Imperialism, Sovereignty and the Making of International Law

This book examines the relationship between imperialism and international law. It argues that colonial confrontation was central to the formation of international law and, in particular, its founding concept, sovereignty. Traditional histories of the discipline present colonialism and non-European peoples as peripheral concerns. By contrast, Anghie argues that international law has always been animated by the 'civilizing mission' – the project of governing non-European peoples. Racial discrimination, cultural subordination and economic exploitation are constitutively significant for the discipline, rather than aberrations that have been overcome by modern international law. In developing these arguments, the book examines different phases of the colonial encounter, ranging from the sixteenth century to the League of Nations period and the current 'war against terror'. Anghie provides a new approach to the history of international law, illuminating the imperial character of the discipline and its enduring significance for peoples of the Third World.

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For my parents

Contents

Foreword

In this challenging book, Dr. Anghie examines a series of episodes in the legal history of the relations between the West and non-Western polities. He argues that they possess common features, reproducing at different epochs and in different ways an underlying pattern of domination and subordination – and doing so despite continued professions of idealism and universal values by the (Western) lawyers and leaders who have been dominantly engaged.

The first of these episodes dates from the earliest phase of international law. Of the five studied, it is the least institutional. Rather it is an episode of justification and apology – Vitoria's attempt to deal with the rights of the Amerindians faced with Spanish colonization. Of course, Vitoria was dealing with this problem after the event and he was teaching (a generation after Columbus) in the Catholic tradition of moral–religious theory and not as a self-perceived international lawyer. But his work, Anghie argues, inaugurated our subject. From the beginning, international law was not exclusively concerned with the relations between states but, and more importantly, with the relations between civilizations and peoples. Moreover these were relations of *domination*. Colonization and Empire were present at the creation, and the apologetic use of universalist ideals has never been abandoned, whatever new forms it may have taken.

The second episode is that of the 1884–5 Congress of Berlin and the final stages of colonial expansion. It was as a result of this process – or, as with Japan and Siam, of the pre-emptive adoption of Western techniques (including international law) by the few entities that managed to survive it without losing their independence – that international law became global. The ancient ideal of universality was realized as a result of and in the course of the substantial (and historically rather recent) suppression

of the non-Western world. In the process the concept of 'civilization' was used as a form of the *exclusion* of non-Western values, of non-Western identity and even of legal personality. This process can be traced through writers such as Westlake just as much as through statesmen such as Bismarck or events such as the Maori wars.

The third episode is that of the Mandate System under the League of Nations, the beginning of the reversal of colonization that was effectively completed under the United Nations. Under the guise of a 'sacred trust of civilization', Western powers (and Japan) under nominal international tutelage applied the concept of the sacred trust to effect the reality of exploitation. The 1992 *Nauru* Case is an illustration, even if it is one for which a modicum of compensation was, uniquely, obtained after the event.[1]

And when, after a long process, independence was achieved (for all but one of the mandated territories[2]) and extended beyond the original list of mandates to all colonial territories, the independence that was granted turned out to be less than it seemed. The newly independent states (this is the fourth episode) fought to develop new rules, even a new international economic order. But in the event the Bretton Woods Institutions triumphed, imposing their own view of development and a certain set of structures of governance on half the world's population and a majority of its governments. The outcome has been, on the whole, increased indebtedness and new forms of dependence.

Finally (for the time being) we have the war on terrorism, a new form of branding of a significant fraction of the world, in particular the Muslim world, as barbarian and as enemies. In Dr Anghie's words, 'law . . . in the name of security, reproduces a new form of imperialism.' Moreover it is a new imperialism in which neo-conservatism vies with neo-liberalism in the assertion of control.

International lawyers have always assumed that their subject existed BC (before colonization), just as they have tended to assume its florescence, as yet open and undetermined, in our time of AD (after decolonization). Anghie's thesis is that we live still in a common era of Continued Empire (CE), albeit under new forms. Not everyone will agree with his argument, or that each of his chosen instances necessarily exemplifies it. Evidently there is a measure of generalization and simplification. There

[1] *Certain Phosphate Lands in Nauru* (*Nauru* v. *Australia*), ICJ Reports 1989 p. 15. Following the decision the claim was settled by Australia, with subsequent contributions from the two partner governments.

[2] Palestine is still the exception.

are many differences among 'Third World' states, and we should resist equating 'Third World' with 'the countries that lack governance' or those in which 'development has failed'; otherwise debates about governance and development will become viciously circular.

It must be admitted that the general theme of the work – that '[t]he colonial history of international law is concealed even when it is reproduced' – is sobering. The book is not, however, unrelievedly pessimistic. In Anghie's view 'the Third World cannot abandon international law because law now plays such a vital role in the public realm in the interpretation of virtually all international events'. It may be doubted whether 'it is possible to create an international law that is not imperial', and faith in the future is hardly balanced by our recorded history of good works. But the fact remains that, although not under circumstances of their own choosing, people and communities do nevertheless make their own history; indeed they are condemned to do so. An understanding of those circumstances, we may hope, may help prevent their endless repetition under new forms. In this way, we can read Anghie as challenging us to think of ways of creating a non-imperial international law.

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