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Re-visiting *Rainbow Warrior*: Virtue and Understanding in International Arbitration

Jan Klabbers[1]

9.1 Introduction

In the burgeoning realm of global governance, ethics has occupied an increasingly prominent place in recent years. One of the buzzwords of the last two decades or so has been 'accountability', a term which carries overtones of proper behaviour, control and responsibility.[2] Persons in a position of leadership emphasize their concern for such things as full financial disclosure and transparency.[3] The humanitarian intervention over Kosovo may have been illegal but was nonetheless, many have claimed, ethically justifiable.[4] Codes of ethics have been devised both for the international bar and, somewhat lukewarm, for the international judiciary.[5] The infamous 'torture memos'

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[1] Professor of International Law, University of Helsinki. I am indebted to the editors for their incisive comments on an earlier draft, and for much, much else besides.

[2] Onora O'Neill, *A Question of Trust* (Cambridge University Press, 2002).

[3] This prominently featured on the website of the previous United Nations Secretary-General, Ban Ki-moon.

[4] The classic rendition is Bruno Simma, 'NATO, the UN, and the Use of Force: Legal Aspects', (1999) 10 *European Journal of International Law*, 1–22.

[5] See, for example, the Burgh House Principles on the Independence of the International Judiciary, adopted in 2004 and available via www.brandeis.edu/ethics/internationaljustice/ethicsintljud.html (accessed 13 December 2018); related are the Oslo Recommendations for Enhancing the Legitimacy of International Courts, adopted in 2018 and available at

have thrown into perspective the need for legal advisors to behave ethically;[6] writings have appeared on the ethical aspects of humanitarian missions,[7] and several studies have been published focusing on the ethics of the international legal order as such,[8] the ethics of international commercial arbitration,[9] or the ethics of the international bar.[10] Most of this has been Kantian in one way or another, at least nominally so, although one or two consequentialists have chipped in as well.[11]

Perhaps surprisingly, very few have been the attempts to discuss global governance or international law from a virtue ethical perspective,[12] despite the circumstance that virtue ethics has started to influence thinking about law and the judiciary in domestic settings. For several decades now, lawyers and moral

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www.jus.uio.no/pluricourts/english/blog/geir-ulfstein/2018–08-01-biij.html (accessed 13 December 2018).

[6] For instance David Luban, 'The Torture Lawyers of Washington', in David Luban, *Legal Ethics and Human Dignity* (Cambridge University Press, 2007), 162–205; one version of the inside story is told in Jack L. Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: Norton, 2007).

[7] Hugo Slim, *Humanitarian Ethics: A Guide to the Morality of Aid in War and Disaster* (London: Hurst & Co., 2015).

[8] Steven R. Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford University Press, 2015).

[9] Catherine A. Rogers, *Ethics in International Arbitration* (Oxford University Press, 2014).

[10] Arman Sarvarian, *Professional Ethics at the International Bar* (Oxford University Press, 2013).

[11] Most well-known is Peter Singer, *One World: The Ethics of Globalization*, 2nd edn (New Haven CT: Yale University Press, 2004); Ratner, *Thin Justice*, is a rare example of an international lawyer self-identifying as a consequentialist.

[12] With the exception of Jamie Gaskarth, 'Where Would We be Without Rules? A Virtue Ethics Approach to Foreign Policy Analysis', (2011) 37 *Review of International Studies*, 393–415, and Jamie Gaskarth, 'The Virtues in International Society', (2012) 18 *European Journal of International Relations*, 431–453.

philosophers have been discussing the possibilities for a virtuous law,[13] discussing such issues as whether the law should stimulate particular virtues,[14] whether the law should set a good example and not sponsor or endorse non-virtuous behaviour,[15] or discussing the relations between virtue ethics and the Rule of Law.[16] And for some ten to fifteen years now,[17] special attention has been directed at the virtues of judges, often if not exclusively[18] under the heading of virtue jurisprudence.[19]

Much of this literature, both on law and virtues generally and on virtue jurisprudence more specifically, has remained limited to the domestic legal setting. The law at issue is, typically, domestic law; the courts and judges at issue are, equally typically, domestic courts and judges. The international judiciary has been by and large neglected – indeed, to the limited extent that there have been attempts at presenting an ethics for the international judiciary, these have manifested a strongly deontological approach to ethics, and have embedded ethical principles into wider thoughts on the legal status of international judges. The Burgh House principles, for example, the most

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[13] For a good general overview, see Amalia Amaya and Ho Hock Lai (eds.), *Law, Virtue and Justice* (Oxford: Hart, 2013).

[14] Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford: Clarendon Press, 1993).

[15] Kimberley Brownlee, 'What's Virtuous about the Law?', (2015) 22 *Legal Theory*, 1–17.

[16] George R. Wright, 'The Rule of Law: A Currently Incoherent Idea That Can be Redeemed through Virtue', (2015) 43 *Hofstra Law Review*, 1123–1147.

[17] An early and somewhat ambivalent forerunner is Stephen J. Burton, *Judging in Good Faith* (Cambridge University Press, 1992).

[18] H. Jefferson Powell, *Constitutional Conscience: The Moral Dimension of Judicial Decision* (Chicago, IL: University of Chicago Press, 2008).

[19] See Colin Farrelly and Lawrence B. Solum (eds.), *Virtue Jurisprudence* (New York: Palgrave MacMillan, 2008); Jonathan Soeharno, *The Integrity of the Judge* (Aldershot: Ashgate, 2009).

emblematic attempt to date, aims to capture the independence of the judiciary through a number of rules about, for instance, extra-curricular activities, past links to either cases or parties, or instructions concerning conflict of interest, instructing judges not to sit in cases in the outcome of which they 'hold any material personal, professional or financial interest'.[20] The underlying premise, it seems, is to set ideal standards of more or less universal validity and applicability, suitable for an abstract universe in which one case is much the same as the next case, zooming in on particular acts that may be reproachable, and with scant attention for the sort of person who ends up on the international bench. The one exception is the reminder that persons appointed to such office should be individuals of 'high moral character, integrity and conscientiousness';[21] the other principles (and sub-principles) are all related to appointment procedures, working conditions, and objectively verifiable conduct.

And yet, the international judiciary, although being a judiciary, is working in a setting radically different from most domestic judges, even though there might be some overlap with domestic constitutional courts. To make a trite point, there is no constitution in the international legal order, no recognized hierarchy of norms; there are no prisons to lock up recalcitrant states, and no police forces to hunt them down. The international legal order is a legal order, but is both embedded in and constituted by its political environment in ways that do not quite apply to a family court in Long Island or a district court somewhere in Bavaria.

And this entails that international judges are confronted with judicial or ethical dilemmas unlikely to occur in the same way in domestic settings. One can think, for instance, of the dilemma confronting one of the judges (judge Röling) sitting on the

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[20] See the *Burgh House Principles*, principle 11.1.

[21] *Ibid.*, principle 2.1.

post-war Tokyo tribunal, who once he had started his work found to his dismay that he had been lured into what was largely a show trial. How then do you find an ethically sound way of addressing your dilemma?[22] Röling did so not by resigning (as he had seriously considered a few times) but, eventually, by re-thinking the notion of crimes against peace to underline that it was a retro-active invention in the years immediately after the Second World War. He had no problem punishing enemies, but cherished the classic *nullum crime sine lege* principle; to him, post-war action was a matter of incapacitating the enemy in the absence of a legal prohibition concerning the commencement of war, rather than pretending to apply non-existent 'law'. In the end, he resolved his personal discomfort by writing a dissenting opinion that, unlikely the majority opinion, has stood the test of time.[23]

One can think of the ethical issues emerging, in particular in international criminal tribunals, due to judges having earlier been vocally discussing individuals and groups later appearing before the tribunals on which they sit. A well-known example is that of Geoffrey Robertson, sitting on the Appeals Chamber of the Special Court for Sierra Leone, having earlier expressed strong opinions on behaviour taking place in Sierra Leone. He agreed to step down as president of the Appeals Chamber and recused himself from some cases, but did not resign altogether, suggesting that doing so would endanger the independence of the judiciary. The bigger question, though, as some have observed, is why he accepted the appointment to begin with – surely, a lawyer of his

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[22] Jan Klabbers, 'Principled Pragmatist? Bert Röling and the Emergence of International Criminal Law', in Frédéric Mégret and Immi Tallgren (eds.), *The Dawn of a Discipline* (Cambridge University Press, 2020), 205-229.

[23] Röling's dissent is conveniently reproduced in B. V. A. Röling and C. F. Rüter (eds.), *The Tokyo Judgment: The International Military Tribunal for the Far East (IMTFE) 29 April 1946–12 November 1948* (Amsterdam: University Press Amsterdam, 1977), Volume II, 1041–1148.

calibre must have realized that his earlier writings could cast a shadow over his own judicial independence.[24]

One can also think of the example of the human rights judge who would prefer to dissent on a substantive decision, but feels that the need for a unanimous judgment outweighs his own individual opinion, given the political situation in the state against which the judgment is being rendered: should such a judge join the majority for political reasons, or stick to his individual opinion? And is there a sliding scale here: the more tangential the object of disagreement, the stronger the pull of the majority? Issues such as these are almost the bread and butter of international lawyers, but are unlikely to surface in domestic settings in quite the same ways.

In turn, virtue jurisprudence usually occupies itself with a limited set of questions, often relating to the activity of judging *stricto sensu*: is a judgment ethically justifiable or not, and if so, under what conditions? Which virtues does a virtuous judge display, or should a virtuous judge display? Hence, much of the literature focuses on corruption, or partiality, or laziness or some such traits – much of the literature on virtue jurisprudence, for all its merits, is pre-occupied with the question how virtue ethics can contribute to virtuous judgments. To the extent that the virtues are made to serve a goal, it is the goal of arriving at virtuous judgments, trying to flesh out what a virtuous judge would do.

Purists might claim that virtue for a purpose is not proper virtue, but that is a discussion for another day. I would like to explore a different role that virtue ethics, or

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[24] For useful discussion of the incident, see James Cockayne, 'Special Court for Sierra Leone: Decisions on the Recusal of Judge Robertson and Winter', (2004) 2 *Journal of International Criminal Justice*, 1154–1162; a more in-depth exploration is Frédéric Mégret, 'International Judges and Experts' Impartiality and the Problem of Past Declarations', (2011) 10 *Law and Practice of International Courts and Tribunals*, 31–66.

virtue jurisprudence, may perform, and that is an explanatory purpose: the virtues may not only be instrumental in arriving at better judgments, but can also help us to understand aspects of judgments that, on a different analysis, remain hidden from view. Borrowing an analogy, one might say that a virtue-based analysis can act like a colouring agent, highlighting aspects that cannot otherwise be seen.[25]

Hence, this paper aims to kill two birds with one stone. I aim to discuss some of the specific ethical issues arising in an international setting, issues that may arise in ways that are unlikely to occur before domestic courts. And I aim to point to an explanatory role for the virtues, instead of a strictly normative role. A good example of an issue bringing both elements to the fore is the classic *Rainbow Warrior* arbitration, an international award rendered in 1990 which has always contained a puzzling element, an element that somehow cannot be grasped by legal analysis alone nor, as it will transpire, by employing ethical perspectives other than the virtues.[26] Let me begin by recalling the facts of the case, and follow up by suggesting that the case neatly illustrates some pressures unlikely to be present before domestic courts, and discussing the ethical problem thus identified. In the process I aim to shed light on this particular arbitration, and aim to illustrate how virtue ethics can be of use for understanding and evaluating manifestations of global governance. That is not particularly ambitious: I am

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[25] I borrow the analogy from Joseph H. H. Weiler, as mentioned during a discussion on global governance at New York University School of Law, in 2010: https://blogs.law.nyu.edu/magazine/2010/roundtable-global-governance/ (accessed 12 December 2018).

[26] For general commentaries, see Michael Pugh, 'Legal Aspects of the *Rainbow Warrior* Affair', (1987) 36 *International and Comparative law Quarterly*, 655–669; Scott Davidson, 'The *Rainbow Warrior* Arbitration Concerning the Treatment of the French Agents Mafart and Prieur', (1991) 40 *International and comparative Law Quarterly*, 446–457.

not claiming a role for the virtues in guiding global governance – at least not here, and that owes something, in part, to the idea that international courts and tribunals have as their primary task the settlement of disputes rather than guiding action. What I am claiming though is that a virtue perspective can help us understand a decision that otherwise remains sketchy at best, and this explanatory or epistemological role is the result not of ascribing virtue to the tribunal, but because a virtue perspective may even help to 'open up' a decision that is not in itself particularly virtuous. Instead of trying to find virtue, then, I am using virtue here as a prism, a way of looking at an arbitral award, a microscope if you will. All this sounds hopelessly abstract and counter-intuitive, so I should share my journey. This journey started, years ago, with reading the award and not understanding a particular aspect of the decision.[27]

9.2 The Horns of the Dilemma

In July 1985, a Greenpeace ship, the *Rainbow Warrior*, was lying in port in Auckland, New Zealand, apparently awaiting the possibility to disrupt French nuclear testing in French Polynesia. An explosion took place on board, killing a Dutch photographer and destroying the ship. It quickly transpired that this was the work of two agents of the French secret service, Major Alain Mafart and Captain Dominique Prieur, both of whom were arrested by the New Zealand authorities, tried for manslaughter, and sentenced to ten years' imprisonment. The French, horrified by the thought of French government

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[27] *Case Concerning the Difference between New Zealand and France Concerning the Interpretation or Application of Two Agreements, Concluded on 9 July 1986 Between the Two States and which Related to the Problems Arising from the Rainbow Warrior Affair*, award of 30 April 1990, reproduced in 20 *UN Reports of International Arbitral Awards*, 215–284 (hereinafter referred to as Award, if only for brevity's sake).

agents in a foreign prison, thought that this was a bad idea and suggested a different settlement, involving the payment of compensation. New Zealand initially disagreed, and following a stalemate, the UN Secretary-General was asked for a binding ruling. Part of his ruling, rendered in 1986 and confirmed in a subsequent set of agreements between the two states, was that Mafart and Prieur would spend a period of three years in relative isolation on a French military basis on the island of Hao. This was not incarceration strictly speaking, but obviously limited their freedom to move considerably: while their families were allowed to join them, Mafart and Prieur could not be removed from Hao, except with the consent of New Zealand.

And so it went, until Mafart fell ill and was removed from Hao in order to receive treatment in Paris for what was labelled an urgent medical condition – without the consent of New Zealand. And so it went, until Prieur was removed from the island in order to address possible complications regarding her pregnancy[28] and visit her dying father in France – again without the consent of New Zealand. France flagrantly violated the terms of the agreement, and New Zealand, obviously, was none too happy with this. Eventually the matter was submitted to arbitration before a panel of three lawyers: one appointed by France, one by New Zealand, and one appointed by the parties together, a prominent international lawyer from Uruguay.

This is where matters became curious for, remember, the idea had been that Mafart and Prieur would be held on Hao for a period of three years: this was what the Secretary-General's ruling and the subsequent bilateral agreement had provided. In the words of the agreement, 'Major Mafart and Captain Prieur will be transferred to a French military facility on the island of Hao for a period of not less than three years.' It

[28] In the classroom this usually provokes a gasp: secret service agents, especially those who blow up ships, are still widely presumed to be men.

seems that there is only one plausible reading of this clause: they shall spend at least three years on Hao, and not a day less.

Still, the arbitral tribunal decided otherwise. It decided that the three year period mentioned in the agreement referred to the duration of the agreement, not the duration of the confinement. Instead of freezing the clock upon the departures of Mafart and Prieur, the clock continued ticking, and by the time of the award, the three year period had passed. Hence, so the tribunal decided, there was no need to transfer the two agents back to Hao.

The reasoning seems impossible to justify on the basis of the text of the agreement, according to which the two are to be transferred to Hao 'for a period of not less than three years'.[29] It is difficult to read this in any other way than to hold that Mafart and Prieur were to spend three years on the island. Admittedly, the text leaves some ambiguities: it does not specify an exact starting date, and it does not indicate whether a leap year shall be counted as a year.[30] But still, upon any regular or ordinary reading, the text does not suggest anything other than that the two culprits shall spend three years on Hao – and possibly more.

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[29] It has not been subjected to a lot of scrutiny in the literature though. Crawford for example, in his monumental work on responsibility, merely issues a parenthetical remark that the Tribunal decided 'somewhat controversially' on this point. See James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), at 265. Salmon likewise merely mentions the decision on this point while questioning whether the tribunal reached its conclusion 'rightly or not', but without analyzing the matter. See Jean Salmon, 'Duration of the Breach', in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, 2010), 383–396, at 388.

[30] For the record, the duration would have included the year 1988, which was indeed a leap year.

What is more, the reasoning of the tribunal is also difficult to justify with the apparent thought behind the provision: the thought that the two agents should receive some kind of punishment for having been involved in manslaughter. Compared to ten years in prison in New Zealand, three years on a French military facility accompanied by family and without deprivation of conjugal rights seems like a pretty good deal for them at any rate. Indeed, in a powerful opinion, the arbitrator submitting a separate opinion, Sir Kenneth Keith, reaches much the same conclusion: the majority decision is difficult to justify under any regular approach to treaty interpretation.[31] And in fact, the Tribunal itself suggested much the same when it stated that 'the essential object or purpose of the First Agreement was not fulfilled, since the two agents left the island before the expiry of the three-year period.'[32] Hence, the Tribunal's reasoning is based neither on the text of the agreement nor on the purpose behind it.

The Tribunal classified France's breach as a 'continuous breach',[33] therewith presupposing that the clock did not stop with the departure of Mafart and Prieur. This, as such, seems sensible enough, but then the Tribunal reached an awkward conclusion. It concluded (again, in itself sensible enough) that the removal of those two would no longer constitute a violation upon expiry of the agreement. However, the agreement had no explicit expiry date,[34] so the Tribunal saw fit to deduce one: since the incarceration had started on 23 July 1986, the agreement expired on 22 July 1989, and therewith expired also the obligation to incarcerate, regardless of the circumstance that for a considerable part of this time neither Mafart nor Prieur was in confinement, and despite

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[31] Arbitrator Keith's separate opinion is appended to the Award, 276–284.

[32] award, para 100.

[33] award, para. 101.

[34] It provided that its main provisions ought to be implemented 'not later than 25 July 1986', but contained few other formal clauses.

the agreement specifying that they will be in confinement for a period of no less than three years. The result is counter-intuitive, as if someone who escapes from prison nonetheless is considered as serving time during his or her escape.

What then might explain it? One possible explanation may reside in the circumstance that the Tribunal was worried about Mafart or Prieur (or both) appealing under the law of the European Convention on Human Rights. For regular criminal lawyers, the *Rainbow Warrior* case was a highly peculiar case, and with potentially a highly peculiar outcome. It was an inter-state dispute that could possibly result in two individuals being further incarcerated on the basis of a ruling by the UN Secretary-General and a treaty between two states, without those two individuals actually having been given the chance, in this phase of proceedings, to defend themselves – as a trial then, it would be as far removed from a fair trial as it could possibly be, and therewith difficult to reconcile with Article 6 of the European Convention on Human Rights. This Convention is not terribly relevant for New Zealand of course, but France is bound to abide by its provisions and bound to protect everyone within its jurisdiction – and this clearly covered Mafart and Prieur.[35]

The continued confinement of Mafart and Prieur could be equally difficult to reconcile with the *habeas corpus* provision of Article 5 of the same European Convention: everyone is entitled to liberty and security of person, unless convicted by a competent court. So here is an ethical dilemma: should the Tribunal insist on the proper 'legal' interpretation of an inter-state agreement, and as a result condemn two individuals to incarceration without giving those individuals the chance to defend themselves? Or should it honour the reach and scope of human rights law, according to

[35] If the right to a fair trial is accepted as part of customary international law, then New Zealand too could be legally implicated.

which no one shall be deprived of their liberty except by a competent court and on the basis of a fair trial?

If the horns of the dilemma are clear enough, there are a few complicating factors. One is, lest it be forgotten, that Mafart and Prieur had actually been found guilty by a competent court in New Zealand,[36] and had originally been sentenced to ten years in prison. In this light, there would be something curious about a complaint that their rights to liberty and a fair trial would have been violated by the Arbitral Tribunal confirming a far lesser sentence decided upon by the UN Secretary-General and accepted by the two states concerned. And, lest we forget, their actions actually resulted in the loss of a human life.

That said, it is of course also a complicating factor precisely that the sentence was one agreed upon by two states; this is difficult to sustain in light of Rule of Law concerns. And yet another complicating factor is that it is clear that Mafart and Prieur were acting on behalf of the French government: they were government agents acting on instructions, rather than private agents acting out of private motives. And France itself, it seems, was not too concerned about human rights when it ordered that the ship be blown to pieces. Even if it never intended that anyone would die, nonetheless preventing political protest is not easy to square with freedom of expression or assembly, freedoms that also meet with strong protection under the European

[36] And it would be difficult to invoke the sort of argument often invoked to justify the inclusion of international arbitration provisions in investment agreements, to the effect that somehow New Zealand courts would not measure up to Rule of Law standards.

Convention. In the end, the case raises intriguing issues of 'inter-legality': how to come to terms with interlocking legal orders?[37]

Perhaps the most complicating factor though is that while the award is not particularly commendable, it is not obviously wrong either. It may set the law aside for no identifiable reason, but the outcome is, curiously perhaps, not particularly outrageous – and has never been received as such. France, obviously perhaps, seems to have been reasonably pleased,[38] but New Zealand too seems to have been puzzled rather than displeased. The outcome does not really engender moral outrage; it is more a matter of intellectual bewilderment – how can the tribunal have decided the way it did? And the upshot of this is that the analysis is driven to finding an explanation, not so much to offering a critique or to suggesting alternatives. And this in turn means that much of the writings on virtue jurisprudence are not particularly helpful: they can help to pinpoint that a corrupt or lazy or biased judgment is flawed, but none of these or similar factors is the case here. Put differently, for all its puzzling aspects this still is an award that could have been rendered by virtuous arbitrators – and the same holds true for a panel that would have reached the opposite conclusion. There is, in yet other words, nothing in virtue jurisprudence that would suggest that the panel ought to have reached a different conclusion. The award is strange, but not, it seems, non-virtuous, unless one would claim that a virtuous arbitrator never departs from a written treaty

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[37] See Jan Klabbers and Gianluigi Palombella (eds.), *The Challenge of Inter-legality* (Cambridge University Press, 2019).

[38] Being pleased shines through in Gilbert Guillaume's in-depth discussion of the affair: Guillaume had been involved in secret negotiations on behalf of the French government, and would later become a judge at the International Court of Judge. See Gilbert Guillaume, *Les grandes crises internationales et le droit* (Paris: Éditions du Seuil, 1994), 219–238.

provision, not even for good reasons – but that comes close to positing a categorical imperative.

9.3 Ethically Justifiable?

But first things first: is the Tribunal's approach ethically justifiable? Is it justifiable to go against the relatively clear injunction of the law that is to be applied, and set it aside for considerations that are external to the case at hand – in this case the fear of encountering different legal issues? A deontologist would run into problems here, as is usually the case when he (let's assume our deontologist is male, for argument's sake) is confronted with normative conflicts. The deontologist would be asked to make a choice between different applicable rules, and can only do so by relying on a different, higher, rule while reaming true to deontology. Other techniques (balancing, applying proportionality) are not available to the pure deontologist.[39] Hence, he would have to decide on the basis of a possible hierarchy of norms – and indeed, the structure of both parties' arguments mirrored a dichotomy, with New Zealand sponsoring an approach based on the law of treaties, and France endorsing an approach concentrating on the law of responsibility. The Tribunal split the difference, denying any distinction between contractual and tortuous obligations in international law.[40] Nonetheless, the distinction

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[39] This suggests that pure deontology is rare indeed; instead, deontological and consequentialist arguments are structurally related, so to speak, leading to MacIntyre's observation that many ethical debates 'can find no terminus'. See Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 2nd edn, (London: Duckworth, 1985), at 6. Some of the consequences for the law of international organizations are explored in Jan Klabbers, 'Interminable Disagreement? Reflections on the Autonomy of International Organisations', (2019) 88 *Nordic Journal of International Law*, 111–133.

[40] Award, esp. para 74–75.

played out, implicitly,[41] between a faithful reading of the agreement, and an implicit insistence on extraneous factors. The bilateral agreement said one thing; other factors, however unmentioned these may have remained, pointed in the opposite direction.

International law provides arguments supporting both positions. On the assumption that the Tribunal had human rights in mind, some might say human rights are substantively superior, and should always trump other agreements. Others might counter that the right to life, itself a human rights norm, was callously treated by Mafart and Prieur and the French government – and much the same would apply to freedom of expression. The *lex posterior* argument would suggest that the two should have been sent back to Hao, as the bilateral agreement was of later date than France's commitments under the European Convention. And likewise, the *lex specialis* argument would probably have to be construed in favour of applying the bilateral agreement. Compared to the general nature of the European Convention, the bilateral agreement dealt with a rather special and narrow topic, and between fewer states at that: so unless one would feel that human rights by definition trump other manifestations of international law, the deontologist would probably have to conclude that the Tribunal erred.[42] And yet, somehow this reasoning, while defensible, strikes as too easy, or at least as difficult to generalize: there must after all be circumstances thinkable where an appeal to human rights should set aside a bilateral agreement between states, even a later and narrower agreement. One example concerns the voluntary rendition

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[41] France at no point expressly invoked human rights considerations or relied on the European Convention, and had it done so it would have made it far more difficult for the Tribunal to apply human rights-related logic, for in that case, it would have had to explain why it seemingly could not accept the outcome of proceedings in New Zealand.

[42] For an overview of the international law mechanisms to address treaty conflicts, see Jan Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press, 2008).

agreements states have concluded in their struggles to contain terrorism: surely, such agreements should not be allowed to depart from established human rights law. So, our deontologist has a problem, although it remains possible that the problem stems not from deontology, but from the configuration of obligations at issue.[43]

To the very limited extent that there is any reasoning to be found in the award on this point, it suggests something along vaguely consequentialist lines, perhaps paying some lip service to traditional great power sovereignty. Having established that the period of incarceration, if it commenced on 22 July 1986, would have ended on 22 July 1989, the tribunal noted without further illustration or reference that it would be 'contrary to the principles concerning treaty interpretation to reach a more extensive construction of the provisions which thus established a limited duration to the special undertakings assumed by France'.[44]

This focus on 'erring on the side of the sovereign' is, in law, an untenable proposition. To the extent that there is (or can be) a general rule of interpretation, it is a rule which favours the ordinary meaning of the terms of the treaty in their context, and in light of the treaty's object and purpose. Instead, the tribunal relied on an old and outdated maxim, to the effect that when in doubt, one should apply the least onerous international obligations, especially perhaps when it concerns great powers – and for some reason France seemed to warrant such treatment. The reasoning followed from the conclusion, rather than the other way around. Perhaps it is useful to remember here that even Vattel, otherwise rather sensitive to the plight of the great powers, would

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[43] That said, for all its popularity the *lex specialis* rule often ends up in this kind of trouble: it would often warrant application of a bilateral agreement so as to overrule a contrary multilateral agreement. Note also that the *lex specialis* rule does not feature in the Vienna Convention on the Law of Treaties.

[44] Award, para. 104.

have balked: to his mind, interpretations that result in absurdities or that would render the treaty null and void, were unacceptable: the parties cannot be presumed to have intended to create an absurdity or to render a treaty nugatory.[45] And that was in the eighteenth century.

This is vaguely consequentialist in that it seems mostly concerned with the consequences for France: surely, France could not be expected to welcome its agents incarcerated on Hao for a period of three years, even if this is what the agreement specified, and even if this is what the Secretary-General of the UN had already decided that should happen. Of course the problem then is that while the consequences of the award might be nice for France, they were not all that happily embraced by New Zealand. This can possibly be overcome by a reliance on overall positive consequences (thus sacrificing New Zealand's desires in the name of the greater good), but it is difficult to sell an unsubstantiated conclusion undermining the sanctity of treaties as somehow overall positive – and it is probably no coincidence that there seems to be no other case adopting a similar approach, or even of the *Rainbow Warrior* point being invoked in legal proceedings as somehow a useful precedent. And here the analytical problem seems to be with consequentialism as such, not just with the materials at hand. Consequentialist reasoning, whatever its merits, seems to be always vulnerable to the critique that the consequences deemed desirable are either too broad or too narrow, and always depending on who makes the decision. There is, in other words, no standard equation: every equation is an inclusion of some factors while it excludes others, and there is no way of telling in advance (or often even afterwards) what the precise factors in the equation were. The problem might be less pronounced in rule-utilitarian

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[45] Emer de Vattel, *The Law of Nations* (Indianapolis IN: Liberty Fund, 2008 [1758], Nugent transl.), at 418–419.

approaches, but these depend on being able to identify an applicable rule (something which is not always self-evident) and still suffer from the absence of standard-equations. Rule-utilitarians have less equations to worry about than act-utilitarians, but cannot escape making calculations altogether. But at least Elizabeth Anscombe's rather scathing conclusion of consequentialism in general will apply with less force: 'you can exculpate yourself from the actual consequences of the most disgraceful [sic] actions, so long as you can make out a case for not having foreseen them.'[46]

9.4 On Courage and Foolhardiness

This still leaves open the possibility of a virtue-based justification, or explanation rather. The search is not for a condemnation of the award in terms of the absence of judicial virtue: I am not looking to claim that the arbitrators were corrupted, or did not do their homework properly, or were biased in favour of France, or lacked empathy,[47] or any suchlike construction. Instead, I am looking to find out whether the award can be justified on the basis of a virtue ethics approach. Many of the often-mentioned judicial virtues have little bearing on the matter. Take, for example, Van Domselaar's recent conceptualization of the judge as a 'civic friend', friendly disposed towards both parties and willing to listen to both without preconceptions: this is an appealing notion in various respects, but does not apply to the case at hand. There was little in the panel that was truly friendly towards New Zealand (this is an empirical point, and as such not

[46] G. E. M. Anscombe, 'Modern Moral Philosophy', reproduced in Roger Crisp and Michael Slote (eds.), *Virtue Ethics* (Oxford University Press, 1997), 26–44, at 37(italics omitted – JK).

[47] I have explored a possible role for empathy elsewhere: see Jan Klabbers, 'Doing Justice? Bureaucracy, the Rule of Law and Virtue Ethics', (2017) 6 *Rivisto di Filosofia del Diritto*, 27–50.

fatal to Van Domselaar's concept), but, more importantly, the notion of civic friendship is better suited to private law disputes involving concrete material interests, rather than the more abstract type of political question mixed with criminal law that was at issue in *Rainbow Warrior*:[48]

Likewise, the checklist proposed by Farrelly and Solum offers little solace.[49] It lists such traits as incorruptibility, sobriety, judicial courage, temperament and impartiality, diligence and carefulness, intelligence and learnedness, and craft and skill. Yet none of these, it seems, was lacking. It is not that the panellists were corrupt, or did not know the law or how to interpret a treaty provision. What characterizes *Rainbow Warrior*, instead, is the wilful setting aside of what was the most obvious solution, possibly in order to prevent possible further legal problems. Perhaps the only judicial virtue mentioned by Farrelly and Solum that can have a bearing on the problem is the idea of judicial courage, but this seems to work in both directions.

On the one hand, the majority could be criticized for lacking courage. Surely, so the argument could go, France made its own bed, and thus had to lie in it. It is not for arbitrators to take possible negative consequences for one of the sides into account, at the expense of the other party to the dispute. Clearly, one might think, the panel bowed to great power politics, perhaps afraid that France would refuse to cooperate (which would not be unprecedented) with any award, whether in the guise of a threat of human rights litigation or not. Clearly, it seemed, France was afraid that its darker practices

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[48] Iris van Domselaar, *The Fragility of Rightness: Adjudication and the Primacy of Practice* (PhD thesis, University of Amsterdam, 2014). After all, some crimes might make it difficult for a judge to be friendly disposed towards the suspect, and faking a friendly disposition would not be particularly virtuous.

[49] Colin Farrelly and Lawrence B. Solum, 'An Introduction to Aretaic Theories of Law', in Farrelly and Solum (eds.), *Virtue Jurisprudence*, 1–23.

could be exposed in human rights litigation, and the panel lacked the courage to tell France to accept responsibility for its actions and let the chips land where they fall. Hence, one might conclude, the panel lacked judicial courage.

On the other hand, it takes considerable courage to wilfully devise an arbitral decision that is counter-intuitive and seems to depart from traditional expectations about the meaning of treaty provisions. It would have been easier for the panel, no doubt, to just order that Mafart and Prieur be sent back to Hao; and should France refuse to comply, then France would have a huge public relations problem, if nothing else. But at least on paper New Zealand would have been vindicated, the sanctity of treaties would have been confirmed, and most people's belief in the fairness of international law would have been strengthened. To go against all this, then, must have taken considerable courage.

This raises the obvious question then regarding how to assess judicial courage: how to distinguish courage from foolhardiness? And that question, it seems, requires an additional element: judicial virtue cannot be assessed as self-standing judicial virtue alone, but somehow needs to be embedded in something larger. One way of approaching this might be to invoke such factors as legitimacy, but this is rarely helpful: whoever invokes legitimacy wants to cheat, one might be tempted to quip, if only because legitimacy is an open-ended and slippery concept.[50]

Van Domselaar provides a clue in tying the exercise of judicial virtue to the exercise of public authority, suggesting that judicial authority is part of public authority and therewith in need of justification. A related, more specific approach is provided by

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[50] The seminal critique is Martti Koskenniemi, 'Legitimacy, Rights, and Ideology: Notes Towards a Critique of the New Moral Internationalism', (2003) 7 *Associations*, 349–373.

Jonathan Soeharno, who points out that generally, a distinction can be made between the virtues of the judge, and the legitimacy of the office of the judge. The former can be evaluated by inquiring into individual judicial characteristics, the latter however is impervious to this, and requires instead an analysis in terms of what he calls 'external accountability'. The starting point of his discussion is that people may come to accept judgments not only because they believe the judge is a decent human being but also, regardless of who the judge is, because the court in question can generally be trusted. Hence, assessments tend to depend on both factors, and both individual judges and courts can over time develop their reputations.[51]

From this angle, it would seem that the award in *Rainbow Warrior* can possibly be defended by pointing to the embeddedness of the Tribunal in the international legal order. The Tribunal's task is, first of all, to settle the dispute before it, but it cannot do so in a vacuum. It is perhaps useful to suggest here that tensions between France and New Zealand had escalated, to the point that France had persuaded the EU to impose import restrictions on butter stemming from New Zealand. The award is usually credited with having helped to alleviate these tensions, and the panel's idea to establish a 'friendship fund', to be financed (at least initially) by France, has often been deemed a useful intervention as well.

On the other hand, and perhaps more to the point, Soeharno's invocation of the integrity of the office hardly applies here. Arbitration tribunals are by definition set up on an ad hoc basis: they exist to settle a dispute, and once that work is done, they stop working and are disbanded. In an important sense therewith, there is no office whose

[51] Soeharno, *The Integrity of the Judge*.

integrity could be at stake, or whose integrity or legitimacy could be relied on to strengthen the appeal of the award.

9.5 Back to Square One

So this brings us back to square one: is the award in *Rainbow Warrior*, departing as it seems to do from applicable law and the obvious way of reading the applicable law, nonetheless ethically justifiable? One other avenue is immediately closed off: it is generally accepted that tribunals may go against the law (*contra legem*) if equity so demands, but it would be difficult to squeeze the *Rainbow Warrior* into this conception – if anything, equity would have demanded the opposite of what the Tribunal decided. Or, at least, it is not immediately obvious what equity would mean here, and between whom it should apply. If the matter is framed as one between France and New Zealand, then there is something to the claim that the latter was not treated very equitably. If the case is framed as one involving two individuals following superior orders, then it becomes more persuasive to think of the Tribunal as engaged in correcting the written law by means of resorting to equity. But this particular framing in itself is not all that compelling perhaps.

Still, the discussion of judicial courage points to something else: given the escalation of the conflict between the two countries, perhaps the prudent thing to do was to defuse the situation by not sending Mafart and Prieur back, but instead opening a friendship fund. This would be in line with the terms of reference of arbitration panels generally (to settle concrete disputes), even if at the expense of one of the parties. In a world of great powers, this inevitably entails that the prudent thing to do is often to let the great powers have their way, and that is a sobering conclusion. Then again, the

virtue ethics tradition shares this with other ethical traditions: leading consequentialists have argued that humanitarian interventions should only be undertaken if there is a chance of success, which effectively means that the great powers are exempt.[52]

The problem with this explanation though is that it does not utilize what I thought could be the justification, and has no need for it: the fear for legal ramifications under the European Convention of Human Rights. If the Tribunal's aim was indeed to defuse the dispute between France and New Zealand (and this is highly plausible), then it could have done so by invoking just about any additional reason, whether possible human rights ramifications in France or anything else; and indeed human rights ramifications would, on balance, probably have been a fairly strong argument – not a conclusive one, as discussed above, but a fairly strong one. If so, then the question remains why the Tribunal did not make it explicit.

And perhaps then one is forced to conclude that sometimes a cigar is, well, just a cigar. The Tribunal decided the way it did without relying on a specific form of justification beyond the vague and unsustainable suggestion that it was merely interpreting the bilateral agreement between the two states concerned in a time-honoured manner. This, as we have seen, was not a particularly good argument, and arguably, better arguments would have been available. The point though is that none would have been invulnerable.

Now what to make of all this? In one way, the Tribunal should be applauded, as it did indeed manage to defuse a tense situation. Whether that was a task of Herculean proportions is doubtful, however: France and New Zealand have their differences,

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[52] Singer, *One World.*

especially on nuclear matters, but their relations have never been so strained as to make war a probability. This was not a James Bond-type scenario with a clock ticking inexorably and the Tribunal engaging in legal-ethical heroics to defuse a time-bomb with half a second left on the clock; it was rather the equivalent of a leisurely stroll with like-minded friends who happened to have a difference of opinion but nothing a little give-and-take could not solve. The Tribunal must have also thought that, in the end, this was a relatively minor incident: it had found the unauthorized removal of Major Mafart justified in light of his health condition, and while it was convinced that removing Captain Prieur without consent on the part of New Zealand had not been a justifiable 'necessity', it nonetheless must have felt that this was a bit of a 'first world problem': it is not like genocide or crimes against humanity had been committed, and both Mafart and Prieur had spent some time on Hao, even if not the full three years. Hence, there was possibly little interest being served by returning the two for the remainder of their three years, except obviously New Zealand's rightful indignation.

So, what France got out of this was that the policies of its secret service were not subjected to further scrutiny, and that in the end it did not have to suffer the indignity of seeing two of its agents confined at the behest of a friendly state – not for very long, at any rate. New Zealand did not get what it wanted (the return of Mafart and Prieur), but it got the satisfaction of the Tribunal condemning some of the French actions and the Tribunal recommending the establishment of a fund to promote close and friendly relations, bolstered with the suggestion that France make a starting contribution of two million US dollar, something that has sometimes been referred to as 'pecuniary compensation' for New Zealand.[53]

[53] See Yann Kerbrat, 'Interaction between the Forms of Reparation', in Crawford, et al. (eds.), *International Responsibility*, 573–587, at 577.

This suggests that maybe, from the perspective of the Tribunal, the prudent thing to do was to decide the way it did, and then hope that the fall-out would be limited. Prudence here should be understood as Aristotle's *phronesis*, practical wisdom: the wisdom of being able to recognize what course to follow given the circumstances – and those are always less than ideal.[54] The hope that fall-out would remain limited turns out to have been justified: the literature takes the *Rainbow Warrior* decision largely as a given. It is not particularly admiring of the construction the Tribunal chose, but not very critical either. The case is usually cited as authority for a number of finer points on responsibility, including the general proposition that once an obligation terminates, so too does a breach of that obligation, but without much attention for the veritable absence of reasoning on the Tribunal's part.[55] Be that as it may, neither a consequentialist nor a deontologist would have easily decided the way the Tribunal did: the latter would have been troubled by the absence of a clear mandate, and the former would have included the normative fall out (undermining the sanctity of treaties, e.g.) in the equation.

9.6 To Conclude

If all this is plausible or correct, then it would seem to follow that virtue ethics can contribute to our understanding of particular decisions taken by relevant actors in the international arena, including individuals who individually or collectively exercise a

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[54] See generally Friedrich Kratochwil, *Praxis: On Acting and Knowing* (Cambridge University Press, 2018).

[55] See, for example, Joost Pauwelyn, 'The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems', (1995) 66 *British Yearbook of International Law*, 415–450, at 443.

judicial function – such as the arbitrators deciding the *Rainbow Warrior*. Whether that renders the award the sort of award that a virtuous person would have reached – as is sometimes deemed the decisive test[56] – is a question that must be treated carefully, for two reasons.

First, most of the regular judicial virtues are to be expected as a matter of course. We assume, and need to assume, that our judges are not corrupt, that they do their work properly, that they are not drunk when deciding cases, that they keep their temper in check, etc. Judgments or awards failing on these grounds will be rare, and as a result, these virtues have fairly little analytical traction. Judicial corruption only comes in analytically when there is a clear suspicion of corruption, but not otherwise.

Second, a virtuous panel may just as easily have reached the opposite conclusion. I may contend that the decision is explicable in terms of prudence, but I could probably make a similar case had the Tribunal decided that France should return the two agents for further confinement. This too could be labelled 'prudent', albeit for other reasons. Such a panel might have appreciated the fairness of two individuals guilty of manslaughter serving what is, in the end, a fairly minimal period of time in fairly comfortable conditions. Such a panel might have thought it prudent to hold that France, as a great power, should not tell its agents to blow up ships in faraway lands. And such a panel might have thought it prudent to honour a ruling of the Secretary-General of the United Nations and a set of bilateral agreements. Prudence, it seems, can play out in a variety of ways, and if that is so, it is difficult to predict with any certitude what a virtuous person will do, or what a virtuous panel will decide.

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[56] Amalia Amaya, 'The Role of Virtue in Legal Justification', in Amaya and Ho (eds.), *Law, Virtue and Justice*, 51–66.

But perhaps that is the point. Prudence, or practical wisdom, can apply in a variety of ways, but the ways in which it applies are not unlimited. Decisions are always contextual, and what is prudent in one setting might not be prudent in the next, or might be differently prudent in the next. It is tempting no doubt, but downright impossible, to try and develop an algorithm (or even merely a general rule) telling us how to choose between competing versions of prudential action, but this only confirms what has been said about using exemplars as a virtue-related method: one should not follow someone else's example to the letter, but rather to the spirit.[57] And it seems that all things considered, the Tribunal in *Rainbow Warrior* made a serious and prudent effort to defuse an awkward political dispute. It is unlikely to have been inspired too much by human rights considerations – while intriguing and not completely impossible, this strikes too much as *ex post facto* justification. But it seems perfectly plausible that the Tribunal wanted to prevent relations between the two countries from undergoing serious and possibly permanent damage – and in this it has succeeded quite well, even if legal purists might be tempted to complain that in doing so, the Tribunal blurred the distinction between law and compromise.

The role for the virtues then, in this case, seems to be largely explanatory. It is not so much the case that the Tribunal aimed to act with particular virtue, or employed all virtues in its behaviour, but that the virtue perspective can help us understand what otherwise seems a puzzling decision: the virtue perspective can go where deontology and consequentialism cannot go. And that in itself establishes a prudent reason for not discarding the virtues in reflecting upon global governance.

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[57] Amalia Amaya, 'Exemplarism and Judicial Virtue', (2013) 25 *Law and Literature*, 428–445. More inclined to follow the exemplar's lead is Linda Trinkaus Zagzebski, *Exemplarist Moral Theory* (Oxford University Press, 2017).