

## Review Essay

### On the Relational Aesthetics of International Law: *Philosophy of International Law*, Anthony Carty\*

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Which dignity and power seems to you greater, that of remitting sins, or that of dividing up fields? There is no comparison.<sup>1</sup>

According to a survey published in 2001, and things will have declined since then, lawyers formed only 16 per cent of the top 100 public intellectuals in the United States.<sup>2</sup> Of the 16, one is dead, one is a Supreme Court Justice, one is a judge and author of the survey, two are converts to law from other disciplines, and so there only remains 11, a cricket team, of well known if not necessarily reputable legal academics. Worse, however, is to come. None of the 11 public intellectual legal scholars is an international lawyer. Let's put this directly. The legal discipline that is most obviously concerned with affairs of state, with highly visible international incidents, with the

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1) Edmund Richer, *De Ecclesiastica et Politica Potestate* (1612) at 47 [... praedia dividendi].

2) Richard Posner, *Public Intellectuals: A Study in Decline* (2001) at 212, Table 5.4.

great public discourses of war and peace, from crimes against humanity to demarcation of territorial boundaries has seemingly vacated the most visible forums of the public sphere.

There are numerous possible reasons for the paradox. International lawyers exist in a tenuous twilight zone between academic homelessness and practical professional insecurity. They tend to peddle a variant form of positive law where it is least plausible, most needed and most unwelcome, and perhaps for that reason a certain professional discretion, a behind the scenes tact quiets those who are consulting with ministries or government offices. Those who are left out of the administrative burlesque of vehement denial and orotund self-justification are generally viewed either as maverick or simply esoteric in their political convictions and scholarly expressions. They are either silent or silenced, covert political operators or marginalized academics.

More than that, the political and legal trend within the upper echelons of the United States administration has moved temporarily at least in the direction of fervent unilateralism in international affairs. There is significant and vocal opposition to signing treaties, to signing on to the International Criminal Court, to observing United Nations protocol, and to recognizing the relevance of law in relation to combat or internment of suspected enemy operatives. There is resistance to even engaging in discussion of international commitments and collective bargaining over protocols and rules of war. There is even high-level hostility to the citation of judicial opinions from other common law jurisdictions. In such a context, under the political pall of isolationism, it is also possible to imagine that international lawyers, whose discipline has always seemed to be a rather precarious juridical enterprise, feel threatened and perhaps safest away from the limelight of public pronouncements. The punditry and pontification that Posner's rather erratic study of intellectuals suggests is the hallmark of the scholar who strays into the public sphere would likely damage whatever hopes of influence or political employment the international lawyer still harbors.

It is into this climate of existential timidity, political opportunism and scholarly apathy that Anthony Carty throws his latest and most systematic treatise on the woeful circumstances and arid substance of international law scholarship. Following on from, indeed taking up the challenge of the last pages of his earlier study, now twenty two years old, *The Decay of International Law?*, Carty here turns to address the philosophical possibili-

ties and the literary and discursive prospects of this relatively marginal yet historically venerable discipline.<sup>3</sup> His question, as simple as it is surprising, is: What do international lawyers do? The question subdivides into ontological and epistemological themes and receives in turn anthropological and philosophical responses. In what follows I will trace first the ontological question of who the international lawyers are, and then move to address the more critical question of what community and public presence, what discursive space and impact they may hope to engender.

### Mobile Identities

The modern discipline of international law is a modern invention. That goes pretty much without saying, by definition in fact, but it fails to offer anything but a negative account of what constitutes the discipline as an intellectual enterprise. Ed Morgan, in a beautifully laconic account of the aesthetics of the modern discipline, concludes, in italics: “looking at the law from the perspective of other disciplines, one might say that this is a clear case. *International law is the law that is used up.*”<sup>4</sup> It is a law that is endlessly deflected, deferred and indeed now derided when it challenges national norms, constitutional assumptions or simple territorial power. No wonder that international lawyers feel timid if they work in such a juridical vacuum. They lack law, and if that is the case they are forced either to vacate or to turn to other disciplines and discourses. The international lawyer has nothing to say, on this theory, because she is not allowed to say anything or at least when the law is all used up there is only literature, allegory or fiction and those, for the modernist obsessed with the positivity of norms, are no law at all. On the other hand, and this is the start of Carty’s lengthy endeavor,

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<sup>3</sup>) Anthony Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (1986), concluding that “the task is to understand that an appreciation of international law as an aspect of culture has to be primarily a matter of introspective reflection rather than one of empirical research”. Also of importance to tracing the development of Carty’s thought, are Carty (ed.), *Postmodern Law: Enlightenment, Revolution and the Death of Man* (1990); and Carty, ‘English Constitutional Law from a Postmodernist Perspective’ in Peter Fitzpatrick (ed.), *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (1991).

<sup>4</sup>) Ed Morgan, *The Aesthetics of International Law* (2007) at 15.

the vacuum might be taken in alternative form as the mind's opportunity in the heart's revenge. This may have always been the case, indeed international law might well be defined best precisely as a different and spectral law, an object of vigorous theoretical construction rather than the manipulation of merely municipal and contentious legal norms.

The distinction between jurisdictions and particularly that between national law and international or universal law can be taken from Bodin at the beginning of our era. Writing in 1580 on the seemingly dry topic of the divisions of universal law, he distinguishes two species of legal jurisdiction as being either voluntary or contentious, by consent or by constraint.<sup>5</sup> The law of Rome or of any given city is merely municipal and contentious whereas the universal law operates by grace. It is interesting to pursue this distinction somewhat further. It has its roots, of course, in the earlier tradition of divine law and the jurisdiction of conscience, which governed all lower orders of legality, the literal shadows of the higher law. The theological radical Edmond Richer, whose remark forms the epigraph to this essay, positively sneers at the lower jurisdiction, the *ius gladii* -- the law of the sword -- and the division of fields, when compared to the jurisdiction of the keys to the kingdom of heaven, *claves regni caelorum*.<sup>6</sup> The law of the kingdom is a donation from Christ to the Church and in this view it belongs to the community of the Church, to the institution and collective body, the *societas amicorum* of Christianity rather than to any one sovereign, be it pope, pontiff, prelate, or Parliament. Jurisdiction in matters concerning conscience, good and evil, thus belongs to the community and is a matter of communal sense, of the entitlement or rights of membership and nothing more. Everyone has a voice, and the collectivity decides. Richer formulates this conclusively at the end of his treatise in asserting: "Jesus Christ wanted the Church to be governed by custom and rules, not by precedents".<sup>7</sup>

How then does this ecclesiastical origin of power and jurisdiction impact the proper understanding of international law? Start with the obvious. It

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<sup>5</sup>) Jean Bodin, *Juris universi distributio* [1580] (reprinted, 1985) at 62.

<sup>6</sup>) Richer, *Ecclesiastica*, at 22. For further discussion of this text and the concept of jurisdiction, see Goodrich, "Visive Powers: Colours, Trees and Genres of Jurisdiction" 4 *Law and Humanities* (2008).

<sup>7</sup>) Richer, *Ecclesiastica*, at 68 [moribus enim et canonibus, non exemplis]

suggests, first, that there are two jurisdictions. One is higher and voluntary, a more noble and spiritual realm that governs according to virtue and ethics, the other temporal and violent, material and concerned principally with ‘dividing up fields’, for all that such is worth. The latter is sovereign and temporal, the former is spiritual and conscientious. Richer also, however, recognizes the relation between the two orders and notes that wherever the temporal power is exercised, this should only be done after consulting the priests: “to avoid all suspicion of injustice in all their government and endeavors, in peace and in war, the Prince should seek the advice of the ecclesiastics”.<sup>8</sup> There are two orders, in other words, and they are external or separate from each other, just as the body is in theological terms at least, separate from the soul. There is another power, in other words, and this provides an exterior standard, independent criteria and norms by which to measure and judge the acts of sovereigns and the exercises of municipal law.

Richer was directly addressing the problem of papal incursions upon national Churches and his intricate and compelling argument was that each Church, as part of a universal and atemporal tradition, was independently entitled to exercise this rule of conscience and play this normative role in relation to the temporality. In England, however, things went badly wrong. The independent role of the other and voluntary law was sadly abolished. More precisely, the Church was absorbed into the State, meaning that the Crown became, in Coke’s expression, the ‘hieroglyph’ of all our laws. The Monarchy absorbed the spirituality and by process of progression, the secular sovereign came eventually to exercise both powers and both laws. The ecclesiastical jurisdiction was collapsed into the secular and, as Cormack nicely formulates it in relation to St German, the temporal law became “the rule against which the claim of conscience was to be measured.”<sup>9</sup> Carty too stresses the extraordinary importance of this inversion and conflation of external and internal, international and national, jurisdictions. It leaves the international lawyer with nothing to say, indeed, all used up.

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<sup>8)</sup> Richer, *Ecclesiastica*, at 49.

<sup>9)</sup> Bradin Cormack, *A Power to Do Justice: Jurisdiction, English Literature, and the Rise of Common Law, 1509–1625* (2007) at 105.

For Carty, the signal Anglican jurisprudential text is Hobbes, although due credit, if credit is the term, is also owed to Hooker whose *Ecclesiastical Lawes* so influenced not only Hobbes but also Sir Edward Coke himself. The story, which is in many facets peculiar to common law, is one of arrogation and annexation. The crown was restored to its rightful place and inheritance as head of the English Church, and an order that predated Roman invasion and the Roman faith, an order that indeed predated time itself, was reinstated. This is the story that is variously told by the proponents of the new old Anglican order, by John Jewel, in particular, and then by Richard Hooker.<sup>10</sup> As regards the discipline of law, the most salient and long lived of texts, the argument that stuck, most ironically by virtue of its celebrated frontispiece image as well as its polemical rigor, is that of *Leviathan*. Hobbes and fear, as Aubrey noted, were born twins and it is the jurisprudence of fear, the repetitive raising of the juridical bulwarks against terror that Carty latches on to.

Hobbes exists in the shadows of international law. Everywhere present, nowhere visible. His influence, as pervasive as it is pernicious, can be summarized as follows. First, Hobbes came as the avatar of the abolition of the natural law tradition. There were no external standards, no norms of nature or humanity, that could in any aspect infect or influence positive law. In anthropological terms, desire for glory generates both competition with and fear of other human beings as the driving force of the omnipotence of the state. Thus the scholastic digressions on justice, the good, and the right forms of behavior were deemed irrelevant to the making of laws and the arbitration of disputes. Those were the territory of the sovereign: “The epistemic center [of] the modern state was not, maybe, an exclusively Protestant phenomenon, but it was an outcome of the Reformation and a break with the medieval tradition.”<sup>11</sup> The consequence of this erasure of the ‘universal’ community and its doctrinal representatives was the “absorption of all symbols of legality into the state, which includes the unification of

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<sup>10</sup> John Jewel, *Apologia Ecclesiae Anglicanae* (1562), translated slightly later as *An Apologie or Answere in Defence of the Church of Englande* (1564). Richard Hooker, *Of the Lawes of Ecclesiastical Politie* (1617). For a brief outline of this history, see Goodrich, “The New Casuistry” (2007) 33 *Critical Inquiry* 673, at 676–95.

<sup>11</sup> Carty, *Philosophy*, at 125.

the religious and the political.”<sup>12</sup> And to this, most crucial of all, needs to be added explicitly that this transfer of power to the sovereign, to Leviathan, constitutes a sacralization of the state. Law is “the Sovereign’s sentence” and it is law simply because it is uttered – promulgated, disseminated, interpreted, announced – by the sovereign in its several forms. In the words of Hobbes’ adversary, Sir Roger Coke, the fulminating critic of the ‘false focus’ of the absolutist theory, there was not a Reformation in England but simply a seizure of power: “For, whatsoever the King took from the Pope he ascribed to himself. If the Pope would be head of the Catholique Church, the King would be Head of the Church of England ... Nor had he any love or desire of Reformation of the Church, but only to the Church-lands ...”<sup>13</sup> He wanted to divide up the fields but ended up taking over the remission of sins as well. The one included the other: no law without *nomos* as the Greeks were wont to say.

On the reverse side of the annexation of the spiritual jurisdiction into the temporal is the virulent dismissal of any remaining claim to an exterior and independent criterion for interpreting and judging law. Thus Hobbes proclaims that the views of the erudite, the scholarly opinions of civilian and ecclesiastical Doctors simply set up obscurity and fantasy, fairies and darkness, indeed potential anarchy as against the proper order of sovereign injunction and secular rule. The Ghostly Power is a straightforward threat to an absolute order of law that can have neither external overseer nor independent spectral jurisdiction. The notion of a higher or ecclesiastical law and doctrine separate from secular rule and potentially a measure of it, and specifically of its justice or injustice, is no longer possible because sacred laws are simply, for Hobbes, “those Civil Laws (he says) which belong to Religion”. Being made and applied by men, such laws are not sacred in themselves but merely human. To which, Sir Roger Coke objects not unreasonably: “Did ever man before hear of Sacred Civil Laws?”<sup>14</sup> It sounds, in other words, like a category mistake. Either the law, rule or norm is sacred – and thus determined by grace, voluntary and binding in

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<sup>12</sup>) Carty, *Philosophy*, at 125.

<sup>13</sup>) Sir Roger Coke, *Justice Vindicated from the False Focus put upon it, by Thomas White Gent., Mr Thomas Hobbes, and Hugo Grotius* (1660) Book V at 215.

<sup>14</sup>) Coke, *Justice Vindicated*, Book I at 13.

conscience – or it is secular and imposed by the sword at the will of the temporal sovereign. Here then is the key to the collapse of the tradition of universal and latterly international law and we can again borrow from Roger Coke's critique of Hobbes to elaborate a little on the significance of the annexation of the spiritual jurisdiction.

Carty opines, with both gravity and melancholy, that “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”. In other words, law binds only those subject to law, not those who make it, for they cannot be bound to themselves. There is the rub, and for all its pragmatic valence and the seeming liberation of being done with God, it needs to be understood first historically as a loss of discourse, as a point of separation and incompatibility, of *diffraction* in Foucault's terms.<sup>15</sup> The consequences of that diffraction of discourses, that parting of ways and constraint upon doctrine as a public forum of political debate needs weighing. It had the effect of cutting the law in half. An amputation of the other jurisdiction, of the criteria of justice and injustice, good and evil as applied to law. Roger Coke, using the legal language of his era, and language changes of course much more slowly than political intent, talks of the ecclesiastical jurisdiction in terms of ‘a mixt Conusance’. What is most interesting in this usage is the equation of jurisdiction – the exercise of power – with knowledge. Conusance is from the Latin *cognitio* and refers to a process of knowing, a coming to learning, a transitive and active understanding. Thus the conusance of the Ecclesiastical Judicature, where it related to things spiritual, was ghostly, a matter of spectral knowledge, of interstitial reasoning as to what was just or unjust, good or evil, and not a matter of precedent or fiat, as Richer had earlier intimated.

Hobbes should not have it both ways. What is Caesar's is Caesar's and what is not, is not. Something like that, according to Coke, meaning that no amount of positive law can undo the conusance or reason of the soul. In political and legal affairs this means that everyone has a right to reason, a right to examine and to critically apprehend the sources of law and the validity of their interpretation. In the language of the day, that meant abiding by conscience and where it conflicted with law then so much the worse for

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<sup>15</sup> Michel Foucault, *The Archaeology of Knowledge* (1972) at 65 et seq.

law. For Coke, “Conscience comes of *con* and *fcio*, to know together with reason, or some law. *Conscientia est animi quaedam ratio & lex, quâ de recte factis, & secus admonemur*: Conscience is a certain reason or law of the Mind, whereby we are well or ill advised of our deeds.”<sup>16</sup> None of which seems insupportably dangerous or too fearfully undermining of authority as such. Note too that conscience relates to thought, to cerebration and ratiocination, to argument and dialogue, to the justice that belongs to conscience, to the soul. More than that, this spiritual conscience, this philosophy of law, is without imposition or coercive force. In other words, to each their own, and Coke concludes that “Temporal Laws oblige not in Conscience when they command contrary to Ecclesiastical; for spiritual peace is to be preferred before worldly, the good of the soule before that of the body”.<sup>17</sup> Here then we face the question with which we began, namely what does this mean for international lawyers, as scholars, as jurists, and as public actors?

The answer is simple. If conscience is annexed to and subordinated within positive law, then conscience no longer matters. It becomes merely private, an emotive and interior affect, a subjective state. More strongly, for present purposes, if conscience is not a separate knowledge, a distinct conscience, then positive law exists without any independent or distinct conscience, indeed it exists free of reason in Coke’s analysis, because if conscience, the law of the mind, is abandoned to sovereign dictate and positive law, then reason too is cast aside. It is a point that Coke makes rather presciently in terms of the sophistry of Hobbes’ *De Cive*: “Wold any man think that these Critiques and pretended Masters of Reason, did either understand Reason or Logick? If *Lex naturalis* be *dictamen rectae Rationis*, I ask Mr. *Hobbs*, what is the reason of it?” To this the answer has to be a prime cause or principle, an exterior dictate which cannot be “subject and inferior to the faculty of a creature; which is not only absurd, but most monstrous and blasphemous”.<sup>18</sup> For Coke there was a divine source for *dictamen rectae Rationis* or the pronouncements of right reason. In contemporary or postmodern argot, there is a collective presence, an institutional root, traditional ground or public forum and debate that founds the political and justifies the actions of the

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<sup>16</sup>) Coke, *Justice Vindicated*, Book 1 at 20.

<sup>17</sup>) Coke, *Justice Vindicated*, Book 1 at 23.

<sup>18</sup>) Coke, *Justice Vindicated*, at 27.

nation state. It belongs not to precedent but to custom and use, to patterns of institutional action, to the populace in their various public sites. Here the relevant discourse is the theoretical and practical dialogue that accompanies the scholarly humanist discourse on political values, expounded over time in doctrinal writings and forming the basis of the *opinio juris* of the international lawyers, the literary sensibility of the discipline, the imagined community and relations of the bar. Rather than viewing the law as all used up, a graveyard of prior decisions, Carty suggests that international lawyers indeed use their reason and make up the law.<sup>19</sup> This is an active principle, an interventionist policy and it is aimed to build new relations between national subjects and thereby, to borrow from the new aesthetics, re-form a lost political territory.

### Melancholia Juridica

There is a striking image on the cover of *Philosophy of International Law*. The year is 1948 and the scene is that of a crowded trial at the Hague. Men and women, many wearing hats, coats and furs, the men in suits, attend. In the foreground is the English barrister Hartley Shawcross with co-counsel, head bowed, hands clasped and covering his mouth, pencil raised and inactive, just to his side. Shawcross is decked out in formal legal garb, now increasingly archaic, including wing collar, robe, horsehair wig, cufflinks and pencil. He looks the part except that his head is tipped to the side and slumped dejectedly upon his fist. His face is impassive and indeed rather vacant as he stares seemingly unseeing into the middle distance. In his hand a pencil, upright, loosely grasped, and in front of him papers open and ignored. It is an emblematic figure of a noted lawyer appearing before the international tribunal. He is looking away or staring with vacant eyes, his pencil idle, his face downcast. It is an image of justice, which goes without saying, except that the figure belongs within a lengthy tradition. Barthélemy Aneau in his remarkable text on famous jurists, *Jurisprudencia*, reproduces one version of the figure. Lady *Iurisprudencia*, *imago Iustitiae*, head tilted to one side, sighted but with eyes looking laterally and holding a tablet on

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<sup>19</sup> Sir Robert Wiseman, *Lex Legum or the Law and Laws* (1660) devotes its energies to precisely this critique of precedent as backward looking and irrational.

which is inscribed *Discite iustitiam moniti* – having been warned, study justice (and learn not to despise the gods).<sup>20</sup>

The cover image of the unhappy advocate is a variant on the classical theme. Shawcross, according to Carty who quotes him on the flyleaf, is concerned in the case with the government's suppression of documents relevant to the other party's case. He continues to reproduce a segment from a letter Shawcross sent to the Prime Minister in relation to the case: "As it is, we retain great misgivings about the propriety of what is being done, which we can only justify on the principle, 'my country ... right or wrong my country'." Here the warning that we look, monitor, scrutinize justice has seemingly been suspended and Shawcross is depleted and saddened by the role that he has now to play as puppet before the Court. At least he protested and so would seem to have a conception of international legal practice and professional role that included a critical distance and a salutary opinion as to what the lawyer should do. This is crucial to the argument that international law needs to re-conceive its role, to return to the philosophy of the discipline, if it is to reclaim a stature and presence within both the political and scholarly legal domains.

The history of the English Reformation, if that is not too strong a term for the simple annexation of the Church to the Crown, is crucial to the understanding of the depleted and constrained role that international lawyers eventually came to occupy within the academy and the profession. Godolphin remarked long ago that without an understanding of what Henry VIII did, common law would be but "insignificant and disfigured Cyphers", an unintelligible and incoherent pattern of mixed discourses.<sup>21</sup> There would be words, *literae*, but no life of the law, no sense, no *anima legis* as it used to be framed. Aneau talks of his famous doctors of law in exactly these terms, as those "through whose lively mouths knowledge of law is dictated".<sup>22</sup> In other words there was a crucial role for the practitioners of the universal law,

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<sup>20</sup>) Barhélemy Aneau, *Jurisprudentia* (1554) 47. The source of the epigram is Virgil and the full sentence runs *Discite iustitiam, moniti, et non temnere divos* (translating as: learn justice, you admonished, and be not disrespectful towards the gods).

<sup>21</sup>) John Godolphin, *Reportorium Canonicum or An Abridgment of the Ecclesiastical Laws of this Realm consistent with the Temporal* (1678) at 1.

<sup>22</sup>) Aneau, *Jurisprudentia*, at 47 (Cuius in ore loquens Iurisprudentia dictat).

for those who addressed the reason of nature, the laws of conscience and the dictates of the voluntary and greater jurisdiction. This was the role, in Greek, of the *nomikos*, the counselor of judges and of legislators, the literate lawyer, the public scholar, the intellectual who would advise and debate decisions but was not himself a judge or governor and hence was independent in both institutional and disciplinary terms. It is these two features of the doctor of laws that appeal most in attempting to think through a greater and more intelligent role for international lawyers.

Hartley Shawcross was depressed, or so one can surmise from the cover image, because the government he represented was acting contrary to conscience, unjustly and improperly. Shawcross, it should be remembered, as I am sure that in the circumstances he did, was famous for his role in the Nuremberg trials and for the statement: “There comes a point when a man must refuse to answer to his leader if he is also to answer to his own conscience.” There, in stark clarity, is the question that faces the international lawyer historically, theoretically and at every level of their practice. What is to be made of the jurisdiction of conscience, the laws of the mind, that were in origin the panoply and plenitude of universal law? What does it mean for a law or an argument to be contrary to conscience? The answer has to be that it means that one should not do it. That is what the lawyer is bound to advise and that is what the legal doctor should both explain and elaborate. That, however, as Hooker and Hobbes made amply clear, is not what gets done. Fear of chaos, of usurpation and dispossession in their view justify acceding to the sovereign’s will even where conscience or reason dictate the opposite. Conscience indeed is for them an insignificant and disfigured cypher, a subjective illocution, a mere affect that should immediately be separated from the linear geometry of law.

Clearly Carty is not an Anglican Thomist, if we refer thereby to Thomas Hobbes, and believes, in great historical and substantive detail, that it is precisely the Thomistic repression of conscience that has undone the role of the international lawyer as an independent thinker, as a doctor and maker of laws. Here is how the argument goes. The highly circumscribed, generally covert role of international lawyers, their disappearance from the public sphere, their silence on affairs of state, all stem from that terrible historical implosion of jurisdictions that came, perhaps inevitably in monotheistic cultures, with the unification of Church and State. The *nomikoi*, the lawyers of conscience, the intellectuals of canon and civil law also received a writ of

prohibition, a forcible excision of their views of doctrine, their opinions on law, from the realm of legal sources. Their jurisdiction was quashed by hostile incursion from an imperialistic, here coined Deuteronomic common law.

The Reformation, the expulsion of the ‘other’ jurisdiction, the denial of the universal or simply supranational in favor of a national Church and law, had amongst other effects that of suppressing that other commons, the *communis opinio iuris* of the civilians and the canonists. This entailed a further loss, an abandonment of a distinctive reasoning and method of law that was not based in precedent, but rather in the elaboration of principles, in the interpretation of *regulae*, and in the subtle play of attention to a humanistic legal philology that dared to attend to the intricacies of interpretation, to both text and tradition, to written and oral transmission across time, both audible and *sub auditio*, both *lex scripta* and *ius non scriptum*. The English international lawyers, and they, historically and jurisdictionally are Carty’s concern, were cut off from the humanistic methods and interpretative traditions of Renaissance law. Be clear about this. The great continental treatises and glosses were profoundly interdisciplinary enterprises and responded directly to developments in adjoining disciplines, in rhetoric, dialectic and logic, because these were integral to the method of law.<sup>23</sup> It was well recognized, in other words, that the text of law – the antique *corpus iuris civilis* – was incomplete, fragmentary, and often corrupt. The text was fallible and its compiler Tribonian was derided by the humanists: *emblemata Triboniani* was the name given to textual errors introduced into classical law by the poor philology and inapt constructions of the code’s compilers. It was thus and properly the role of the doctors of law to amend, elaborate, interpret and invent as the practical needs of the occasion demanded. The law was always an invention in the rhetorical sense of being a discourse inspired by an historical textual source, be it on the particular occasion a fragment, a gloss, a jurist’s opinion, but elaborated through and expanded upon by the interpreters, the interposed persons – the *interpositae personae* – of all the legally learned, the erudite and eloquent commentators upon the law.

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<sup>23</sup>) On which theme, see in particular Ian Maclean, *Interpretation and Meaning in the Renaissance: The Case of Law* (1992) ch 2; and most recently Valérie Hayaert, *Mens Emblematica et humanisme juridique: Le cas du Pegma cum narrationibus philosophicis* (2008) ch. 1.

It is against this background of *communis opinio doctorum*, of what Carty terms doctrinal discourse, that we have to understand the sorrows of the young Shawcross and the initial dimension of the critique that motivates the *Philosophy of International Law*. It is not just a matter of diasporic irritation or itinerant unrest but rather of a very clear vision of a very simple situation. International law has no comprehensive text. It can rely even less than civil law upon any extant legislative or judicial sources. It is faced continuously with novel incursions upon and breaches of the available compacts and protocols, the persuasive authorities that overlook international action. Lacking a code, having no exhaustive body of case law, the very substance of international law is either non-existent or it is the invention of the doctors, a matter of *communis opinio*, legal knowledge, political skill and rhetorical ability. That is what doctrine is, the learned viewpoint of the international law expert, the elegant opinion of someone who knows about that of which they speak. A legal opinion, in this context, is always an intervention, an interposition in the classical language, and while this does not differentiate international law from national governance, it is a much starker and more immediately political context in which to purvey, meaning to teach, elaborate and publicize doctrine.

The second stage of Carty's argument is substantive and positive. If doctrine is a source of international law, a ground for challenging the numerous illegal actions of states and their minions, then it is to the elaboration of disciplinary sources, and the claiming of a voice and place for doctrine, that serious jurists should turn. This requires a humanistic and hermeneutic revision of the discipline. It requires a will to power and an advocacy of conscience against the dictates of the state and the claims of mere precedent. The great questions of state practice, of war, of self-determination, of land claims, of abuse of human rights, of reparations and of the role of the international community are all much more than merely or only legal questions. They are concrete political issues that involve the actual practice of states and the juridical conscience, the justice and injustice of international life. It is these issues that international law has vacated and it is these issues that have to be claimed back by way of an expanded conception of doctrine and an enlarged sense of practice.

A hermeneutics of international law is in this vision one that addresses directly the symbolic, cultural and ethical significance of what states do. In this salutary view, doctrine has its roots precisely in philosophy and

specifically in challenging the timidity of lawyers and the arrogance of state actors. Borrowing from David Campbell, Carty offers a bleak account of the decline of international law and in particular its reduction to the abject handmaiden of state practice. Lacking critical distance and political resolve, international lawyers have accepted the sacral character of the state and so witnessed the reduction of their role to that of docilely confirming the actions of the state and uncritically reporting and systematizing the decisions of uncommunicative and timid courts. Now absorbed into the sacral bureaucracy, playing the role at best of a functionary within the armature of sovereign will, “the inclusion of international law within the identity of the self, so that it merely serves as a boundary of the self and as a weapon against the other” (143) signals both a contempt for juristic tradition, for the humanistic philosophy of law, and a removal of the discipline from the reaches of any practical political significance. What Campbell terms a ‘Deuteronomic principle’ – idolization of the self and demonization of the other has become the norm of Western international policy, purveyed nationally through the manipulation of the media and the quiescence of international lawyers. The reclamation of doctrine requires a significant change of position, a renewing of the jurisdiction of the interpreter and a realignment of international legal thought with its disciplinary and more particularly interdisciplinary roots.

Moving to the positive hermeneutics of international law that Carty proposes we should note that the legacy of Hobbes’ absolutism is not simply the sacralization of the state, but also an existential figure of fear alongside the image of Leviathan lowering over a denuded and empty city.<sup>24</sup> Is there here any space from which the jurist can speak? The answer is that there probably is not or at least that such a space has to be created through the deconstruction of the Deuteronomic principle. The public sphere may be receding, the stage already occupied and a concept of law abrogated or *iustitium* – justified by terror or security or economic necessity – may have taken control but lawyers should in truth be used to that. It is always happening and from

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<sup>24</sup> For a discussion of the frontispiece image of Leviathan, and specifically the linear emptiness of the city, its disinhabitation, its geometry pure and unsullied by bodies or persons, see Peter Goodrich, “Postmodern Justice”, in Austin Sarat et al. (eds), *Law and the Humanities* (2009).

John Cooke's successful (if personally ill-fated) prosecution of Charles I for an early version of war crimes to the Nuremberg trials, the international lawyer has at best shifted ground from merely repeating the norms of prior and generally irrelevant judgments, to raising questions of justice and injustice, conscience and coexistence. Deep within doctrine, in the community of international lawyers, in the *societas amicorum* of international relations, Carty finds the possibility of a seizure of the jurisdiction of interpretation, and of a correspondingly new doctrinal role.

Start at the end. Law is the supreme form of diplomacy. In the international sphere, in the absence of an international constitution and without institutions or courts capable of enforcing norms against national bodies, the role of law has to be more obviously fictive, aspirational and political than in local national contexts. Law here is primarily and simply discourse. It is, as noted at the outset, a voluntary jurisdiction in which, to borrow from antique codes, "agreement prevails over law, and love conquers judgment".<sup>25</sup> In a more contemporary idiom, dropping the Latin for a moment, this is a question of hermeneutics in its most classical sense, that of building community, establishing shared norms of meaning, and reciprocal spaces of discourse. Here, in the last instance of law, in the constitutional moments of international community, it is the role of the jurist to broker rational dialogue through the hermeneutic tools of the art of law, which has promised, from Gaius on, to give each their due. And their due is a space, a moment of recognition rather than erasure within the dialogue of international subjects.

The hermeneutic, as opposed to purely jurisdictional dimension of this position deserves analysis. First, there is an international community, a tradition of scholarly texts and humanistic practices that together can form a *communis opinio iuris* or tradition of juristic discourse and practice upon matters of state action and communal dealings. The humanistic texts address, as the outline above suggests, a number of questions relating to the constraints upon sovereign action imposed by divine and natural law. While such sources of law are less readily used today the questions addressed concerning the ethical parameters of behavior, recognition of other subjects

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<sup>25</sup>) *Leges Henrici Primi* (Downer ed., 1972 edn) at 45a [pactum legem enim vincit et amor iudicium].

and laws, the justifications and limits upon violence all merit consideration as political *topoi* and as legitimate objects of legal opinion.

Second, the hermeneutic scope of international discourse, the boundaries of doctrine merit re-examination. The Deuteronomic principle is one that obliterates the other for essentially economic reasons – an expanding market always needs new territories to be opened up for plunder. This principle denies subjectivity and speech to those defined and demonized as enemies. In this binary logic you are either us or them, friend or foe, comrade or harbinger of death. This oppositional logic applied to international communication eradicates the space of dialogue between radically different cultures. Indeed significant differences are simply the potential sign of the other's membership of the uncivilized or lesser nations, an index of exclusion from the club of Western powers and potentially the first instance in the call to extermination. Imperium as fear and unthinking obedience leads directly to a view of law as 'sovereign sentence', the dictat of a unitary will without the space for dialogue or reasoned discussion. There is here no space for politics, no room for poetics, no role for doctrine as a humanistic hermeneutics.

Carty builds a very plausible case, and using Ricoeur's later work proposes an enlarged role for international lawyers as part of an expanded process of engagement, discourse and political debate. To revive legal hermeneutics in the realm of international law, to send jurists as diplomats, lawyers as scholars and humanists requires a leap of imagination and a sustained effort at respect, truce and trust. The humanistic endeavor is here a radical exercise in faith, a return to the fiction of an international legal order, and to the imagined community of a plurality of nations. In hermeneutic terms, the other is not *terra nullius* but *terra incognita*, and as such is to be respected, explored, mapped and engaged. Here the question is that of learning a new language, something the Europeans – the English in particular – have not on the whole been good at, not that willing to do. The purpose, in any event, of such language learning is simply to start a dialogue, to begin a discourse within the community of nations, a politics in place of war. This is where, finally, the protocols of hermeneutics, as spelled out by Ricoeur, by Said and Steiner as well, amongst others, can help to rebuild a tradition of legal community and juristic opinion which addresses the political context, the historical and moral roots of State claims.

### Conclusion: Closure or Critique

The choices are stark. The community of international law scholars is small and not that prominent in law faculties overall. They exist on the margin and practice a somewhat sclerotic discipline that hovers uneasily between bureaucratic intrigue, political philosophy, and positive law. Belonging fully to none and partially to all, the call that Carty makes to a legal humanism that recognizes the potential value of this distinct and uncertain small niche within the legal institution is fascinating and laudable. It is the very uncertainty of their role that provides the international legal scholar with a unique opportunity to develop a critical discourse, outside of the aridity of positivism and the subservience of liberal lawyering, on the historical records of states and the injustices of their practices. This leads to a final question, one that may seem somewhat outmoded but equally intriguing and proleptic, namely what does this call for a new hermeneutics, a realist ethics of law, have to teach the critical legal community about the politics of law?

When it comes to critical legal studies, and even though he is writing within a European jurisdiction – Scotland – where CLS is not subject to *damnatio memoriae*, to visceral forgetting, Carty is uncharacteristically cautious. It is true that early on there is a reference to critical legal studies as a useful heuristic tool, allowing for a critique of practitioners for failing to ground appeal to rules in anything more than supposed, rather than actual evidence of practice and then the punch-line: “its postmodernism (its opposition to the idea of any fundamental or absolute values) does not allow it to resurrect any creative role for doctrine” (8). Beyond saying that legal decisions are decisions and hence involve political and ethical choices the critical scholars have tended to abandon legal doctrine, the possibility of usefully and intelligently discussing precedent, in favor of dismissing law and engaging in exercises in various forms of cultural studies. A little wickedly one could say that the ‘crits’ became obsessed with being likeable and engaged in long elaborations of likenesses: law is like aesthetics, like literature, like music, like economics, like film, like politics and more. Such is a start, one could say, a first effort at elaborating a contextual view of law and of the communities that promulgate it, but it suffers the incisive flaw of no longer discussing law either directly or substantively. Law suffers critical closure from the outside in a fashion that exactly mirrors law’s internal and

exclusionary closure within the positivist vein of reproducing only the rules. Positivism and critique were two sides of the same coin, one belonged to Caesar, one to God, and never the twain will meet.

The return to doctrine, the renewal of law teaching, and that after all is what legal scholars – critics and conservatives – do, requires recognition that their object of study is a socially constructed practice of generating, developing and applying legal rules. Critical legal thought is already embedded in doctrine, housed in law, committed to promulgating in some form the tradition, norms and institutions of the rule of law. Failure to recognize that existential and jurisdictional location leads to a wanton abstraction and an unrealizable flight from the real. Here Carty, with a nod to Roberto Unger and Boaventura de Sousa Santos, two media literate critical legal scholars, is at his best. The hardest thing to do with scholars is to engage them in conversation. Dialogue is difficult where professional skill is developed in isolating conditions, in formative years of lonely, idiosyncratic and technical research conducted in libraries, on screen, in the variable trances of postmodern university scriptoria. In later years, now tenured, the scholars will often abandon the library but tend now to communicate only with children, with students, and hence again develop unrealistic ideas of the ease of conversation and the apodictic importance of their own views. The scholars become as removed from community as the legal professionals are removed from ethics. A series of non-spaces, of interiorized critiques and denied practices take the place of critical apprehension and public intellectual exchange. There is a strange deterritorialization, an emergent delirium, a loss of relationship and hence of sociality, of reality, that runs through the work of the academy, and which both marks and expresses its withdrawal from the public sphere.

In the end the message of *Philosophy of International Law* is one of reclamation and a surprising realism. Law is less ‘used up’ than ‘made up’ and it is incumbent on critical legal scholars to take responsibility for their part, be it passive or positive, in that process of construction and transmission. The function of critique is to dismantle the closure of the discipline and to do this means reverting to an older and fuller sense of legal doctrine, to a renewed juridical ‘conusance’ which allows the scholar to invent a space from which to address, dissect and discuss what gets done in the name of law. Where Sir Roger Coke rather ably attacked the ‘false fucus’, the conniving cosmetics that he thought Hobbes had used to cover over the injustice of

law, Carty addresses a similar sense of injustice by taking apart the rhetoric of doctrine and the manipulations that pass for the reason of law. The role of the scholar is in the end that of a “mature anarchism” and equally utopian. How is the international lawyer to build a community and inhabit a legally facilitated and fundamentally dialogic global zone? The answer is initially at least that the international lawyer has to speak more publicly, get out more and not in the currently chameleon fashion of taking on the color of whatever institutional or administrative environment he encounters.

Time then, in good Renaissance fashion, for the legal humanists to draw on the poets and the artists in their midst. Time to borrow from relational aesthetics and go into the world, inhabit the diagram, event, and context. Breaking the closure of law requires engagement, a ‘coming out’, a willingness to speak to the political identity of the legal act and to the injustice of the state intervention. The hermeneutic model that Carty utilizes indeed projects a more comprehensive and engaged mode of scholarship. He sees the jurist expanding attention from market and citizenship, from the law and economics of production relations and workplace interactions to a less constrained address of all the forms of law, formal and informal, private and public, interior and exterior, partial and systemic, certain and uncertain, that subjects encounter. This expanded remit and potentially plural discourse envisages community as a network built around co-operation, in which the role of the law is that of keeping open and equal all those spaces from which difference can speak. To this, and by way of conclusion, I will add the suggestion of relational aesthetics.

Following the principles of humanist hermeneutics takes the international lawyer into the international community in a dynamic and yet equally intimate way. There is no reason here not to learn from the artists who after all gave law too its name as an art, as *ars iuris* to be frontal about it. In Bourriaud’s account, nicely complementing the international lawyer’s “mature anarchism” (241), relational aesthetics is a mode of artistic intervention in the public sphere. The artist does not seek any grand utopian design, but rather a limited and provisional solution in the here and now. The “microtopia” as he coins it, is an aesthetic of intervention in the everyday, a materialism of encounter, the inauguration of minor events, the instantaneous capture of public space by the rendering of an interior, the acting out of an intimate vision, in the immediacy of the street. It is an ontological anarchism summarized vividly by the notion that “It seems more pressing

to invent possible relations with our neighbors in the present than to bet on happier tomorrows. That is all, but it is quite something.”<sup>26</sup> The point is that the image is a social relation and produces social relationships and the artist is keen to get out there and participate in that production. Art produces images. Their interstices are social, relational and political. The artist enters the social so as to express and to build relationships, modes of being together, of getting on.

Translated into the art of international law, it is the cases that conceal and manufacture social relationships and it is in the cases, and specifically their interpretation that the jurists should intervene. If the artwork is a ‘social interstice’ to the relational artist, the case is exactly an interstice but more buried, seemingly more technical, foreign and opaque. So the jurist, as *nomikos* or humanist, poses the insistent question of what relationships, what justice do these judgments represent and now, inside the text, what can be taken from it, what can be made anew? The point, whether expressed in artwork or in legal debate is “to learn to inhabit the world in a better way”. In effect, then, the critical lawyer and activist artist engage the same problem and look for similar ways to generate respectful encounters, and self-reflectively democratic ways of being together. International law scholars cannot achieve such an ideal of sociality by themselves or alone. They are a small group, housed in rather isolated institutions. Carty argues for a breaching of that isolation, a coming to conversation and to action. This will include its share of antagonisms and conflicts, and it will take place in minor scenes and microtopic locations. This is not much, but it is also quite something. And at least he dares to speak, to hope, to traverse the empty public spaces where nothing is said and international law is all used up.

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<sup>26</sup> Nicolas Bourriaud, *Relational Aesthetics* (2002) at 45; and ably excoriated if not wholly deflated in Claire Bishop, “Antagonism and Relational Aesthetics”, 110 *October* 51 (2004) and again in Claire Bishop (ed.), *Participation* (2006).



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