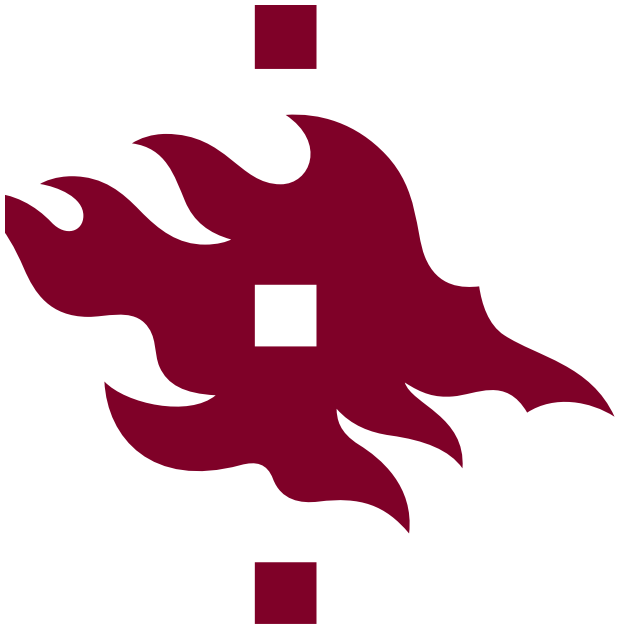

UNIVERSITY OF HELSINKI
FACULTY OF LAW

TOWARDS RESPONSIBLE GLOBAL GOVERNANCE

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Helsinki 2018

ISBN 978-951-51-4542-0 (paperback)
ISBN 978-951-51-4543-7 (PDF)

Unigrafia
Helsinki 2018

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CHAPTER 4
RESPONSIBLE RHETORIC

Lorenzo Gasbarri

I. INTRODUCTION

With the words 'Argument is everywhere, argument is unavoidable, argument is interminable, argument is all we have' begins Stanley Fish's latest book, *Winning Arguments*, in which the author brings to a broader public his academic research on interpretative communities.[1] He argues that, as happens in natural sciences as much as in social sciences, argumentation plays a major role in the historical path of a discipline. Human beings cannot escape from persuasion. Since we need a language to communicate knowledge, we always recreate a fictional reality that reproduces observed facts. He uses the allegory of the platonic cave to persuade of the correctness of this hypothesis:[2] The condition of humanity is to struggle with the shadows produced by itself against a wall of a deep cave. Objective facts exist and are behind our shoulders, but we can create knowledge and communicate it only by the means of shadows. Knowledge and communication would be easier if we could do without language. Like in the Royal Academy of Lagado (Swift's *Gulliver Travels*), professors could avoid miscommunication by substituting words with objects to carry around for the purpose of showing objective facts.[3] As George Orwell suggested, we could think 'wordlessly' and then look for the perfect word in a process of subtraction, cleaning the vocabulary until arriving at a neutral observation language.[4] We could try to avoid abstract words that do not point to any concrete thing. This is the kind of objectivism that legal formalism tries to achieve, and from its failures flourish rhetoric. To assert that the law should be kept safe from rhetoric is itself rhetoric. In global governance as much as in ancient Greek polis, the language of law is a means to persuade and shape our common future.[5]

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1 Stanley Fish, *Winning Arguments: What Works and Doesn't Work in Politics, the Bedroom, the Courtroom, and the Classroom* (New York: Harper, 2016).

2 Plato, *Republic* (New York: Barnes and Noble Classics, 2004, Jowett trans.), 514a–520a.

3 Jonathan Swift, *Guliver's Travels* (Oxford World Classics, 1986, reprint 2008), part III, ch 7.

4 George Orwell, *Politics and the English Language* (Peterborough: Broadview Press, 2006).

5 'Language is humanity's first self-ordering': Philip Allot, *Eunomia* (Oxford University Press, 1990) at 11, para 1.25.

Opposing Fish's focus on winning an argument[6], this paper develops the notion of responsible legal rhetoric: a form of rhetoric that is not aimed at getting more, at obtaining a better deal for limited interests, at 'victory' against an opponent, but that is aimed at 'taking care of our common world'. The language of international law cannot address the challenges of contemporary global society if it is only aimed at defining a winner. For instance, in addressing climate change there is no state or entity that can claim victory over another one. While in many cases it is ontologically impossible to obtain 'a better deal', the need for victory is embedded in international law and triggers the conflict between institutions. Rhetoric is the subject to study for understanding, and eventually changing, the language of international law. The next sections will comment on three arguments made in different contexts pertaining to global governance: legal responsibility of international organizations, social responsibility for climate change, and individual responsibility and the creation of the first peacekeeping mission.

Each situation will focus on a particular notion of rhetoric, defined by Aristotle's *Art of Rhetoric* as the 'three means of persuasions'.[7] The utterance 'means of persuasion' does not find an easy translation. The ancient Greek term is '*pisteis*', while a commercial edition of Aristotle's work speaks of 'three kinds of proofs that are furnished through the speech'.[8] These are the three constituent elements of rhetoric: the speech, or *logos*; the disposition of the audience, or *pathos*; the character of the speaker, or *ethos*. One of the purposes of this paper is to show their interrelations in the realm of global governance. Despite its fragmentation in different academic traditions, the constituent elements of rhetoric do not have internal hierarchy and they all take part in shaping legal debates. This paper aims at describing how there can be a responsible rhetoric without privileging one element over the other. The purpose is to identify a form of rhetoric that it is not only aimed at 'winning' an argument, but to obtain cooperation towards global common goods. As Aristotle pointed out, the art of rhetoric is not about defeating an opponent, but it is the ability 'to see the available means of persuasion'.[9]

6 For a strong criticism of Stanley Fish work (for the reason I mention, and many more), see T. Eagleton, 'The Estate Agent' in (2000) 22 *London Review of Books* 10, available at https://www.lrb.co.uk/v22/n05/terry-eagleton/the-estate-agent (accessed 3 July 2018).

7 G.A. Kennedy, *Aristotle On Rhetoric: A Theory of Civic Discourse* (Oxford University Press, 2007), at 27.

8 Aristotle, *The Art of Rhetoric* (London: Penguin Classic, 2004, Lawson-Tancred trans.), at 74.

9 Kennedy, *Aristotle on Rhetoric*, at 37.

II. THE FORM: LEGAL RESPONSIBILITY AND THE UN RESPONSE TO THE CHOLERA CRISIS IN HAITI

The academic field of rhetoric that only deals with the speech is concerned with the study of logical arguments, strictly related to syllogism and dialectic.[10] In legal practice, legal formalism shapes this logical demonstrative means of persuasion.[11] Formalism represents the establishment of a grammar over which the creation and the communication of knowledge pretend to be objective. It is an attempt to isolate and marginalize forms of rhetoric that produce ungrounded beliefs. Within legal practice, human beings create the illusion of being objective. However, pretending the existence of objective knowledge is only an argumentative attempt to claim the superiority of the method.

The limits of relying exclusively on this means of persuasion are evident when looking at the international responsibility of international organizations. Despite academic scholarship dealing with the development of an elaborate system to attribute legal responsibility, what happens in practice is the use of an unclear form of rhetoric that merges a number of unrelated themes. Logics create the illusion that an argument can be found which is objectively better than another one. Like if, in every possible context, the same reasoning would always provide the best answer.

For instance, the responsibility that the United Nations bears for the cholera outbreak in Haiti clashed against a wall of 'political and policy matters'.[12] This has been considered a 'moral and legal failure'[13], attributable to a specific misuse of the language of international law that can be tracked analysing one of the fundamental legal texts in which the UN refused to provide compensation for the victims, in particular, the communication of 21 February 2013 addressed to Mr Concannon, Director of the NGO Institute for Justice and Democracy in Haiti.

The letter comprises eight paragraphs. The distribution of the words in the text shows the preeminent use of positive terms, such as 'support', 'initiative', 'improving', 'providing'. Technical expressions appear more frequently in the middle of the letter, while the beginning and the end of the letter alternate formal legal reasoning and emotional involvement. It is useful to divide the text in three sections: the introduction consisting of two paragraphs, the body of the text containing

10 Stephen E. Toulmin, *The Uses of Argument* (Cambridge University Press, 2003 [1958]).

11 Duncan Kennedy, 'Legal Formalism', in Neil Smelser and Paul Baltes, *Encyclopedia of the Social and Behavioral Sciences* (Amsterdam: Elsevier, 2001) 8634.

12 I will not recall in detail the legal battle to give redress to the victims of the cholera outbreak. Among the large number of references on the case, see M. Buscemi, 'La codificazione della responsibilità elle organizzazioni internazionali alla prova dei fatti. Il caso della diffusione del colera ad Haiti', (2017) *Rivista di Diritto Internazionale* 989.

13 Alston Report, Extreme poverty and human rights, UN Doc. A/71/367, 26 August 2016, para. 3.

four paragraphs, and a conclusion of two paragraphs. The letter is a patchwork of different themes, merging empathy concerning the catastrophe, the United Nations' role in alleviating the sufferance of the population, and formal legal arguments, to dismiss the claims. These three themes are not orderly divided but tend to appear in competition with each other. The analysis will focus on the form of the letter and its capacity to persuade the audience as being logically sound. From this perspective, rhetoric is the capacity to rationally persuade an audience: "a sound argument, a well-grounded or firmly-backed claim, is one which will stand up to criticism, one for which a case can be presented coming up to the standard required if it is to deserve a favourable verdict".[14] It is here reproduced in full in italics, with my commentary between the above-mentioned sections.[15]

> *21 February 2013*
>
> *Dear Mr Concannon:*
>
> *I refer to your letter of 3 November 2011 to the Secretary-General, transmitting claims against the United Nations related to the cholera outbreak in Haiti. With respect to these claims, you seek compensation for individuals affected by the cholera outbreak and an agreement with the Government of Haiti in order to establish and fund a nationwide program for clean water, adequate sanitation and appropriate medical treatment to prevent the further spread of cholera.*
>
> *The United Nations is extremely saddened by the catastrophic outbreak of cholera, and the Secretary-General has expressed his profound sympathy for the terrible suffering caused by the cholera outbreak. The cholera outbreak was not only an enormous national disaster, but was also a painful reminder of Haiti's vulnerability in the event of a national emergency.*

The first paragraph is rather formal, and in plain legal language recalls the reason for writing. From the outset, the letter appears as a private communication, which was not intended to have unexpected publicity. The second sentence contains two relevant omissions. Besides compensations and actions of relief, the petition included the request to establish a standing claim commission pursuant to the

14 Toulmin, *The Uses of Argument*, at 8.

15 The original can be found at this link: http://www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf.

Status of Forces Agreement (SOFA) between the UN and Haiti to hear claims in a fair, impartial and transparent manner. Secondly, it asked for public apologies, including an acknowledgment of the facts and an acceptance of responsibility.[16] These omissions in the reply are particularly relevant. From a legal standpoint, the reply explicitly ignores the obligation included in the agreement concluded with the government of Haiti. Here is a failure of logic motivated by a contextual factor which is, for the moment, unknown to the reader.

There is no logical connection between the first and the second paragraphs. The tone of the language of the two paragraphs is different, and the second paragraph includes a form of diplomatic empathy for the victims. However, the last sentence is brutal in clarifying from the outset that the petitioners will not obtain anything except pity. Indeed, it blames the general situation of the state for the specific allegation of the cholera epidemic. The only rhetorical effect of this sentence is to infuriate the reader. If this is the line of defence, the audience needs to be prepared, maybe discussing first the conclusions of the 2011 panel on the causes of the outbreak and not waiting for the fifth paragraph.

> *From the very early stages of the epidemic, the United Nations, along with its partners, has expended considerable effort and resources in combating cholera and improving Haiti's water and sanitation facilities, as well as on training, logistics and early warning systems.*
>
> *To date, the United Nations has expended $118 million in support of such efforts, including, for example, by (i) providing over 9 million critical items (aquatabs, soap, medical equipment, etc.) to the Ministère de la Santé Publique et de la Population (MSPP); (ii) assisting in the expansion of the community-based health network by establishing and upgrading cholera treatment facilities and oral rehydration points across the country, as well as mapping health partners and medical stocks in each commune; (iii) providing latrine sewage management in nearly 1,500 sites, improving handwashing and toilet facilities in 240 schools and constructing the first two human waste treatment plants at Croix-des-Bouquets and Morne-à-Cabrit; (iv) assisting in establishing nearly 700 water points and temporary chlorination points, improving water supplies to the most vulnerable areas in Port-au-Prince and Petit Goave, including by installing 4,000 small and four large filtration systems in public institutions, and improving water, sanitation and hygiene conditions in remote rural*

16 Available here: http://www.ijdh.org/2011/11/topics/law-justice/chief-claims-unit-minustah-log-base-room-no-25a-boule-toussaint-louverture-clercine-18-tabarre-haiti-ijdh-bai/. See Section VII, Request for Relief.

> *areas; (v) providing technical support to the Direction Nationale de l'Eau Potable et de l'Assainissement (DINEPA) to develop a water quality monitoring system for health institutions in the Port-au-Prince metropolitan area, as well as in 140 municipalities in Haiti; (vi) implementing over 70 projects to improve flood mitigation and watershed institutions in the Port-au-Prince metropolitan area, as well as in 140 municipalities in Haiti; (vi) implementing over 70 projects to improve flood mitigation and watershed management in vulnerable areas; (vii) supporting the completion of the 2012 cholera contingency plan in collaboration with the Pan-American Health Organization (PAHO); (viii) supporting community-based hygiene campaigns which have trained over I ,400 trainers and 5,200 community workers and that has reached approximately 700,000 families; and (ix) providing logistics support to move personnel and supplies, including 400 metric tons of health, water adduction and sanitation materials.*
>
> *Additionally, in January 2011, the Secretary-General formed an independent panel of four independent experts (the "Panel") with a mandate to investigate and seek to determine the source of the 2010 cholera outbreak in Haiti. In its report dated 4 May 2011, the Panel concluded that the outbreak was caused by a confluence of circumstances and was not the fault of, or deliberate action of, a group or individual.*
>
> *Most recently, on 11 December 2012, the Secretary-General launched his Initiative for the Elimination of Cholera in Haiti. The Initiative, developed through a partnership between PAHO, UNICEF and the MSPP, which aims to strengthen Haiti's own National Cholera Elimination Plan and to mobilize significant new resources and support for the Haiti component of the Hispaniola Cholera Elimination Plan. The Initiative will support prevention and treatment measures, water and sanitation projects, as well as the vaccination campaign being led by the Government of Haiti. Linked to the Initiative, bilateral and multilateral donors are contributing significant funding to support the implementation of ongoing immediate and long-term elimination efforts. Moreover, the United Nations has committed a further $23.5 million in support of the Secretary-General's Initiative.*

This is the body of text, in which the author should lead the reader from the premises to the conclusions. Here the effect is the opposite. There is no relation of causal logic between the claims for compensation and what the UN has done after the

commission of the harm. However, the letter reveals an implicit internal coherence, based on a particular concept of the United Nations which prevents it from "doing harm". This is the main argumentative flaw from a logical standpoint. What the organization does is to perform attributed functions, and these functions cannot do harm. As Jan Klabbers commented, this tragic episode illustrates the limits of functionalism: "Under functionalism, organizations only perform lawful tasks – otherwise, how could they have possibly been created?"[17] This is the contextual factor that induced the Office of Legal Affairs to ignore the request for a claim commission that would have been the first of its kind. Indeed, the larger part of the argument is used to list UN actions that have taken place after the cholera outbreak. Coherently, under functionalism the only defensive strategy of the Legal Adviser is to show all the lawful tasks in which the organization is involved, but this can only constitute an answer to a different question. There is not logical connection between the premises of the first paragraph and the body of the text. The UN looks like a broken machine only capable of repeating standard affirmations in response to new questions.

The only attempt to address the causes of the outbreak and to defend the organization from the frontal attack is in the third paragraph of this section. In two sentences the letter dismisses the proofs put forward by the petitioners concerning UN responsibility. There is no motivation that could explain the position of this paragraph in the text, since it is clearly unrelated to the actions of relief provided by the organization. It copy-pastes lines from the conclusion of the 2011 panel[18], inserted in the text between past actions and future intentions.

> *With respect to the claims submitted, consideration of these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946.*
>
> *The United Nations is dedicated to continuing its efforts to take concerted action to eliminate cholera from Haiti and to assist the Government of Haiti in building an adequate public health system which will reduce the risks posed by any future catastrophic events and will ensure the well-being of the Haitian population.*

17 Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law', (2015) 26 *European Journal of International Law* 9, at 73.

18 "… the Haiti cholera outbreak was caused by the confluence of circumstances as described above, and was not the fault of, or deliberate action of, a group or individual". See http://www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf (2011 UN Panel).

After the body of the text, the last two paragraphs should contain a consequential conclusion. However, there is not a syllogistic relation between all the sections of the letter and the sudden conclusion does not appear as logically sound. This is not only a problem of legal reasoning concerning the distinction between public and private claims.[19] What is lacking is a motivation that could persuade the audience and a clear understanding of the context in which the argumentation was performed. Only one year and a half before, the same legal counsel signed a similar letter to dismiss claims of compensation for damage to health suffered by lead contamination in certain internally displaced persons camps in Kosovo.[20] The legal reasoning was the same, founded on the distinction between private and public claims, considered in section 29 of the Convention on the Privileges and Immunities of the United Nations. However, the form of the letter and its context was completely different. In the absence of a public campaign in support of the victims, the tone of the letter is strictly legal and successful:

> *25 July 2011*
>
> *Dear Madam,*
>
> *I refer to previous correspondence to this Office and to the Special Representative of the Secretary-General, UNMIK, in respect of the above-mentioned claim. I regret the delay in responding to you.*
>
> *In your letters, you assert certain claims against the United Nations for damage to health suffered by your clients as a result of lead contamination in certain Internally Displaced Person (IDP) camps in Mitrovica. Kosovo. With respect to these claims, it is asserted that your clients are entitled to compensation and other remedies pursuant to General Assembly resolution A/RES/52/247.*
>
> *The existing legal framework for the Organization to receive claims is set forth in Section 29 of the 1946 Convention on the Privileges and Immunities of the United Nations (the "General Convention"). Section 29 of the General Convention provides that the Organization shall make provisions for appropriate modes of settlement in disputes either arising out of contract or disputes of a private law character to which the United Nations is a party. General Assembly Resolution A/*

19 Riccardo Pavoni, 'Choleric notes on the Haiti Cholera Case', (2015) *Questions of International Law*. Available at http://www.qil-qdi.org/choleric-notes-on-the-haiti-cholera-case/.

20 Available at http://www.sivola.net/download/UN%20Rejection.pdf.

RES/52/247 sets forth parameters regarding third- party liability and compensation in disputes of a private law character.

As you are aware, the IDP camps came into existence as a result of a major population displacement during the Kosovo conflict in 1999 and are located in the proximity of long-established residential areas in Northern Mitrovica. As noted in your previous communications, the Mitrovica region has a long history of major industrial pollution, including lead contamination from the Trepca mine.

While the UN acknowledges the concerns raised by your clients, after having carefully reviewed and considered the claims advanced in your letters, we note that the claims asserted involve alleged widespread health and environmental risks arising in the context of the precarious security situation in Kosovo. The claims do not constitute claims of a private law character and, in essence, amount to a review of the performance of UNMIK's mandate as the interim administration in Kosovo. Based on the framework established by the Member Slates, therefore, the claims are not receivable under Section 29 of the General Convention or General Assembly Resolution A/RES/52/247. Accordingly, we are not in a position to accede to your request to receive these claims.

Notwithstanding the above, we would note that, while having no legal obligation to do so, UNMIK has taken substantial steps to improve the condition of the IDP population. Notably, in 2000, when the Trepca mine unilaterally resumed operation, UNMIK closed the smelter down. Moreover, since 2000, UNMIK and the international community, in consultation with IDP representatives, as well as representatives of the local structures in Kosovo have expended considerable resources in the protection and assistance of the IDP population, including the relocation of camp residents to Osterode camp and to newly constructed housing in the Roma Mahalia.

Nothing in this communication shall be deemed a waiver, express or implied, of the privileges and immunities of the United Nations, including its subsidiary organs, which are hereby expressly reserved.

The difference in persuasive force is striking. The legal reasoning is the same, but the logical form of the argument is completely different. Knowledge and truth do not precede the argument, but, rather, they emerge from it and it is valuable for a

particular context. Formalism, among which legal formalism, cannot achieve what it promises and other means of persuasion will always disrupt its endeavour.

The indeterminacy of language is what characterizes human condition. In law, there is a presumption that subjectivism is negative, something to avoid for the sake of justice. On this view, if we leave too much space to rhetoric, it will misconceive reality and it will make us believe that, for instance, climate change does not exist or that state X is the enemy of the day. Thus, better to keep the law far from rhetoric and believe that it is in the text. Protected by the shield of technical and professional roles provided by formalism, jurists can foster any kind of value or political agenda underneath their opinion.

III. THE VALUES: SOCIAL RESPONSIBILITY AND CLIMATE CHANGE

The second category of rhetorical means of persuasion concerns the ability to provoke emotions through the manipulations of the values recognized by the audience.[21] This is the realm of rhetoric understood as the capacity to manipulate reality to serve the purposes of the speaker. The traditional bias against rhetoric is described by Plato in the dialogue *Gorgias*, in which Socrates distinguishes between the persuasion that produces knowledge, offering reasons for holding a belief, and the persuasion that imposes on the audience a psychological pressure which produces an ungrounded belief.[22] Gorgias contends that rhetoric is a means that can be used either for good or bad purposes. On this conception, rhetoric becomes the art of modifying reality for the purposes of the speaker. The work of the rhetorician is to study the audience in order to find a common background over which one can look credible, and to slowly persuade this audience of her new truth. Often, what a rhetorician does in this context is to sell doubts to dismantle a previous belief.

Among various examples, it is interesting to read the debates surrounding the adoption of legal measures to tackle climate change. The speech given by the President of the Czech Republic, Václav Klaus, addressing the UN Climate Change Conference on the 24th of September 2017 is a remarkable example:[23]

21 Chaim Perelman and Lucie Olbrechts-Tyteca, *Traité de l'Argumentation. La Nouvelle Rhétorique* (Brussels: Éditions de l'Institut de Sociologie de l'Université Libre de Bruxelles, 1971).

22 Plato, *Gorgias* (London: Penguin Classic, 2004, Hamilton trans.).

23 Available at http://www.un.org/webcast/climatechange/highlevel/2007/pdfs/czechrepublic-eng.pdf.

Distinguished colleagues, ladies and gentlemen,

As responsible politicians, we know that we have to act when it is necessary. We know that our duty is to initiate public policy responses to issues that could pose a threat to the people of our countries. And we know that we have to form partnerships with colleagues from other countries when a problem cannot be confined to national boundaries. To help us doing it is one of the main reasons for the existence of institutions such as the United Nations.

The beginning is aimed at building trust between the speaker and the audience. It recalls what they have in common and how to face common challenges. Speaking at the UN Climate Change Conference, President Klaus is in the lion's den. Everyone knows already that he is going to speak against the UN efforts to tackle climate change with a legal framework, and he starts by creating a common background: we are all responsible politicians who care about their own constituents.

However, the politicians have to ensure that the costs of public policies organized by them will not be bigger than the benefits achieved. They have to carefully consider and seriously analyse their projects and initiatives. They have to do it, even if it may be unpopular and if it means blowing against the wind of fashion and political correctness. I congratulate Secretary General Ban Kimoon on organizing this conference and thank him for giving us an opportunity to address the important, but until now one-sidedly debated issue of climate changes. The consequences of acknowledging them as a real, big, imminent and manmade threat would be so enormous that ***we are obliged to think twice before making decisions. I am afraid it is not the case now*** *[Bold in the official Transcription].*

'However': this is the first doubt. We know that we all are responsible politicians, but what does a responsible politician look like? What if our efforts are not aimed at the goal we all share?

Klaus builds his argument in three steps:

Let me raise several points to bring the issue into its proper context:

1. Contrary to the artificially and unjustifiably created worldwide perception, ***the increase in global temperatures has been – in the last years, decades and centuries – very small in***

> ***historical comparisons and practically negligible in its actual impact upon human beings and their activities.***
>
> ***2. The hypothetical threat connected with future global warming depends exclusively upon very speculative forecasts, not upon undeniable past experience and upon its trends and tendencies.*** *These forecasts are based on relatively short time series of relevant variables and on forecasting models that have not been proved very reliable when attempting to explain past developments.*
>
> *3. Contrary to many selfassured and selfserving proclamations, there is* ***no scientific consensus about the causes of recent climate changes****. An impartial observer must accept the fact that both sides of the dispute – the believers in man's dominant role in recent climate changes, as well as the supporters of the hypothesis about their mostly natural origin – offer arguments strong enough to be listened to carefully by the nonscientific community. To prematurely proclaim the victory of one group over another would be a tragic mistake and I am afraid we are making it.*

Klaus' first step is to ask: What if scientists are wrong? The paragraphs above form a perfect example of the fight between the two forms of rhetoric we have encountered insofar. On the one hand, there are the scientists, pretending to provide objective truths in a world of uncertainties – to provide the logical thought that seeks to overthrown subjectivism. On the other hand, there are the values that we all share, we, the common people, who have the right to be able to define truth without imposition from self-proclaimed authorities. He plays as a 'merchant of doubts'.[24]

> *As a result of this scientific dispute, there are those who call for an imminent action and those who warn against it.* ***Rational behaviour should depend on the size and probability of the risk and on the magnitude of the costs of Its avoidance.*** *As a responsible politician, as an economist, as an author of a book about the economics of climate change, with all available data and arguments in mind, I have to conclude that* ***the risk is too small, the costs of eliminating it too high and the application of a***

24 Naomi Oreskes and Eric Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* (London: Bloomsbury, 2010).

fundamentalistically interpreted "precautionary principle" a wrong strategy.

The second step is the substitution of authority. Klaus calls rationality on his side, showing himself to be a different kind of scientist from the ones mentioned above. Not only does he know better, he is a responsible politician. He artificially – and artfully – creates an opposition between good science and bad science.

> *5. The politicians – and I am not among them – who believe in the existence of a significant global warming and especially those who believe in its anthropogenic origin remain divided: some of them are in favor of mitigation, which means of controlling global climate changes (and are ready to put enormous amounts of resources into it), while others rely on adaptation to it, on modernization and technical progress, and on a favorable impact of the future increase in wealth and welfare (and prefer spending public money there).* ***The second option is less ambitious and promises much more than the first one.***

> *6. The whole problem does not only have its time dimension, but a more than important spatial (or regional) aspect as well. This is highly relevant especially here, in the UN. Different levels of development, income and wealth in different places of the world make worldwide, overall, universal solutions costly, unfair and to a great extent discriminatory. The already developed countries do not have the right to impose any additional burden on the less developed countries. Dictating ambitious and for them entirely inappropriate environmental standards is wrong and should be excluded from the menu of recommended policy measures.*

Finally, in the third step Klaus proposes his solutions to the problem. The irresponsible politicians who believe in climate change are divided and do not know how to tackle a problem that, in reality, does not exist. The core of his argument is presented as a direct consequence: the measures that the UN wants to adopt to tackle climate change are too costly. Suddenly, the audience is no longer sharing the same values, but they all have different exigencies concerning different levels of development. Good science versus bad science is here reproduced as developed versus less developed countries.

> *My suggestions are as follows:*

> *1.* ***The UN should organize two parallel IPCCs and publish two competing reports.*** *To get rid of the onesided monopoly is a sine qua non for an efficient and rational debate. Providing the same or comparable financial backing to both groups of scientists is a necessary starting point.*
>
> *2. The countries should listen to one another, learn from mistakes and successes of others, but* ***any country should be left alone to prepare its own plan to tackle this problem*** *and decide what priority to assign to it among its other competing goals.*
>
> *We should trust in the rationality of man and in the outcome of spontaneous evolution of human society, not in the virtues of political activism. Therefore, let's vote for adaptation, not for the attempts to mastermind the global climate.*

Conclusions: first, it is necessary to include other perspectives in the debate. Ignoring his pledge for saving resources, Klaus proposes to double the effort. Second, freedom. Each country should be left alone. This is the aim of the speech: to prevent the adoption of new legal instruments. The speech started from endorsing the common value of international cooperation and ended in its exact opposite, claiming that any country should be left alone.

This story tells a lot about the power of this form of rhetoric in shaping political discourse. Values do not have the pretence to be objective and create truths, and they are a powerful weapon against any use of rationality and logical forms that pretends to create true knowledge. Argumentation is a value-oriented activity. Chaim Perelman has examined the distinction between the persuasion of an ungrounded belief and the persuasion that produces knowledge in his *Nouvelle Rhétorique*, in which he considered that "le domaine par excellence de l'argumentation, de la dialectique et de la rhétorique, est celui où interviennent des valeurs".[25] In *Nouvelle Rethorique*, Perelman focuses on *les valeurs* as the common background over which argumentation plays its role. Justice, one of the most powerful human feelings, shapes the moral acceptance of the argument. It is the 'rhetoric of justice', under which acceptance of interpretation is obtained through the appeal to common values: "They appeal to a sense of justice and seek to find acceptance for interpretations by inducing a belief in the rightness of their interpretations".[26] This notion of rhetoric is

25 Chaim Perelman, *Logique juridique. Nouvelle rhétorique* (Paris: Dalloz, 1976).

26 Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press, 2012), at 198.

limited by a fight between values. What matters is how to persuade of the rightfulness of a belief.

IV. THE VIRTUES: INDIVIDUAL RESPONSIBILITY AND PEACEKEEPING MISSIONS

Finally, I will address the third element that constitutes rhetoric, concerning the ethical quality of the speaker and the speaker's capacity to be 'worthy of credence'.[27] Aristotle describes the character of the speaker in terms of the theory of virtues described in the *Nicomachean Ethics*.[28] Virtues are certain dispositions of character that enable an agent to reach a certain good. However, this is not an objectively good end. Even if the number of different theories on virtue ethics are equal to the number of virtue ethicists, the present paper is based on an anti-foundationalist approach that refuses to accept the existence of natural predispositions towards objective ends. Aristotle's *eudaimonia*, as the aim of human beings, has to be relativized and seen in the context of the ancient Greek society.[29] Individuals can 'flourish' in different social contexts, and flourishing may actually entail opposite virtues. Achieving sainthood in Christianity or being a 'sincere Nazi' are the products of different virtues.[30] Legal practice may consider as virtues some qualities that are not considered as virtues in political practice or in managerial practice within corporations.[31]

Consequently, I cannot describe the role of virtue argumentation in abstraction from the context in which the argumentation takes place.[32] What seems to be a virtue in one argumentative situation could very well be a vice in another. Ethical choices are made in the context of values and logical arguments, developing a unique field of research. A good argumentation strengthens the belief system and the practice in which the virtues are created. One of the reasons to turn to ethics for describing global governance is that positive rules are 'not good enough'. Rules have a difficult job in constraining the interpreter, regardless of whether they are perceived as formal law or as argumentative instances, accumulated trends of past decisions, or coercive techniques of violence that reproduce social hierarchies. Scholarship on legal interpretation has described the process and the extent by

27 Recently, a new academic field has been suggested under the label 'Virtue Argumentation'. See Andrew Aberdein and Daniel H. Cohen, 'Introduction: Virtues and Arguments', (2016) 35 *Topoi* 339.

28 Aristotle, *Nicomachean Ethics* (London: Penguin Classics, 2004, Johnson trans.).

29 Alasdair MacIntyre, *A Short History of Ethics* (Abingdon: Routledge, 1998 [1966]).

30 Euan MacDonald, *International Law and Ethics after the Critical Challenge* (Leiden: Martinus Nijhoff, 2011), at 194.

31 Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles* (Cambridge University Press, 2001), at 21.

32 David Godden, 'On the Priority of Agent-Based Argumentative Norms', (2016) 35 *Topoi* 345.

which the indeterminacy of law becomes a source of norm-creation.[33] These analyses conclude that the study of the international society only by means of its rules is not enough to describe, and eventually prescribe, the behaviour of international actors. From this starting point derives the attempt to describe legal choices also in terms of ethical choices, and to expose how the functioning of international law is inextricably linked with the individual capacity to perceive and act on what is right and what is wrong.[34]

Normative ethics, and in particular virtue ethics, has the merit of putting individuals at the centre of the investigation.[35] Indeed, another reason to approach global governance from an ethical perspective concerns the Copernican revolution that puts individuals at the centre of the investigation.[36] Virtue ethics does not focus on doing but on being. The aim of the virtuous legal agent is not the legal decision but the virtue argumentation.[37] It is not about winning an argument but being a good arguer. It is concerned with the creation of a model or an ideal observer.[38] Actors internalize a 'regulative ideal', a certain concept of correctness or excellence to be used as a comparison and conform to this standard.

> *Consider this speech:*
>
> *1. Yesterday morning – on the basis of the information then available – I would have used my right to call for an immediate meeting of the Security Council, had not the United States Government in the course of the night taken the initiative.*
>
> *2. Yesterday afternoon – on the basis of reports of the Anglo-French ultimatum to Egypt – I would have acted likewise, had not the substance of the matter already been under consideration as one new aspect of the item proposed by the United States.*
>
> *3. This morning, under my special mandate from the Security Council, which still is formally valid, I would have directed an appeal*

33 See e.g. Venzke, *How Interpretation Makes International Law*.

34 Martti Koskenniemi, "The Lady Doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law', (2002) 65 *Modern Law Review* 159.

35 G.E.M. Anscombe, 'Modern Moral Philosophy', (1958) 33 *Philosophy* 1, is usually considered as the starting point of a new interest in virtue ethics. See Roger Crisp and Michael A. Slote (eds.) *Virtue Ethics* (Oxford University Press, 1997).

36 Hersch Lauterpacht, 'The Subjects of International Law', in Elihu Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht, Volume I: The General Works* (Cambridge University Press, 1970) 136, at 149.

37 Katharina Stevens, 'The Virtuous Arguer: One Person, Four Roles', (2016) 35 *Topoi* 375.

38 Oakley and Cocking, *Professional Roles*, at 11.

to the Governments of Israel and Egypt to the effect of the second draft resolution of yesterday, had not the most recent developments rendered my mandate and such an initiative pointless.

4. This afternoon. I wish to make the following declaration: The principles of the Charter are, by far, greater than the Organization in which they are embodied, and the aims which they are to safeguard are holier than the policies of any single nation or people. As a servant of the Organization, the Secretary-General has the duty to maintain his usefulness by avoiding public stands on conflicts between Member nations unless and until such an action might help to resolve the conflict. However, the discretion and impartiality thus imposed on the Secretary-General by the character of his immediate task may not degenerate into a policy of expediency. He must also be a servant of the principles of the Charter, and its aims must ultimately determine what for him is right and wrong. For that he must stand. A Secretary-General cannot serve on any other assumption than that – within the necessary limits of human frailty and honest differences of opinion – all Member nations honour their pledge to observe all Articles of the Charter. He should also be able to assume that those organs which are charged with the task of upholding the Charter will be in a position to fulfil their task.

5. The bearing of what I have just said must be obvious to all without any elaboration from my side. Were the members to consider that another view of the duties of the Secretary-General than the one here stated would better serve the interests of the Organization, it is their obvious right to act accordingly.

This speech was given by the Secretary General of the United Nations Dag Hammarskjöld at a meeting of the Security Council on the 31st of October 1956.[39] Two days before, Israel had attacked Egypt, followed by the pre-conceived Franco-British ultimatum to both parties. In this speech, Hammarskjöld is defending the role of the United Nations, confronted with a flagrant violation of the Charter. In a moment in which the UN was set aside, he imposed its role, recalling all the steps that the organizations can take without the initiative of member states. This was the first speech that led to the first application of the 'United for Peace' resolution,

39 Available at http://repository.un.org/handle/11176/84005.

and, eventually, to the creation of the United Nations Emergency Force (UNEF) and other peacekeeping missions.[40]

Hammarskjöld's speech is a good example of how a crisis offers potential to exploit a scope for action. The absence of a legal framework on which to establish an argumentation based on logical arguments left space to the qualities of the speaker of being 'worthy of credence', which ends up reinforcing the values and the system of belief he represented. Offering resignation is a rhetorical means to persuade of the rightfulness of the purposes of the UN Charter which he is representing. Hammarskjöld strengthened its system of beliefs by presenting himself as a standing example opposing un-virtuous behaviour. Focusing on the arguer instead of the argument means to accept the importance of the context in argumentation and reduces the need to find a winner or an objectively good argument that can defeat any opponent. The scope of virtue argumentation is to strengthen the belief system enabling the agents to make the best informed and justified choice.[41]

Virtuous arguers are particularly important in global governance, where the belief system is in continuous development and influenced by the interactions of different cultures. In this context, the virtue arguer is the one who seeks to define the common good. She knows that it is not an objectively common good, but it is the arguer's individual responsibility in that particular situation.

V. CONCLUSION

Meet three hypothetical judges of the International Court of Justice: Oliver, Johanna and Marsha.[42] They had to decide whether the Court has jurisdiction to hear the claims submitted by the Marshall Islands against United Kingdom, India and Pakistan, in the case *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*.[43]

Oliver believes in law as the apolitical application of rules derived by reason. His only focus is on formalist arguments to strengthen the international legal system and the role of the World Court. He knows what is a strong and a weak argument in law, and his aim is to find a winning argument that can be as objective as possible in order to set a precedent and contribute to the development of cooperation among

40 Manuel Fröhlich, *Political Ethics and the United Nations: Dag Hammarskjöld as Secretary-General* (Abingdon: Routledge, 2008), at 148.

41 Stevens, 'The Virtuous Arguer'.

42 The example is taken from H. Jefferson Powell, *Constitutional Conscience: The Moral Dimension of Judicial Decision* (Chicago Il: University of Chicago Press, 2008), at 20. The names of the judges are the same; the Court and the issue at stake is adapted to the needs of the present discussion.

43 *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands v. United Kingdom), Preliminary Objections, [2016] ICJ Reports 833.

nations. In the context of the Marshall Islands case, he is convinced that the best logical argument is in favour of dismissing the case for the absence of a dispute between the parties. He supports his argument with logical means of persuasion, believing that it will enhance the confidence that States have for the Court.

Johanna is the flag-bearer of a progressive political movement that seeks to bring international law closer to individuals. She sees judging as a means to advancing whatever political outcome she thinks is the best. Her judging is often a fight between states and individuals, trying to reinforce a system of values that protects human beings. She knows that any application of the law is political, that even Oliver has a political agenda, and that he cannot escape from that. She believes in the morality of law and in her role to use logical arguments to reinforce her values. In the context of the Marshall Islands case, she is convinced that the best logical argument should be used in favour of upholding jurisdiction and dismiss the preliminary objection on the absence of a dispute between the parties. This is a way to be in peace with her conscience to do the outmost to develop her ideal system of law, which is engaged in a perennial fight against an enemy seen as 'formalist arguments'. The authority of the Court and its respect by states can only guaranteed if values are at the centre of its endeavour.

Finally, Marsha represents the third means of persuasion, developed in accordance with ethical training on the substance of what it means to be a virtuous judge. She realizes that the pure bureaucratic mind-set and the pure value-based mind-set cannot be discerned from one another and that legal argumentation must be the composition of three sources of persuasion: the speech/text reflects the idealism based on the grammar established by legal formalism; the audience reflects political realism based on the relevant values; and the speaker reflects the ethical component of the virtues. She accepts the role of both perspectives in argumentation, but she adds a third fundamental element which concerns the person who takes the decision. In the context of the *Marshall Islands case*, she is convinced that there is no argument that can be objectively better than another one; the matter is only a question of perspective. Rhetoric shapes any argument on the basis of the points of views and there is no real winner before the Court. She believes that the fight between logical arguments and values is pointless. Putting at the forefront her capacity to take a good decision justified by her being a good person she intends to initiate a dialogue with the aim of strengthening the common belief system.