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Concluding Rejoinder: The Art of International Law and Altruism of International Lawyers

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By Mary Ellen O'Connell April 29, 2020

In the introductory essay, I sought to apply *The Art of Law in the International Community* as a response not only to military force and other ills, but to the COVID-19 pandemic. Four colleagues have contributed on how they believe the book works and could work better. They have done so at a time of extraordinary challenge and in a spirit of generosity toward the goal we all seek, the flourishing of the created world.

Professor Karel Wellens's essay captures the essence of *The Art of Law*. He shares my view of the potential of aesthetics as a new bridge to natural law, and of the good a revitalized natural law can do in supporting *jus cogens* norms and general principles. New natural law can re-commit our world to the prohibition on the use of force. Professor Wellens poses two questions essential to taking these ideas forward. First, he recounts my point that the prohibition on the use of force "'cannot be transgressed in the attempt to advance another norm, even another peremptory norm"' then asks, "where do we find the moral and legal reasons for this prohibition's supreme position among *jus cogens* norms?" He agrees it cannot be the right to life, which may also be a *jus cogens* norm. He suggests "survival"—a concept on all minds. All peremptory norms concern aspects of survival, whether in prohibiting genocide, apartheid, or the use of force. The reason lies elsewhere—it lies in humanity's need for society that can only flourish in peace. Law helps create peace by providing an alternative to violence in resolving disputes. As Lauterpacht said, and Professor Desierto quotes in her essay, "the first function of the legal organization of a community is the preservation of the peace." (Lauterpacht, pp. 65 and 72) The prohibition on the use of force is, therefore, the one principle without which there is no law. The other *jus cogens* do essential work, work close to the prohibition on the use of force in preserving the survival, the identity, and dignity of humanity. They do not create the possibility of law.

Professor Wellens also asks about the Security Council's authority to authorize humanitarian intervention. I explain that the Council is bound by the principle of necessity and that military force for human rights cannot meet the test. But what about the Council and the prohibition on the use of force? Professor Wellens is likely correct that the consistent answer with my understanding of *jus cogens* is that these norms bind all. No one doubts the Council is limited by other peremptory norms, for example, the prohibition on genocide. The Council must be bound by prohibition on force as well. That means no expansion on United Nations

Charter Article 39-42. The Council may take measures necessary to restore international peace and security. Later practice or agreements, such as the 2005 World Summit Outcome document, cannot expand the Council's authority. Nor should it. Protecting human rights requires alternatives to offensive force. I am grateful to Professor Wellens for his nudge toward this conclusion.

Professor Neha Jain also raises questions of legal theory. I welcome her interest in a deeper discussion of the book's primary theoretical claims. She begins with the book's stark contrast between positive and natural law. She asks about other versions of positivism that may show appreciation of natural law. *The Art of Law* is focused on the version of positivism being used today to justify expanding the right to use military force. These arguments rely on a quite basic notion of the positivism and customary international law. There is no acknowledgement, let alone appreciation, of *jus cogens* in these arguments.

And positivists who do produce more nuanced descriptions are unlikely to be relying strictly on positivism. As I detail in Chapter Two, versions of positivism beyond simple consent incorporate natural law. Natural law is the only other explanation of law beyond the consent of positivism. "Social facts" as the basis of law, for example, which Professor Jain mentions, need explanatory theory beyond positivism's basis in consent. Theory beyond consent *is* natural law theory. Much more should be said on this by me and others. I will conclude here by re-emphasizing the important point that positive law is the greater part of all law. It is essential and can be interpreted in the humane way Professor Jain prefers, but the durability of such an interpretation comes through symbiosis with natural law theory.

Professor Jain also invites more analysis of the inherent general principles. The International Law Commission (ILC) has taken up the topic, so I, too, hope the interest will grow, including of my assessment that certain general principles such as equality and necessity require natural law explanation. My own research has not led to the wealth of literature she indicates, but rather to a timidity by the International Court of Justice and others to even hint at natural law general principles. Judge Kōtarō Tanaka is the great exception. In Chapter Two, I discuss his dissenting opinion in the *South West Africa* cases in which he eloquently explains "that Art 38 incorporates 'natural law elements' by extending the sources of international law 'beyond the limit of legal positivism,' and by indicating that the general principles of Art 38(1)(c) are binding on all States, even those that do not recognize them." (Ch. 2, p. 87)

I also appreciate Professor Jain's question about my omission of the ILC's work on peremptory norms. Given my own work on this topic prior to the ILC taking it up, the question might be why has the ILC omitted discussing natural law as the basis of *jus cogens*? In both *The Art of Law* and *Self-Defense Against Non-State Actors* (co-authored with Dire Tladi and Christian Tams) I set out the legal history of the concept of *jus cogens*, including the ILC's own past references to natural law. Armenia has recently asked why natural law is being omitted in the ILC's work. Professor Jain recognizes that the ILC attempts to "forego

theoretical debates on the sources" of peremptory norms. Then it begs the question by citing treaties and customary international law—positive law sources—as the source of *jus cogens*.

The most important norms are not found in state practice and government *opinio juris*. They are found through discernment of humanity's moral and aesthetic philosophy, as well as theology. I understand the political pressures the ILC is under but now is a time for courage and understanding the role of natural law in *jus cogens* theory for a world newly opened to altruism. The cataclysm of COVID-19 may finally open minds. It may shake the complacent view of what counts as international law.

Professor Enzo Cannizzaro equally sees the need for law supporting humanity in this moment of crisis but has doubts, like the ILC apparently, about natural law. He writes that "the quest for justice and fairness can transform international law, upon condition, however, [that it …] be vested in positive terms." He recognizes the natural law in the Charter and the Vienna Convention on the Law of Treaties, but finds it more akin to positive law, as does the ILC in its reports so far on peremptory norms. Professor Cannizzaro's chief concern is that he understands natural law changes and worries that I do not. Not so. Natural law changes but not as positive law changes. The process of discerning new norms is toward ever-deeper understanding. It is a constant process, but not of state practice. Once a moral good of *jus cogens* is identified, it may be expanded but not diluted. Change is toward constantly toward the greater humanity. It is, as he says, a quest.

The Art of Law explains the suitability of courts for the discerning on natural law norms and principles. We plainly need renewal courts and other methods of dispute resolution for this important work and so much more. *The Art of Law* recognizes that restricting armed force requires attractive alternatives. The discussion of a new approach to dispute resolution attracted Professor Diane Desierto's primary interest. She wonders at my call for new interest in courts, pointing to the well-known phenomenon of proliferating courts and tribunals. *The Art of Law* sees the need not necessarily for more criminal courts or trade courts, but alternative to military force.

Consider the extensive use of military force by the permanent members of the Security Council and the fact that only one adheres to the ICJ's compulsory jurisdiction. Even that member, the United Kingdom, has extensive reservations. Now is a moment for attracting these and other states to build the capacity of peaceful resolution. Why was there more passion, commitment, and sense of the possible in dispute resolution in 1920 when the PCIJ was founded than today? We can regenerate those attitudes as our profession did in the past, and it is where international lawyers can have immediate impact. We can bring change through how we speak about, advise on, and value peaceful settlement.

The *Art of Law* emphasizes courts. I should have said much more about all the alternatives of peaceful settlement. The ICJ is a proven venue for resolving boundary disputes. It would be ideal for settling South China Sea issues because boundary disputes are backward looking. For disputes of the type we are seeing among the United States, the World Health Organization, and China, however, other methods hold more promise, such as conciliation. The World Health Organization Constitution has an ICJ dispute resolution provision, expertly discussed here. It might be possible to win some sort of judgement against China or even the U.S., should President Trump follow through in withholding dues or in other ways fails to meet WHO obligations. Mass tort claims are already under way in the U.S. against China and the WHO could be next. How will any of these suits for money damages, however, prevent the next pandemic? The WHO needs more resources, not fewer. Conciliation of these disputes would lead to recommendations for a better WHO and clearer responsibilities on the part of member states.

We can teach why and how to use the full panoply of dispute resolution mechanisms employing the constructive language of the performance arts. Professor Desierto and I agree we can transcend the old binaries through teaching and practice that moves us from "polemics and polarization towards pacific dispute settlement."

The Art of Law in the International Community relates the story of how we came to this low point in our common history. It is the story of moving away from natural law to a law explainable only through the human inclination toward wealth maximization and military security. It is also a story of how we may return to the explanation of altruism—of the other-oriented, transcendent selflessness of which we are all capable.

Natural law is the selfless, transcendent aspect of law. It bases fundamental normative principle on capacity to act out of selflessness. In the months of the pandemic, this capacity has been on clear display as health care workers risk their lives daily for others. The pull in the opposite direction to selfishness is strong, however, and needs mitigation.

International lawyers are the advisers to governments, the educators of the next generation of leaders, and the drafters of the ideas that will transcendent the pull to fear and greed. Lauterpacht and Allott provided those ideas for the two generations after the Second World War. The *Art of Law* offers ideas to inspire us now.

Scientists have put aside their usual fierce competition to work cooperatively to mitigate the virus. Those of us who teach, study, and practice law can surely do the same. My colleagues, Karel Wellens, Neha Jain, Enzo Cannizzaro, and Diane Desierto have modeled constructive collaboration toward improving our art. They have motivated me to think more expansively and comprehensively, to think about the place of altruism in international law. They give me confidence that the greater part of the international community can be guided to a path beyond recovery to recover better.