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Gentle Civilizer Decayed? Moving (Beyond) International Law

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Anthony Carty, **Philosophy of International Law***,* Edinburgh: Edinburgh University Press, 2007, 255 pp, hb £66.50.

The second half of the 1980s saw the publication of two remarkable analyses of international law, Anthony Carty's *The Decay of International Law: A Reappraisal of the Limits of Legal Imagination in International Affairs* ('*Decay*')[1] in 1986 and, three years later, Martti Koskenniemi's *From Apology to Utopia: The Structure of International Legal Argument* ('*FATU*').[2] When they came out, the world was still just about in the grip of the Cold War. Much of international politics consisted of the ritualistic posturing of the two political blocks in different global theatres; and international law and international lawyers seemed to have been relegated to being smoothers of their respective prince's path.[3] Both works set out to take issue with the way the discipline understood itself and its object, and how it related to its constitutive other, international politics. And both won their authors considerable acclaim (or disdain) as (so called) critical legal thinkers. A quarter of a century later, the world has much changed, yet the fundamental predicament of international law as diagnosed in these earlier texts has arguably not. So much so that both authors have felt it necessary to return to their earlier argument in order to restate and reinforce their point, and underline its continued currency in present day conditions. Koskenniemi has done this, in more or less equal measure, through his seminal *The Gentle Civilizer of Nations: The Rise and Fall of International Law* (*Gentle Civilizer*)[4] and a re-edition of *From Apology to Utopia*, amended by a sizeable Epilogue.[5] Carty, in turn, has published his *Philosophy of International Law* ('*Philosophy*') as an explicit, if qualified, sequel to *Decay* (*Decay*). Both these re-visits express bemusement about the apparent fact that, despite the opening up of legal-political possibilities after 1990 and the constant broadening of the reach of international law,[6] the 'profession' has continued to engage in what both works denounce in different ways as a legal managerialism, full of politics but devoid of political

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1 A. Carty, *The Decay of International Law* (Manchester: Manchester University Press, 1986).
2 M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Lakimiesliiton Kustannus, 1989).
3 M. Koskenniemi, 'The Politics of International Law – 20 Years Later' (2009) 20 *European Journal of International Law* 7, 16.
4 M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2002).
5 M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, *Reissue* (Cambridge: Cambridge University Press, 2005).
6 Koskenniemi, n 5 above, 9.

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commitment.[7] Yet rather than merely reiterate their critique of the 'profession', both have attempted to go one step further by proposing an alternative for international law – albeit in cautious, tentative and sometimes vague terms. This, as much as their common diagnosis, unites them and singles them out as being among the (relatively) few who, in an Arendtian sense, have sought to *act* on their critique.

Notoriously, Koskenniemi has done so by, introducing on the margins of *Gentle Civilizer* what he called the 'culture of formalism', a term he himself used with circumspection and has since tried to avoid, but which nonetheless mesmerised the discussion and created a focal point for critical thought in/on international law. Indeed, it has had repercussions well beyond critical legal circles and has brought in a much wider international legal public,[8] so much so that it has arguably become a compass for any reflection on what it is that international lawyers are, and what, instead, they ought to be doing.[9] Taking his cues from 'classical' critical legal thought,[10] he attributes the crisis of international law to the inherent indeterminacy of (international) legal norms and the structural political bias with which the application of apparently neutral norms is imbued. Both of these he sees as embedded in the deep structure of international legal discourse, which unfolds between the apology of power and the utopia of such ideals as peace, justice or equality.[11] Having exposed the deep grammar of international legal discourse in *FATU*, Koskenniemi then traced the historical actualisation of this structure in *Gentle Civilizer*, and found that international law, as a self-consciously modern conceptual framework, had left behind its utopian origins as a politically progressive intervention into power politics and had developed steadily into an apologetic provider of debating chips for the (state) powers that be. With this analysis, he confirmed and deepened insights widely shared among the critical community, but, importantly, he also uncovered the (potentially) progressive origins of the (so called) 'mainstream'.[12]

7 Koskenniemi, n 4 above, 15.

8 See *inter alia* M. Goodwin and A. Kemmerer's introductory editorial 'The Same Performance, And So Different. Marking the Re-Publication of From Apology to Utopia' (2006) 7 *German Law Journal* 977, and the following nine essays at http://www.germanlawjournal.com/past.issues.archive.php?show=12&volume=7 (last visited July 14, 2009).

9 Koskenniemi concludes the Epilogue of the re-edition of *FATU* in this vein, affirming that 'international law is what international lawyers make of it': n 5 above, 615.

10 See originally D. Kennedy, *The Rise and Fall of Classical Legal Thought* (New York: Beard Books, 1975); R.M. Unger, *The Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1986); and C. Douzinas, P. Goodrich and G. Hachamovitch, *Politics, Postmodernity, and Critical Legal Studies: The Legality of the Contingent* (Milton Park: Routledge, 1994).

11 F. Hoffmann, 'An Epilogue of an Epilogue' (2006) 7 *German Law Journal* 1100 at http://www.germanlawjournal.com/article.php?id=780 (last visited July 14, 2009).

12 The term 'mainstream', or as B.S. Chimni has it, 'mainstream international law scholarship' (or 'MILS'), while often casually used by both its adherents and its detractors, is, of course, theoretically charged and problematic, as much as its antonym, notably 'marginalism', New Stream, New Approaches to International Law (or 'NAIL') etc. Carty uses the term in the title of his second chapter, and infrequently thereafter. For his purposes, the historical connotation of 'modern' or, indeed, 'classical' – as Jens Bartelson defines the Hobbesian/Vatellian approach – is probably better suited to describe the 'mainstream'. There is, as will be discussed briefly below, generally a degree of vagueness attached to Carty's use of 'mainstream'/'modern'/'classical', it is sometimes associated also with positivism, at other times with the 'practitioner's approach to international law'. On these

Koskenniemi's 'culture of formalism' seeks, then, to reframe international legal discourse from within its formalist premises, notably by showing it to contain all the elements necessary to move it back from the current apologism to a politically progressive utopia. He consequently affirms that the vocabulary of formal (legal) norms and the judicial and quasi-judicial institutions within which it is performed offers the most hopeful platform for transformative politics under current global conditions, provided such strategic legal interventionism is aware of its own contingency and refrains from essentialising its lacking centre through reified concepts such as governance, human rights, constitutionalisation etc.[13] Indeed, the emphasis is on strategic processes that avoid crystallisation into firm institutions or structures and thereby stay clear of the legal managerialism which has, Koskenniemi thinks, taken over the profession. Even though the theoretical underpinnings of the 'culture of formalism' clearly betray its critical pedigree, it has nonetheless left a big door open for interested members of 'the profession', since their professional practice would appear to be quite compatible with Koskenniemi's 'strategic formalism', provided their political intentions were progressive, as would arguably be the case with many contemporary practitioners of 'lawfare',[14] especially in such fields as human rights, humanitarian law, environmental law or labour law. The 'culture of formalism' has, in other words, especially appealed to 'practitioners' in search of a theory. More importantly, perhaps, it has dealt out a new hand for international legal theorising, for it confronts any quest for alternatives with the facticity and functionality of 'traditional' formal legal language and the interpretative community of international lawyers. It has, thereby, defined the question which contemporary international legal theory has to address before anything else, notably whether there is, or can be, anything outside of the formalist box.[15] One who has quite clearly understood this question and who has picked up the challenge it represents is, of course, the author of the *Philosophy*, for whom there most definitely is an alternative. It is built on a similar analysis of the crisis of international law as Koskenniemi's, and has evolved over a similarly long period of time. Both contributions can be seen as self-consciously remedial discourses, build on a medical plot that unfolds through an exposition of symptoms, diagnosis, and therapy, and that aims at curing the patient, namely international law, from the ailments it has acquired over time. Neither explicitly uses medical metaphor, but both can be structured around the intent to remedy a discourse and a discipline in which both continue to believe. Yet, while sharing both concern about the symptoms of international law's ill health and the diag-

classifications, see B.S. Chimni, 'An Outline of a Marxist Course of International Law' in S. Marks (ed), *International Law on the Left: Re-Examining Marxist Legacies* (Cambridge: Cambridge University Press, 2006); A. Orford, 'Embodying Internationalism: The Making of International Lawyers' (1998) 19 *Australian Yearbook of International Law* 1; M. Koskenniemi, 'Letter to the Editor of the Symposium' (1999) 93 *American Journal of International Law* 351; and J. Bartelson, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995).

13 See, however, for a more nuanced examination of the relationship between acknowledged contingency and 'false' necessity S. Marks, 'False Contingency' (2009) 61 *Current Legal Problems* (forthcoming).

14 I. Scobbie, 'On the Road to Avila? A Response to Koskenniemi' (2009) EJIL Talk at http://www.ejiltalk.org/on-the-road-to-avila-a-response-to-koskenniemi/ (last visited July 14, 2009).

15 D. Kennedy, 'Thinking Against the Box' (2000) 32 *New York Journal of International Law and Politics* 335.

nosis, Carty fundamentally differs from Koskenniemi in his therapeutic strategy. The latter effectively turns the *Philosophy* into a rejoinder to the 'culture of formalism', an alternative interpretation of the symptoms of international law's (political) ailments, a veritable if oblique *Gegegenentwurf*.

To appreciate just what Carty is offering, the reader of *Philosophy* has, unfortunately, first to master what an earlier, although ultimately sympathetic, reviewer called 'a disparate set of essays, with no coherent theme' that leaves the reader with 'an overall sense of incoherence due to the absence of any effort to connect the dots by providing a unifying argument.'[16] Indeed, Carty does himself no favour by hiding his thought in a stream of consciousness-style narrative that largely develops its plot by contouring the author's motley choice of books selected to exemplify the different aspects of his theory. While this is not in itself a bad strategy, the sheer number and breadth of readings is daunting, ranging from classics of international studies such as Vitoria, Grotius, or, again and again, Hobbes, via such disparate contemporary international lawyers as Emmanuelle Jouannet, René and Pierre-Marie Dupuy, Guy De Lacharrière, Jean Combacau and Serge Sur, Alfred Verdross and Bruno Simma, Karl Döhring, or, indeed, David Kennedy and, of course, Koskenniemi, to (political) philosophers, theologians and physicists. What is more, these works are reviewed in a somewhat jumbled fashion, with some being treated to prolonged discussion and others just being name dropped *en passant*, without it being made clear why this should be so. Indeed, with the exception of his nemesis Hobbes, Carty's treatment of these texts leaves the reader in some doubt as to whether they are building blocks for his own theoretical construct, or examples of what the latter is up against. This may arguably have something to do with a certain methodological experimentalism which relates to Carty's attempt to reconstruct an alternative language of international law – on which more below – but it is hardly conducive to winning him disciples. Not a shadow of doubt is left, on the other hand, as to what Carty thinks is the ideal-typical incorporation of the Hobbesian state in the contemporary world, namely the real-existing United States. And the book's self-conscious anti-American tone[17] unnecessarily introduces an element of reductive stereotyping that contradicts Carty's overall objective of de-simplifying the story international law tells. Yet, this is not an author to mince words or to engage in overly didactic gestures to his readership, but one who lets the willing reader share his own existential concern for international law and what it does to the world. The book is permeated by a spirit of earnest inquietude with the global state of affairs, the role played by 'traditional' international law, and the anxious quest for an alternative. In this sense, the *Philosophy's* quixotic style betrays the humanist predisposition at the core of Carty's argument.

16 R. Falk, 'Review Essay on A. Carty, *Philosophy of International Law*' (2008) 102 *American Journal of International Law* 902.

17 He, admittedly, ironises his own stance by referring to it as one of several 'uncool' features of his argument, but he does not then explain what is cool about being 'uncool' in this respect: see *viii*.

THE SYMPTOMS

What, then, is that argument? As with Koskenniemi, *Philosophy's* starting point is a profound discomfort with the way international law is conceived and practised in the contemporary world. This is not a discomfort over the relevance or even the basic validity of the concept of international law as such, it is, on the contrary, a passionate concern about the health of a discourse the necessity of which Carty at no point calls into doubt. What he does call into doubt is the dominant conception of international law, which he sees as a symptom of disease, notably the gradual 'consumption' of the original body of the law of nations. The outward appearance of the disease is what he calls, in *Philosophy's* second chapter, the 'continuing uncertainty in the mainstream' (26). What he refers to is not merely the indeterminacy of legal language, the preeminent theme of critical legal studies,[18] but the lurking doubt about the law's substance that besets international lawyers in regular intervals. It is a doubt concisely described in that second chapter, notably with reference to the sources doctrine upon which the 'classical' tradition builds its conception, and, in particular, the *arché*-source of all international law, namely custom. As he does throughout the book, Carty elaborates his point in the form of an intriguing conjunction of jurisprudential analysis and the contrasting of different publicists on the theme. Hence, in his treatment of custom, it is, in the main the *Nicaragua*,[19] *Nuclear Weapons*,[20] *Arrest Warrant*,[21] and *Wall*[22] cases, as well as two exponents of the French tradition – the, in Carty's terms, positivist idealist René Dupuy and the realist Guy Ledreit de Lacharrière – through which he seeks to expose why the 'classical' theory of custom represents a 'paralysis of reflective intellect and moral sense' (55).

Carty's issue is the idea of *opinio juris*, the subjective complement of objective state practice, and the inherent indeterminacy that attaches to it. The fact that one of the two doctrinally required criteria for customary law creation is vague and slippery is, to Carty, no mere happenstance, but reveals the underlying problem with the 'classical' conception. That problem consists in what, for Carty, boils down to a false ontology of international law, coupled with a false epistemology of international lawyers. On a first level of analysis, Carty re-states an old critique of custom,[23] namely that 'the state is itself, as a totality . . . capable of having 'legal sense' (27). This counterfactual assumption creates an original divide between the multiple facets of that which the 'state' stands for and which Carty seeks to recover, and the reductive and anthropomorphic Hobbesian State which Carty thinks underlies 'classical' international law. The latter, to Carty, is a fiction without real

18 Koskenniemi, n 4 above, 11.

19 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits, Judgment, ICJ Reports 1986, 14.

20 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66.

21 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* Judgment, ICJ Reports 2002, 3.

22 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, ICJ Reports 2004, 136.

23 Carty cites approvingly A. D'Amato, *The Concept of Custom in International Law* (Ithaca: Cornell University Press, 1971).

being, and the painstaking examination of its expressions of will by international lawyers cannot ever reveal the 'will of the state' as international law's constitutive signified. If the 'classical' conception of statehood is ontologically implausible to Carty, so is its idea of legality, premised, according to him, either on 'naïve positivism', 'superficial idealism', or 'nationalist prejudice' (33). In a move that resembles Koskenniemi's analysis of international legal argument as the structural coupling of a legalist (positivist/objectivist) and pure facts (realist) account of inter-state normativity, Carty stakes Dupuy against De Lacharrière to a similar end; the former holds that international law emerges through a dialectical mediation between cooperation, which is institutional and horizontal, and conflict, which is relational and vertical. To the latter, this is a form of transcendentalism removed from the reality that 'states retain control of the interpretation of international law, so that there is merely an application of multiple conflicting state policies' (31).[24] Carty rejects both accounts, because they are ultimately premised on a false ontology of international legality, one that is conceived of in abstraction from the historicity of grown national collectivities. It is the false ontologies of statehood and legality that deprive customary rules of a concrete foundation and turn them into virtual, and, hence, ultimately indisposable, empty norms. Yet, that emptiness triggers, as Carty shows, an epistemological shift towards the interpretative authority of international courts. For him, there is 'a residual confidence among international lawyers that the international judiciary can, "reveal" . . . the presence of custom, and turn it from virtual to real law' (27). In other words, the indeterminacy of custom is covered up by the determinism of judges. That determinism, however, cannot actually be seen as what it is, for otherwise international legal process would be revealed as essentially arbitrary. Judicial decisions must, hence, be couched in terms of reasons purporting to be universally comprehensible and compelling.

Yet, as Carty shows in his analysis of recent case law, that is not what courts have provided. Rather, courts have employed the 'subjective' element of custom to spin a particular factual situation towards a certain conception of legality or illegality. Hence, in *Nicaragua*, the ICJ used *opinio juris* (in relation to customary exceptions to the prohibition of inter-state intervention in internal affairs) to reframe what, for Carty, was an issue of high politics in the formalistic terms of legal intentionality (29), thereby dodging the issues at the heart of the conflict. Similarly, in what is, perhaps, the quintessential hard case, the *Nuclear Weapons* decision, Carty sees custom as playing the role of legitimising the Court's abstention from a substantial determination of legality. He thus calls its refusal even to examine *opinio* in relation to the doctrine of deterrence 'scandalous and . . . showing the utter bankruptcy of the doctrine of positivist customary law' (p 35). Likewise, he cites approvingly the *ad hoc* (dissenting) judge Christine van den Wyngaert who, in the *Arrest Warrant* case, stated that the 'pseudo-application of custom as a reflection of state practice could erase the very idea of balance of conflicting principles' (45), alluding to the Court's avoidance of a substantive weighing of two conflicting claims, namely for universal jurisdiction and for sovereign

24 R.J. Dupuy, *La Communauté internacionale entre le mythe et l'histoire* (Paris: Editions Économica, 1986); G. De Lacharrière, *La Politique juridique éxterieure* (Paris: Editions Économica, 1983).

immunity and its 'deferral' to what Carty regards as a spurious reading of state practice and *opinio* on the matter. He closes his examination of custom with a fascinating digression on the importance of secrecy in state practice, and the limitations this imposes on the 'finding' of an *opinio* by a court (or an international lawyer), through the example, contained in an appendix, of the Oman and Muscat incident in British diplomatic history. It is in these sections, in which Carty most directly engages with the essence of the 'classical' tradition, notably the interpretation of jurisprudence in light of doctrine, that he reveals himself as most ambivalent. For in order to support his dismissal of the Court's reasoning as a mere reproduction of the false ontology that he sees at the heart of international law's decay, he engages in the very exercise, namely a close textual reading of judgments and dissents, that he sets out to overcome. Put differently, Carty seems to want to engage substantively in the *querelle des interpretations*, and, at the same time, reject that *querelle* as irrelevant to the concerns of international law proper. In the best textbook tradition, he appears to be diving into the case law, only then to single out a few judicial statements through which he rhetorically underlines his case against the 'classical' way of interpreting case law. He thereby leaves the reader uncertain as to the authority he attributes to the 'classical' sources of international law and the judicial bodies charged with deciding upon them. Would the latter in principle be competent to pronounce the 'right' international law – one cured from false ontology – if only it applied, in Carty's view, 'right' reasoning; or would the very idea of a sources doctrine and judicial bodies pronouncing upon it be nonsensical from Carty's perspective? This important question is left open, making it correspondingly hard for the reader to assess his reading of case law, for want of a clear framework of reference. On balance, Carty tends to see international judgments as more or less sophisticated attempts artificially to graft international law's false ontology onto facts which, for him, would militate towards different conclusions. This view is in line with his therapeutic strategy – explored below – which would have international legal discourse consist of a much wider array of relevant facts than the 'classical' method, and with it existing international courts, could admit.

Having dissected the 'classical' treatment of custom, Carty goes on to exemplify his critique of the (false) ontology of international law with further deep readings of the grand themes of international relations, namely statehood (chapter three), the use of force (chapter four), the conjunction of statehood and force in an ideal-typical United States (chapter five) and the international economic regime (chapters six and seven). Statehood, which is accorded a privileged ontological function in Carty's analysis of international law, is examined with reference to the *Frontier Dispute*[25] and the *Island of Palmas*[26] case, cross cut by a *tour de force* reading of contrasting continental (mostly French and German) conceptions of statehood.[27] To

25 *Frontier Dispute (Burkina Faso v. Republic of Mali)* Judgment, ICJ Reports 1986, 554.

26 *Island of Palmas Case (Netherlands v. United States)* Perm. Ct. Arb. (1928) 2 UN Rep Intl Arb Awards 829.

27 A. Cassese, *International Law* (Oxford: Oxford University Press, 2001); J. Combaceau and S. Sur, *Droit international public* (Paris: Montchrestien, 1993); A. Verdross and B. Simma, *Universelles Völkerrech* (Berlin: Duncker & Humblot, 3rd ed, 1984); and K. Döhring, *Völkerrecht* (Heidelberg: Müller Verlag, 1998).

Carty, international law's idea of statehood is intimately connected to the historically grown views on territory and nationality held by European nation-states and their immediate offspring. Starting with the principle of effectiveness as outlined by Antonio Cassese in his *International Law*, Carty shows how the formal criteria of statehood are entangled with the colonialist notion of 'civilization' and serve at once a differentiation and an incorporation function.[28] By promoting an idea of abstract statehood the legitimacy of which is based on force – notably effective control over territory – and verisimilitude – with alike entities, historical European nation states created the basis for both their colonial expansion and their absolute integrity, not to be challenged by claims for self-determination on part of any of their constituent components (82). The corollary of this, notably that self-determination is subject to the consent of existing nation-states, is tautological in Carty's view and serves only to preserve the club-like atmosphere of the 'community of states', a logic that transpires from the *Frontier Dispute* case and its enshrinement of the principle of *uti possidetis*, as well as its later application to the disintegration of the Former Yugoslavia. The two seemingly opposed principles of territorial integrity and self-determination again reveal the muddled ontology of an international law premised on the artifice of the nation-state. The latter combines the notion of an ahistorical and abstract sovereignty with one of a historically-contingent and concrete community.[29] The question of self-determination sits at the dividing line between these two notions and the way it is answered is determinative of the way statehood and international society are conceived. Here Carty provides a fascinating reading of French and German responses, showing how they privilege either of the two sides of the state/nation dichotomy.

The French line of argument, represented by Jean Combacau and Serge Sur's *Droit international public*, attempts to transpose French public law theory onto an international frame, considering the state as a corporate objective entity which, on the international plane and vis-à-vis other states, acts as a monolithic entity intent on preserving-itself and maximizing its influence. Law arises in this international state of nature from discretionary commitments linked to collective self-interest. Most importantly in relation to the question of self-determination, the nation and its historical title – or lack thereof- to the territory it inhabits is entirely subsumed by the concept of the state which, to others, including claimants of self-determination, is an impenetrable black box; only when a state acts out of its own volition, or when it loses the attributes of statehood entirely, can new states come into existence on its territory. The German position, by contrast, laid out through Alfred Verdross and Bruno Simma's *Universelles Völkerrecht* and Karl Döhring's *Völkerrecht*, is taken by Carty to come out on the side of the nation. Here, statehood is entirely contingent upon historically grown nationhood, it is not primarily territoriality, but nationality, or more precisely common descent, that defines the state,

28 See A. Angie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2007).

29 See in greater detail, F. Hoffmann, '*In Quite a State: trials and tribulations of an old concept in new times*' in R. Miller and R. Bratspies, *Progress in International Organization* (Leiden: Martinus Nijhoff Publishers, 2008).

and its sovereignty flows from the 'natural' authority of the nation that underlies it. While this view *prima facie* privileges self-determination over territorial integrity, it runs into trouble where statehood and nationhood do not coincide, that is, in the case of multi-ethnic states. Here Carty examines Döhring's idea of shared values as a substrate of nationhood that retains the viability of the precedence of the nation over the state; where such values no longer exist, no bar to self-determination can be imposed. Although the latter position feeds into Carty's substantive propagation of the right to self-determination, his analysis of the two points of view in relation to the ontology of statehood shows that neither overcomes the state/nation dichotomy as both reify one of its sides. Again, formalised legal concepts narrow the horizon and block access to the 'things themselves'.[30] Although, between the lines, he seems to find the 'German approach' more attuned to his community-oriented vision, he again leaves the reader in some doubt as to what precisely he wishes to show with these contrasting readings. Once more, a suspicion is raised that they essentially serve a straw-person function, as stylised representations of discourses he aims to critique and move beyond. His reading thus remains a rough cut.

His subsequent treatments of the use of force and the international economic regime, as well as his revisit of statehood in a vivisection of the present-day United States are less directly constructed on the judicial articulation of international legal doctrine and introduce a wider set of readings. They nonetheless follow a similar line as the initial exposition and are used as thematic wedges to make, from several different angles, his overall point as to false ontology. Hence, he uses the chapter on the use of force to analyse the dichotomy between the prohibition of the use of force (Art. 2(4)) and the right to self defence (Article 51) as yet another case in point of the ambiguity that inheres international law in the 'classical' conception. For Carty, this dichotomy boils down to a fundamental conflict between state sovereignty and international legality. Both negate the respective other, yet both are meant to be constitutive principles of the international. This conflict is neither solved in the predominant voluntarist Vattellian conception, in which legality flows from sovereignty, nor in the objectivist Kelsenian one, in which legality is constitutive of sovereignty. The former cannot, as Carty observes on the basis of his reading of Emmanuelle Jouannet's *Emer de Vattel et l'émergence doctrinale du droit international classique*,[31] provide for an absolute (legal) limitation of the discretionary use of force by states because it holds that states are themselves the interpreters of rules they have undertaken to comply with (116). For Carty, Jouannet's reading of the voluntarist conception reduces international law to being no more than the expression of the relations between free and equal states. Hans Kelsen, by contrast, embodies the ultimately failed post-World War I movement against voluntarism and in favour of institutionalisation/constitutionalisation. It attempted to legalise the use of force by redefining it as the legal sanction of prior and illegal aggression, that is, by postulating an international legal system in

30 The allusion is to Kant's concept of the *noumenon* denoting the thing-in-itself, which, in Kantian epistemology, is not directly accessible to the human mind; see I. Kant, *Critique of Pure Reason* (Basingstoke: Palgrave Macmillan, 2007).

31 E. Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (Paris: Éd. Pédone, 1998).

which states are relegated to being competent organs of an international legal community that precedes and transcends them (119). This idea is meant to be anchored in state practice through a system of compulsory (international) adjudication, though in its absence what Carty terms the 'institutional' approach is bound to fail (123). As with his previous readings, Jouannet's Vattel and Kelsen act more as a placeholder for the actual point Carty wishes to make, namely that the dichotomy between sovereignty and legality is in itself a dysfunctional misconception of what lies at the heart of inter-state violence. Again, insofar as Carty's frame of reference lies outside of this dichotomy, the reader is bound either to take his point here or leave it. An 'internal' critique of voluntarism and objectivism, along the lines of the argument Koskenniem makes in *FATU*, is not an option for Carty.

In a similar vein, what Carty calls the neoliberal economic order and what he considers to be its flag-bearers, namely human rights, democratisation and the rule of law, are expressions of the prevailing voluntarism through which the state system and its law are conceived. Through an eclectic cross-analysis of the contemporary international trade regime, the forceful propagation of human rights, the rule of law and democratisation, and analytical jurisprudence's reduction of law to a system of rules backed up by sanctions, Carty again dissects what he terms 'Western legal culture' in his search for cancerous tissue (211). He finds the latter in form of a multi-facetted legal phenomenon that informs the logic of contemporary international relations: human rights, the rule of law, and democratisation are forms of conceiving social relations that express the methodological individualism and 'consumerism typical of advanced capitalism' (211); they are also a substantive articulation of certain values, made out to be universal but 'entirely compatible with the expansion of Western economic interests' (211); what is more, legalised human rights are necessarily framed in a way compatible with voluntarism's construction of law as backed by power, so that the de facto value pluralism in the world is forcefully settled by recourse to the 'weight of the majority' (211), that is, pure power. Here, 'traditional' Marxist political economy aids Carty's analysis, and he defends it against its 'postmodern' critics, especially those standing in a post-Marxist tradition such as Hart and Negri and their *Empire*.[32]

Lastly, Carty returns to his core theme of statehood by taking a closer look at the state he considers to be both dominant and an ideal-typical incorporation of the voluntarist Hobbesian conception of statehood, namely the United States. He does so by reading a wide range of contemporary American reflections on itself and, most notably, on its 'legal cultures of collective security', all stemming from the experience of the Bush administration (142). His purpose is to gauge the causes for US foreign policy in its cultural history and social psychology. The backdrop is formed by David Campbell, a critical international relations scholar, whose *Writing Security, United States Foreign Policy and the Politics of Identity*[33] names two logics that inform American security consciousness, namely 'the construction of the self through the exclusion of the other, and the repetitive character of the tech-

32 M. Hart and A. Negri, *Empire* (Cambridge: Harvard University Press, 2001).

33 D. Campbell, *Writing security: United States Foreign Policy and the Politics of Identity* (Manchester: Manchester University Press, 1992).

niques used to construct the self' (143). On this basis, Carty analyses three aspects of American identity formation. The first, explored through Jewett and Lawrence's *Captain America and the Crusade Against Evil*,[34] looks at the entanglement of (Protestant) Christian theology with the discourse of international law. That work argues that the 'faith-based presidency' propounded by the Bush Administration led to a 'Deuteronomic subversion of international law' (143), an idolisation of the self and demonisation of the other which produced a mental 'pop fascism' the script of which the Bush Administration incorporated into the domestic political process and its foreign policy. The secular *pendant* to this theological mark in American social psychology is the historically grown reflex to counter real or perceived threats through expansive pre-emption, a thesis advanced by the historian John Lewis Gaddis in his *We Know Now: Rethinking Cold War History*.[35] Both these cultural explanations of US conduct feed into Carty's reading of several explicit (re-)statements of the American conception of international law, and of collective security in particular. They confirm his suspicion that an influential line of American international legal scholarship is quite willing to do away with formal aspects of international legal process, bringing to the fore what, in his view, has for long underwritten American foreign policy, notably a 'cops and robbers' view of the world (159). In it, everybody 'else' comes to be seen as a potential robber, threats are omnipresent and the need for defence is transformed from an exception to normality; or, rather, the exception becomes normality. Security can, hence, only be obtained proactively, by continuously expanding one's sphere of control. The literally immeasurable threats posed by either 'terrorists' or weapons of mass destruction in rogue hands perpetuate this logic. To Carty, the Bush Administration's United States, as the quintessential late-modern state, leads the Hobbesian-Vattellian conception of statehood and of international law *ad absurdum*. It is premised on the 'apparent construction of order based upon the opposition of the domestic and the foreign, and the paradox of a state system which rests upon the mutually exclusive suppositions that each is a self for itself and an other for all the others' (161). This must be an unstable construction that is bound to implode by its own logic. Hence the Bush years mark the 'bankrupted end of an international law tradition' (161).

The symptom chart that emerges from this analysis shows international law to be terminally ill, consumed by the 'fragmentation of statist language'. It has become in essence a hostage to egomaniac states defined by individualist liberalism, predatory capitalism, and aggressive self-preservation, all of which are inimical to what, for Carty, is the *law* in international law.

THE DIAGNOSIS

How, then, does Carty explain this anamnesis? What is his diagnosis? On the most abstract level, it is modernity itself. For Carty argues that it is ultimately

34 R. Jewett and R. S. Lawrence, *Captain America and the Crusade Against Evil: The Dilemma of Zealous Nationalism* (Grand Rapids: Wm B. Eerdmans Publishing, 2004).

35 J.L. Gaddis, *We Now Know: Rethinking Cold War History* (Oxford: Oxford University Press, 1998).

the modern idea of the state as an objective and discrete entity endowed with personality and legitimised through sovereignty, and of law as a system of positivised rules applicable to the relations between states, which overwrites the substantive foundations of political community and normativity. He sets out this basic diagnosis in *Philosophy's* first chapter, where he distinguishes between the notions of legal doctrine and of legal dogmatics. The former, as defined in the *Dictionaire encyclopédique de théorie et de sociologie du droit* with which Carty begins his reading exercise,[36] emanates from the medieval and Renaissance natural law tradition and refers to interpretation and systematisation of the law. It was spontaneously and freely held opinion and its authority came from the presumed reasonableness of 'erudite and morally serious people' (2). Legal dogmatics, by contrast, is concerned with the interpretation of legislation and jurisprudence understood as a logically coherent system of rules: it is not concerned with the values informing legal precepts nor with their meaning in relation to history, society or politics (1). Carty argues that the transition from the medieval/Renaissance period to the modern is marked by the gradual substitution of doctrine by dogmatics and the consequent change in the conception of what (international) law actually is. That change, in turn, is intimately linked to the emergence and growth of the concept of the modern (nation) state. Its propagation, regardless of the historical vagueness of the entity it means to denote,[37] goes back to Hobbes who represents, so to speak, the original cancer cell from which the modern state and modern international law developed.

More precisely, it is the shift from a medieval scholastic framework to a particular version of Renaissance humanism, of which Hobbes is, for Carty, the apex. Following a Cartesian plot, Hobbes institutes the sovereign as the subject of international relations, that is, as an unquestionable epistemic origin. It 'is not named, but names, not observed, but observes, a mystery for whom everything must be transparent' (6). The expression of such sovereign subjecthood is the state, which must consequently be geared primarily towards protecting its very 'being', that is, with fending off any and all challenges to the very artificiality at its roots. This implies a suppression both of its material origins in violence – notably the 16th and 17th century wars of religion and the parallel conquest of colonial territories and the subjugation of its peoples – and its constituent components – the society and its individual members represented in the body politic.[38] The result is a conception of statehood that is modelled on the liberal ontology of social contractarianism, with the state being conceived as an autonomous moral agent. The crucial difference from (domestic) constitutionalism is, however, that there is no contractually constituted Leviathan in international society, and instead what prevails is a (Hobbesian) state of nature in which every state is each other's wolf. Law is, under such circumstances, something fundamentally different from the earlier natural law. The latter produced legality through (moral) legitimacy, as set out by criteria taken to be objective by the standards of 'right reason'. As such, it preceded and

36 A.-J. Arnaud, *Dictionnaire encyclopédique de théorie et de sociologie du droit* (Paris: Librairie générale de droit et de jurisprudence, 2nd ed, 1993).

37 See on the mythical character of Westphalian statehood, A. Osiander, 'Sovereignty, International Relations, and the Westhpalian Myth' (2001) 55 *International Organization* 251.

38 Carty refers extensively to A. Lejbovicz, *Philosophie du droit international: l'impossible capture de l'humanité* (Paris: Presses universitaires de France, 1999).

qualified the conduct of states, and it premised the legality of warfare on criteria beyond the reach of any *raison d'etat*. The emergent *ius gentium*, however, turned the natural law logic upside down, subsuming legitimacy under legality, and turning law into the language of sovereignty. The sovereign itself – that is, the state – is now the fountain of all law but not itself bound by it. It is *legibus solutus*, an attribute previously arrogated by princes and the pope, both claiming ordination by God.[39] The state is, hence, sacralised and removed from the sphere of human judgement, its subjective interest is objectivised, as Jens Bartelson observes in his *Genealogy of Sovereignty*, which is Carty's main reference for this history of ideas.[40] Hence, 'the image of the divinity of the state leaves the European international law tradition with a concept of the state which is incompatible with any overarching, binding notion of law' (126). This Hobbesian construct makes its way, though Locke and Gentili, to Vattel, who becomes the intellectual father of the prevalent voluntarist conception of international law and the 'liberal democratic, market oriented' (128) concept of statehood it implies.

What Carty's argument entails is not that the place of law in international relations has been diminished, but that law signifies something fundamentally different from what it did before. In effect, we are talking about two entirely different international 'laws', the 'classical' version being based on a double reduction: namely of legal doctrine to legal dogmatics (1) on one hand, and of historically grounded communities to 'sovereign' states on the other (94). This false conception of international law is built, as we have seen, on a false ontology of both statehood and law, and has shaped modern international legal *praxis*. Yet with aggressive individualism at its core, 'modern' international law could not crystallise into a stable legal system or, rather, the only stable element has been its recurrent dysfunctionality when it comes to regulating effectively international affairs for the benefit of its stakeholders. The shift from doctrine to dogmatics, effected by international lawyers, has underwritten this dysfunctionality and has led to the continuing crisis of international law.

This is a powerful analysis, persuasive to anyone open to critical argument, and it offers an important complement to Koskenniemi's diagnosis in *FATU* and *Gentle Civilizer*. However, Carty himself subverts the dramatic effect of his analysis by dealing with the process of dogmatisation in a surprisingly imprecise way. *Prima facie*, he associates it with legal positivism – that is, the practice of interpreting the law as law, and not as morality, politics or culture – conceiving it as logical, value-free and neutral. So defined, it would indeed be an activity appropriately tailored to the functional requirements of Vatellian international law in which there is no room for independent – ie extra-legal – inquiry into the validity or meaning of the law. If that is what Carty means by positivism, then positivism would be the name for the very practice that reproduced the 'modern' conception of international law, and Carty does seem to use the term in this way on several occasions in the *Philosophy*. Yet that 'modern' conception is essentially voluntarist – that is, in contemporary terminology, realist – and so is at odds with, for instance, Kelsen's

39 See K. Pennington, *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley: University of California Press, 1993).

40 Bartelson, n 12 above.

objectivist venture expressed in the terms of legal positivism. Indeed, both a realist (voluntarist) and an idealist (positivist) conception of law are amenable to a dogmatic-positivist mode of interpretation as one that refuses to step outside of what seems to be given by the language of the law. However, to add to the confusion, Carty then also associates a self-consciously positivist mindset with the founding generation of the academic discipline of modern international law in the context of the Institute of International Law. However, these nineteenth century lawyers are hailed in the *Gentle Civilizer* as the pioneers of progressive legalism, and are seen by Carty as having been motivated by a preoccupation with a 'law of peoples . . . who exist in a morally significant global order created by God' (52). Having started out with strong and negative assumptions about legal positivism, he ends up so much as admitting that, at least in its progressive legalist form, positivism could be informed by the moral meta-narrative he is principally interested in recovering. But again this does not lead him to make a case either for a progressive legalism along the lines of Koskenniemi or against it along alternative lines.

However, what the legal dogmatic (as opposed to *doctrinaire*) mindset ultimately connotes for Carty is apologism. Whether it is the theoretical apologism of French voluntarism, or the 'practitioner-based' model of British pragmatism, it is the (classical) international lawyer's refusal to be what Peter Goodrich likens to the Greek *nomikos*, 'a counselor of judges and of legislators, [a] literate lawyer, [a] public scholar, [an] intellectual who would advise and debate decisions but was not [her]self a judge or governor and hence was independent in both institutional and disciplinary terms.'[41] By going out of his or her way to eliminate the vestiges of this humanist heritage in (international) legal discourse, the modern international lawyer has become the principal instrument of the discipline's decay. However, that decay, as Carty entitles it in the prequel to *Philosophy*, is not a true decay. For the radical alternative which Carty seeks to sketch, and which is rooted in this earlier tradition, has not so much decayed as been replaced by modern voluntarism. For that very reason, he believes, it is possible and worthwhile to recover and reconnect to it.

THE THERAPY

The therapy Carty devises is essentially medicinal, with the tonic being an eclectic set of theoretical frameworks through which international law proper can be re-found(ed). Typically, Carty does not systematically relate these frameworks to each other, nor are they necessarily compatible. They rather emerge from the different readings Carty has been inspired by. On the broadest level, the remedy against the Hobbesian/Vattellian plot consists of (re-)philosophising international affairs. This he understood already in *Decay* as 'the development of a method for valid, legitimate, or otherwise convincing argument'.[42] He explains in *Philosophy* that it means 'recognizing the inherence of an anthropology in the legal

41 See P. Goodrich, Review Essay 'On the Relational Aesthetics of International Law: *Philosophy of International Law,* Anthony Carty' (2008) *Journal of the History of International Law* 321, 332.

42 Carty, n 1 above, 130.

discourse of international lawyers which needs to be brought to life *and made to run*' (19). This is both a critical method aimed at exposing the irreality of the concepts of modern international law, and a way of exploring the 'real' being of society and political community, and the law at its basis. As such, his call to philosophise is no mere gesture to the importance of theory, but a substantive cure. Unlike Koskenniemi, Carty leaves the reader in no doubt that he believes that a 'real' international law is indeed out there, waiting to be found, if only (methodological) 'right reason' were properly applied. While he shares with Koskenniemi the historical critique of the Vatellian conception and the role it has given to international lawyers, he radically differs on his vision of an alternative. For Koskenniemi, arguably the only cure can be the disease itself, which is why the agency of international lawyers is necessarily reduced to strategic intervention rather than containing a capability to originate an entirely alternative *praxis*.

The viability of such an alternative *praxis* is produced through the dual nature of the international: it is, at once, an *episteme* mediated by language and a set of material circumstances. As language, it is amenable to interpretation, and thus to a plurality of meanings. As a set of material circumstances, it is rooted in the social and political 'reality' of the people inhabiting the world. The classical conception represents a distorted account of this 'reality' produced by the interpreters of its effects, notably international lawyers. It is hence up to these to pierce the veil of classical statehood and its law, and to chart what they find behind it. The method Carty proposes to achieve this is what he calls 'an ethnographic phenomenology of human conduct, whereby the place of language as an all-determining structure is accepted up to the point that our minute instances of surface consciousness, general social perspectives can be read' (17). This hermeneutic phenomenology is derived from Paul Ricoeur's reflection on recognition,[43] which plays a central, if somewhat opaque, role in Carty's thought. In essence, Carty seeks to re-conceive the international as a space inhabited by 'cultural (and) historical communities' for whom the figure of the 'state is the institutional or procedural framework they give themselves for the conduct of their public affairs' (18). These communities are culturally incommensurate, and are themselves made up of distinct individuals in a continuous search for identity. They are engaged in continuous conflict and struggle, though this engagement does not, as in Hobbes, take the necessary form of enmity, but, on the contrary, of mutuality. This is so because, Ricoeur insists, there are shared moral motivations among all participants, motivations which inhere in the human person. Although these motivations are recognised as shared, the duality of capabilities and vulnerabilities that constitutes the self makes for a constant need to struggle. However, this is really 'a struggle against the misrecognition of others at the same time that it is a struggle for recognition of oneself by others.'[44] What Carty takes from Ricoeur is the acceptance of the inherent conflictuality of human community and his simultaneous rejection of both the absence of recognition in Hobbes, and the 'cheap' recognition of a line of thought going from Hegel to Axel Honneth (225). Likewise, he credits

43 P. Ricoeur, *Parcours de la reconnaissance: trois études* (Paris: Gallimard, 2005).

44 From the English translation of the *Parcours*: *The Course of Recognition* (Harvard: Harvard University Press, D. Pellauer trans, 2005) 258.

Ricoeur for providing 'the framework in which one can understand the ethnic-nationalist and Marxist responses to the bourgeois capitalist Hobbesian state' while retaining an overarching moral thread (225). In other words, Carty finds his Marxist analysis of imperialist statehood and his interest in the logic of self-determination both compatible with and subsumed within Ricoeur's framework. He complements it, in typically eclectic manner, with other authors who have explored the irreducible solicitude of human beings, such as George Steiner in relation to (cultural) translation,[45] or Barry Buzan with his idea of 'mature anarchy' based on reciprocity,[46] as well as James Der Derians analysis of the inherent alienation of states from each other,[47] and Helmuth Plessner's concept of distance and tact.[48] What all of these point to is the fundamental solicitude of human beings, their opaqueness, and the need to work with rather than against this basic 'human condition'. Law, in this scenario, is the medium through which mutuality through (diplomatic) tact is expressed in the form of reasoned (public) opinion by international lawyers, subject to mistakes and misjudgment or, rather, to the intransparency of the effects of agency. In this way, the Hobbesian order of fear may be replaced by an order of respect in which 'tact in the face of perplexity has to take the place of fear in the face of the unknown and apparently threatening' (245).

This is a complex medicine, with varied ingredients and diffuse effect. That is perhaps a reflection of Carty's daring to think differently: namely, a certain theoretical overstretch which gives him cover, not least by shrouding his actual position in a thick theoretical haze. It is possible to read Carty in several different ways. As a Marxist sensitive to the class struggle and imperialism. As a descendant of the historical school of jurisprudence and its penchant for nationhood (and nationalism?). As a legal 'hermeneut' and quasi-Dworkinian theorist of adjudication. Certainly not as a legal positivist, yet still as someone who deeply believes in the existence and relevance of law, and who continues to consider the concept of statehood as significant, if in a radically distinct manner from that of positivism. Perhaps, at the core of his thought is that tradition he acknowledges throughout the *Philosophy* as being at the heart of his project, namely natural law – or, rather, (legal) humanism as it developed within the historical natural law tradition. Despite its frequent mention, it is never openly acknowledged as the medicine's active ingredient, and Carty somewhat mystifies its role in his theoretical framework. Yet what he ultimately does, in so many words and through so many disparate theoretical tools, is to reconstruct a naturalistic world view in which law primarily denotes a complex morality that inheres in human community and is subject to rational exploration. It denotes only secondarily 'positive' precepts meant to regulate human conduct according to that overarching morality. And it reserves for the lawyer the role of the public intellectual engaged in a continu-

45 G. Steiner, *After Babel: Aspects of Language and Translation* (Oxford: Oxford University Press, 2nd ed, 1992).

46 B. Buzan, *People, States and Fear: The National Security Problem in International Relations* (Brighton: Wheatsheaf Books, 1983).

47 D. Der Derian, *On Diplomacy: A Genealogy of Western Estrangement* (Oxford: Blackwell, 1987).

48 H. Plessner, *The Limits of Community: A Critique of Social Radicalism* (Amherst: Humanity Books, 1999).

ous debate about the content of the good (not of the right). Carty is very careful not to present this scheme in simplistic or potentially hegemonic terms, and he makes it clear that his insistence on an overarching morality that precedes legal relations (in Ricoeur's sense) is as averse to 'moralism' as the more agnostic lines of thought he surrounds himself with. Yet ultimately it is this which distinguishes him from Koskenniemi's strategic legalism and makes the *Philosophy* a truly bold venture with its motto: back to humanism.

THE PATIENT DISCHARGED?

So can the patient be discharged? Is this a viable and a compelling alternative to the classical conception? What is more, is it, in Koskenniemi's sense, 'progressive'? It is more difficult to respond to these questions than Carty's concentrated, if somewhat breathless, argument would lead one to expect. Carty's humanism clearly places itself on the anti-formalist side of the paradigmatic divide, privileging legitimacy over legality, with the former deriving from a contemplation of substance, not from a formal, that is, procedural or institutional, setup. This move away from formalism, whether classical or strategic, and towards substance is, to this reviewer's mind, enlightened and fascinating. Yet at the same time, that very humanism's naturalistic shape means that Carty must continue to insist on a privileged role for law as a fact, albeit a complex one, to be properly discovered and interpreted by the interdisciplinary mindset of the humanist lawyer. Indeed, the lawyer continues to play a distinguished role, not unlike that played by the classical tradition's 'independent expert' who is not a stakeholder of what s/he advises, but a mere commentator, a sage, akin to the *litterarum alterum decus ac primae deliciae*, the 'honour and delight of the world of letters',[49] as exemplified by the humanist icon Erasmus of Rotterdam. Yet why is the figure of a privileged interpreter, whether sage or 'practitioner', necessary? On what grounds could s/he be removed from the fragility of the human condition, the experience of which Carty presents as a precondition for the recognition of the morality of mutuality? Is Carty's lawyer perhaps of a different kind and subject to a different law, more a priest ordained to act as *persona Christi* when administering the sacrament of the *ius* to an uninitiated laity?

What is more, the apparent immanence of the *ius naturale* is mysterious. With Ricoeur, Carty sees the latter as pervading human relations, engendering the diplomatic tactfulness that is the only legitimate way of engaging with others – human beings, communities, states – as others. Yet where does it come from? Is it a logical postulate or an 'objective' empirical observation, arrived at through his method of ethnographic phenomenology? Insofar as it is decidedly not a mere effect of power, where does the authority of 'right reason' come from? By choosing Ricoeur over Habermas, he has precluded himself from a procedural and

49 The title was bestowed on Erasmus by John Calvin, in the dedicatory letter to Claude de Hangest in which he introduced his first published book, a commentary on Seneca's *De Clementia* in 1532: see W. de Greef, *The Writings of John Calvin: An Introductory Guide* (Louisville: Westminster John Know Press, L. de Bierma trans, 2008).

resolutely post-metaphysical answer. Yet he seems unwilling openly to espouse a metaphysical one, thereby leaving the assertion of a natural law standing 'out there' in the air, without authority and exposed to the potential ridicule of both the 'clacissists' and the 'crits' Does he not want (or is he unable) to make the final leap of faith? It is arguably only some form of faith which could bestow an authority to this law that is capable of addressing the phenomenon of power in the world. Carty, as far as he goes in the *Philosophy*, largely dodges the question of power. He offers instead a theory in which power becomes miraculously dissolved into the respectful recognition of alterity and where the operators of Leviathan are transformed into gentlemen diplomats of independent disposition. Perhaps what ties Carty up is the futurist eschatology implicit in natural law theory: that is, the idea that the *parousia*, the coming of that which concludes the *civitas hominum*,[50] is put off to a distant future, leaving it to human beings to build their city by following the precepts of a natural law which, *ius-ex-machina*, is revealed to and interpreted by the initiated. The result 'on the ground' is possibly quite indistinguishable from the managerialist problem-solving Koskenniemi bemoans and Carty does little to undermine with this *long durée* perspective. After all, within this world, the sage will eventually need institutions and procedures within which to make herself heard, and these will all too easily become petrified into the 'Law' and the 'Profession' that Carty originally sets out to undermine.

However, there is arguably the spark of a more radical vision contained in this humanism, one that dares make the leap of faith and that leaves the secure, if illusory, ground of revealed universal morality. For the initial and crucial move of Protestant nominalism against Catholic realism was arguably the shift from a futurist to a presentist eschatology: that is, the idea that human community is conceived as if it were in the endgame.[51] In this space between the us and the (O)ther, human agency is concentrated in the present. Absolved from the burden of the past and the future, it is purely relational and immanent, and in this sense fundamentally free.[52] This is arguably the space of the political, as articulated by Hannah Arendt.[53] Indeed, she represents an attempt to think politics as politics, rather than as an instrument for something outside of it. From an Arendtian perspective, (re-)politicising the 'law' cannot mean simply to use law as politics: that is, as a means to advance or achieve a certain objective, as arguably is the case with both Koskenniemi's 'culture of formalism' and Carty's naturalistic humanism. For the grounds for that objective – peace, social justice, environmental sustainability etc – are kept outside such apparent political action, mystified and out of the reach of public accountability and personal responsibility. What is more, by imbuing the 'law-as-given' with political purpose or, rather, privileging it as a place for political action, one severely restricts the expressive space of the political, and, hence, of political action. For law, insofar as it is taken to be a transparent set of rules produced in a preordained way and backed by material sanction, is inher-

50 See Augustine of Hippo, *Concerning the City of God against the Pagans* (London: Penguin Classics, H. Scowcroft Bettenson trans, 2000).
51 J.L. Walls, *The Oxford Handbook of Eschatology* (Oxford: Oxford University Press, 2007).
52 See G. Agamben, *The Time that Remains: A Commentary to the Letter to the Romans* (Stanford: Stanford University Press, P. Dailey trans, 2005).
53 H. Arendt, *The Human Condition* (Chicago: University of Chicago Press, 2nd ed, 1998).

ently and necessarily reductive of the fullness of (human) being. It 'subsumes', that is, forces, an (infinitely) complex 'reality' into generalised stylisations of substance and premises action on a particular causality. Law, in this sense, is the antithesis of the Arendtian freedom which characterises the political.

Recovering that authentically political in 'world affairs' cannot, therefore, mean merely to squeeze a complex set of issues – Afghanistan, Iraq, North Korea, Palestine, Darfur, Geneva etc – into a legal iron cage in order to advance particular solutions.[54] Nor can it mean to treat the values and aims of these solutions as pre-political and to situate them either in the private choices of individual strategists, as Koskenniemi does, or in a presumed moral disposition shared by all, as with Carty. To Arendt, political action is both public and communal, non-instrumental and, literally, power-less. It is indeed a revolutionary moment that unfolds in the short space after one and before another law, when humans are radically thrown back to their own communal responsibility and when they have to found authority, rather than rely on someone else's. It is a moment before the abyss when that ephemeral and, yet, so resilient (O)ther stands before the human condition. Perhaps it is political action so conceived that lurks as the hidden essence behind Carty's humanism, as a way to account for the immeasurably complex and irreducibly relational being of humans.

54 On whether Koskenniemi in particular proposes this or not, see J. Beckett, 'The Politics of International Law – 20 Years Later – A Reply' European Journal of International Law Talk at http://www.ejiltalk.org/author/jason-beckett/ (last visited July 14, 2009).