The evolution of international law: Colonial and postcolonial realities

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ABSTRACT *The colonial and postcolonial realities of international law have been obscured by the analytical frameworks that governed traditional scholarship on the subject. This article sketches out a history of the evolution of international law that focuses in particular on the manner in which imperialism shaped the discipline. It argues that colonialism, rather than being a peripheral concern of the discipline, is central to the formation of international law and, in particular, its founding concept, sovereignty. It argues that international law has always been animated by the civilising mission, the project of governing and transforming non-European peoples, and that the current war on terror is an extension of this project.*

The colonial and postcolonial realities of international law have been obscured and misunderstood as a consequence of a persistent and deep seated set of ideas that has structured traditional scholarship on the history and theory of international law. This article seeks to identify these structures, suggesting ways in which they have limited the understanding of the relationship between imperialism and international law. It then sketches a set of alternative perspectives that may offer a better appreciation of the imperial aspects of international law, and their enduring effects on the contemporary international system.[1] My purpose, then, is to sketch a history of the relationship between imperialism and international law in the evolution of international law from the 16th century to the present, and to suggest a set of analytic and conceptual tools that are adequate for the purposes of illuminating this history.

The traditional understanding of international law regards colonialism—and, indeed, non-European societies and their practices more generally—as peripheral to the discipline proper because international law was a creation of Europe. The explicitly and unquestionably European character of international law has been powerfully and characteristically asserted by historians of the discipline such as JHW Verzijl:

> Now there is one truth that is not open to denial or even to doubt, namely that the actual body of international law, as it stands today, not only is the product of the conscious activity of the European mind, but also has drawn its vital

Antony Anghie is in the SJ Quinney School of Law, University of Utah, 332 South, 1400 East, Salt Lake City, UT 84112-0730, USA. Email: anghiet@law.utah.edu.

essence from a common source of beliefs, and in both of these aspects it is mainly of Western European origin.[2]

International law in this view consists of a series of doctrines and principles that were developed in Europe, that emerged out of European history and experience, and that were extended in time to the non-European world which existed outside the realm of European international law.

Thus, for instance, the classical concept of sovereignty, which stipulated that all sovereigns are equal and that sovereign states have absolute power over their own territory, emerged from the Treaty of Westphalia of 1648. Non-European states lacked this sovereignty, and the development of international law can be seen in part as the 'Expansion of International Society',[3] the process by which Westphalian sovereignty was extended to include the societies of the non-European world. This process was triumphantly completed through the mechanism of decolonisation that ensured the emergence of sovereign states from what had previously been the colonised societies of Asia, Africa and the Americas. Seen in this way, colonisation was an unfortunate—but perhaps necessary—historical episode whose effects have been largely reversed by the role that international law has played, particularly through the United Nations system, of promoting decolonisation by both institutional and doctrinal mechanisms. Whatever the earlier associations between imperialism and international law, then, imperialism is a thing of the past.

A further problematic that has preoccupied international law scholars and that has inevitably shaped traditional understandings of the relationship between colonialism and international law emerged most explicitly in the 19th century, when John Austin, an English jurist whose views had an enormous significance for international law, argued that law and order were only explicable in a system governed by an overarching sovereign that could create and enforce the law. Consequently, international law could not be regarded as law properly so called since the international system lacked such a sovereign. This problematic emerged as a corollary of the Westphalian model of sovereignty which stipulates the equality of sovereign states. Since that time, at least, the question: 'how is legal order to be established among equal and sovereign states?' has preoccupied the discipline, and the greatest scholars of international law have developed numerous theories questioning the Austinian paradigm and elaborating on how international law is 'law' despite the absence of an overarching sovereign that legislates and then enforces the law.

Finally, the history of international law is structured around the idea that different phases of the history of the discipline were characterised by distinctive styles of jurisprudence. Naturalism, which prevailed from the beginnings of the modern discipline in the 16th century to roughly the end of the 18th century, stipulated that international law was to be found in 'nature'; it could be ascertained through the employment of reason, and this transcendent 'natural' law—which had religious origins—was binding on all states. Positivism, the jurisprudence that has prevailed since the 19th century,

and which continues to be the dominant mode of thinking, prescribes that a state can only be bound by rules to which it has consented. Pragmatism is associated with the emergence of international institutions that provided the international system with a new set of technologies with which to address international problems. All three strands of jurisprudence continue to play a role in the international system. However, they are seen as embodying quite distinctive ideas of law, society and the international system.

The non-European world plays an insignificant role within each of these schemes. Certainly, the non-European world posed numerous problems to the international system. How were these peoples to be governed? On what legal basis could their lands be occupied? But these were viewed as practical, secondary problems that did not impinge on the great theoretical issues confronting the discipline. Rather, the principal analytic frameworks governing the discipline precluded any real examination of non-European societies and people, and the ways in which they impinged upon and shaped the making of international law. For instance, the Austinian problem of 'how is order to be created among sovereign states' prevents an exploration of the status of the non-European societies that were designated as non-sovereign by the jurisprudence of the time. The problem of 'order among sovereign states' arises, then, only in the context of sovereign European states, and the transformation of this problem into the central theoretical dilemma of the discipline systematically occludes the study of non-European societies. It avoids the question: how was it decided that non-European states were not sovereign in the first place? Asking this question in turn raises further issues. Rather than adopting the traditional view of sovereignty as an exclusively European product extended into a non-European world that was somehow, naturally, non-sovereign, we might see sovereignty doctrine as consisting in part of mechanisms of exclusion which expel the non-European society from the realm of sovereignty and power. This is then a prelude to the grand redeeming project of bestowing sovereignty on the dark places of the earth.[4] In other words, sovereignty doctrine expels the non-European world from its realm, and then proceeds to legitimise the imperialism that resulted in the incorporation of the non-European world into the system of international law. The process of transforming the non-European world is completed through decolonisation, which enables the non-European state to emerge as a sovereign and equal member of the global community. In short, these mechanisms of exclusion are as essential a part of the sovereignty doctrine as the mechanisms of incorporation and transformation, colonialism and decolonisation that are the subject of the conventional histories of international law. And if, as I argue, the mechanisms of exclusion that deprive the non-European world of 'Western' sovereignty persist and endure despite the official end of the colonial period, then it might become necessary to rethink the standard accounts of both colonialism and decolonisation.[5]

Rather then focusing on the paradigm of 'order among sovereign states', then, I would argue that the evolution of international law, and the role of non-European societies within this process, may be better understood in terms of the problem of cultural difference. International law may be seen as

an attempt to establish a universal system of order among entities characterised as belonging to different cultural systems. This problem gives rise to what might be termed the 'dynamic of difference': international law posits a gap, a difference between European and non-European cultures and peoples, the former being characterised, broadly, as civilised and the latter as uncivilised (and all this implies in terms of the related qualities of each of these labels).

This gap having been established, what follows is the formulation of doctrines that are designed to efface this gap: to bring the uncivilized/aberrant/violent/backward/oppressed into the realm of civilisation, the universal order governed by (European) international law. This distinction between the civilised and the uncivilised, the animating distinction of imperialism, is crucial to the formation of sovereignty doctrine, which can be understood as providing certain cultures with all the powers of sovereignty, while excluding others. In short, cultural difference precedes and profoundly shapes sovereignty doctrine—whereas the traditional approach asserts that an established sovereignty manages the problem of cultural difference. This basic dynamic is played out, in different vocabularies and doctrines, throughout the history of international law. And, further, its replication in all the distinctive styles of jurisprudence—naturalism, positivism and pragmatism—suggests its profoundly enduring character. Colonialism, then, far from being peripheral to the discipline of international law, is central to its formation. It was only because of colonialism that international law became universal; and the dynamic of difference, the civilising mission, that produced this result, continues into the present.

The colonial origins of international law

Contact between European and non-European peoples, of course, has taken place for many centuries. As the European presence in non-European areas intensified, however, beginning in the 15th and 16th centuries, legal doctrines were developed to manage more complex forms of interaction between European and non-European states, and these extended, inevitably, to doctrines that purported to account for the acquisition of sovereignty over non-European peoples. These doctrines, invariably, were created by Europeans, or adapted by Europeans, for their own purposes, although scholarship has shown that many important international legal principles relating, for example, to the law of treaties and the law of war, were also developed, understood and practised by non-European states.[6]

Many of these themes may be illustrated by an examination of a work commonly regarded as one of the first texts of modern international law, Francisco de Vitoria's *On the Indians Lately Discovered*.[7] Vitoria here addresses the complex legal problems that arose from Spanish claims to sovereignty over the Americas following Columbus' voyage. Drawing upon the naturalist and theological jurisprudence of the period, Vitoria argued that all peoples, including the Indians, were governed by a basic 'natural law'.

While others characterised the Indians as heathens, and animals, lacking any cognisable rights, Vitoria instead humanely asserts of the Indians that:

> the true state of the case is that they are not of unsound mind, but have according to their kind, the use of reason. This is clear, because there is a certain method in their affairs, for they have polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws, and workshops, and a system of exchange, all of which call for the use of reason: they also have a kind of religion. Further, they make no errors in matters which are self-evident to others: this is witness to their use of reason.[8]

It is because of his acknowledgement of the humanity of the Indians of the New World that Vitoria is remembered as a champion of the rights of indigenous and non-European peoples. Equally, it is precisely because they possess reason that the Indians are bound by a universal natural law. And yet Vitoria also considers the possibility that, while there is an order apparent in Indian affairs, it is a deficient order because it fails to meet the universal criteria established by natural law:

> Although the aborigines in question are (as has been said above) not wholly unintelligent, yet they are a little short of that condition, and so are unfit to found or administer a lawful State upto the standard required by human and civil claims. Accordingly they have no proper laws nor magistrates, and are not even capable of controlling their family affairs.[9]

As a consequence, Vitoria suggests that proper government must be established over the Indians by the Spanish, who, he argues, must govern as trustees over the uncivilised Indians. The Indians now are children in need of a guardian. There is a gap, then, between the ontologically 'universal' Indian and the historically, socially 'particular' Indian that can only be remedied, it transpires, by the intervention of the Spanish, who are characterised as the agents of natural law. Seen in this way, the recognition of the humanity of the Indians has ambiguous consequences because it serves in effect to bind them to a natural law which, despite its claims to universality, appears derived from an idealised European view of the world, based on a European identity. Consequently, it is almost inevitable that the Indians, by their very existence and their own unique identity and cultural practices, violate this law, which appears to deal equally with both the Spanish and the Indians, but which produces very different effects because of the asymmetries between the Spanish and the Indians.

The ramifications of these asymmetries become clearer when Vitoria proceeds to enunciate the principles of natural law: 'The Spaniards have a right to travel to the lands of the Indians and to sojourn there, so long as they do no harm, and they can not be prevented by the Indians'.[10] These apparently innocuous rights to trade and travel have profound consequences for the Indians, for, as Vitoria further argues, "to keep certain people out of the city or province as being enemies, or to expel them when already there,

are acts of war'.[11] Thus, any Indian resistance to Spanish incursions would amount to an act of aggression by the Indians that justified the Spanish in using force in self-defence—and, in so doing, in endlessly expanding their territory, conquering the native rulers in the process. Violence arises, in Vitoria's system, through the inevitable violation by the Indian of the natural law by which he is bound.

Once commenced, war, in Vitoria's scheme, has an overwhelming and transformative character. It is through war that the aberrant Indian identity might be effaced. It is clear, furthermore, that war against the barbaric Indians has a different character from war waged against a civilised, Christian adversary. In describing this war, Vitoria reverts to principles and arguments developed earlier, in the times of the Crusades. The Indian is like the Saracen, a pagan:

> And so when the war is at that pass that the indiscriminate spoliation of all enemy-subjects alike and the seizure of all their goods are justifiable, then it is also justifiable to carry all enemy-subjects off into captivity, whether they be guilty or guiltless. And inasmuch as war with pagans is of this type, seeing that it is perpetual and that they can never make amends for the wrongs and damages they have wrought, it is indubitably lawful to carry off both the children and the women of the Saracens into captivity and slavery.[12]

The barbaric Indian exists beyond the existing rules of law; war against the Indians is 'perpetual', their guilt or innocence is irrelevant. Thus, both bound by the law and yet outside its protections, the Indian is the object of the most extreme aspects of sovereignty, which can expand and innovate its practices and manifestations precisely because of this peculiar, in-between status.

I have dwelt on Vitoria's work because it illustrates several crucial and enduring aspects of the relationship between colonialism and international law, and this in a text regarded as the first modern work of the discipline. Vitoria's work demonstrates, for instance, the centrality of commerce to international law, and how commercial exploitation necessitates war. It shows, furthermore, how an apparently benevolent approach of including the aberrant Indian within a universal order is then a basis for sanctioning and transforming the Indian. The Indian is characterised in a number of different and sometimes contrasting ways: as economic man anxious to trade with the Spanish; as oppressed by his own rulers and looking to the Spanish to liberate him; as backward and in need of guidance; as irredeemably and hopelessly savage and violent. In each of these cases Spanish intervention appears the appropriate response. And Spanish violence is characterised as, simultaneously, overwhelming, liberating, transforming, humanitarian. My argument, furthermore, is that Vitoria's attempt to address the problem of difference demonstrates the complex relationship between culture and sovereignty, for Vitoria's jurisprudence decrees that certain cultures—such as that of the Spanish—are universal and enjoy the full rights of sovereignty, whereas other cultural practices—like those of the Indians—are condemned as uncivilised and non-sovereign.

The same structure of ideas is evident in the 19th century, the apogee of imperial expansion, and the period when positivism was established as the major jurisprudence of international law. Unlike naturalism, which argues that all states are subject to a higher universal law, positivism, in basic terms, asserts that the state is the exclusive creator of law, and cannot be bound by any law unless it has consented to it. There is no higher authority than the sovereign, according to this system of jurisprudence. Nominally, at least, under the system of naturalism both European and non-European societies were bound by the universal natural law which was the foundation of international law.[13] Positivist jurists, however, devised a series of formal doctrines that used explicitly racial and cultural criteria to decree certain states civilised, and therefore sovereign, and other states uncivilised and non-sovereign. Thus non-European societies were expelled from the realm of international law. Lacking legal personality, these societies were incapable of advancing any legally cognisable objection to their dispossession, and were thus reduced to objects of conquest and exploitation.

This law legitimised conquest as legal, and decreed that lands inhabited by people regarded as inferior and backward were *terra nullius*. In other cases imperial powers claimed that native chiefs had entered into treaties which gave those powers sovereignty over non-European territories and peoples. The ability of natives to enter into such treaties was paradoxical, given that they were characterised as entirely lacking in legal status. What is clear from an examination of the treaties, however, is that international lawyers granted the natives such status, quasi-sovereignty, for the purposes of enabling them to *transfer* rights, property and sovereignty. The right of the native to dispose of himself or his resources was in effect upheld by these treaties, just as in Vitoria native personality is established so that it may be bound by international law.

Once again, Western standards were declared universal, and the failure of non-Western states to adhere to these standards denoted a lack of civilisation that justified intervention and conquest. Thus John Westlake, the Whewell Professor of International Law at Cambridge, declared in 1894, that 'Government is the Test of Civilization' and elaborated:

> When people of European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former may carry on the complex life to which they have become accustomed in their homes, which may prevent that life from being disturbed by contests between different European powers for supremacy on the same soil, and which may protect the natives in the enjoyment of a security and well being at least not less than they had enjoyed before the arrival of the strangers. Can the natives furnish such a government, or can or can it be looked for from the Europeans alone? In the answer to that question lies, for international law, the difference between civilization and the want of it.[14]

Westphalian sovereignty denoted the right of a state to establish its own system of government within its territory. In the case of the non-European

state, however, its internal system had to comply with standards that in effect presupposed a European presence within that polity. Thus countries such as Siam, which were never formally colonised, were compelled to enter into a humiliating system of unequal treaties, capitulations according to which foreigners were governed by their own law rather than that of the non-European state. Non-European societies that failed to establish the conditions in which Europeans could live and trade could then be justifiably replaced by European governance, which proclaimed itself as bringing with it civilisation and stability, and, indeed, better protection for the natives themselves. Such government was essential and inevitable, as 'The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied'.[15]

Many of the legal doctrines used at this time dealt not only with relations between European and non-European states but between European states who were intent on acquiring title over the non-European territories. These doctrines were developed for preventing conflict between European states over who had proper title to a non-European land. Thus, at the Berlin Conference of 1884–85 the great European powers of the period met in Berlin to decide on how Africa was to be divided among them. The resulting division of the continent, which occurred with no regard to the complex system of political organisation that operated within that territory, has created enduring problems.[16]

By the end of the 19th century European expansion had ensured that European international law had been established globally as the one single system that applied to all societies. It was in this way that European international law became universal.

Decolonisation and the postcolonial state

The trauma of the First World War generated many changes in international law and relations. Most significantly, the imperial character of the discipline was recognised and criticised by scholars and statesmen in the inter-war period who denounced the international law of the 19th century that had legitimised colonial exploitation. The League of Nations attempted to formulate a new approach towards colonies, which were now labelled 'backward territories'. Whereas in the 19th century the division between Europe and uncivilised non-Europe had been formulated principally through an elaboration of racial and cultural categories, the League of Nations characterised the differences between the civilised and uncivilised in economic terms, the 'advanced' and the 'backward'.

As a consequence of these shifts, the territories of the defeated powers (the Ottoman Empire and Germany), rather than being acquired as colonies by the victors, were placed under the authority of the Mandate System of the League of Nations.[17]

The purpose of this system was, through international supervision, to ensure the 'well being and development' of the mandate territories;[18] it was

even contemplated that the most advanced territories, such as Iraq, would become sovereign states. These territories were placed under the control of Mandate Powers—Britain and France, most often—who acted as trustees on behalf of the League towards the backwards peoples, and were ultimately accountable to the League.

The League of Nations is studied most often in terms of its failed attempts to prevent international aggression. For the Third World, however, what is perhaps most important about the League was its attempt to create a set of techniques that were uniquely devised for the specific purpose of transforming backward, non-European societies into modern societies. Once more, whereas the interior realm of Western states (and of course of their colonies) was immune from international scrutiny by the League, the non-European mandate territories were completely accessible to the technologies of this, the first major international institution. The League's ambitions to establish international peace were thwarted by the obdurate sovereignty of Western states—and of Japan, which was in effect treated as a Western state. In the case of the Mandate System, by contrast, the League was confronted by a novel and contrasting task, that of *creating* sovereignty and promoting self-government. As a consequence, once more, it was in the non-European world that the League could devise legal, administrative and institutional mechanisms to address this great challenge, and in so doing develop the technologies of management and control that have become entrenched in the repertoire of techniques subsequently used by international institutions.

While this project suggested the first attempts to achieve something like decolonisation and to create an international law that would further rather than suppress the aspirations of Third World peoples, the character of the sovereignty to be enjoyed by the non-European peoples was problematic. As Sir Arthur Hirtzel of the Indian Foreign Office recommended, regarding the sovereign Iraq that Britain—the mandatory power—should bring into existence:

> What we want to have in existence, what we ought to have been creating in this time, is some administration with Arab institutions which we can safely leave while pulling the strings ourselves; something that won't cost very much, which Labor can swallow consistent with its principles, but under which our economic and political interests will be secure.[19]

In essence, while the Mandate System worked towards the creation of sovereign states, or at least politically developed, 'self-governing' societies, both the 'sovereignty' and 'government' of the non-European society were created with a view to furthering Western interests. Third world sovereignty, then, at least to the extent that it was shaped by international institutions, and by Western states acting through international institutions, was created in a way that could continue to serve Western interests. Crudely put, an examination of the Mandate System illuminates the ways in which political sovereignty could be created to be completely consistent with economic subordination.

The Mandate System, of course, did not apply to the victorious colonial powers, such as Britain and France. Sustained nationalist protest by Third World peoples, however, ensured that decolonisation had become a central preoccupation of the international system. The United Nations responded by creating a number of institutional mechanisms for the furtherance of decolonisation, and by extending and adapting the doctrine of self-determination to colonial territories. The newly independent states significantly changed the composition of the international community, as they became a majority in the UN system. Most significantly, this enabled the sovereign Third World states to use international law and sovereignty doctrines to further their own interests and to articulate their own views of international law. The new states were especially intent on protecting their recently won sovereignty and negating the enduring effects of colonialism. Thus they sought to establish a set of principles that outlawed conquest and aggression, and prevented intervention in Third World affairs. Further, the new states used their numbers in the General Assembly to pass a number of resolutions directed at creating a 'New International Economic Order'.[20] This initiative was especially important, as the new states realised that political sovereignty would be meaningless without corresponding economic independence. Thus the new states sought to regain control over their natural resources through the nationalisation of foreign entities that had acquired rights over these resources during the colonial period.

Issues such as the terms on which a state could nationalise a foreign entity became particularly controversial. International economic law, which determined these issues, became a central arena of struggle between the West and the new states. The new states argued that this body of law had been created by the West to further its own interests and that they had played no role themselves in its formation. While several Western scholars acknowledged the legitimacy of the claims made by the new states, Western states argued that they were not bound by the principles authored by the Third World because of the basic rule that a state could not be bound by international rules unless it agreed to be so bound.[21] Nevertheless, the West proceeded to argue, the Third World was bound by the older rules of international economic law that the West had authored. Indeed, the West argued, acceptance of these and the other established rules of the international system was a condition of becoming an independent, sovereign state. In this context, Third World sovereignty was again articulated principally as a basis for being bound by international norms. The Third World initiatives, undertaken in the belief that colonialism was embodied in certain specific doctrines relating, for instance, to conquest or the rate of compensation payable upon nationalisation, confronted the problem that the colonial past could not be so easily excised from the discipline.

My argument is that colonialism had shaped not only those doctrines of international law explicitly devised for the very purpose of suppressing the Third World, but also had also profoundly shaped the very foundations of international law, including the ostensibly neutral doctrine of sovereignty. The end of formal colonialism, while extremely significant, did not result in

the end of colonial relations. Rather, in the view of Third World societies, colonialism was replaced by neo-colonialism; Third world states continued to play a subordinate role in the international system because they were economically dependent on the West, and the rules of international economic law continued to ensure that this would be the case.

The acquisition of sovereignty by the Third World state had numerous other repercussions. The postcolonial state, in many ways, adopted the models of development, progress and the nation-state that had first been articulated in the Mandate System and that had been further refined and elaborated by development theories such as modernisation theory. The leaders of these states sometimes consisted of elites with close ties with the West; in other cases they derived their power from affiliations with superpowers in the context of the ongoing Cold War. Further, Third World states divided along ethnic lines experienced civil wars as different ethnic groups fought for control of the state.

The postcolonial state, then, engaged in its own brutalities: women, minorities, peasants, indigenous peoples and the poorest were the victims. The international human rights law that emerged as a central and revolutionary part of the United Nations period offered one mechanism by which Third World peoples could seek protection, through international law, from the depredations of the sometimes pathological Third World state. It was for this reason that international human rights law held a special interest and appeal for Third World scholars.

Human rights law was controversial, however, precisely because it legitimised the intrusion of international law in the internal affairs of a state: it could be used to justify further intervention by the West in the Third World. Aspects of this intervention became evident after the collapse of the USSR and the intensification of globalisation. The ascendancy of neoliberal economic policy and the creation of the World Trade Organization (WTO), presented new challenges to Third World states. International financial institutions such as the IMF and the World Bank played an increasingly intrusive role in the economies of Third World states, and attempted to use their considerable powers to reform the political and social structures of these states, this in the name of promoting 'good governance', a project that entailed drawing in various strategic ways on international human rights law. The virtues of good governance are apparently self-evident. But the meaning of the terms remains open and contestable and these institutions attempted to use an amended version of human rights law to further their neoliberal policies in the guise of 'good governance', rather than enabling real empowerment of Third World citizens. In this way these international institutions, which proclaimed that the project of 'good governance' was entirely novel and necessary, were in many ways replicating the earlier efforts of their predecessor, the Mandate System and its efforts to promote 'self-government'. The demand made by the international financial institutions (IFIs) that these states reform their internal arrangements was compared by some scholars with the system of capitulations that had previously been used by European states to demand the reform of non-European states.[22]

Towards the present: the 'war on terror'

Following the 9/11 attacks many international law and international relations scholars argued that a new and unique threat confronted the international community, and that established international law was inadequate for the challenges it presented. As a consequence, scholars proposed a range of theories that purported to reform the laws of war, international humanitarian law and the law of human rights to address these new realities. What these arguments generally overlooked is that Third World countries themselves have suffered the worst consequences of terrorism for many years without attempting, as the USA is now doing, to dismantle the fundamental norms of international law relating to human rights and the use of force established by the system of the UN Charter, all in the name of effecting this supposedly essential adaptation.

What is clear, however, is that the 'war on terror'—articulated in the National Security Strategy of the USA and now launched by that country—with its willingness to use pre-emptive force against 'rogue states' and its ambitions to transform Middle Eastern countries into peace-loving democracies, resembles in many ways a much earlier imperial venture. The rhetoric employed by President Bush to justify the invasion of Iraq disconcertingly resembles the rhetoric used by Vitoria to justify the Spanish conquest of the Indians. Once again, then, it is the barbaric, the uncivilised, that has prompted a concerted attempt to reconstruct international law. Ironically, however, these efforts to create a new international law appropriate for the allegedly unprecedented times in which we live have involved returning to a primordial and formative structure of international law, the civilising mission. This has resulted in the formulation of a new form of imperialism that asserts itself in the name of 'national security', as self-defence.

The imperial dimension of these initiatives is so explicit and unmistakable that even scholars and institutions who were largely indifferent, if not impervious, to the phenomenon of imperialism have begun to focus on the relationship between imperialism and the international system. A large and sometimes dishevelled literature has resulted, and prominent Western scholars such as Niall Ferguson have argued for the return of an imperial system of management headed by the USA.[23] There is a happy assumption made in much of these supposedly expert writings—the validity of which has only been questioned by the violence in Iraq—that imperial rule would be welcomed and acquiesced to by those who are subjected to it.

There are certain dangers associated with this sudden focus on imperialism, and not only because of the calls for its return. I would argue that the Iraq episode and the war on terror more generally are simply very explicit and obvious examples of imperial practices. Imperialism is experienced in the Third World, I would suggest, in a much more everyday way through, for example, international economic regimes, supported and promoted by international law and institutions that systematically disempower and subordinate the people of the Third World.[24] This is the 'everyday' imperialism, the quotidian and mundane imperialism, that is accepted as somehow normal

and that is furthered and promoted not only by the USA, but by European states that otherwise have opposed US policy in Iraq. Much has been made on both sides of the Atlantic about the differences between Europe and the USA.[25] But, I would argue, whatever separates Europe and USA, they are in many ways arguing for different versions of an imperial international system, one more explicit than the other. For the Third World, I suspect, imperialism is not an aberration that has emerged with the US actions in Iraq. Rather, imperialism is an integral aspect of day-to-day international relations. What is required, then, is an understanding of how imperial relations and structures of thought continue to operate in an ostensibly neutral setting. This would reveal how imperialism has *always* been a part of the international system, as opposed to a phenomenon that has suddenly emerged with the US war on terror and against Iraq.

The current war on terror involves the return of a much older form of imperialism. Equally, however, there is a certain novelty about the present that requires closer analysis, as the USA's policy appears to be premised on the belief that only the use of force and the transformation of alien and threatening societies into 'democratic' states will ensure its security.

I have argued that the transformation of the peoples and polities of the non-European world is a continuing preoccupation of international law from its Vitorian beginnings. That transformation was seen principally in terms of enabling economic exploitation; now, however, the transformation of the non-European world is seen as essential for physical security.

Yet what events in Iraq and elsewhere have suggested is that US policies have only exacerbated the situation, and are more likely to generate resentment and retaliation. The paradoxes emerge: while proclaiming to further human rights, the USA has persistently violated them, while seeking to prevent terrorism, it has generated further violence. There is a cycle of violence here that could make the attempts to create a Kantian world of peace-loving democratic states into a guarantee of endless war rather than perpetual peace.

Conclusions

The use of international law to further imperial policies is, I have argued, a persistent feature of the discipline. The civilising mission, the dynamic of difference, continues now in this globalised, terror-ridden world, as international law seeks to transform the internal characteristics of societies, a task which is endless, for each act of bridging generates resistance, reveals further differences that must in turn be addressed by new doctrines and institutions. This is not to say, however, that these imperial ambitions and structures have always prevailed; rather, they have been continuously contested at every level by Third World peoples. Equally, of course, Third World states have often engaged in what might be regarded as colonial practices, in relation both to other, smaller states and to minorities and indigenous peoples within their own boundaries. Colonial practices, further, suffer from their own contradictions and incoherence. But they certainly

pervade every aspect of the discipline. The questions that then arise are whether, how and to what extent international law can be used for the purposes of furthering the interests of Third World peoples—protecting them against the excesses of the authoritarian and sometimes genocidal state, on the one hand, and advancing their interests in the international sphere on the other. Third World international lawyers, immediately following the period of decolonisation, placed a special faith in international law, believing that it could achieve these results. However, this faith proved unfounded, and many international initiatives that were explicitly humanitarian and anti-colonial—such as the Mandate System—became a vehicle for imperialism. As a result, some scholars have eloquently argued that the Third World should dispense with international law altogether. But this not a feasible option, simply because that would leave open the field of international law to the imperial processes I have sketched, and this in a context where international law plays an increasingly vital role in the public sphere, where questions of violation, injury, legitimacy are all discussed in terms of international law. International law operates, I have tried to suggest, at every level: international and national; economic, political and social; private and public. And it is in all these arenas that it is now imperative to understand the operations of imperialism and how they might be opposed and overcome. This is an issue that must surely concern all international lawyers, North and South, who intend international law to make good on its promise of furthering the cause of global justice.

Notes

1 This article presents arguments that are developed at greater length in Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge: Cambridge University Press, 2005.
2 JHW Verzijl, *International Law in Historical Perspective,* 10 vols, Leiden: AW Sijthoff, 1968, Vol I, pp 435–436.
3 See Hedley Bull & Adam Watson (eds), *The Expansion of International Society*, New York: Oxford University Press, 1984. For an important critical treatment of the same theme, see Onuma Yasuaki, 'When was the law of international society born? An inquiry of the history of international law from an intercivilizational perspective', *Journal of the History of International Law*, 2, 2000, pp 1–66.
4 On this theme, see Martti Kosekenniemi, *The Gentle Civilizer of Nations*, Cambridge: Cambridge University Press, 2003, pp 98–178.
5 This approach draws heavily on the work of pioneering postcolonial scholars, eg Edward Said, *Orientalism*, New York: Pantheon Books, 1978; Said, *Culture and Imperialism*, New York: Knopf, 1993; and Gayatri Chakravorty Spivak, *A Critique of Post-Colonial Reason*, Cambridge, MA: Harvard University Press, 1999.
6 Important works that deal with these themes include TO Elias, *Africa and the Development of International Law*, Leiden: AW Sijthoff, 1972; RP Anand, *New States and International Law*, New Delhi: Vikas Publishing House, 1972; and CH Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies*, Oxford: Clarendon Press, 1967. For a more recent work that offers an important Third World perspective, see Siba N'Zatioula Grovogui, *Sovereigns, Quasi Sovereigns and Africans*, Minneapolis, MN: University of Minnesota Press, 1996.
7 See Francisco de Victoria (1557/1917) *De Indis et de Ivre Belli Relectiones*, ed Ernest Nys, trans John Pawley Bate, Washington, DC: Carnegie Institute of Washington. This work consists of lectures that Vitoria gave with the titles that might be broadly translated as 'On the Indians lately' and 'On the law of war made by the Spaniards on the barbarians'. Significantly, this is the first work in the series 'The Classics of International Law' published by the Carnegie Institute of Washington. Victoria is more usually referred to as 'Vitoria' and I have used the latter name.
8 Vitoria, *De Indis*, p 127.
9 *Ibid*, p 161.

10 *Ibid*, p 150.
11 *Ibid*, p 151.
12 *Ibid*, p 181.
13 See Alexandrowicz, *An Introduction to the History of International Law in the East Indies*.
14 John Westlake, *Chapters on the Principles of International Law*, Cambridge: Cambridge University Press, 1894, p 141.
15 *Ibid*, p 142.
16 Makau wa Mutua, 'Why redraw the map of Africa? A moral and legal inquiry', *Michigan Journal of International Law*, 16, 1995, pp 1113–1176.
17 For an early and masterly account of the system, see Quincy Wright, *Mandates Under the League of Nations*, Chicago, IL: University of Chicago Press, 1930.
18 This was stipulated by Article 22 of the Covenant of the League of Nations, which created the Mandate System. *Ibid*, p 591.
19 Peter Sluglett, *Britain in Iraq, 1914–32*, London: Ithaca Press, 1976, p 37.
20 The classic work on this subject is Mohammed Bedjaoui, *Towards a New International Economic Order*, New York: Holmes and Meir, 1979.
21 Fundamental norms, *jus cogens* norms, are an exception to this broad principle.
22 David Fidler, 'A kinder, gentler system of capitulations? International law, structural adjustment policies, and the standard of liberal, globalized, civilization', *Texas International Law Journal*, 35, 2000, p 387.
23 Niall Ferguson, *Empire: The Rise and Demise of the British World Order and the Lessons for Global Power*, New York: Basic Books, 2003.
24 See, for example, BS Chimni, 'International institutions today: an imperial global state in the making', *European Journal of International Law*, 15 (1), 2004, pp 1–37.
25 See, for example, Robert Kagan, *Of Paradise and Power*, New York: Alfred Knopf, 2004.