
Book Reviews

Antony Anghie. ***Imperialism, Sovereignty and the Making of International Law***. Cambridge: Cambridge University Press, 2005. Pp. 356. ISBN 0-521-82892-9.

According to the 19th-century jurist James Lorimer, 'Till there were two nations international law could not have been; when there were two nations, it could not but have been.'¹ Antony Anghie is not so sure about the timeline and circumstances of international law's emergence. For the discipline of international law, the relationship between the states system, colonialism and international law is something of a chicken and egg question: Which came first? Tradition suggests that international law came 'to the colonies fully formed and ready for application, as if the colonial project simply entailed assimilating these aberrant societies into an existing, stable, "Eurocentric" system' (at 4). Anghie, on the other hand, argues that international law 'did not precede and thereby effortlessly resolve' the issues arising out of European–non-European encounters. Rather, 'international law was created out of the unique issues generated by the encounter between the Spanish and the Indians' of the Americas (at 15).

Anghie's general claim is that 'colonialism was central to the constitution of international law in that many basic doctrines of international law – including, most importantly, sovereignty doctrine – were forged out of the attempt to create a legal system that could account for relations between the European and non-European worlds in the colonial confrontation' (at 3). In arguing his case Anghie focuses primarily on the period

1870–2003. The exception and launching point for the book is his forensic examination of the work of the 16th-century Spanish jurist, Francisco de Vitoria, in particular his *De Indis et de Iure Belli Relectiones*.² In concentrating on this period in the evolution of international law, Anghie picks apart its three core paradigms: 16th-century naturalism, 19th-century positivism, and 20th-century pragmatism. They are the three dominant yet 'radically different' jurisprudential paradigms that he sees as having more in common in respect to international law's relationship to colonialism than they have differences.

A key concern of this study – from Vitoria and the Spanish 'discovery' of the Americas through to the 21st-century and the 'war on terrorism' – is the issue of 'cultural difference' and the catalogue of crimes it was used to 'justify' when 'civilized' Europe came face to face with the 'uncivilized' savages and barbarians beyond; a precedent that would serve the West well for centuries to come. But, first, it is worth making a point that is overlooked in this study: these characterizations of savagery and barbarism and the various civilizing techniques directed at the non-European world had their own precedent and were developed and honed much closer to home centuries earlier; such as through the English imperial expansion into the Celtic lands of Wales and Ireland.

All historical studies have to start somewhere; and Vitoria, along with Hugo Grotius, is widely regarded as a founding father of modern international law. Nevertheless, there is some value in noting the importance to the fledgling Law of Nations of the role of Pope Innocent IV's – described by Frederic Maitland as 'the greatest lawyer that ever sat

¹ J. Lorimer, *The Institutes of the Law of Nations*, II Vols. (1883), Vol. I, at 12.

² F. de Vitoria, *De Indis et de Iure Belli Relectiones* (1539, E. Nys (ed.) 1964).

upon the chair of St. Peter³ – 13th-century commentary on Pope Innocent III's decretal *Quod super his*, in which he begins to articulate the nature of papal-infidel, or civilized–uncivilized relations. Instigated by issues of dominion raised by the Crusades, Innocent IV sought to address the question: '[I]s it licit to invade a land that infidels possess or which belongs to them?' In response to the problem, Innocent offered the following legal opinion: 'Men can select rulers for themselves . . . Sovereignty, possessions, and jurisdiction can exist licitly, without sin, among infidels, as well as the faithful.' However, he was adamant that as the 'vicar of Jesus Christ' the Pope 'has power not only over Christians but also over infidels' and 'the pope can grant indulgences to those who invade the Holy Land for the purpose of recapturing it although the Saracens possess it . . . [for] they possess it illegally'.⁴ In effect, Innocent claimed that as the Saracens had illegally seized control of the Holy Land in an unjust war, the Pope had the right to authorize an invasion to secure its return to its supposedly rightful Christian inhabitants.

Central to Anghie's analysis of Vitoria are questions of sovereignty: 'Who is sovereign? What are the powers of the sovereign? Are the Indians sovereign?' (at 15) And, if not, what does this mean for Spanish–Indian relations? A particularly interesting aspect of Anghie's analysis is the highlighting of Vitoria's sleight of hand in effectively enshrining the same Christian principles that formed the basis of

divine law in a system of natural law that was to form the basis of a universal *jus gentium*. As Anghie explains, given the 'novelty' of the newly discovered Amerindians, 'Vitoria clears the way for his own elaboration of a new, secular, international law' (at 28). Moreover, in effect the Indian holds an ambiguous position in that international law – partially subjected to it, but afforded minimal protection under it – which is to say that Indians, and non-Europeans more generally, 'exist within the Vitorian framework only as violators of the law' (at 26).

Moving on to the 19th century, whilst highlighting the 'violence of positivist language' (at 38), Anghie outlines the various means by which 'positivism legitimized conquest and dispossession' of non-European peoples (at 37). Notably, the prominent jurists focused on here – James Lorimer, W. E. Hall, John Westlake, Thomas Lawrence and Henry Wheaton – by and large hail from the Anglo tradition of international law. Even if just to reaffirm the point, it might have been a worthwhile exercise to also look at some of the more prominent continental jurists who were doing their bit for empire in France, the Netherlands or Portugal. While much of this book will be of great interest beyond the discipline of international law – particularly to scholars of international relations, and post-colonial and development studies – the analysis of positivism and its claims to scientific rigour is an understandably and perhaps unavoidably dry topic that is unlikely to appeal beyond legal circles.

This would have been an ideal point to note the influence of anthropologists and ethnologists – such as Lewis Henry Morgan (who began his professional life as a lawyer) and Arthur de Gobineau – on positivist legal discourse. For instance, Lorimer proclaimed: 'No modern contribution to science seems destined to influence international politics and jurisprudence to so great an extent as that which is known as ethnology, or the science of races.' The influence of ethnology led him to conclude: 'As a political phenomenon, humanity, in its present condition, divides itself into three concentric zones or spheres – that of civilized humanity, that of barbarous

³ Maitland, 'Moral Personality and Legal Personality' in H. A. L. Fisher (ed.), *The Collected Papers of Frederic William Maitland*, Vol. III (1911), at 310.

⁴ Pope Innocent IV, 'Document 40: *Commentaria Doctissima in Quinque Libros Decretalium*', in J. Muldoon (ed.), *The Expansion of Europe: The First Phase* (1977), at 191–192. See further, R. A. Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (1990); Bowden, 'The Colonial Origins of International Law: European Expansion and the Classical Standard of Civilisation', 7 *Journal of the History of International Law/Revue d'histoire du droit international* (2005) 1.

humanity, and that of savage humanity.⁵ And this is the skeleton in the closet that Anghie tackles next; what he terms the 'racialization of law', whereby 'cultural difference translated into legal difference' (at 55–56).

At the heart of this legal difference between Europeans and non-Europeans and Anghie's tale of woe more generally is the principle of sovereignty: Who has it, who grants it, and who is denied it. As he states it: 'Europe is the subject of sovereignty and non-Europe the object of it' (at 102). The whole idea of the white man's burden or civilizing mission and its inextricable links with international law and state sovereignty is tied up in Anghie's poignant point that 'the acquisition of sovereignty was the acquisition of European civilization' (at 104). An equally poignant conclusion is that for non-Europeans the gaining of sovereignty was about 'alienation rather than empowerment' (at 108).

Anghie's study of the League of Nation's Mandate System and the post-colonial moment demonstrate that while the civilized-uncivilized divide might have been expunged from the annals of international law, 'the nineteenth century is simply one example of the nexus between international law and the civilizing mission' (at 113). In the post-Colonial world of globalization and laissez-faire economics and amidst demands for 'good governance', sovereignty remains partial at best for much of the Third World, particularly in respect to economic sovereignty. At the same time civilizing missions now bare the varnish of respectability under the guise of democratization, human rights, economic liberalization and development. All selectively interpreted and promoted, of course.

In the wake of September 11, the war on terrorism becomes the latest – and perhaps most dangerous – incarnation of Anghie's recurring 'dynamic of difference' theme, manifesting itself in the form of superpower imperialism in the name of self-defence; a claim that harks back to the arguments of Vitoria and even Immanuel Kant. It must be

said, however, that imperial ambitions pursued under the cover of the war on terrorism lack, more so than any other imperial epoch, the unqualified support of international law. Rather, there is an ongoing struggle among practitioners of international politics and their legal advisers and the broader community of international law scholars about the legality of the war on terrorism and what actions it permits. It is almost ironic that at a time when international law seems to be finding a voice and opposing what many see as the imperial hubris of the war on terror, that its authority wilts under the overwhelming presence of international political power as exercised by a geo-strategic superpower. Time will tell if this is a fair assessment or not, or whether it is international law that gets to have the last say.

Whether naturalist, positivist, or pragmatist (European/Western), international law has to defend itself against accusations that it is relegated to finding legal justifications after the fact for power-political actions – conquest, possession, oppression, war, even genocide – targeting non-Europeans; from the Spanish conquest of the Americas to the American conquest of Iraq some 500-plus years later. In some way, shape or form all of these jurisprudential paradigms are implicated in the imperial project and the subjection of non-European peoples. As Anghie carefully outlines, in some ways, then, international law has come a long way since 1492, but in others it has not come very far at all. And this is why Anghie can say with some justification that 'the Native American is connected to the Iraqi' (at 288).

A key question for Anghie is: '[C]an the post-colonial world deploy for its own purposes the law which had enabled its suppression in the first place?' (at 8) There is no simple answer to this question and, as Anghie notes, it is not something the Third World can achieve on its own. Rather, it requires a concerted effort by all concerned, international lawyers from all quarters especially, to recognize the 'other' inside us all in the hope of broadening the traditions and histories that form the basis of international

⁵ Lorimer, *supra* note 1, at 93 and 101.

law so that it might one day truly lay claim to universality. This book makes an excellent and most welcome contribution to that admirable goal.

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Jan Paulsson, ***Denial of Justice in International Law***. Cambridge: Cambridge University Press, 2005. Pp. 306. ISBN 0521851181.

'By what artifice might a state owe a duty to the world at large to maintain an adequate system for the administration of justice?' This is the question that begins Jan Paulsson's book, *Denial of Justice in International Law* (at 1). He answers it with one of the oldest principles of customary international law: the international minimum standard of conduct known as denial of justice.

Paulsson's book grew out of the 2003 Hersch Lauterpacht Memorial Lectures at Cambridge. It is the first book-length treatment of denial of justice since Alwyn Freeman's 1938 treatise, *The International Responsibility of States for Denial of Justice*. Given the 'renaissance'¹ of denial of justice claims under international human rights and investment treaties, it is timely to revisit the basic elements of this venerable international delict in the context of the 21st-century state.

State responsibility for claims of denial of justice has once again become controversial due to the web of over 2,300 international investment treaties that guarantee minimum standards of treatment directly enforceable through investor-state arbitration mechanisms.² Denial of justice was, for instance, at the heart of the claim in *Loewen v. United*

States,³ in which a Canadian investor claimed that the treatment it received from the Mississippi court system amounted to a denial of justice for which the United States was responsible under the investment protection provisions of the North American Free Trade Agreement (NAFTA).

Denial of Justice in International Law is a succinct and illuminating modern treatise on denial of justice. The book reviews and comments on the classic authorities and addresses more recent international jurisprudence under international human rights and investment treaties. Chapters 1–4 outline the main elements and modern definition of denial of justice. Chapter 5 examines the relationship between denial of justice and exhaustion of local remedies. The substantive content of the delict is explored in Chapters 6 and 7. Chapter 8 addresses remedies and sanctions. The book moves from treatise to polemic in the ninth and final chapter in what Paulsson describes as 'hors sujet' 'post scriptum' (at 228). Paulsson brings his formidable experience and knowledge of international arbitration to a spirited defence of the necessity and legitimacy of international adjudication of denial of justice claims.

Paulsson reviews the history of denial of justice and provides a modern restatement of its essential elements. He develops three fundamental points. First, denial of justice is always procedural. Second, the international obligation on states is not to create a perfect system of justice but a system of justice where serious errors are avoided or corrected. Since denial of justice involves a system failure, exhaustion of local remedies is an inherent material element of denial of justice. Finally, the content of denial of justice cannot be reduced to a set of predictable or objective criteria. Neither can denial of justice be easily categorized, since the 'patterns of behaviour said to comprise denial of justice are often

¹ The first chapter of the book is aptly called 'The Renaissance of a Cause of Action'.

² For an overview of the increasing number of international investment treaties and investor-state arbitrations under those treaties, see UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review* (2005).

³ *The Loewen Group, Inc. and Raymond L. Loewen v. United States* (Award, 26 June 2003) 42 ILM 811 and 7 ICSID Reports 434 [hereinafter *Loewen*]. *Loewen* and other investment treaty awards and decisions are available online at <http://ita.law.uvic.ca>.