BOOK REVIEWS

The Decay of International Law: A Re-appraisal of the Limits of Legal Imagination in International Affairs, With a New Introduction by ANTHONY CARTY [Manchester University Press, Manchester, 2019, xxx +194pp, ISBN: 978-1-5261-2791-4, £22.50 (p/bk)]

Anthony Carty's *The Decay of International Law* (hereafter '*Decay*') was an iconic work of the Cold War era, addressing some of the most fundamental questions about the nature of international law and practice. The book has now been reissued by Manchester University Press with a new introduction by the author and an additional preface by Professors Iain Scobbie and Jean D'Aspremont.

The book critiques the concept of the State that has developed in international law thought since the turn to sovereignty as an organising principle in the late Renaissance period, as exemplified in Gentili's writings. Carty argues that in a system of equal sovereigns, where States in their international relations exist only in a state of nature, there is no Civil Law, no guarantee of property and contracts. It follows that in such brute conditions there can at best only be an incomplete system of positive law (29–30).

Carty points to the history of colonial domination as evidence that not only does international law not effectively restrain States, but it has been used as a tool to justify annexation of territory. The State is conceived in spatial terms and yet international law lacks an adequate conception of territorial legal principles and, consequently, of how territorial States come to be. This allowed sovereignty, rooted in notions of political organisation and civilisation, to be employed to exclude non-European kingdoms and communities from 'civilised international society'. As these kingdoms allegedly lacked political organisation, they were also deemed to lack sovereignty and valid title to their territories. This use of sovereignty was in marked contrast to how European States interacted with each other in Europe, where the concept of territory as property was replaced by the law of exclusive jurisdiction.

Despite not having an adequate legal basis for how States and territorial sovereigns properly come about—beyond recognition of the outcomes of conquest, cession, prescription, and occupation—mainstream modern international law thought and practice holds that these States are the entities entitled to make international law by voluntarily exercising and expressing some mystical will through treaties and assent to new customary rules. Moreover, there is no absolute guarantee that States will abide by the obligations they create because international law, as it had emerged by the nineteenth century, provided inadequate protection of the sanctity of treaties. It failed to mark out where what Vattel calls 'faith in treaties' ends and lawful renunciations begin. History shows that when the maintenance of the European balance of power required it, treaty commitments could be cast aside (87–90).

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Chapters 4 and 5 on territory and treaties derive from Carty's Heidelberg work and remain cornerstones of his view. By way of illustration, Carty and the present reviewer were both guest speakers at a recent public discussion of the Sino-British Joint Declaration. Carty expressed disquiet at the view that that treaty contained detailed prescriptions where it was readily ascertainable that they simply fit one or other political claim, rather than being evidence of a solemn compact between two governments concerning how they contemplated their ongoing mutual relations, which various events had placed under considerable strain.

If lawyers' views on treaty and territory are found wanting, then the most 'dubious aspect' (54) of their intellectual apparatus, Carty argues, is their notion of international custom, according to which a 'sovereign will' which is 'shaped' around a rule becomes cognisable to other sovereigns. He treats this requirement of *opinio juris*, what Ian Brownlie saw as a sovereign's assent to or willingness to accept a rule's opposability to itself and which Carty for his part sees as a conception of authority and obligation premised upon a 'Kantian ethic' (55), as an apparition. How and where do we identify the elements of a State which may be said to be capable of having a consciousness of its legal duties (60)? It is one thing to treat custom as classical writers did, as simply presumed consent to a rule, but quite another, beginning with Rivier and von Kaltenborn and culminating in Article 38 of the Statute of the Permanent Court of International Justice, to speak of an *opinio juris communis*. As Carty puts it, there is a need to deconstruct (2–3):

> …the illusory fabric of an international legal community supposedly resting in a common consciousness of a customary international law. International law doctrine asks us to imagine that States have a juridical conscience (an *opinio juris*) which evolves historically, as they become aware of how their repeated conduct reflects a juridical conviction that this conduct is required by Law. This view … is an illusion.

So that was how *Decay* sought to deconstruct the sovereign-voluntarist model and its illusion, or so Carty argued, of disembodied, weightless creatures supposedly endowed with a mystical will. However, it would be a mistake to think Carty simply wanted entirely to reject the basis of obligation and authority of international law. Rather, Carty's programme was that of an ethical reorientation, against the 'decadence' of the sovereign-voluntarist, what he also calls the 'unilateralist', conception. He meant to heighten awareness of moral decay and professional-cultural decline, which carried with it a discomfiting allegation of dissoluteness and self-indulgence in the international lawyer's adherence to certain organising concepts. For him, 'international society', which in the nineteenth century marked out the civilised from the uncivilised world, still lacks any sound ethical basis. These are, and will remain, deeply contested waters.

Those who have also read Carty's *Philosophy of International Law* (hereafter '*Philosophy*') in the intervening years will be likely to treat the new introduction

to the second edition as a third instalment in what has become in essence a trilogy. *Philosophy* had continued to examine the indeterminacy of *opinio juris*, at a time when the USA was a sole hyperpower, arguing that what we have are conflicting policies instead of international law (*Philosophy*, at 27–33; FF Hoffmann, 'Gentle Civilizer Decayed? Moving (Beyond) International Law' (2009) 72 MLR 1016, at 1020–1). With the reissue of *Decay*, and as the global power configuration changes again, Carty in this new Introduction begins by restating his views thus (1):

> It is not just a matter of 'America First'. It is 'Israel First', 'Britain First', 'Russia First' and so on. The 'law of the Charter' (excluding the use of force) is just one more treaty.

As for international courts and arbitration, specifically the ability of adjudication to mediate and fill in the legal gaps, Carty cites EH Carr's criticism of Hersch Lauterpacht to show how *opinio juris* in the hands of courts has served as an instrument with which to reach preferred views of legality (6). As for humanitarian intervention, Carty retorts that interventions are commonplace, humanitarian or otherwise, ie the UN Charter is 'just another treaty' (8). Most international lawyers will consider such assertions heresies, but there is always method to Carty's heresies: in arguing, methodically, for the replacement of defunct doctrine with a search instead for 'common religious and spiritual values' that might bridge current global divisions, accepting at the same time that many, if not most, lawyers will see that as being none of their affair.

The second edition of this slim and erudite work marks its passage from a 1980s polemical tract to a now mature reflection on a visionary foundational text. By subjecting the dead hand of nineteenth century doctrines to close scrutiny, *Decay* not merely foreshadowed the turn to history in current scholarship but sought to reconnect international law's past and future at a methodological level. It has been a lodestar for many critical international lawyers who have followed Carty's line(s) of thought. When it first appeared, the triumphalism surrounding the end of the Cold War made *Decay*'s concerns seem esoteric. But today a more searching attitude toward international institutions, adjudication, and modernist notions of inevitable progress becomes more relevant than ever. This second edition of *Decay*, still controversial after more than 35 years, promises to serve a new generation of thoughtful readers as amply as it did a previous generation.

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