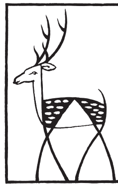
Hannah Arendt and the Law

Edited by
Marco Goldoni
and
Christopher McCorkindale



OXFORD AND PORTLAND, OREGON
2012

Published in the United Kingdom by Hart Publishing Ltd
16C Worcester Place, Oxford, OX1 2JW
Telephone: +44 (0)1865 517530
Fax: +44 (0)1865 510710
E-mail: mail@hartpub.co.uk
Website: http://www.hartpub.co.uk

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA
Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190
Fax: +1 503 280 8832
E-mail: orders@isbs.com
Website: http://www.isbs.com

© The editors and contributors severally 2012

The editors and contributors have asserted their right under the Copyright, Designs and Patents Act 1988, to be identified as the authors of this work.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission of Hart Publishing, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Hart Publishing Ltd at the address above.

British Library Cataloguing in Publication Data
Data Available

ISBN: 978-1-84946-143-6

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall

Summary Contents

Foreword v
Richard J Bernstein
Contents xi
Acknowledgements xvii
List of Contributors xix

Introduction 1
Chris McCorkindale and Marco Goldoni

PART I: BETWEEN *NOMOS* AND *LEX*: THE CONCEPT OF LAW IN HANNAH ARENDT'S POLITICAL THOUGHT 13

1. Law beyond Command? An Evaluation of Arendt's Understanding of Law 15
   Keith Breen
2. Between Freedom and Law: Hannah Arendt on the Promise of Modern Revolution and the Burden of 'The Tradition' 35
   Michael A Wilkinson
3. Law and the Space of Appearance in Arendt's Thought 63
   Johan van der Walt
4. A Lawless Legacy: Hannah Arendt and Giorgio Agamben 89
   Vivian Liska

PART II: ON CONSTITUTIONALISM AND INSTITUTIONS 99

5. Arendt's Constitutional Question 101
   Emilios Christodoulidis and Andrew Schaap
6. The Role of the Supreme Court in Arendt's Political Constitution 117
   Marco Goldoni and Chris McCorkindale
7. A Constitutional Niche for Civil Disobedience? Reflections on Arendt 133
   William Smith
8. The Search for a New Beginning: Hannah Arendt and Karl Jaspers as Critics of West German Parliamentarianism 151
   Kari Palonen

PART III: BEYOND THE NATION STATE: HANNAH ARENDT AND INTERNATIONAL LAW 171

A. Public International Law 171

9. Facing the Abyss: International Law Before the Political 173
Florian Hoffmann

10. International Law and Human Plurality in the Shadow of Totalitarianism: Hannah Arendt and Raphael Lemkin 191
Seyla Benhabib

11. Power and the Rule of Law in Arendt's Thought 215
Hauke Brunkhorst

12. Hannah Arendt and the Languages of Global Governance 229
Jan Klabbers

B. International Criminal Law 249

13. 'How Dangerous it Can Be to Be Innocent': War and the Law in the Thought of Hannah Arendt 251
Patricia Owens

14. Hannah Arendt's Judgement of Bureaucracy 271
Leora Bilsky

15. Arendt in Jerusalem, Demjanjuk in Munich 291
Lawrence Douglas

PART IV: THE RIGHT TO HAVE RIGHTS 305

16. Between Politics and Law: Hannah Arendt and the Subject of Rights 307
Charles Barbour

17. Citizens and Persons: Legal Status and Human Rights in Hannah Arendt 321
James Bohman

18. The Right to Have Rights: From Human Rights to Citizens' Rights and Back 335
Samantha Besson

Index 357

9

Facing the Abyss: International Law Before the Political

FLORIAN HOFFMANN

> There is an art … or rather, a knack to flying. The knack lies in learning how to throw yourself at the ground and miss. (Douglas Adams, *Hitch Hiker's Guide to the Galaxy*[1])

I. A DISCIPLINE OF CRISIS

IN MANY WAYS, Hannah Arendt may be called a philosopher of crisis. It is a recurrent theme in Arendt's thought, notably the crisis of republicanism, the crisis of education; indeed, the crisis of modernity itself.[2] It is as much a heritage of her philosophical upbringing as of her witnessing of the quintessential crisis of the project of modernity.[3] And it is, not least, a product of her classicism, that is, her seeing through the defining terms of modernity to their Greek-Roman origins which, to her, revealed the fundamental issues of human existence in a clearer way than modern civilisation has been able to. It is, arguably, primarily in the latter sense that Arendt can be said to have been a philosopher of crisis, as she did not see crisis only as the breakdown of normality, but as an instance that calls for a response to a question and, thus, as a moment of decision, which, in turn, requires judgement.[4] In this classical sense, crisis is, for Arendt, the opposite of an undesirable state; it is, in fact, a crucial element for a modernity that does not fail itself by falling to hyperbole. For Arendt, it becomes a crisis in the modern sense only when the question to which a response is sought is either forgotten or no longer heard. And that question is, arguably, the question of political authority which, to her, is constitutive of the world itself.[5] That world is, of course,

[1] D Adams, *The Hitch Hiker's Guide to the Galaxy* (London, Del Ray, 1995).
[2] See, in particular, her collection of essays in *Between Past and Future* (Chicago, Ill, University of Chicago Press, 1961) as well as *Crises of the Republic* (New York, Harcourt, 1972); see also M Antaki, 'The Critical Modernism of Hannah Arendt' (2007) 8 *Theoretical Inquiries in Law* 253.
[3] See E Young-Bruehl, *Hannah Arendt: For Love of the World* (New Haven, Conn, Yale University Press, 2004).
[4] Antaki, above n 2, 252.
[5] Arendt, *Between Past and Future*, above n 2; see also S Humphreys, 'Nomarchy: On the Rule of Law and Authority in Giorgio Agamben and Aristotle' (2006) 19 *Cambridge Review of International Affairs* 331.

the 'now', ie that which bridges the 'gap between past and future' and which thereby provides a firm footing over the abyss that looms below.[6] Until the dawn of modern thought, that bridge consisted of authority in what Arendt defines as its Roman mode, notably authority as an act of foundation reiterated across time. Vested in those who represent past foundation, the elders, it was expressed through tradition and as such literally made (up) the world of the ancients.[7] That world, however, is gone, and modernity is, to Arendt, not just its replacement but the ongoing lamentation of its demise, not just a new thinking triggered by crisis but crisis itself. For modernity represents the breakdown of authority, and the essential modern condition is to face that predicament. It is, for Arendt, a specifically *political* predicament, that is, one in which the bridging activity has become individualised and bestows upon each and every one the need to act for oneself, to make world, to think critically.[8] The *political* is, hence, woven into the fabric of modernity; yet it has all too often been obscured. Recovering the political under conditions of modernity was, in any case, one of Arendt's primary quests and the task she placed on those passing through her thought.

Arendt's diagnosis of the inherently critical condition of the modern world is echoed in historiographical reflection on the dawn of the enlightenment.[9] Reinhard Koselleck, for one, notoriously argued that it was the 'discovery' of historical contingency that led to the critique of traditional authority, and its eventual replacement with an unholy melange of authoritarianism and utopianism.[10] He located this crisis in the eighteenth century, which, following Otto Brunner, he called the 'saddle period' (*Sattelzeit*).[11] Like Arendt, Koselleck's reflection on the modern condition took place against the backdrop of what would have seemed to both of them modernity's catharsis, the catastrophes of the first half of the twentieth century, and both would retain a degree of ambivalence about the modern project because it stemmed from, and indeed represented, crisis. Somewhat earlier, Paul Hazard had argued that it was the emergence of the modern State system after the Peace of Westphalia in the seventeenth century that represented a 'crisis of European conscience'.[12] Hazard argued, not unlike Arendt, that it

[6] Arendt, *Between Past and Future*, above n 2, 'Preface: The Gap Between Past and Future' 3; see also A Herzog, 'Political itineraries and anarchic cosmopolitanism in the thought of Hannah Arendt' (2004) 47 *Inquiry* 20, 26.

[7] H Arendt, *The Human Condition* (Chicago, Ill, Chicago University Press 1958) 90; see also B Constant, *The Liberty of the Ancients Compared to that of the Moderns* (New York, Peerless Press, 2010).

[8] Arendt, *Between Past and Future*, above n 2; see also T Bonacker, 'Die Politische Theorie des freiheitlichen Republikanismus: Hannah Arendt' in A Brodocz and G Schaal (eds), *Politische Theorien der Gegenwart* (Stuttgart, UTB, 2009).

[9] On the historiography of 'crisis', see R Starn, 'Historians and "Crisis"' (1971) 52 *Past and Present* 3.

[10] R Kosellek, *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society* (Cambridge, Mass, MIT Press, 1998); see also AJ LaVopa, 'Conceiving a Public: Ideas and Society in Eighteenth Century Europe' (1992) 64 *The Journal of Modern History* 79.

[11] R Koselleck, 'Einleitung' in O Brunner, W Conze, R Koselleck (eds), *Geschichtliche Grundbegriffe* (Stuttgart, Klett Cotta, 1979).

[12] P Hazard, *La Crise de la Conscience Européenne* (Paris, Le livre de Poche, 1994).

was the loss of religious authority which vouched for the reality of transcendent meaning that brought about a critical juncture and the eventual emergence of rational absolutism as the *materia prima* of the modern concept of sovereignty and the modern State system. Unlike Arendt, Hazard did not see all that followed as crisis but focused on the transitory moment of crisis which he evocatively called '*une zone uncertain … malaise*',[13] that is, a time in between, a moment to be seized, a *kairos*. Crisis as decision, as Arendt well perceived, links the concept not only to its etymological roots but also to the sphere into which it emerged in its native Greece, namely the public sphere of assemblies and courts, later of medicine and, of course, (military) history.[14] To these ancients, the idea of crisis introduced an element of disruption and contingency into more archaic concepts of repetition, 'eternal return' or the 'Golden Age', thus creating a sense of time at once organic and fragmented, and bringing about an incipient sense of historical contingency and relativity.[15] Much later, this critical contingency of the flux of history would, in turn, be re-framed so as to express the deeper logic of history itself. Augured in by the likes of Jean-Jacques Rousseau or Thomas Paine at the dawn of the 'age of revolutions', it was Marx who, by historicising the altogether uncritical Hegel, came to be the arch-thinker of the modern philosophy of crisis.[16]

Here crisis is the necessary consequence of the deeper logic of economic production; indeed, it arises from overproduction, and it necessarily forces the system of production to reconfigure itself in a historically more advanced form.[17] Thus crisis drives historical evolution through revolution, the ingenious formula on which Marxist philosophy of history is premised. Yet this deterministic view of history came to be opposed by a different strand of late nineteenth-century historiography, notably that inaugurated by Jacob Burckhardt, which gave crisis near equal prominence in its historical narrative, if from a very different perspective. For in the incipient historicist tradition, crises as events mark the narrative stepping-stones of history. It is, hence, through breaks with the regular flow of history, through upheaval and disruption that historical flux may be discerned and described, though without there being an overarching meta-narrative and clear-cut teleological direction of history.[18] Arendt, in turn, may be said to have attempted to budge this choice between crisis as structure or as event. Her critique of Marx centered, amongst others, on historical materialism's elimination of the historical significance of the event, and the resulting reduction of freedom

[13] *Ibid*, 'Preface' 4.

[14] Crisis derives from the ancient Greek *krisis* meaning 'judgement'; it, in turn, derives from the verbs (*krinein*) 'to separate, to decide, to judge' and 'to dispute, to contend, to explain', which has the (hypothetical) proto-Indo-European root *kri*-, 'to sieve, to discriminate, to distinguish'; the '*krites*' is, then, the judge; see Online Etymology Dictionary at <http://www.etymonline.com/index.php?search=krinesthai&searchmode=none>.

[15] Starn, above n 9, 5.

[16] See E Hobsbawm, *The Age of Revolution: 1789–1848* (New York, Vintage, 1996).

[17] Starn, above n 9, 7.

[18] *Ibid* 8.

to the recognition of objective necessity.[19] Yet her 'libertarian existentialism' placed her at an equal distance from mainstream historicism with its interest in observing the event as an external occurrence. For her, the event is not accidental but the result of pure, non-utilitarian action which interrupts the normal flow of historical time. It is, at least according to the exceptionalist interpretation of Arendt's thought, crisis action;[20] it implies a moment of choice, a bifurcation in the course of history which forces one to decide and move on, lest one ventures to abandoned history itself.

Is international law, then, in crisis? Has it, as a discourse and discipline, reached a dead end, and do global actors need to chart new territory to conceive of their relations? Or is there no crisis? The relation between international law and crisis is complex and multi-faceted. First, there is what might be termed international law *and* crisis. This is, arguably, the most common and, to many international lawyers, intuitive association with crisis, and it refers to those numerous yet discrete 'international incidents' which represent a breakdown of 'normal' inter-State relations and which raise the spectre of violence or humanitarian catastrophe.[21] This is the sort of crisis that international lawyers thrive on, for, as Hilary Charlesworth has critically remarked, 'it provides a focus for the development of the discipline and it also allows international lawyers the sense that their work is of immediate, intense relevance'.[22] Charlesworth's point here is that international lawyers tend to focus on one particular type of incident, notably individual instances of crisis, to the exclusion of the deep structures that produce what she terms 'everyday life' and which account for far greater human suffering than the aggregate of isolated incidents.[23] This is, of course, an elaboration of the general contention that international law's blind spot with regard to the deep structure of the international is no coincidence but a consequence of the project it articulates, notably the reconstruction of global politics as a liberal polity governed by a neutral rule of law.[24] Yet, perhaps ironically, while this project sees international legality as the norm and its violation as the exception, it is largely through these exceptional 'incidents' that international law is reaffirmed and reproduced.[25] It is during times of crisis that international law, by demarcating international 'normality', becomes a privileged episteme through which to frame the exception as exception and through which to articulate restorative action.

[19] E Müller, 'Hannah Arendt's Marxkritik' (2003) 14 *Berliner Debatte INITIAL* 104; see also WA Suchting, 'Marx and Hannah Arendt's The Human Condition' (1962) 73 *Ethics* 47, and J Ring, 'On Needing Both Marx and Arendt: Alienation and the Flight from Inwardness' (1989) 17 *Political Theory* 432.

[20] Müller, above n 19; see also PF d'Arcais, *Libertärer Existenzialismus: Zur Aktualität der Theorie von Hannah Arendt* (Frankfurt am Main, Neue Kritik, 1993).

[21] See most notably M Reisman and A Willard, *International Incidents: The Law that Counts in World Politics* (Princeton, NJ, Princeton University Press, 1988).

[22] H Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 *MLR* 377.

[23] *Ibid* 388.

[24] See S Marks, 'The End of History? Reflections on Some International Legal Theses' (1997) 3 *European Journal of International Law* 449.

[25] See G Agamben, *State of Exception* (Chicago, Ill, University of Chicago Press, 2005).

It is also these moments which, as Charlesworth observes, bestow a critical role onto international lawyers, namely as the scribes whose privileged knowledge of the grammar of international affairs opens to them the prince's ear.[26] Hence, in a world in which 'normal' law, Charlesworth's 'law of everyday life', is largely hidden within the private life of States, 'incidents' represent instances when international law becomes public and is affirmed as the *telos* of global political action. As such and paradoxically, the crises that dominate the international political agenda and that, to many external observers, reveal a failure of the international rule of law, are not, by and large, seen or felt as crises *of* international law by its practitioners.[27] Indeed, for many an international lawyer, non-compliance does not challenge the reified view of international law as a factual system of rules governing inter-State conduct. Neither does it weaken the underlying conviction that this system enshrines progressive values which make it the most desirable *modus operandi* for inter-State relations.[28]

There is, however, a second sense in which international law is associated with crisis, and in this one, crisis does seem to affect the discipline and discourse itself, namely in the form of the phenomenon commonly referred to as 'fragmentation'. The latter challenges, on empirical grounds, the idea that one unified body of rules governs all international conduct, and it implies three threats to the traditional conception of international law: the segmentation of rule applicability; the pluralisation of interpretative authority; and the colonisation of some legal regimes by others. All three may be viewed as dangerous cracks in the edifice of 'normal' international law which, if taken to their logical conclusion, would imply a dissolution of international law 'as we know it'.[29] However, while some scholars have expressed concern over the potential loss of coherence, and with it of legal certainty, predictability and equal treatment that fragmentation may represent, this has hardly been viewed as life-threatening for international law.[30] Hence, in its *Report on the Fragmentation of International Law* the International Law Commission concluded that the available body of rules and accumulated precedent already contained all the tools necessary either to overcome or to manage regime pluralism and potential regime clash. Indeed, it stressed that

[26] See M Koskenniemi, 'Epilogue' in *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge, Cambridge University Press, 2005); see also F Hoffmann, 'An Epilogue on an Epilogue' (2007) 7 *German Law Journal* 1095.

[27] For a forceful if polemical defence of international law, see P Sands, *Lawless World: America and the Making and Breaking of Global Rules* (London, Penguin, 2005).

[28] See M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge, Cambridge University Press, 2001) 494ff.

[29] What a global legal pluralism might look like has been conceived, inter alia, by A Fischer-Lescano and G Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999.

[30] For concern about fragmentation, see PM Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1999) 31 *New York University Journal of International Law and Politics* 791.

> the very effort to canvass a coherent legal-professional technique on a fragmented world expresses the conviction that conflicts between specialized regimes may be overcome by law, even as the law may not go much further than require a willingness to listen to others, take their points of view into account and to find a reasoned resolution at the end. Yet this may simply express the very point for which international law has always exited [*sic*].[31]

Here, international law is advertised not just as a necessary moderating device in international relations, but as being its own meta-law. It is taken to contain not only its own rules of recognition, but also its own rules of integration through which the different legal regimes are made to cohere.

Is international law, thus, resistant to crisis? If political crises are but international law's basic nutrient, and if international legal pluralism is but its natural evolution, then its critique would be besides the point, that is, analytically misconceived and politically naive or even dangerous. Yet there is, arguably, a third way in which international law may be associated with crisis, notably as itself denoting crisis, or rather, as a symptom of the structural crisis that pervades global politics. That crisis is rooted in a lack of political authority in the international sphere and the replacement of political action by strategic politics. The latter is built on the Vatellian model of atomistic statehood and antagonistic national interest which is premised on the idea of (State) sovereignty. A product of the absolutist era, such sovereignty, in Arendt's view, confounds freedom with free will, and therefore defines politics as the antagonistic encounter of sovereign wills.[32] Anthony Carty has called this a 'false ontology' which provides the intellectual ground for what to him is a Hobbesian (mis-)conception of order in the international sphere. The latter is based 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.[33]

Thus, (State) action is conceived of as inherently strategic and utility-oriented, driven, as it were in Arendt's terms, by capitalism and nationalism, and international affairs become a network of private economic and military engagements, with the State being, in essence, an *animal laborans* writ large.[34] The private pursuit of survival comes to constitute the public sphere of States, while the public pursuit of freedom is relegated to the private sphere of civil society. The crisis that modernity represents for Arendt is, hence, also one of the modern State system

[31] International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversitification and Expansion of International Law—Report of the Study Group of the International Law Commission* (A/CN.4/L.682 of 13 April 2006) at 246.

[32] Arendt, *Between Past and Future*, above n 2; see also J Keedus, '"Human and nothing but human": How Schmittian is Hannah Arendt's critique of human rights and international law?' (2011) 37 *History of European Ideas* 190, 193f.

[33] T Carty, *The Philosophy of International Law* (Edinburgh, Edinburgh University Press, 2007) 161.

[34] Arendt, above n 7.

and of international relations. As such it is one, too, of the modern international legal project; for the latter is, as Martti Koskenniemi has shown, inherently paradoxical in its 'structural coupling' of utopian legalism and the apology of sovereignty.[35] On the one hand, international law's near exclusive focus on the State enshrines the idea of antagonistic sovereignty and creates a false *nomos* of politics; on the other hand, its articulation of universal features of humanity abstracts from concrete human beings and inverts cause and effect of (their) political action.[36] Both result in a reduction of the space for politics and, thus, of freedom. For Arendt, the law of the modern nation State is unable to maintain, by itself, the balance between *demos* and *ethnos*, the rule of law and popular sovereignty.[37] It may well, on the contrary, serve to cover up any imbalance in the name of an abstract humanity and to substitute technical solutions for political ones, a phenomenon now frequently referred to as managerialism.[38]

It is, hence, international law itself that demarcates the crisis of international politics. It embodies the fundamental tension between the universal and the particular which modernity, Sisyphus-like, continuously strives but fails to overcome. By enshrining the identity-creating particularism of the State system, international law produces the conditions of its own demise. To balance this sliding scale, it covers its particularist traces in an air of universalism which, however, abstracts from its concrete foundation in modern statehood and surrenders government through law to governance under law. Hence, the more the law is put in question in *international* relations, the more it is reasserted in *trans-national* ones; the less States seem to govern (through law), the more governance there is (by law). It is modernity's mode of functioning, namely, to cover up the loss of foundation through a simulacrum of foundation. If political authority is the foundation, law mimics it in form but not substance. To conceal that lack of substance, its formal authority must continuously expand and reaffirm itself on new sites. Indeed, it must inherently strive to cover all the discursive space of, in this case, international relations in order to protect its authority and eliminate the possibility of uncovering its lack of (political) substance. As such, (international) law strives to rule, and the ideal of the (international) rule of law is a reflection of modernity's imperialist discursivity. Its concrete shape is that of international legalism, that is, of the continuous expansion of the rule of law in international affairs. As a phenomenon, this has for long been known in (domestic) legal sociology as 'juridification', that is, as the gradual infiltration of the functional logic, or code, of law into other codes, most notably that of

[35] Koskenniemi, above n 26.

[36] Keedus, above n 32.

[37] Bonacker, above n 8.

[38] See here, in particular, Koskenniemi's recurrent critique, developed, inter alia, in 'Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) 1 *European Journal of Legal Studies* 1; 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4; 'The Politics of International Law—20 Years Later' (2009) 20 *European Journal of International Law* 7; 'Miserable Comforters: International Relations as New Natural Law' (2009) 15 *European Journal of International Relations* 395.

politics. The early Habermas described this, of course, as a process of colonisation which, at the time, he critically thought shifted legitimacy away from the political and onto the legal sphere.[39] In fact, insofar as international legalism is, necessarily, articulated against international politics, it is itself a political project, namely, one that champions international law as the better international politics.

As with modernity in general, international law is paradoxically instrumental both in bringing about the loss of political authority and in trying to cover it up. It can obscure its failure to fill out entirely the hole left by political action only by hypertrophying, yet it provides, thereby, a sense of foundation and reassurance. It does so, of course, by laying claim to two legitimating discourses outside of its own remit, notably justice and peace. It is in the name of these two that international lawyers justify their 'intervention' in international politics, notably as a morally, sociologically and perhaps even politically necessary shifting of language games, out of politics and into law. Yet while expansive legalism is driven by the deep logic of the modern project of international law, international lawyers have scarcely been awake to its inherent contradictions or to the (ethical) need to take position on account of them. Instead, the abyss between real and ideal, power and norm, apology and utopia has largely been ignored in theory and plastered over by compromise formula in practice. Indeed, many international lawyers have felt emboldened by the legalisation of ever more subjects of international politics, be it international trade, environmental degradation and climate change, or mass atrocity in conflict situations.[40] The seeming centre-stage place taken by legal—as opposed to political—discourse when it comes to dealing with situations such as those in Sudan, Kosovo or Iraq, is often enough to distract the discipline from its actual state. A culture of muddling through has taken hold, whereby international law's relevance and legitimacy is taken at face value, and where international lawyers mechanically apply their expert idiom to whatever (political) reality presents itself to them. As a result, those insisting on taking the project's critical condition seriously have been pushed to the margins of the discipline, while, at the same time, the language itself has become, by grammatical standards, impure and inconsistent, as well as inflated with the neologisms of governance and management. As with modernity, international law seems to run its own end-game.[41]

II. OUT OF THE MUD? (NEO)FORMALISM V (NEO)NATURALISM

Awareness of this end-game usually surfaces only during critical periods when the contingency of the concepts and institutions that make up 'the world' becomes

[39] J Habermas, *The Theory of Communicative Action*, vol 2 (Boston, Mass, Beacon Press, 1987) 355.

[40] See T Skouteris, *The Notion of Progress in International Law Discourse* (The Hague, Asser, 2010).

[41] A Wellmer, *Endgames: The Irreconcilable Nature of Modernity* (trans D Midgley) (Cambridge, Mass, MIT Press, 1998).

undeniable.[42] In Euro-American history, it is times such as the *fin-de-siècle* of the nineteenth century, the inter-War years or, indeed, the contemporary post-Cold War, post-9/11 period which are marked by soul-searching and an uneasy recognition of the need to reconsider and reconstruct. In contemporary international law, the post-Cold War period has seen a prolonged soul-searching both for the role of law in international affairs and for the state of the international legal project and the discipline of international law. The picture that has emerged here is more complex than would appear at first sight, most notably because of a cross-cutting of theoretical concerns and (perceived) geo-political position. Broadly put, one axis of the matrix that represents contemporary international legal theorising shows the divide between what has been described above as the 'muddling through' position, notably the non self-reflexive formalist 'practitioner's approach',[43] on one hand, and those approaches self-consciously critical of it and commonly grouped under the label of 'critical legal studies', on the other hand. This divide is both about the status of theory in the discipline and about the appropriate theoretical perspective on it, namely, either the internal perspective of legal positivism or the external perspective of auxiliary disciplines such as philosophy or sociology.

The formalist 'mainstream' forms, as Stanley Fish might have put it, an interpretive community in which a received canon of primary and secondary rules is applied to concrete cases rather than theoretically reconstructed with reference to anything beyond that canon.[44] There is, hence, in this position an inherent critique of theory as necessarily critical, that is, as being essentially about reconstructing law through terms outside of it. The underlying epistemology is, of course, that of legal positivism, which has combined an analytical critique of the 'impurities' of legal analysis with a political critique of the alleged primacy of certain theoretical meta-narratives over others.[45] Instead, law is seen as an autonomous field of norms and normative relations, a specific code that can be properly understood only from the vantage point of its own syntax and grammar. This turn to a positivistic mindset in international law as of the nineteenth century has also meant a shift away from scholarly argument to judge-made law, with the emphasis on formal legal process reducing the reflective space for theorising. If theory is accorded any relevance at all in this 'practitioner approach', it is as doctrine or, as Anthony Carty would have it, as dogmatics, that is, as the interpretation of

[42] For a popular if enlightening argument to that end, see P Blom, *The Vertigo Years: Europe 1900–1914* (New York, Basic Books, 2010).

[43] Carty, above n 33; see also BS 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).

[44] See S Fish, *Is There A Text in This Class* (Cambridge, Mass, Harvard University Press, 1980) 147ff.

[45] For good overviews of the tenets of legal positivism in international law, see J Von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in International Law* (Cambridge, Cambridge University Press, 2010); and J Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (London, Routledge, 2010).

legislation and jurisprudence understood as a logically coherent system of rules and not concerned with the values informing legal precepts, nor with their meaning in relation to history, society or politics.[46] Such a legal dogmatic approach corresponds, of course, to a hermetic shielding-off of the legal from the political language game and to a (political) denial of the need to provide (theoretical) justification. This is the impulse behind the prevalent muddling through.

Yet with this being so, alternatives have, by and large, been articulated in and through opposition to the 'mainstream' position, notably as critical theories (about international law) and critical meta-theories (about international lawyers). They broadly fall into three methodological streams, notably *postmodern* perspectives inspired, inter alia, by French post-structuralism, linguistics and psychoanalysis, and they are interested mainly in the indeterminacy of legal language and the (micro-) politics behind the law;[47] *Marxist* perspectives drawing on an historical-materialist framework of analysis and mainly interested in international law's implication in imperialism, colonialism and global capitalism;[48] and *pragmatic/legal Realist* perspectives focusing on the techniques and strategies of international legal governance.[49] However, in line with the broader project of critical theorising, these 'critiques' of international law operate on the level of critical hermeneutics that aim to reconstruct an existing social reality in different terms. They thereby essentially seek to produce emancipation through enlightenment, notably by theoretically recharging practice. The international legal project as such is, however, not questioned as such; indeed, it is the building block for critical theorising, and the majority of self-conscious 'crits' continue to see themselves as international lawyers. Much critical legal theorising has, in effect, engaged in driving the 'mainstream' deeper into its mud, rather than in systematically articulating alternatives.

In the shadow of the ongoing engagement between the formalist 'mainstream' and the 'crits', two other positions have established their theoretical niches, namely, sociological approaches and law and economics. The former purport to be strictly analytical and reconstruct international law in legal sociological terms, drawing on international relations theory, administrative law and comparative political science. From the international perspective of formalism, these approaches, too, are external to the law, though the main difference from critical approaches is their primary goal of developing a systematic approach to all forms of international normativity. Their premise is that canonical doctrine no longer captures the reality of that normativity, with phenomena such as fragmentation or the non-State actor predicament calling for new vocabularies and new systematic

[46] AJ Arnaud, *Dictionnaire encyclopédique de théorie et de sociologie du droit* (Paris, Librarie générale de droit et de jurisprudence,1993); Carty, above n 33.

[47] See A Rasulov, 'International Law and the Poststructuralist Challenge' (2006) 19 *Leiden Journal of International Law* 799.

[48] See Marks (ed), above n 43.

[49] See D Kennedy, 'Spring Break' (1985) 63 *Texas Law Review* 1377.

for international law.[50] 'Law and economics' or rational choice, or simply realist approaches to international, have emerged relatively recently as a reflection of the predominant position this 'school' has reached in American domestic jurisprudence. Besides drawing on the rational choice perspective developed in neoclassical economics, it builds on the realist scepticism of the relevance of norms in international relations, and consequently represents a strong critique of the international legal project as such. Indeed, authors such as Jack Goldsmith or Eric Posner go one step further and, unlike their realist colleagues in international relations, not only downplay the role international law may possibly occupy, but hold out as positively perilous the international legalism that follows from the formalist project.[51]

While the international legal theory matrix has produced a wealth of critical reconstructions of international law, few have ventured to point to a way out of the mud to either a critically recharged or an entirely alternative practice. From an Arendtian perspective, this undermines the very political, and politically progressive, character that critical theory claims for itself;[52] and it leaves politically relevant action to a 'profession' which, as such, is inherently averse to recognising that it is engaging in such practice. However, two recent theoretical projects stand out in this respect: one for attempting to provide 'mainstream' practice with a critical underpinning and explicitly to reframe it as progressive political practice; the other as an experimental revisiting of humanist natural law as an alternative to the State-centric Vattellian-Hobbesian scheme that underlies today's notion of international law. Both are, thus, attempts at redefinition, albeit from opposite angles, and both share a commitment to international law as law and to the empirical relevance and theoretical importance of the international legal project.

The first, conceived by Koskenniemi, goes down the path of formalism. As has been seen, he began his phenomenology of international legal discourse with the identification of the latter's paradoxical structural coupling of power and norm. He then went on to trace the historical actualisation of this discursive configuration and found that, as a self-consciously modern conceptual framework, international law had left its utopian origins as a politically progressive intervention into power politics and steadily developed into an apologetic provider of debating chips for the (State) powers that be. On the basis of this, Koskenniemi has, arguably, gone one step further and ahead of most other critical projects and offered a new and future-oriented perspective for the discipline in the form of the 'culture of formalism'. In (simplified) essence, the 'culture of formalism' seeks to reframe international legal discourse from within, notably by showing it to contain all the elements necessary to move it back from the current apologism to the political progressive

[50] See N Krisch, B Kingsbury and RB Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15.

[51] See E Posner, *The Perils of Global Legalism* (Chicago, Ill, Chicago University Press, 2009).

[52] Arendt, *Between Past and Future*, above n 2.

utopias of global peace and social justice. Koskenniemi affirms that the vocabulary of formal (legal) norms and the judicial and quasi-judicial institutions within which it is performed provide 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. Indeed, the emphasis is all on strategic processes that avoid crystallisation into firm institutions or structures and thereby stay clear of the legal managerialism which, being devoid of political commitment, has, in Koskenniemi's mind, 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 well-intentioned practitioner-positivists, since 'canonical' professional practice would appear to be quite compatible with 'strategic formalism', if only the latter's professed political intentions were deemed progressive, as would arguably be the case with many practitioners of 'lawfare', especially in such legal fields as human rights, humanitarian law, environmental law or labour law. It is, perhaps, for this reason that the 'culture of formalism' has seemed to win the day over other critical projects. Indeed, it has asked the question of international legal theory about what else there is or ought to be apart from traditional international legal language and the interpretative community of international lawyers.

One international lawyer who has taken up this challenge is Anthony Carty, whose humanist neo-naturalism represents the other grand attempt at a way out of the mud.[53] As already hinted, it is diametrically opposed to neo-formalism, in that it fundamentally challenges the very notion of international law that informs the formalist canon. The latter is, to Carty, a Hobbesian/Vattellian plot that reduces the international to the 'deuteronomic' antagonism of sovereign States.[54] Carty's 'original sin' lies in this paradigm shift in the seventeenth century, with the turn to positivism in the nineteenth century only denoting the formalisation and canonisation of this scheme. His remedy against this plot consists, in essence, of (re-)philosophising international affairs through the 'development of a method for valid, legitimate, or otherwise convincing argument'. This is both a critical method aimed at exposing the unreality 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. Unlike Koskenniemi, Carty believes that a 'real' international law is '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 in his vision of an alternative. For Koskenniemi, arguably the only cure must be the disease itself, which is why the agency of international lawyers is necessarily reduced to strategic intervention rather than containing a capability

[53] Carty, above n 33.
[54] *Ibid* 143.

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.

For Carty, the 'mainstream' conception represents a distorted account of this 'reality' produced by international lawyers. It is hence up to them to pierce the veil of traditional 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'.[55] Basing himself, amongst others, on the thought of Paul Ricoeur, 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'.[56] 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 there are shared moral motivations among all participants, motivations which inhere in the human person. At the bottom lies 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 misjudgement 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'.[57] This, then, is a sophisticated revisiting of natural law, or, rather, (legal) humanism as it developed within the historical natural law tradition. It aims 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 continuous debate about the content of the good (not of the right).

Are, then, either neo-formalism or neo-naturalism viable ways out of the mud? Can they address the Arendtian challenge of restoring the political to international

[55] *Ibid* 17.
[56] *Ibid* 18.
[57] *Ibid* 245.

relations? Do they conceive of a law that guards against, rather than articulates, either totalitarian or technocratic impositions? And are they apt for practice? It would go beyond the scope of this discussion to redescribe either conception in Arendtian terms. Yet, in a nutshell, one might argue that Koskenniemi's neo-formalism has a problem with politics, whereas Carty's neo-naturalism has one with the law. The 'culture of formalism', for one, is all about how to orient the particular language game that States play when dealing with each other towards certain political objectives. Yet there is no concept of the political and of the substantive objectives that flow from it in the 'culture of formalism'. On the contrary, it must preserve the autonomy of the law and legal institutions if it is to succeed in making law the better politics. Indeed, all legal formalism must be anti-political, and neo-formalism as politics can thus not itself be political. Nor does international law in Koskenniemi's conception play the role either of the *nomos* in the Greek *polis*, notably by providing the 'architectural' conditions of possibility for political action, or of the Roman *lex* that creates linkages between interlocutors. For formal law is, to Koskenniemi, a language game that derives its progressive potential precisely from its indeterminacy that permits its speakers to interpret and negotiate over meaning. That meaning, in turn, is stabilised through formalised grammatical rules which theoretically bind all speakers. Law thereby becomes, for Koskenniemi, the privileged discourse of (international) politics, a position curiously similar to Carty's notion of diplomatic tact at the basis of his new naturalism. Ultimately, both envisage (international) law as a sort of hypothetical ideal speech situation in which, in Koskenniemi's case, formalised language, in Carty's case a formalised morality, provides the barrier to (undue) power asymmetries. Yet as far as the 'culture of formalism' is concerned, it is not only power that is (theoretically) kept outside, but also politics itself, or rather the sort of political action of which Arendt speaks. As was seen, formal law abstracts and diverts from 'pure' non-instrumental political speech, and it imposes its own rules of causality and accountability. The politics which the 'culture of formalism' is meant to foster lies outside of the law, in a space which Koskenniemi leaves largely unexplained and unaccounted for. It might well be a private space, or a network of private spaces, yet, at any rate, not the public space which, for Arendt, is an essential feature of genuine political action.

By contrast, Carty's humanistic neo-naturalism appears to have much in common with Arendt's conception of politics and law. The stylised conversation among diplomats, the disinterested opinion (formation) of well-educated, generalist counsellors seem not too distant from the debate of (male) Athenians in their *agora* or Arendt's own experience of jury duty.[58] Even the central role of legislation in political action is compatible with Carty's idea of humanistic international relations. Yet Carty's naturalism is ultimately bound to define the law substantively, a 'rightly-reasoned' public

[58] H Arendt and K Jaspers, *Correspondence 1926–1969* (L Kohler and H Saner eds) (Boston, Mass, Houghton Mifflin Harcourt, 1992) 666.

morality that conceptually conflicts with Arendt's idea of the inherently unpredictable nature of the political. Law, to Arendt, may be instrumental to political action but it is not identical to it; politics must remain an autonomous field, a 'pure politics' accompanied by a fairly pure law, as Jan Klabbers has insightfully observed.[59] Yet, as the space of freedom, it cannot be filled out either by formal law, nor by substantive morality, but must remain open and unpredictable.

III. FACING THE ABYSS: RE-POLITICISING THE INTERNATIONAL

Yet can there be an Arendtian alternative to Koskenniemi's enlightened legalism and Carty's legalised enlightenment? The core challenge any response to this question faces is that that which lies beyond formalism and naturalism is not a promised conceptual land out there to be occupied but, as it were, a territory contested by two opposing meta-narratives, notably (Schmittian) realism and (Marxian) materialism. Neither can (yet) be said to have been articulated in the same systematic and explicit way in relation to international law as have neo-formalism and neo-naturalism, though in combination they set the threshold over which any alternative conception of the international must pass. It is a threshold which Arendt also perceived and over which she recurrently laboured.[60] Its Schmittian component consists, in essence, of the claim that politics is fundamentally about determining and maintaining identity through power which is articulated as sovereign will. It is a line of thought that stretches from Hobbes to Schmitt, from Morgenthau's realism to, arguably, the contemporary 'law and economics' approach.[61] It postulates that political action is necessarily antagonistic and decisionist, based on an irreducible *pouvoir constituant*. Law, including international law, is, if anything, a function of that *pouvoir*, and politics is the continuous affirmation of the latter among distinct polities in the international sphere.[62] It is what is colloquially referred to as 'power politics' and what gives politics the bad name it has among many critical thinkers. For Arendt, as has been seen, it is really a conception of an anti-politics that usurps the name of the political and eliminates the space for political action.[63] The other component of the threshold is, of course, (Marxian) historical materialism, that is, the affirmation that both (international) law and political action are but epiphenomena of a deeper structure, namely that of capital reproduction. Arendt's reading of Marx was, of course, critical but complex, with both sharing the analytical entanglement

[59] See J Klabbers, 'Possible Islands of Predictability: The Legal Thought of Hannah Arendt' (2007) 20 *Leiden Journal of International Law* 1.

[60] H Arendt, *Denktagebuch: 1950 bis 1973* (Munich, Nordmann, 2002).

[61] See A Vermeule and E Posner, 'Demystifying Schmitt' in A Vermeule and E Posner (eds), *The Cambridge Companion to Carl Schmitt* (Cambridge, Cambridge University Press, forthcoming)—manuscript available as University of Chicago Public Law Working Paper No 333.

[62] Keedus, above n 32, 195.

[63] Arendt, above n 7.

of the theory of action with the theory of society.[64] In relation to politics, her main critique of Marx was the determinism that resulted from his elevation of a materialist theory of labour to the main driving force of history. This, to her, leaves no space for genuine (political) freedom, as politics is, for Marx, not an autonomous concept but premised on social relations. This makes Marx, to Arendt, as anti-political as Schmitt, if on entirely different grounds; it reduces freedom to the insight into objective necessity, and politics to the enactment of that insight.

Schmittian realism has, of course, found expression in and through part of international relations discourse, whereas Marxist materialist readings of international law have occupied one of the niches of critical legal thought; sometimes both have entered into what some would describe as an unholy alliance.[65] What is common to both, and definitive of the threshold for any alternative conception, is that political action in Arendt's sense, as non-utilitarian inter-subjective speech focused on 'promising, combining, and covenanting',[66] is considered as essentially inexistent and derided as at best naive and at worst dangerous. Neither is (international) law accorded any emancipatory role, too deeply is it thought to be contingent on the power either of historical agents such as States, or of history itself. Arendtian international thought must, hence, make its way in-between the imperialist legalism of the 'mainstream' and the totalitarian realism of the sceptics. However, both are incomplete accounts of contemporary international affairs, they leave questions open, or rather they cease to ask certain questions, which is precisely a symptom of the crisis of authority that modernity represents. It is that crisis which, if recognised as such, opens up a horizon for the genuinely political.

Yet of what would such international political action consist, and what, if any, would be the role of international law in relation to it? These are, of course, the hard questions all those interested in Arendtian thought have been asking themselves all along, and Arendt's refusal to present her thought as a system has left ample room for a plurality of interpretations. The, perhaps, dominant line today might be described as the 'normalist' reading of Arendt,[67] in which her conception of politics is made to resemble the Habermasian reconstruction of modern constitutional (and liberal) democracy with a special emphasis on the role of civil society and public opinion.[68] However, Arendt herself undermines the 'normalisation' of her political thought through her own complex fascination with revolution and moments of revolutionary re-foundation. Indeed, an 'exceptionalist'

[64] *Ibid*; and H Arendt, *On Revolution* (New York, Viking Press, 1963).

[65] C Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Chicago, Ill, Haymarket, 2006); for an appreciative if not uncritical review, see A Carty, 'Marxist International Law Theory as Hegelianism' (2008) 10 *International Studies Review* 122.

[66] Arendt, *On Revolution*, above n 64, 212.

[67] Müller, above n 19.

[68] See, for instance, S Benhabib, *The Reluctant Modernism of Hannah Arendt* (London, Sage Publications, 1996).

reading of Arendt has her espouse the interruption of the 'normal' flow of history, the 'human condition' of unpredictability, the recurrent 'out-of-jointness' of time as the conditions of possibility for political action, moments when human action is freed from the automatisms of institutions and procedures—indeed of law (!)—and thrown into a condition of radical responsibility. To be sure, Arendt seems herself to have been ambivalent about the implications of the exceptionalist side of her thought, as she was well aware that a theory build on the permanent exception would be a contradiction in terms.[69]

Yet her libertarian exceptionalist existentialism has to be seen in the context of her reading of modernity as crisis. For it is not self-conscious agency that produces revolutionary moments, but the fundamental contradictions of modern life that are kept at a constant simmer by the lack of any overarching and integrative authority. This continuously generates exceptional moments, moments of crisis, though, as has been seen, it also plasters these over with simulacra of normality. One of these simulacra is, of course, law, namely, when it functions to substitute political authority and becomes an instrument of the bureaucratic usurpation of the space of politics. It goes along with a de facto political disenfranchisement through massified democratic process. It is only when this plaster is forced open by the magnitude of crisis that sensitivity for a genuine constitutional moment returns, a moment which, for Arendt, is one of egalitarian, if also aristocratic republicanism. She derives it from real-life experiences of exception, such as the American Revolution, the Paris Commune, the early Soviet and other syndicalist experiences, even the Hungarian uprising of 1956[70]—and one might add any subsequent spontaneous moments of intense political action from the fall of the Berlin Wall to the uprisings in Burma, Iran, or the Arab world. It is moments that are not made but offer themselves up as a stage for communal political performance. The, perhaps, central element of that performance is, of course, responsibility, which, like political action, can be experienced only in those (exceptional) moments when all mechanisms by which responsibility is delegated and represented are suspended. It is only then that exposure is unmediated and that the audience can judge properly. Again it the law of the modern State that absorbs a good part of that responsibility and thereby creates a veneer of de-politicised normality over modernity's semi-liquid surface.

Law plays an ambivalent role in this. Although it is clearly marked out as an element of the crisis of modernity, Arendt also recognised its indispensability. The necessary antinomianism of constitutive moments is coupled with an elective espousal of law as both a precondition (as *nomos*) and a consequence (as *lex*) of political action. Some have contended that Arendt saw law as 'islands of predictability' necessary to navigate the sea of unpredictability that is the human

[69] Müller, above n 19.

[70] Arendt, *Between Past and Future*, above n 2; see also S Auer, 'The Lost Treasure of the Revolution: Hannah Arendt, Totalitarianism and the Revolutions in Central Europe: 1956, 1968, 1989' (2006) *Eurozine* 10 (available at <http://www.eurozine.com/articles/2006-10-25-auer-en.html>).

condition;[71] others have argued that she deconstructs the dichotomy between law and politics all together.[72] What is clear is that she resisted any and all 'imperative' conceptions of law as threatening the autonomy of the political, and that she did not agree with strategic uses of the law in lieu of political debate, to which her controversial stand on legal desegregation in the United States bears witness.[73] Perhaps law was, to Arendt, a particular form of political action, not qualitatively distinct from it and without a logic of its own. As such it would represent both the self-reflexive awareness by all (political) actors of their own 'actorness', as well as the heightened sense of responsibility that the promise, once made, implies. Its essence would be the process of legislation, that is, the continuous making, unmaking and re-making of laws by a body politic acting out of mutual responsibility and not obligation. Recovering the political in 'world affairs', cannot, hence, mean merely to squeeze a complex set of issues—Afghanistan, Iraq, North Korea, Palestine, Darfur, Geneva—into a legal iron cage in order to advance particular solutions. Neither can it mean to treat the values and aims behind these solutions as pre-political and situate them, as Koskenniemi (perhaps inadvertently) does, in the private choices of individual strategists. What it can mean, however, is to espouse political agency and responsibility; to name things; to insist on argument; to attempt to grasp people and things, as best as possible, in their infinite complexity; to resist conclusion; to face up to contingency; to make promises as a marker of seriousness and commitment to an ongoing conversation; and to dare to throw oneself into the abyss of politics!

[71] Klabbers, above n 59, 9.

[72] C Volk, 'From Nomos to Lex: Hannah Arendt on Law, Politics, and Order' (2010) 23 *Leiden Journal of International Law* 759.

[73] H Arendt, 'Reflections on Little Rock' (Winter 1959) *Dissent Magazine* 47; see also D Allen, 'Law's Necessary Forcefulness: Ralph Ellison vs. Hannah Arendt on the Battle of Little Rock' in AS Laden and D Owen (eds), *Multiculturalism and Political Theory* (Cambridge, Cambridge University Press, 2007).