner, *An Ethics of Responsibility in International Relations* (Boulder, CO: Lynne Rienner, 1991).

[26] One excellent example is Manuel Fröhlich, *Political Ethics and the United Nations: Dag Hammarskjöld as Secretary-General* (Abingdon: Routledge, 2008).

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the process, creating something worthwhile – a framework for applying a virtue-based perspective to the study and practice of global governance.

The central tenet of this study is this: we live in a world of rules, but cannot live by rules alone. Rules need people to interpret and apply them, people of flesh and blood. Hence, there might be some merit in trying to figure out whether we may expect the individuals who are charged with doing that sort of thing, whether individually or collectively as governments or courts or advisory bodies, to have certain character traits and, if so, what kind of character traits. To put the same point differently, there is an important sense in which rules and virtues go hand in hand: "To train a person for moral action," says philosopher Robert Roberts, "is to train him in the virtues. But this is also a training in rules if we conceive these as including the grammar of the virtues."[27] Just as the competent linguist speaks a language (i.e. applies the rules of a language) without always realizing how and why or actively knowing the grammar, the competent moral agent will behave in ethical fashion by disposition and training.

I will do so in a limited context: the context of global governance. I am trained as an international lawyer and international relations scholar – global governance is, so to speak, my natural habitat or area of expertise.[28] I will not specifically address business ethics or the ethics of public administration, although I will sometimes draw on the relevant literature. Instead, the focus will rest on manifestations of global governance, broadly conceived.

I will speak of "global governance" in general terms, without having a strong commitment as to whether we should speak of global governance (which suggests a focus on governance rather than politics), or international relations (which suggests the priority of the state), or world politics (which suggests politics on a global level). As an international lawyer, much of what I write is influenced by legal thought, legal concepts, and legal cases, but it seemed that limiting myself to international law alone would be uncalled for. Lawyers might be united in thinking that public intellectuals or religious leaders do not make law, but

[27] Robert C. Roberts, "Virtues and Rules" (1991) 51 *Philosophy and Phenomenological Research*, 325–343, 343.

[28] This study therewith follows Hoffmann's lovely suggestion of being engaged in "uplifting politics." See Stanley Hoffmann, *Duties beyond Borders: On the Limits and Possibilities of Ethical International Politics* (Syracuse, NY: Syracuse University Press, 1981), 2. Others speak of "experimentalism" as a related approach to ethics: Eric Weber, *Morality, Leadership, and Public Policy: On Experimentalism in Ethics* (London: Bloomsbury, 2011).

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given that someone like Albert Camus has a strong hold on our imagination and on our collective sense of ethical behavior (the number of references made in the popular press to his novel *The Plague* upon the outbreak in late 2019 of the Covid-19 virus is voluminous), and given the influence exercised by opinion leaders, celebrities, and "influencers" (the word itself speaks volumes), it seemed appropriate to include a brief discussion on such an individual, even if no legal analytical framework is available to capture such a role. Likewise, as illustrated time and again by popes and imams, religious leaders may well exercise influence incommensurate with their formal legal status and powers.

Chapters 2–6 will address a number of preliminary questions, effectively putting a framework for analysis in place. Chapter 2 addresses the question whether there even is a need for virtue ethics: would it not suffice, as is often thought or implied, to have strict rules and strict enforcement mechanisms? A virtue perspective entails some attention to the role of individuals in global governance, yet global governance studies are typically state-centric. Hence, Chapter 3 addresses the question whether it is at all possible or helpful to concentrate on individuals in studying global governance. Chapter 4 takes on a different challenge: even if it were accepted that the virtues can affect individuals, does it make sense to think of the virtues in connection with global governance to begin with? Chapter 5 zooms in more specifically on the relationship between the virtues and law, whereas Chapter 6 is dedicated to operationalizing the virtues: how can a virtue perspective on global governance be workable? Chapters 7–9 will illustrate how, through concrete examples, the virtues can inform the study of global governance. The underlying idea is that the virtues can do so in three major ways: by helping to understand, describe and define, and evaluate and guide political conduct.

Throughout this book, I shall consistently use the terminology of virtue ethics. Experience suggests that doing so might not be self-evident, for a variety of reasons. One is that the term has been commandeered by Ayn Rand's short book *The Virtue of Selfishness*, which, in harmony with Rand's general philosophical system, outlines a Hobbesian world of all against all in which all one can do – and should do – is look out for oneself. It is only when everyone does so that, miraculously, some sort of social order comes into being.[29] The conclusion could be drawn

[29] Ayn Rand, *The Virtue of Selfishness* (New York: Signet, 1964).

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