Book Review-III


Introduction

Professor Mary Ellen O’Connell, in her new book, The Art of Law in the International Community, packs the tale of an extra-positive approach to law-making back at the centre of the stage. The book attempts to consider the of the community to explain the rise of two pillars of contemporary international law, namely the legal regulation of the use of force and the rules (or more precisely the meta-rules) on jus cogens. The book shifts steadily towards the intersection between natural law, jus cogens, and the ban of unilateral use of force. Methodologically speaking, the two regimes intersect since both are off springs of the UN Charter and the 1969 Vienna Convention. Perhaps not in the same trend of state practice, both principles formulate the general principle of international law. In sum, they add a small group of rules which feature the new world order in the aftermath of World War II.

Theorizing the Art of Law

Professor O’Connell in the introduction confesses that the book is inspired by the writings of Hersch Lauterpacht. Lauterpacht wrote on the growing influence of Realism, which emphasizes the moral duty of national leaders to amass military assets, project power, and suppress opponents. Realism teaches disregard for the law that constrains resort to force. The seven decades between the publication of The Grotian Tradition and The Art of Law is a catalog of legal arguments reflecting Realist influence. The book underscores Phillip Allott’s observation that ‘the sordid justifications of war persist and, in the 21st Century, are being strengthened by the emerging of new forms of old atavisms.’ (p. 16)

Believing in military force helps account for the violence, privation, and environmental decline of this century. This, in sum, could be accounted for and classified as precursors of the pandemic. Exacerbated by the extraordinary investment of capital and human ingenuity that has been poured into the invention and stockpiling of weapons. Driven by the insecurities of nations who had trillions for their militaries, but only a trickle for solving climate change or public health care policy. To put things into perspective, consider NATO’s annual budget which is bigger than the WHO’s. Lauterpacht foresaw this. As a response to his foresight, he reminded readers of the natural law principles available to preserve the law in the face of Realist ideology, principles envisioning peace as law’s purpose, and the preference for legal dispute resolution. The Art of Law returns these pointers and is underpinned by what Allott refers to as the ‘ancient idea of the essential unity of humanity.’ (p. 5)

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Re-igniting Theory and Practice

The book accounts for an assessment of international law in the absence of natural law. It is left with positive law alone, which is made through positive action expressing consent. To understand this conundrum, it must be ascertained why consent has a legal effect. Since consent can be withdrawn and is not a sufficient basis for the most important legal principles.

While critics argue for greater ability to resort to military force further the argument to enable the state practice and opinion Juris- the building blocks of customary international law. They are, however, dissolving the rules restricting resort to force. This positivist perspective turns out to be consistent with realist political theory holding that the only actual fetter on state action is not law, but coercive power, especially in the form of an opponent's superior military strength.

It must be noted that consent and norms of jus cogens permit and control state practice. Regarding the theology of law, it should be noted that they relied on a method of discerning extra-positive norms. However, since we find ourselves in a pluralistic world that has international law as a common forum of utilization and discussion. Further, the book, re-considers law on the use of force using the principles of jus cogens which prohibit the use of force. As a common tone to the book, each chapter begins with a case study involving the five Permanent Members of the Security Council, given their privileged position to 'enforce the peace.'

Salient features

The chapters highlight the gross violations of international law by the Permanent five on whom (most importantly) rests the responsibility to protect. By showcasing the blatant abuse, the author showcases the reinforcement of the Realist belief in military force which has failed to create the national security it promised. And additionally, has become a black hole soaking human and capital resources. This being the moot point the author wishes to convey- that security can only be found through the law, the law prohibiting force and providing alternatives for resolving disputes.

In Chapter 6, the author turns to the performance arts to re-generate passion and commitment for a peaceful settlement. Courts are a dramatic alternative to violence. International Courts and Tribunals themselves, have been touted as a formalistic piece of theatre. They can offer to play their role and can be enhanced through insights from theatre and other empirical studies. Even teaching and scholarship can move preferences from war stories to legal drama.

The classical narrative spun around the prohibition of the use of force is enshrined in the UN Charter. This process of crystallizing a sacrosanct value demands a historical study of the interwar era. Avoiding a historical discourse, the preparatory works of the San Francisco conference highlight the delegates' firm belief and advocacy towards a new legal regime. The same conviction was expressed by the ICJ a few years later, in Corfu (Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949, p. 4). In
the last part of the judgment, it qualified "the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rising to most serious abuses and such as cannot, whatever be the present defects in an international organization, find a place in international law". The distinction between the pre-Charter and the post-Charter law could not be clearer.

Moreover, the rule prohibiting the use of force proved to be endowed with an exceptional capacity to resist the inconsistent practice. In *Nicaragua* the ICJ held that conducts inconsistent with this rule if accompanied with an appeal to the exception of justification, produces the paradoxical effect of enhancing rather than weaken its normativity (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States of America). Merits*, Judgment, I.C.J. Reports 1986, p. 14, para 185). Thus, in short, what seems obvious in the face of multiple violations is the conviction of the international community that the existence of a prohibition, despite its relative ineffectiveness, is preferable to the return to the Hobbesian state of nature which featured the pre-Charter era.

**Codifying International Law**

Before the Vienna Conventions, it remained an arduous attempt to quote the existence of a higher law. Faintly acknowledged in the *Corfu Channel Case* certain rules constituted the “essential foundations” of the new legal order. A few months after the conclusion of the Vienna conference, in *Barcelona Traction* (*Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3), the ICJ referred to certain rights whose “importance” entailed that “all States can be held to have a legal interest in their protection”. The normative value of a right became thus the decisive element for the development of the doctrine of the obligations *erga omnes*.

One can hardly deduce from these sparse fragments the highly sophisticated legal regime enshrined in the 1969 Vienna Convention. In the same vein, it is difficult, after fifty years from its drafting, to provide examples of treaties declared void and null because of their inconsistency with a *jus cogens* rule. Yet, as showed by Mary-Ellen O’Connell’s book, the existence and the legal regime of *jus cogens* is conspicuously considered as part of international law to the point that its scope and function considerably expanded well outside the limited field of the law of treaties.

It can be easily ascertained that there remains to be a noted emergence of rules protecting the collective interests of the world community. This ‘trend’ seems to be the product of countless social factors, among which, perhaps, the sense of justice, reasonableness, fairness, and necessity of a rule which matches the needs of the international community in a given historical time. In other words, the drafters of the Charter were aware that they were not codifying a previous practice but rather were writing a law for the emerging world order. In the same vein, the ILC members who put on the table the idea of *jus cogens*, the judges of the ICJ who formulated the idea of obligations *erga omnes* highlighting, perhaps erroneously, the importance of the rights involved; the delegates to the Vienna conference who voted in favor of Articles 53 and
64 VCLT, all were inspired by the same sentiment, namely that they were materializing the principles of the new international ethos for the new world.

**Conclusion**

In the end, the book offers a journey and quest for justice and fairness. It attempts to transform the discourse around international law, upon the condition, however, to be vested in positive terms. It can be suspected that while writing of natural law and on its contribution to contemporary international law. And the book which came out of it represents a precious reference for whoever should attempt to navigate, even against the tide, these troubled waters.