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CONFERENCE OF INTERNATIONAL INVESTIGATORS

OFFICE OF THE INSPECTOR GENERAL OF THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALERIA

16TH CONFERENCE, MONTREUX SWITZERLAND

FRANZ-HERMANN BRÜNER MEMORIAL LECTURE 2015

CORRUPTION, PROPORTIONALITY AND THEIR CHALLENGES

30 SEPTEMBER 2015

The Hon. Michael Kirby AC CMG

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CHAMPIONS OF INTEGRITY: BRÜNER AND O'KEEFE

It is a privilege to be invited to give the Brüner Memorial Lecture. The first such lecture was given by my friend and late judicial colleague in Australia, Barry O'Keefe. He delivered it on 6 June 2010 in Nairobi, Kenya, five months after Franz-Hermann Brüner died. The lecture was substantially in the form of a biographical reflection. It is as well to remember the main outlines of the life of Brüner. As the years pass, fewer will have known him personally.

Franz-Herman Brüner was born in Hesse in Germany, shortly after the end of the Second World War. He trained in the discipline of law in Bavaria. At first he was an investigating judge and then (1981-98) a prosecutor in the German legal system.

[*] Text for an address to the Conference of International Investigators, Montreux, Switzerland, 30 September 2015. The address was delivered as the Franz-Hermann Brüner Memorial Lecture 2015.

[**] Justice of the High Court of Australia (1996-2009); President of the International Commission of Jurists (1995-8); Member of the Equitable Access Initiative of the Global Fund (2015-16); Member of the Pacific Friends of the Global Fund (2007-); Member of the Secretary-General's High Level Panel on Access to Essential Healthcare (2015-16)

In 1998 Brüner commenced work in the Anti-Fraud Office of the High Representative for Bosnia and Herzegovina. In 2000, he joined the European Anti-Fraud Office, established to protect the integrity of financial dealings in the European Union. He paid particular attention to harmonisation of the practice of investigators. The staff of the Office grew to 500 employees, with an annual budget of €60 million.

In 2003, Brüner met Barry O'Keefe, who, at that time, was a Judge of the Supreme Court of New South Wales in Australia. The two men found that they shared many interests in common.

In 2006, Brüner was elected the first chair of the Conference of International Investigators. He helped establish the International Anti-Corruption Academy. This was only established because of the persistence and support of the United Nations Office on Drugs and Crime (UNODC) and the Government of Austria. The Academy opened its doors in October 2010, nine months after Brüner's death in consequence of a melanoma.

Barry O'Keefe, in Australia, had been a brilliant advocate with a huge legal practice. For a long time, his public service was mainly devoted to local government. He became a councillor and later mayor of one of the most substantial and beautiful harbour side suburbs of Sydney. The high respect he enjoyed in the legal profession was shown by his election, in 1989, as President of the Bar Association in his State. He also took a leading part in the work of the National Trust of Australia. However, by 1989, he was becoming increasingly involved in issues of international governance and anti-corruption.

Between 1993-2004 Barry O'Keefe served as a judge of the Supreme Court of New South Wales and later Chief Judge of its Commercial Division. During this service he was seconded to be Commissioner of the Independent Commission Against Corruption (ICAC) (1994-99). Because of this post he joined the Conference of International Investigators. He also joined many international groups of experts on anti-corruption strategies and good governance. One of the last times I saw him was when he chaired a major international conference on anti-corruption in Bangkok, Thailand.

Barry O'Keefe, like Franz-Hermann Brüner, died too young. In his speeches and advice, he insisted that financial inspectors should not be fanatical. They should be persistent but fair. They should act only on admissible and convincing evidence. They should display ingenuity: looking for the motivation of those who stray from integrity. They should exhibit sound judgment at all times.

The theme of this 2015 conference is most appropriate for these two honoured guardians of integrity. And for the legacies they have left to us. It is always useful to remember those whose lives are faithfully engaged in investigation, prosecution and the law. But also those whose lives are impacted by defalcation, infidelity to duty and neglect of proper standards. These are lessons that Brüner and O'Keefe left to us their successors.

A NEW VIEWPOINT AND BACKGROUND

I come to this address from a background that is relevant to the concerns of this Conference. But not proximate.

For most of my life, like Brüner and O'Keefe, I served as a lawyer, advocate and judge. In Australia, unlike the civilian tradition of law, there is a great divide between the judiciary, on the one hand, and inspectors and prosecutors on the other. Before the judges, the inspectors are simply witnesses, whose evidence has no special standing. Prosecutors have no privileged place in the courtroom, certainly not on or near the bench. They sit at the Bar table, equally with the representatives of the accused. This is the tradition in which I was raised.

In the Federal judiciary, in Australia, there is a specially strict separation of the judiciary from the agencies of the Executive Government. Their respective powers cannot be comingled.[1] This sometimes leads to inconvenience and artificialities. But it is part of the established constitutional law of Australia. In the states of Australia, the strictness of the separation is traditional, but not generally as strict or constitutionally required. That is how O'Keefe came to fulfil both a state judicial function and the executive function as ICAC Commissioner. That could not happen in the federal sphere in Australia.

Inferentially, my proponent for the honour of giving this lecture was the Global Fund against AIDS, Tuberculosis and Malaria (GF). Until recently, I have had little contact with the GF. About 10 years ago, I joined the Pacific Friends of the GF, established to promote awareness in government and support for its work in Australia and the Pacific. More recently, I have been appointed to a panel of GF exploring its Equitable

[1] *The Queen v Kirby*; *ex parte Boilermakers' Society of Australia (Boilermakers Case)* (1956) 194 CLR 254; Cf. D. Thomson, "The Separation of Powers Doctrine in the Commonwealth Constitution: *The Boilermakers' Case*" (1958) 2 *Sydney Law Review* 480.

Access Initiative. Yesterday, in Geneva, I joined with staff of the GF at a lecture I gave on the history of the HIV epidemic. It was, in fact, my first visit to the headquarters of the GF. I have therefore not had close association with its organisation, still less with the Office of the Inspector General.

Just the same, I have certainly had a long association with the HIV/AIDS epidemic. This began soon after HIV was first identified in the 1980s. In 1989 I was appointed by the World Health Organisation (WHO) to the inaugural Global Commission on AIDS. In the activities of that body I learned two basic rules that have been followed ever since in international strategies to address HIV and AIDS:

* Such strategies must be based on sound empirical data, not guesswork, prejudice, intuition or religion; and

* People living with HIV and AIDS (PLWHA) must always be consulted and engaged in all discussions on the topic and in designing policies and responses to it.

Adopting these policies, I have been witness to many international strategies on the HIV epidemic. I have served on the Reference Group on Human Rights of UNAIDS (2002 -); on the United Nations Development Programme (UNDP) Global Commission on HIV and the Law (2011-12); and as a member of UNAIDS/Lancet Commission on Defeating AIDS and Advancing Global Health (2014 – 15). I realise that this conference, and the international investigators present, are not confined to the work of the Global Fund or to HIV or even disease more generally. But self-evidently, the huge amounts of money involved in the

international response to global epidemics (and particularly through the GF) present important challenges to the protection of financial integrity and probity. Which is where international financial investigators frequently come in.

Integrity is a watch word for the legal profession and the judiciary. Those found not to have integrity are usually removed from the profession without much ceremony. One project in which I have been engaged, specifically addressed to integrity in the judiciary, was launched with the support of Transparency International and UNODC. This was the Judicial Integrity Group (JIG), set up in 1999. The JIG propounded the *Bangalore Principles on Judicial Integrity.*[2] These have proved highly influential within the United Nations; in national legislation; in case decisions; and in the drafting of judicial codes of conduct. A key to the success of the JIG was the close involvement of the judiciary itself in identifying the considerations essential to protecting integrity in that profession.

Lately, I have also witnessed close up fresh scrutiny of the meaning of integrity. I have done so on the International Advisory Board of Transparency International; and as a member of a group convened by the President of the International Bar Association (David Rivkin) pursuing his initiative to get the legal profession worldwide involved in upholding judicial and lawyers' integrity. Even my recent work for the Human Rights Council of the United Nations (HRC) on the Commission of Inquiry on the Democratic People's Republic of Korea (DPRK) (North Korea) has been concerned with issues of integrity. DPRK, for example,

[2] UNODC, commentary on the *Bangalore Principles of Judicial Conduct*, UNODC, Vienna, September 2007. The principles were adopted in Bangalore, India, 24-26 February 2001. They were subsequently refined by the Judicial Integrity Group first established by UNODC and endorsed by several UN bodies.

would not permit the normal inspections and auditing of the expenditure of international assistance that is a universal prerequisite to provision of international aid, with food and healthcare. Although the UN Food and Agriculture Organisation (FAO) and the World Food Programme (WFP) have continued their work in DPRK, other bodies, such as Médecins sans Frontières (MSF) have withdrawn from the country because of the lack of the possibility of demonstrable integrity. Integrity is not, therefore, a stranger to my life and work.

In the course of the foregoing engagements I have learned some lessons. I will explain them in the form of four parables.

FOUR PARABLES FOR INTEGRITY

Parable 1: Auditing Politicians

My first parable concerns two cases that have recently arisen in parliamentary democracies sharing considerable similarities to each other: Australia and Canada.

The Australian case concerned Mr Peter Slipper, a politician previously aligned with the conservative side of politics in the Australian Federal Parliament. In 2011 he switched to be an Independent and offered a lifebelt to the Australian Labor Party, then trying to retain minority government. This resulted in his election as Speaker of the House of Representatives. This perceived betrayal of Mr Slipper's erstwhile colleagues was followed by accusations of a personal kind made against him by a male staff member. When these were investigated by police they, in turn, resulted in the prosecution of the Speaker for misuse of a

travel entitlement he enjoyed as a Member of Parliament. No such financial allegation had been made by his staff member, who later abandoned his personal claims. However, the Speaker was prosecuted for using taxi vouchers in and near the national capital, involving a total cost of $954.

Allegedly, the taxi vouchers had been used in 2010 to visit wineries around Canberra. It might have been considered that leafy wineries were amongst the least dangerous activities in which a politician, confined to a sometimes tedious environment, could encounter. Mr Slipper always protested his innocence and, at worst, postulated oversight of the rules. Eventually, a magistrate's conviction of him was set aside on appeal to a judge, who entered a verdict of not guilty.[3] The Speaker's political career was, however, ruined. He retired from the Federal Parliament at the next general election. He always contended that the prosecution was part of a political payback. Successive higher court decisions appeared to indicate that the judges may have thought that there was an element of truth in that claim. In the hothouse of Canberra, it is often difficult to escape politics. But the best prosecutors always should

In Canada, in 2011 the Auditor-General, an important guardian of the integrity of public office-holders including Members of Parliament, struck what at first was a favourable chord with the media and citizens. He commenced a comprehensive audit of 80,000 expense claims lodged by 116 senators. This required a great deal of time to be expended by the senators, officers of the Senate and the auditor's own staff, sifting through all these claims. On the journey to the resolution of the audit,

[3] *Slipper v Turner* [2015] ACTSC 27.

some cases were revealed to the public through the media. One of them concerned a Minister who, after an overnight flight to London to give a speech, took a bottle of orange juice from her hotel minibar and purported to charge this as an expense. Perhaps it should not have been charged. Apparently, it was outside the rules. However, the amount involved was completely trivial.

The Minister was forced to acknowledge her indiscretion. She eventually resigned her portfolio. The Auditor-General had secured a ministerial 'scalp'.

Of the 30 questionable claims identified by the Auditor-General, nine files were sent to the Royal Canadian Mounted Police to consider criminal prosecutions. A further 21 files were sent for review to a Senate committee. The total cost of the audit was estimated, by those who did it, at $CAN 23.5 million. The Auditor-General was unrepentant, suggesting that the audit would eventually save taxpayers large sums in the future. However, whilst much media commentary concentrated on the small number of senators who had committed, for the most part, relatively small infractions, a few journalists questioned what had occurred.

Thus, Jeffrey Simpson, in a comment in the *Globe and Mail,* commented: [4]

> "*The Auditor-General of Canada used a very large hammer to strike some flies in his investigation of senators' expenses. Five lead auditors*

[4] *Globe and Mail,* 10 June 2015 "What the Auditor General found, Canada's imperfect Senate built on contradictions".

plus "many other staff within the office of the Auditor-General…" examined more than 80,000 expense items… over a two year period from 2011 to 2013. Headline-grabbing indiscretions and mistakes notwithstanding, the haul of the allegedly guilty in the A-G's report is rather small. This conforms to a long pattern of A-G reports going back many years on various issues: they are astringent with praise but long with condemnation. … It turns out that the Senate's rules were lax and unclear, although teams of auditors [5 full-time over 2 years] do often demand documentation and details that might escape even the most resolute keeper of files."

Another commentator said that it would:

"*Take the Senate more than 34 years to cover the cost of the Auditor-General's audit if its members save every penny flagged in the report… Divide the cost of the audit by the potential annual savings, and the senators are looking at more than three decades of belt-tightening before they save enough to cover the cost of the audit they ordered*."

Because the Canadian Senate itself, doubtless also for political reasons, had initially ordered the audit, it would be unfair to blame the Auditor-General entirely. However, one suspects that someone in his office could have performed a sensible triage operation; sought to identify efficiently a very few serious cases; and saved taxpayers the huge amount occasioned by the five year investigation of everything. Proportionality was what went out the window.

This conclusion is small comfort to the ex-minister, Ms Oda, who felt forced to resign. She has gone down in the history books saying:

> *"I arrived in London. It was very late. I was working on a speech I was to give the next morning. But you know, that cost of the orange juice was not maybe the appropriate expense for the government to pay. I have repaid that cost and I have apologised for it."*[5]

One suspects, that in Ottawa too, politics can sometime blind officials to the measuring stick of proportionality.

Parable 2: Corruption and Law Reform

When I was a university student in the 1960s, I undertook study for a degree in economics. At a particular lecture, I was shocked to hear a respected professor talk about the problem of corruption in Indonesia. We are talking about 1963, so perhaps things have changed in the interim. At independence, Indonesia had inherited the legal codes of the Netherlands. As in other colonies, it was often difficult to get the newly independent legislature of Indonesia to act on necessary reforms of the law, both criminal and civil. The result was that many laws were outdated. Everyone knew this. Officials sometimes saw the incoherence between the letter of the law and the needs of contemporary society as an opportunity to make corrupt gains. Like quicksilver, money tended to flow to overcome outdated, inapplicable, unsuitable but still unreformed laws.[6]

[5] Jerry Pedwell, *The Canadian Press*, "Billing for Orange Juice was a Mistake, Bev Oda Concedes"

[6] See by analogy the *Indian Penal Code* 1860 (India) s377. This provision was invalidated by the Delhi High Court in *Naz Foundation v Delhi and Ors* [2009] 4 LRC 838. However that decision was later overturned by the Supreme Court of India in *Koushal v Naz Foundation* (2014) 1 SCC 1. A 'corrective petition' has been filed in the Supreme Court of India and is listed for further hearing. See M.D. Kirby, *Sexual Orientation & Gender Identity – A New Province of Law for India*, Universal, New Delhi, 2015, 3.

My surprise at this academic assertion was lessened, a few years later, when elsewhere in Sydney, I began to explore the relatively few LGBT meeting places that existed in the 1960s. Assignations made in these venues doubtless led on many occasions (sometimes immediately) to sexual conduct which at the time, was criminalised under Australian law.[7] It would not have taken much legal imagination for police to attack the venues and close them down. Very occasionally, they did so. But usually they turned a blind eye.

Even in Australia, with its generally well run institutions, gaps would sometimes open up between what the law says and what happens in practice. The practicalities included, in my own case, meeting at one such venue, in February 1969, my partner Johan van Vloten. He has lived with me ever since.[8] A reflection on this fact has taught me that sometimes vigorous and absolute endorsement of the law (where the law is misguided, seriously unjust and offensive to basic human rights) may not always be desirable, still less essential. Had that happened in 1969, my life would certainly have been different. It would certainly have been diminished.

This is a point that I have raised several times in the work of the International Bar Association on corruption in the law and its related professions: advocates, prosecutors, police and the judiciary. On the face of things, corruption is undesirable. It tends to white ant the institutions of society. On the other hand, this is said on an assumption that the society in question has institutions, procedures and a willingness

[7] See e.g. *Crimes Act 1900* (NSW), ss79-81B ('Unnatural offences'), later repealed.
[8] M.D. Kirby, *A Private Life* (Allen and Unwin, Sydney) 2012, pbk, 73.

to confront the important needs for law reform that are endemic in every legal system.

Take Singapore, for example, in this connection. Because it was part of the British Empire until its independence 50 years ago, it received in its law criminal code provisions for punishing LGBT people for 'sodomy' or 'gross indecency'. These were the so called 'unnatural' sexual offences. Despite proposals for reform of that law in Singapore (even with the support by the Founder of the island state, Lee Kuan Yew) amendment has not been secured. The Singapore legislature rejected the proposal when the proposed reform was denounced by an appointed member of parliament (a law professor and 'Born Again' Christian no less) as offensive to her religious scruples and community values.

More recently, the courts of Singapore have rejected a challenge to the law based on an appeal to the basic right to equality expressed in the *Singapore Constitution*.[9] The Prime Minister of Singapore (himself the son of the Founder) said that there should be no prejudice against gay people in the island State, despite the letter of the law. They are "our kith and kin", he declared. The criminal law is not 'enforced', except in cases of under-aged or unconsensual sex. However, this means that there is a gulf between what the law *says* and how it is *enforced*. Within that gulf, there is room for corruption and neglect of public duty.

Singapore prides itself on its zero tolerance of official corruption. It has made many achievements on that front. However, its stance on the applicable provisions of its *Penal Code*[10] is fundamentally inconsistent

[9] *Lim Meng Suang v Attorney General* [2013] 3 SLR 118 (and subsequent cases on appeal).
[10] *Singapore Penal Code*, s377A.

with zero tolerance towards the corruption of officials. What would happen if other laws were ignored by officials? Might this, of itself, not lead to corrupt conduct and dishonest decisions?

Parable 3: The Global Fund Model

The GF is an extraordinary international institution. Most such institutions (particularly within the family of the United Nations) have a substantial bureaucracy deployed to scrutinise all financial expenditures and receipts. This is the case, for example, with WHO and UNAIDS. Wherever such scrutiny occurs, there is a long line of control to uphold the integrity of the dealings with official funds. Obviously, this is an expensive requirement, in terms of personnel, accommodation, facilities, auditing and so forth. When the GF was created, this was the most obvious model to be followed for rigorous financial discipline within the Fund. It would be handling huge sums of money, voted to the GF by donor countries. It would be expending those monies mostly in poor countries where corruption was endemic and where the local laws and institutions were inadequate and often imperfect.

Instead of following the usual model for an international institution, the GF deliberately created a small bureaucracy. It presently totals 650 officers. To a large extent, the decision to minimise the number of financial officials has saved huge administrative expenditures in a very big global service. It has allowed the GF to concentrate the expenditure of its subventions in the 140 countries worst hit by HIV. This is so, although those countries are frequently poor, with disfunctional governmental arrangements of their own. Choosing to adopt such a

different organisational model was a bold decision. It was necessarily risky.

An Inspector-General was appointed for the GF in 2010. Correctly, he was determined to respond to donors and to protect the integrity of the Fund. As was pointed out at the time, if only 1% of the $4 billion attributed to the Fund were misspent, this would already constitute $40 million, which would be intolerable. Unsurprisingly, the Inspector-General found faults in the management of particular grants by the GF, especially in poor recipient countries. These discoveries led to demands for more powers and more funding to support the functions of the Inspectorate.

It was at this stage that the process took an unfortunate turn. The Inspector-General bypassed the management of the Fund. He went straight to the Board. The Board did not handle the problem well. The outcomes that followed were unfortunate. The then executive head of the GF was removed from office, although no personal fault in the management of monies was ever established on his part. Eventually, the Inspector-General also departed office. Much publicity attached to this aspect of internal management. As we know, even small errors in international bodies are news. Enormous good works go unreported. The resulting publicity and institutional damage was almost fatal to the GF.

Looking at recent reports of the current Inspector-General of the GF, one can see that lessons have been learned, as no doubt they also have at the level of the Executive Director. The recent audit of Pakistan's funding by the GF is a case in point. It addresses ways to improve the

systems and controls. It identifies unacceptable circumstances in past practice. The report was prepared with close involvement of management. It procured the co-operation of officers and sharp attention to systems and methods that protected the GF. It went beyond particular instances to address the adaptation of internal auditing methodologies to the environment in question. It pointed to the obvious fact that management in central Asia or Africa is not likely to conform to the standards that might be expected in Singapore or Denmark. Unfortunately perhaps for purists, the levels of HIV are higher in Pakistan and Sub-Saharan Africa than they are in Singapore and Scandinavia.

This story teaches the importance of addressing marginal utility and marginal costs: also a lesson I learned in my study of economics so many years ago. As with the Speaker's taxi dockets in Canberra and the Minister's orange juice in London, attention has to be paid to the marginal costs of attempting to stamp out all forms of financial impropriety: especially where the environment is unconducive to change and the cost of procuring change is disproportionate to the amounts at stake.

Parable 4: The World Bank and Global Fund

The fourth parable concerns institutions that are international in every sense; but which stand outside the institutions of the United Nations. The United Nations was created by the *Charter* of 1945.[11] This is a treaty and a legal document that modifies international law for the participating states and constituent organs and institutions. The *Charter*

[11]United Nations *Charter*, 26 June 1945. UNTS 993; 3 Bevans 1153, entered into force 24 October 1945.

envisages the creation of the many bodies and agencies of the United Nations. The General Assembly of the United Nations, in 1948, adopted the *Universal Declaration of Human Rights*. That declaration asserted principles of international law which, in the intervening decades, have come to be regarded as part of the customary law of all nations.

Nevertheless, there are some international bodies that stand outside the *Charter*-based UN agencies. These include the World Bank (International Bank for Reconstruction and Development) and the Global Fund.

It is because the World Bank was created before the adoption of the *Charter* that some participants and observers assert that it is not bound by universal human rights principles. This assertion has been contested, including in a recent initiative addressed to the President of the World Bank in 2015 by a number of United Nations human rights mandate holders, notably Professor Philip Alston.[12] They have contended that the World Bank should adhere to the universal law of human rights. To some extent, the Bank appears already to have done this, as for example in the stance that it has taken by its investment decisions in advancing the status of women and also anti-corruption strategies. But when it was argued that the same logic required that it should take steps to advance human rights more generally, there has been push back. Specifically, when it was suggested that LGBT rights and needs should be taken into account in investment decisions of the Bank, conservative internal 'banking' policy has resisted.

[12] See UN General Assembly, *Extreme Poverty and Human Rights*. Note by the Secretary-General (A/70/274) paras 10-14 (p6).

Fortunately, the GF has not taken the same narrow view of its constituting document in its spending priorities. Particularly in recent years, the GF has enhanced its priorities in recipient countries to advance the rights of relevantly vulnerable populations. This involves looking at the three diseases that are written into the remit of the GF. And making sure that the needs of those specially at risk are addressed effectively. In part, this is a basic matter of principle – even legal principle - as the international law of human rights comes to apply to all international actors. But it is also a matter of considering how initiatives to understand and apply universal human rights tend to target efficiently the scale of the problem with the three diseases. Human rights are causally significant for a successful international strategy against AIDS, tuberculosis and malaria. This is not just do-goodism or obedience to the bidding of Western countries. It is a matter of expending the scarce (and even diminishing) funds so that they operate in the most efficient and well-targeted manner.

If sex workers are prosecuted in a recipient country, as for example for being in possession of a condom, that undermines a successful HIV strategy. If men who have sex with men (MSM) cannot readily secure an HIV test and access antiretroviral therapy because of prejudice or hostility, that diminishes the ambit of treatment as prevention. It undermines an optimal HIV strategy. If injecting drug users are confined to detention in harsh environments with others in the same category, that also undermines an effective strategy.

I pay tribute to the leadership of the GF, in discharging its mandate effectively and efficiently. The recruitment of experts in effective human

rights strategies (such as Ralf Jürgens) has been right in principle. But it has also been an effective strategy. That strategy has lessons for the World Bank. Also for international investigators examining, and sometimes questioning, the expenditure of funds on purposes other than strictly medical therapies. The pursuit of these purposes will sometimes be exactly the right strategy for the most efficient fulfilment of the mandate of an international body addressing the challenges of vulnerable and unpopular minorities.[13]

A body such as the GF, particularly using the administrative model that it has adopted, will always be vulnerable to media criticism. Every time a misuse of funds is reported, media listeners or readers will be reminded of the events of 2010. Exaggerated stories will be revived concerning wrongful expenditures. It is not difficult, with such reports to whip up a storm of hostility.[14] Reduction of overseas aid passes unnoticed or is even applauded. Attempts by leaders to reach the United Nations target of 0.7% of national income, devoted towards foreign aid, are dismissed as extravagant, ill-timed and naïve.

An example of this can be found in *The [London] Times* of 24 July 2015. Specially taken to task was the funding by the UK Department for International Development (DfID) which in December 2013 gave £GBP415 million to the GF, increasing its commitment by 324%. This was described as "extraordinary largesse" on behalf of British taxpayers, as the United Kingdom was contributing "more than a fifth of the Fund's

[13] See e.g. UNAIDS/Lancet Commission on *Defeating AIDS and Advancing Global Health*, Summary in *The Lancet*, London, 25 June 2015, at 29 (Development Assistance and Human Rights); and 35 (Compacts for Monitoring and Accountability). See also SLM Davis, "Human Rights and the Global Fund to Fight AIDS, Tuberculosis and Malaria" (2014) 16 *Health and Human Rights Journal*, 134. The author describes the 2012 commitment of the Global Fund to a 4 year strategy involving protection and promotion of human rights and describes steps to operationalise this strategy.

[14] *The [London] Times*, 24 July 2001, 1 and leading article.

budget". It was stated that "it would have been more effective to have established a British fund, administered by DfID and scrutinised by the National Audit Office [of the United Kingdom]" to avoid the suggested profligacy of the GF. This was described as "an aid agency set up with commendable objectives… [but which] became a lavish beast, remunerating the average employee to the tune of $200,000 while commissioning a new campus in Geneva with 360 parking spaces".[15]

The misuse of mosquito nets sent by the GF to African countries and their use for alternative purposes, such as making fishing nets or wedding dresses, was once again attacked. There was no mention of the extraordinary gestures of solidarity with vulnerable humanity evidenced by the creation and work of the GF and PEPFAR. Nor of the lesson that these initiatives gave for other future initiatives designed to ensure that access to essential healthcare does not depend on the accident of being born in the United Kingdom, Australia, or other countries with properly functioning national healthcare systems. Access to essential healthcare is a universal human right.[16] It should not depend on such factors. Nor does the report balance its hostility with the estimate, attributed to DfID itself, that the expenditures of the GF save, on average, a human life somewhere in our world every 3 minutes. There is no denying that some mosquito nets have been used for purposes other than those for which they were initially provided. But it is the lack of proportionality in the coverage and castigation that is the main fault of such reportage.

[15] *Ibid.*

[16] See now the Sustainable Development Goals (SDG) of the United Nations 2015, September 2015, especially SDG3. In November 2015, the UN Secretary-General (Ban Ki-Moon) established a High Level Panel (HLP) to address the incoherence in current laws and policies that impede in the attainment of SDG3. The author was appointed a member of the HLP and chair of its Expert Advisory Group.

LESSONS FOR INTEGRITY'S GUARDIANS?

Reflecting on these parables and necessarily addressing them from the background of my own experience in the search for integrity in the areas of my own work, there are a number of lessons that I suggest may be drawn from what I have said:

1. *Modesty*: The first is the need for a posture of modesty. Modesty in the what can be achieved by the GF. Modesty in the expenditure of those precious but limited funds. Modesty when errors and wrongs are shown. Modesty about the capacity of all human institutions, operating in some of the most disadvantaged and vulnerable places on earth. Whilst such modesty is specially important for a body like the GF, it is equally important for other international institutions. The world of nation states is suspicious, and sometimes hostile, towards helping institutions. International aid institutions are well advised to act accordingly.

2. *Austerity:* The funds of such international institutions should be expended with great care. This much is suggested in the critical leading article in the *Times*. The monies donated to the GF have been raised from taxpayers in countries often far away from the recipients. In the case of the United Kingdom, at least, it grew rich in earlier times by reason of its control over vast dominions, often acquired and ruled to Britain's own economic advantage. However, the failure of virtually all countries to reach the UN standards of expenditure upon foreign aid subventions demands a recognition that, in modern constitutional democracies, such aid has to be voted by a legislature from the consolidated revenue

fund containing the taxes raised from the electors. To the extent that any international agency derives funding ultimately from national payments, the need for rigorous oversight of expenditures is just as great as in the spending of local money on national purposes, duly appropriated with the consent of the representatives of the people from whom the revenue was originally raised.

3. *Prudence*: In the conduct of international bodies in particular, it is obviously important that a rule of vigilance be observed. To the extent that benefits accorded to the staff of such bodies are excessive, this will attract opprobrium and raise objections back home. As anyone who reads *The Economist's* schedule of 'Big Mac' prices around the world will know, Switzerland and Geneva are extremely expensive places to live. I do not believe that the salaries paid to GF staff exceed the local standards. There are, of course, many reasons, of efficiency and interagency cooperation, that argue for locating a body such as the GF in Geneva. However, eventually the cost factors have to be considered. Sometimes prudence may suggest the desirability of mitigating operating costs by outsourcing some functions or locating them in less expensive (but safe and efficient) venues in developing countries. That, after all, is where the three diseases of the GF mandate are centred.

4. *Aesthetics:* Other things being equal, there is no reason why employees of the GF should be denied windows that open onto the scenery surrounding Geneva. The same goes for other international bodies. The mountains have the unchosen merit of

height, so that many windows in Geneva will capture at least some of their beauty. Still, envy and animosity are the frequent companions of international bodies, especially those devoted to providing assistance to the poor, sick and vulnerable. A workforce operating in a congenial environment may perform better. But there will be a marginal cost for access to scenery and parking spaces. Such costs will fall on national taxpayers, most of whom probably work in locations closer to the 'dark satanic mills' of less beautiful localities.

5. *Individuality:* The foregoing characteristics are not simply those that should be displayed by an international body the concern of, and checked by investigators. They should be observed by everyone who works in such bodies. I have myself made a modest contribution to these objectives. Although I was able to add most of the costs of my participation to present this lecture to an international air ticket provided by a wealthy corporation, my additional ticket from London was purchased in a modest seat in economy class. My train ticket from Geneva was also in second class. It nonetheless offered marvellous views of lakes and mountains for which I decline to feel guilty. Yet strict modesty is a good personal attitude for all who work for, or with, bodies expending funds on aid for the most vulnerable.

6. *Frugality:* As myself a child of the Great Depression of the 1930s, I learned the resulting habits well. Excessive frugality may sometimes be out of place in personal and family environments. However, a measure of parsimony, as a signal of personal attitudes, is institutionally desirable. At least this is so in aid

organisations. In my experience most HIV/AIDS conferences take place in modest hotels, often in countries not famous for their scenic beauty. Montreux, where this conference of international investigators has been organised, is a place of spectacular beauty. It is also the location of vast wealth, breathtaking views and expensive hotels. I am told that the sponsors were able to negotiate a good price for accommodation in the conference hotel in Montreux overlooking the lake. Yet it is a five star hotel. As I entered my room (doubtless intended to repay me for my modest transport and for delivering a memorial lecture without other rewards) a thought crossed my mind. What would the people whom the financial inspectors safeguard, think of this room and its outlook? For all but a trivial number, it would be far beyond their wildest imaginations. Someone pays such costs. At least in some cases, including my own, it would not be the guests themselves. *Quis custodiet ipsos custodies?*[17] The financial inspectors should always apply to themselves principles that they rightly insist upon from those whose conduct they inspect and evaluate; and.

7. *Participation:* A lingering memory recurs of a lesson taught to me in the early, frightening days of the HIV epidemic by a great international civil servant: Jonathan Mann. Before the GF, before even UNAIDS, before the Global Programme on AIDS (GPA) of WHO and before the work in Geneva of the early UN human rights office on AIDS, Jonathan Mann was propounding a very simple rule to guide us. No meeting should ever be held concerned with the epidemic without the participation of stakeholders. Not just as part of the audience. Not just to hear themselves spoken to, or

[17] Latin: translation – 'Who will guard the guardians themselves?'

about, or of. But as full participants. Speaking clearly of their values, their own experiences and their responses to what the scientists, experts, officials and distinguished foreign memorial lectures were saying. If Jonathan Mann had been with us today, he would have applied his own *dictum* to us all. He would say that we ought to have invited at least some people living with HIV or AIDS (PLWHA) or other global diseases to speak up for the customers and beneficiaries, potential and actual, of the GF and its financial inspectors. He would have remarked pointedly upon their notable absence from our sessions in Montreux. Perhaps in the midst of so much luxury and idyllic beauty, if they had been here, those PLWHAs would have caused some embarrassment to the rest of us. Perhaps that would not have been such a bad thing.

Franz- Hermann Brüner and Barry O'Keefe were outstanding guardians of integrity. They cannot now respond to these words expressed in their memory. Each was an example of the human virtues that I have mentioned. Neither was a harsh Calvinist, mortified about holding conferences in beautiful places. Neither saw the principle of integrity as running disproportionately in unrealistic directions. *Proportionality*[18] is essentially the binding theme of this lecture. Or as Franz-Hermann Brüner would have put it *Verhältnismässigkeit*. It links together the parables that I have recounted. It unifies the lessons in integrity that I have suggested. Both Franz-Herman Brüner and Barry O'Keefe were personally humble, hardworking builders of new institutions. Somehow, I think that each might have been willing to embrace the conclusions that

[18] Proportionality as a common unifying concept of lawful and just actions by people with public responsibility. It is a test that is "dominating the dockets" of constitutional courts around the world. See Alec Stone Sweet, "Proportionality, Balancing and Global Constitutionalism", 47 *Columbia Journal of Transnational Law*, 72 at 74 (2008).

I have expressed before departing, as I now must, by second class rail to begin my long journey home.