The Art of Law in the International Community

or How to Prevent a Killer Robot Apocalypse[1]

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The conference title for the Sydney Biennial Meeting of the International Law Association was well chosen: "International Law in Challenging Times". Humanity is facing extraordinary challenges of major violence, environmental decline, human rights abuse, and economic privation. Our ILA committees are seeking remedies through international law as one of the few tools humanity commonly shares. But there seems to be a widespread preference for violence and the use of military force over international law. Untold sums are poured into armed conflict and weapons research, including on fully autonomous robotic weapons, a truly inhuman weapon. International law needs to attract adherence. Military strategists have Sun Tzu's *The Art of War* to inspire them. We need *The Art of Law*.

People comply with law for generally three reasons: they fear punishment, seek an advantage, or accept that it is the right thing to do. Louis Henkin wrote the classic respecting the advantages of complying with international law, *How Nations Behave*. I wrote what is in my own mind a classic on the enforcement system, *The Power and*

[1] These remarks are drawn from Mary Ellen O'Connell, *The Art of Law in the International Community* (Cambridge: Cambridge University Press, publication date May 2019).

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Purpose of International Law. Tonight, I want to focus on doing the right thing. I teach international law and the law of contracts at Notre Dame Law School. I show some concluding scenes of Spike Lee's famous film *Do the Right Thing* at the end of the contracts course. I do this to balance what the students have just learned: That contracts can be broken if you buy your way out of them. It is known as the "efficient breach doctrine." It is so pervasive, most contracts law texts in the U.S. never speak of the sanctity of promise or of abiding by your word because it is the right thing to do.

We can see this mentality at work today in U.S. foreign policy. Why remain a party to the Paris Agreement on Climate Change if there is no punishment for leaving and if the U.S. can enjoy the benefits of others' efforts without sacrifice? There is only one reason—because it is the right thing to do. My international law students from around world point out rightly that the States contributing more to climate change, should do more. I say I agree but ask how we can persuade the leaders of any wealthy country of this point? And, of course, climate change is only one example.

This is where I see an opportunity. There is a way to attract people again to seeing international law as doing the right thing, regardless of gain or pain. Of complying with it wholly for the good of others. Sir Hersch Lauterpacht indicated the way; he, too, sought to persuade a world racked by war to believe in international law.

In 1946, Lauterpacht wrote his inspirational article, "The Grotian Tradition". He wrote to restore confidence in international law and to respond to the proponents of Realism who were blaming weak international law and institutions for two world wars. Some international lawyers, such as Hans Morgenthau, were ready to reject international law as having any viable role in the control of military force. Morgenthau was

extraordinarily influential. His book, *Politics Among Nations*, is read by every student of political science, certainly in the U.S., but in many other countries as well. Every nation's foreign policy today is more or less oriented toward Morgenthau's view that amassing military power is a national leader's highest moral duty. It is a higher duty than compliance with international law.

Lauterpacht pushed back against arguments he found to be 'the work of international lawyers anxious to give legal expression to the State's claim to be independent of law.'[3] He objected to arguments on the use of force that depicted legal restrictions as illusory. He also rejected self-serving arguments designed to avoid resort to binding dispute resolution, arguments like Morgenthau's that some disputes are too important, grave, political, or military in nature to be proper subjects of international courts and tribunals.

Lauterpacht based his strong, principled stand on natural law.

He understood that all law consists of mostly positive law within a frame of natural law. Natural law is needed to explain why legal norms remain binding with or without consent; why they are binding with or without advantage and regardless of effective enforcement. In other words, natural law provides the explanation of *jus cogens* and of the essential general principles of fairness, equality, and proportionality. It also explains why consent to positive law leads to obligations that cannot simply be abandoned by withdrawing consent. Lauterpacht looked to natural law as the 'ever-present source for supplementing the voluntary [consent-based] law of nations'.[4]

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[3] Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Oxford University Press 1933), 6.

[4] Hersch Lauterpacht, 'The Grotian Tradition in International Law,' *British Yearbook of International Law* 23 (1946), 1-53 (21-22).

He said little more in the "Grotian Tradition" about natural law. Positivism was already dominant by 1946, but he could assume lingering understanding of what natural law entailed as the basis for his appeal for hope in world law. More than three generations later, knowledge of natural law has all but disappeared. To understand law beyond positivism, to find law once again, as Lauterpacht did, normatively superior to the consent of States and their will to military power is to re-discover natural law.

The rise of science is generally linked to the decline of natural law knowledge in the West. The principles of classic natural law are found by subjecting to reason observations of the natural world and inspiration from contemplation of Divine will. Aquinas discerned from this approach not only certain fundamental principles of law, but that compliance with law leads women and men to virtue. Material evidence plays only a small role in this equation. The non-material, transcendent aspects of law have been suppressed since the invention of the scientific method in the 18th century. We live on in the tradition established by pre-Enlightenment natural lawyers.

That tradition is fading, however. For me it is interesting that it is fading even in States that declare fidelity to religion. Fortunately, we have available a transcendent source of insight to substitute for or supplement the theological dimension of natural law. Aesthetic philosophy teaches, as do many religious faiths, the good of empathy, selflessness, generosity, and love. Aesthetic philosophers from Plato to Kant to Hannah Arendt found in the study of beauty the deep human appreciation for harmony as well as the human capacity to live in community, to be moved to action wholly on behalf of others, regardless of self-interest. Aesthetic philosophy is secular but also compatible with theological approaches.

The contemplation of beauty whether of nature or in the arts gives human beings pleasure that is separate from the pleasure provided by life's necessities, such as the food, drink, and shelter. The pleasure is different from the avoidance of pain. Everyone here has experienced it in listening to music or watching a sunset. These experiences lift us from self-absorption. They prove our capacity for forgetting the self, for selflessness. They also Everyone has the experience of pleasure in the contemplation of beauty, so it is also an experience that binds us in a non-competitive, harmonious way. Hannah Arendt observed that judging something beautiful is done within a social context. If we find something beautiful, we assume that others will as well. When judging we have communication with others in mind. This process demonstrates that human beings are social beings. In the great debate between Hobbes that human beings are anti-social and Grotius that they are social, Arendt proves Grotius to be correct. With that proof, law is possible.

The Oxford philosopher Iris Murdoch explained in her book, *The Sovereignty of Good*, that these lessons drawn from the contemplation of beauty must, like religion, be taught. Human beings seek to satisfy their survival needs on the basis of intuition alone. The intuition to be self-less, to care about the good of strangers needs nurturing. Aesthetic scholars such as Elaine Scarry call for a broad based, popular education in the linkage between the pleasure of beauty and the basis of effective law that seeks justice and peace, rather than self-interest. In addition to telling our students or clients that failure to obey may lead to punishment, we should also tell them that compliance is doing the right thing. It leads to virtue and successful life in society. Community thrives in good order under the rule of law. A client may be able to get away with law evasion, depending on the size of her army or bank account, but that is not doing the right thing. What the ancients understood

through the contemplation of Divine will, we can understand through the contemplation of beauty. Some theologians say it is the same thing.

Thus, law is the means to a goal that is as much a part of who we human beings are as our striving for things, and using force to defend those things.

International law has the specific purpose of preventing armed conflict—the most serious form of violence. It does so by directly prohibiting the use of force and supplying alternative means for international actors to resolve disputes. Yet the prohibition on force is as Yale law scholars, Oona Hathaway and Scott Shapiro observe, "under greater assault today than it has been in seven decades."[5] The same challenges that Lauterpacht identified continue to weaken respect for law in contrast to war. Lawyers continue to argue on the basis of positivism for States to have maximum freedom from legal restraint.

The prohibition on force is certainly reflected in positive law, including, a treaty version in United Nations Charter Article 2(4) and a customary law version identified by the International Court of Justice in the *Nicaragua* case. But these manifestations of the norm do not cancel out its status as a natural law *jus cogens* principle. This means it is not subject to derogation, to limitation through contrary state practice or interpretation.

Courts may discern over time that peremptory norms reach more conduct; they may not be interpreted to reach less.

The prohibition on the use of force incorporates two aspects long identified as exceptions, one for United Nations Security Council authorization of force and the other for self-defence. Exceptions to general rules require narrow interpretation in every case so

[5] Oona A. Hathaway/Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon and Schuster 2017), 417–18.

as not to swallow up the rule with an exception that Chris Greenwood would say you can drive a horse and cart through. The case for narrow interpretation is even stronger when the norm is *jus cogens*. General principles of natural law provide additional restrictions on resort to force.

These legal hurdles to resort to force of course conflict with Realist theory. Morgenthau's extraordinary confidence in military force has led to blindness in seeing the utter failure of major military force that has many of our governments continuing to fight in Afghanistan after 17 years with no end in sight. It leads to violent rebellion against governments despite the abhorrent price of such attempts seen today in Congo, Libya, Syria, Somalia, South Sudan, and Yemen.

Perhaps the greatest paradox of Realist ideology is how the thinking has morphed from squarely supporting military force in the area of national security to supporting military force to wage war for human rights. We have come to think of military force as the only effective means to accomplish great good. Violence in the cause of virtue is becomes virtuous by association. Yet, this syllogism illogical. It conflates means and ends. It requires an unrealistic, illusory understanding of the effectiveness and appropriateness of military force and the omission of alternative, non-violent means of attaining the same ends. As Ian Brownlie asked, how many wholly innocent people should be killed and maimed, how much of the environment destroyed for all time to protect the human rights of some? The question always reminds me of the line I heard growing up in Chicago with respect to the Vietnam War, "we have to destroy the village to save it."

The arguments using moral justification omit the fact that the prohibition on the use of force is itself *jus cogens*, a higher ethical, natural law norm. The prohibition in Article

2(4) has equal status to the prohibition on genocide. This is a higher status than other human rights. There is no justification for violating a peremptory norm, not even in the interest of trying to get compliance with another peremptory norm.

Arguments to use force in these cases—of human rights, anti-terrorism, or arms control--are inevitably special pleading. Those making the arguments do not intend them to apply to all subjects of international law equally. Yet, what sets international law apart, what makes it the law of an international community, is the absence of an imperial power with superior rights and privileges. Critics often remark that the Permanent Members of the UN Security Council have the privilege of exercising the veto over decisions of peace and security. The veto represents authority within the UN to exercise deliberative judgment on behalf of UN members. It provides no higher status to the P-5. It does, however, obligate them to act in the promotion of peace. They have an exceptional duty to lead in promoting peace through law.

International law supports a variety of means for peaceful settlement of disputes, each with a better record of success than military force. Yet, through a confluence of factors, military force has achieved a dominant place in intellectual life on all continents but Antarctica. Confidence in military force supports the vast spending on armed conflict and weapons technology, which, in turn builds an industry with a profit motive to lobby for the purchase, use, and replacement of their products. A major effort is underway to create computers that select and destroy without human intervention in the 'kill' decision. Resources are devoted to these 'slaughterbots' rather than controlling greenhouse gases, a truly existential threat to the planet. Investment choices are driven by ideas. Ideas that can change.

Re-generating interest in the idea of prohibiting force through law and substituting peaceful dispute resolution requires persistence, creativity, and vision. Long-separated from the transcendent ideas that gave rise to it, interest in alternatives to war has declined dramatically. Peaceful settlement through international legal process is no longer promoted as a cause. The driving force behind the proliferation of courts and tribunals in the late twentieth and early twenty-first century has been interest in specific substantive areas. Arguments are no longer made in favor of the compulsory jurisdiction of the ICJ. Advocates do not pursue expanding the ICJ's jurisdiction. And now, unsurprisingly, interest in special subject matter courts is waning, too.

Lauterpacht wrote passionately of the ideas of transcendence integral to international law. He invited the international community to embrace those ideas in the wake of world war. The international community is currently experiencing a 'piecemeal' World War III, in the words of Pope Francis. To exit this war requires, once again, a renewal of confidence in the law of peace. Philip Allott sees the possibility of at last making 'a world without war' through transcendent ideas that respond to what Philip calls 'the sordid justifications of war [that] persist and, in the 21st century, are being strengthened by the emerging of new forms of old atavisms.'[6] These justifications rely on international law but do so erroneously.

Those making them fail to see that law is more art than science. Anyone who has taught the theory of customary international law knows this to be true. Students want to know with so-called 'scientific certainty'—a phrase obviously coined before the discovery of black holes--how much state practice is needed to prove the existence of a rule. We even

[6] Philip Allott, 'Towards Utopia—Rethinking International Law', *German Yearbook of International Law* 60 (2017), 269-312.

use a term from science—crystallization to determine the exact moment. But we know that crystallization is a poetic metaphor. We, like mathematicians, discern a rule when it feels right, when the evidence looks plentiful, when it is general and diverse. We sense that the claim of 'specially affected' states creating their own customary international law to permit them greater rights to use force is a claim that conflicts with the equality and harmony of the whole. And there is more art--literary methods are used in interpreting treaties. Legal drama plays out in international courts on the world stage. My idea is to use artistic methods in teaching the good of complying with law. It is a simple, yet I hope elegant, point--to use natural beauty as a synonym for the Divine command to obey the law. To say that our tradition of fidelity to law, of the sanctity of contract and treaty is supported by this secular insight as much as any religious one.

This is the revolutionary moment to propose a new idea. Assumptions are being shaken about democracy, international institutions, capitalism, and war. Realism has had its run, leaving destruction and debt in its wake. As Martti Koskenniemi has said, people are looking to international law for a 'horizon of transcendence'.[7] Great hope is being attached to the effort in Geneva to ban fully autonomous weapons. That effort received a major boost several months ago which originated in Australia. Researchers here, the creative people who think up amazing things like artificial intelligence, refused to allow their work to be used by colleagues at universities undertaking military contracts. Scientists at Google followed and soon a major agreement in the tech industry was formed to restrict military uses of new technology. These are important developments. Perhaps most of all because it comes from scientists, the folks who suppressed our higher ideals in law in the

[7] Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', *Modern Law Review* 70 (2007), 1-30 (30).

first place. They are giving them back. It is also a major blow to Realism and the relentless drive for new weapons. Maybe now scientists can invent a carbon eating robot that can kill climate change instead of human beings and endangered species.

This is a moment like 1946 to explain to or students, clients, governments, and neighbors how international law can win compliance with a slaughterbot ban. That requires a ready explanation of international law's coercive means of enforcement, the positive benefits of compliance, and the conviction that compliance is a moral good, that it is doing the right thing. Revitalized natural law, through the insights of aesthetic philosophy, support the morality of law, the good of law compliance, of non-violence, and of peaceful settlement. Hersch Lauterpacht encouraged just such a holistic approach when he extolled Hugo Grotius's appeal 'to the law of love, the law of charity, … and of goodness'[8] for the flourishing of the entire international community.

[8] Lauterpacht, 'The Grotian Tradition' 1946 (n. 4), 25.