



# The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs

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*The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs.* By Anthony Carty. Manchester and Dover, N.H.: Manchester University Press, 1986. Pp. x, 138. Index. \$40.

Tony Carty criticizes public international law on the basis of its own theoretical foundations. He does not condemn international law for political naivety, Eurocentrism or imperialist sympathies. He neither bemoans its historical infancy nor chastises its moral failures. Since international law cannot sustain its claims to comprehensiveness without jettisoning its predominant theory of the state, Carty argues, international society is best thought of as a Hobbesian state of nature.

Carty's argument is difficult to untangle because he advances a number of organizing themes for the divergent issues pursued in his seven short chapters. Carty's most telling criticisms are directed at international law's claims to "completeness." He argues that international law claims to "define comprehensively the rights and duties of States towards one another" and to produce a complete geographic allocation of state jurisdictions. Carty traces these notions of normative and territorial completeness to two schools of European jurisprudence—the German historical school (e.g., Savigny) and the pure theory of law (e.g., Kelsen).

Carty associates these notions of completeness with a theory of the state as a legally ordered system of competences. This state theory, anchored in 19th-century European nationalism, relies upon an unsustainable jurisprudence. The law that orders its competences cannot also regulate its coming into being. Once the state exists, moreover, it cannot fully regulate the coming into being of the law if it is to remain a system of legally regulated competences. As a result, Carty argues, "the completeness of the legal order is nothing more than a hypothesis" (p. 10). International law must choose between its theory of the state and its comprehensive jurisprudential claims.

Several exemplary doctrines sharpen the contrast between state theory and jurisprudence. The inadequacies of self-determination doctrines developed to regulate the coming into being of international legal subjects expose international law's dominant state theory. Absent some doctrine relating the people and territory to the state (a relationship not sustained by self-determination doctrine), state theory must rely upon jurisprudence to complete the normative and territorial order of jurisdictions. Carty finds the doctrines that might establish these jurisprudential claims inadequate. Just as doctrines about self-determination signaled the inability of international law to regulate the coming into being of its own subjects, so also sources doctrine about *non liquet* signals the inability of legal subjects comprehensively to regulate the coming into being of their law. Similarly, doctrines about territorial jurisdiction, designed to complete the grid of sovereign authority, remain little more than "hypotheses" about a pattern of authority that must be established by states.

Carty's critical method is familiar and powerful. One identifies two elements of legal consciousness—here a theory of the state and a theory of

law—and demonstrates that each can only be sustained with the assistance of the other. One then demonstrates that those elements of each responsible for sustaining the other depend upon that which they were meant to support. Carty pursues this oppositional method in discussing doctrines about sources and territory. He argues that normative comprehensiveness depends upon institutional authorities and procedures that can develop gap-filling doctrine, while territorial comprehensiveness depends upon a complete and authoritative normative structure to regulate the jurisdiction of its subjects. To the extent that claims about normative comprehensiveness stem from the historical school while claims to territorial completeness can be traced to the pure theory of law, the opposition Carty identifies between state and legal theory is echoed within both legal theory and doctrine.

The direction of the critique is also familiar. By grounding a critique of law in its theory of the state and then undoing the theory of law, one leaves the reader with the state: debunking law to trumpet politics. Once Carty has critiqued international law's jurisprudential claims, his discussion of state theory is a mopping-up operation. We expect his conclusion that the international system is in some sense a state of nature.

Although the structure of Carty's critique is powerful whichever way one tells it, his indictment would have been far stronger had Carty forgone his conclusions about the "state of nature" and pursued his criticism somewhat farther. Instead, he adopts the familiar rhetoric of disciplinary "crisis" and "decay." This rhetoric is troubling both because it purports only to describe what it produces and because it shares with the discipline it criticizes a sense of "*après moi le déluge*."

Many readers might find Carty's statement that "international law is now assumed to be a complete system of law" (p. 10) difficult to comprehend. If Carty means normatively and territorially "comprehensive," his insistence upon absolute comprehensiveness seems too strong. Why not "comprehensive enough"? Gaps might merely offer the opportunity for further work. Perhaps he thinks that unless the system is absolutely complete, the theory of the state—the subject that will interpret and construct law—cannot be sustained. This may be true, although Carty does no more than hint at this relationship by vaguely associating "completeness" with "positivism"—a somewhat misplaced association, given his broader claims. Nevertheless, if comprehensiveness must be absolute to sustain the theory of the state, one wonders why we should not simply conclude that the international legal order is not yet finished.

These difficulties illustrate a common reaction to internal criticism. Why is the critic so insistent upon the absoluteness of the discipline's own claims when other scholars and practitioners are content to see the glass as half full? Carty might respond by elaborating the consequences of adhering to a framework that is flawed in this way—that seems erected upon the stilts of mutually unsustainable referents between state theory and jurisprudence—but he does not.

This question suggests another. To one used to thinking of law as the product of some human agency, it seems important to know *who* is assuming

international law to be one or another sort of system. I have never met an international lawyer or scholar who made the sort of assumptions Carty imputes to "international law." They seem to acknowledge and bemoan its incompleteness as a matter of course.

Carty might have responded by restricting his critique to the texts and materials of the discipline, or simply to the historical doctrines and texts that he studies, situating himself with others responding to gaps in the discipline's tools. On the other hand, he might have extended his critique by demonstrating that others rely upon claims that they explicitly deny, directly critiquing contemporary doctrinal work. Instead, he suggests that the claims about completeness that he criticizes characterize the work of certain 19th- and early 20th-century European scholars who continue to "influence" his contemporaries.

To substantiate this claim, Carty devotes part of each of the first chapters to demonstrating the continued doctrinal validity of positions associated with these schools. For example, in chapter 2 he argues that Article 38 of the Statute of the International Court of Justice must be seen "in the wider context of a broad attempt, following the first world war, to 'institutionalise' relations among States" (p. 14). He claims that the approach to sources taken by 19th-century writers "has had an influence which is not taken on board by Article 38" (p. 14), a claim he supports by tracing the roots of contemporary doctrine about treaties to "certain late nineteenth century discussions in Germany" (p. 15). This is an interesting insight of the sort that one happily finds throughout Carty's text. Its relationship to his critical project, however, is somewhat obscure.

He might be arguing that the vision of Article 38 is insufficient to the needs of modern theory unless supplemented by a respect for general custom incompatible with its positivist tenor, but he does not tell us enough about contemporary international legal theory to make this case. He stops after identifying some perplexing similarities between the historical school's approach to treaties and certain minority tendencies today. Having "illustrated" the importance of these early schools, he criticizes the tendency of all contemporary theory to differentiate the subjective and objective dimensions of custom and concludes that "international law is nothing more than the way that those who call themselves international lawyers look at international relations" (p. 21).

This conclusion is provocative and telling, unsettling not merely the positivist tenor of Article 38, but also those strands of contemporary doctrine that challenge and supplement that emphasis. At the same time, this conclusion seems to be an extension of the historical school's legal theory.

To criticize contemporary international law's continued separation of the objective and the subjective, Carty must read out of contemporary literature precisely the qualifications that might reasonably be traced to the historical school. Carty does not deal with the explicit rejection and qualification of Savigny's and Kelsen's work within both modern German jurisprudence and 20th-century international legal scholarship. Contemporary German legal literature treats the historical school both as one "factor" to be taken into

account in the interpretive process and as a description of law's general function as an expression of culture. The school's dogmatic claims have been both balanced against the insights of the pure theory school and relativized within a framework provided by the jurisprudence of interests and values. Carty might have developed a more direct assault on contemporary theory by showing that the relative influence accorded the historical school is incompatible with the more rigid doctrinal distinctions that it either defends or denies. In this way, he might have turned his own ambivalence about these materials against the discipline itself—reading it as a tension between its doctrine and theory.

Carty's ambivalence about the theoretical materials on which he bases his internal critique is familiar to critics who try to exploit a discipline's oppositions and ambivalences. But using one part of the discipline against another has a frustrating tendency to plunge the critic into self-contradiction. Having studied the historical school, Carty wants to establish the authority of his critical tools within the discipline and then use them against the discipline as a whole. The difficulty is that disciplines rarely give so much authority to their own tools.

Carty is much more convincing in close doctrinal work. Chapters 3 and 4 develop his criticism of general customary law and the law relating to territory. His analysis of 19th-century European treatises is broad ranging and reliable. He traces the origin of notions of normative and territorial completion in an emerging theory of national statehood. He grounds doctrines about general custom and jurisdiction in the *imagination* of 19th-century state theory, contending that they are the elaboration of a theoretical hypostasis rather than the functional elaboration of a set of new interactions among new state entities. This is Carty's most original insight.

If the basic thrust of Carty's argument seems sound, however, it is certainly easy to misunderstand. I do not think Carty would claim that nationalism demanded a particular approach to jurisdiction and custom. This seems too idealistic and Carty is silent on the mechanism of theory's tyranny. On the other hand, if he claims only that doctrines arose as creative responses to legal problems generated by nationalism, he sacrifices much of his critical bite, for other less "unrealistic" doctrines might accomplish the same thing. Carty tells us little about mechanisms of influence except in his choice of verbs. These doctrines "express," are "rooted in" or are "a projection of" a theory of the state.

After extending his critique of state theory and self-determination doctrine in chapters 5 and 6, Carty concludes by "applying" his insights to U.S. policy in Latin America, the Falkland Islands dispute and the Israeli invasion of Lebanon. Carty indicates that these sections resulted from the "prodding" he received "to work out the more positive implications of a general line of argument to which I have myself reacted rather negatively" (p. x). Unfortunately, these analyses emphasize his weakest points and abandon his strongest criticisms.

Rather than continuing a systematic critique of the doctrinal and theoretical foundations used to analyze these problems—extending his criticism

into contemporary literature—he brings along only his conclusion that states live in a “state of nature.” Separated from his earlier dialectical analysis, this seems commonplace. Much modern international legal theory, after all, claims that but for international law it *would* be a state of nature out there. Having just spent an entire book demonstrating the “decay” of scholarly attempts to construct a legal system on the basis of some image of a state by articulating the *continuing relationship* between legal and state theory, it seems very odd that Carty should abandon jurisprudence and assert the authority of state theory so insistently. The resulting analysis combines a somewhat exaggerated formalism about the law with the panache of vigorous realism—both ill-suited to the development of the “ideal discourse” Carty advocates.

Taken as a whole, I found Carty’s short book a good, stimulating read. His analysis of 19th-century international legal scholarship is interesting and well-done. Most fascinating, however, is his attempt to generate a dialectical critique within the international law tradition. Carty situates himself in our midst and weaves a complicated critique by opposing various strands of doctrine and theory he finds in our collective consciousness. If anything, he should have pressed his critique further. The discipline could use more such imaginative work.

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*Grotius et la doctrine de la guerre juste.* By Peter Haggenmacher. Paris: Presses Universitaires de France, 1983. Pp. xxiv, 682. Name index. F.270.

With the publication of his landmark treatise, *De jure belli ac pacis*, in 1625, Hugo Grotius laid claim to the title of Grand Master of public international law. His impact upon its subsequent development was extraordinary, and his influence in one form or another continues down to the present day.

Peter Haggenmacher, in a massive study of Grotian theory and the doctrine of the just war, claims that Grotius has often been misunderstood and, without question, wrongly perceived. For one thing, Haggenmacher asserts, Grotius’s seminal work was badly translated owing to the difficulties of coming to grips with a reputedly dead language. For another, the “baroque luxuries” of his citations confused more than they clarified.

Haggenmacher states at the beginning of his huge tome that *De jure* was not a study of natural law or of international law, but rather a treatise on the law of war. According to the author, the medieval commentators were caught up in theorizing about the right of legitimate defense. Thus, they were the precursors of the idea of the just war.

Thomas Aquinas is given credit for being the first classical contributor to the development of international law. It is with Aquinas, Haggenmacher asserts, that the theory of the just war begins its long journey to the modern day. Yet the claim is also made that “Grotius invokes entirely a foundation of Germanic and feudal ideas, supposing a kind of contract between government and people, equally submitted to a common law.” (The author’s style tends to be ponderously academic and occasionally bewildering.)