

Is International Law Colonial?

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MAREIKE OLDEMEINEN, APR 23 2010

Several scholars like James Thuo Gathii have emphasised the apparent 'Eurocentricity'[1] of modern international law and have hence argued that the development of international law over the past centuries has, for the most part, been "a European story"[2]. But what is there to this argument? Is the realm of international law like a play that is being performed, in which the Western or European states are the actors on stage and their colonies – the Third World states – are only the spectators who are affected by what is happening on stage but do not have any real possibility of participating? This essay will go on to argue that this is a valid claim to make, as, despite the recent efforts made by Western states to include the Third World into the arena of international law, its history, practice and language show that what we are faced with today is a truly colonial international law.

Looking at the history of international law, it can be seen that the origins of modern international law can be traced back to the time of the Treaty of Westphalia in 1648. By dividing Europe up into sovereign and independent states, this treaty laid the foundations for what would later become known as the "standard of civilization"[3], that is the concept of sovereignty and membership of the "family of nations"[4]. This 'new' Europe of sovereign states then faced the task of "how order could be established and maintained among sovereign states"[5] and hence resorted to the establishment of an international law that was based on their shared norms and values. It was then asserted, that this "international law applied only to the sovereign states that composed the civilized "Family of Nations""[6] and hence, by definition, it excluded the Third World states, which were regarded as "uncivilized non-Europeans"[7] by the West. Hence, this has shown that right from the beginning of the development of international law, it was exclusively a European domain, based on Western norms and values and designed only to allow other states into the 'family of nations' by approval of the European states.

When examining the practice of international law in relation to the colonial encounter, similar conclusions can be drawn. Scholars like Antony Anghie have repeatedly pointed to "the significance of the nineteenth-century colonial encounter for the discipline as a whole"[8], as it was not only international law that shaped life in the colonies, but it was also the colonies that shaped the discipline of international law. Anghie further informs us that

"By 1914 [...] virtually all the territories of Asia, Africa, and the Pacific were controlled by the major European states, resulting in the assimilation of all these non-European people into a system of law that was fundamentally European in that it derived from European thought and experience."[9]

The Western states were able to take over the colonies so easily and without facing any legal obstacles mainly on the ground that the Third World states are inferior and therefore it was the European mission to "civilize the natives"[10]. The colonies were considered "too primitive to understand the concept of sovereignty"[11] and thus since they were denied the sovereignty that the European states were enjoying, they were also denied access to the 'family of nations' and hence had no right to have to recourse to the concepts of international law. Moreover, this colonial international law did not only deny the colonies full participation in the international society but it was also used to "subordinate non-European peoples"[12].

All these practices, arguably, made the non-European world more an *object* of international law than an actively participating *subject*. Once the West had imposed its international law on its colonies, there arose the need to incorporate these somehow into the European legal system, so as to be able to engage in political and commercial

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relations with the non-Europeans. This was achieved by granting some colonies 'quasi-sovereignty' and by concluding what came to be known as 'unequal treaties'. The concept of 'quasi-sovereignty' was introduced "to emasculate rather than enliven non-European states"[13] and Antony Anghie further asserts that these states "could be formally "sovereign"; but unless they satisfied the criteria of membership in the civilized international society, they lacked the comprehensive range of power enjoyed by the European sovereigns."[14] The 'unequal treaties', then, only served to further this difference in legal status, as they "only create[d] obligations of "honour" on the part of the European states"[15] and "were humiliating to the non-European states"[16]. Hence, because "these industrialised and well-organised states [the West] compelled the rest of the world to accept relations with them on their [the West's] own terms"[17], international law came to be colonial.

Another area which shows that the non-Europeans were really more spectators watching the play of international law being performed by their colonisers – the main actors – is the language that was and still is used in the discipline of international law. As has already become apparent throughout this essay, the probably most commonly used distinction was that of "the *civilized* and Christian people of Europe"[18] and "the *uncivilized* non-Europeans"[19]. From the first colonial encounter, this distinction was applied and has been in use ever since. Nowadays, this distinction has become that of the 'developed' and the 'developing' world, posing the question, whether the stigma attached to that distinction has actually changed, or whether it is just the name that did. All this emphasises "the racialization of the vocabulary of the period [which included] not only the explicit distinctions between civilized and uncivilized, advanced and barbaric, but also the integration of these distinctions into the very foundations of the discipline"[20]. Another distinction that highlights the colonial aspect of international law and often also leads to confusion, is the interchangeable use of the terms "*universal* international law"[21]; "*imperialist* international law"[22] and "*European* international law"[23], which, again, suggests that the international law that was supposed to be "universal in its geographic scope and application"[24] was, at its heart, really a purely colonial international law. Or to put it in the words of Georg Schwarzenberger and George W. Keeton: "Thus the Christian law of nations was transformed into international law."[25]

Having established that modern international law is, as far as its history, its application in the past is and its language are concerned, a colonial international law, we should now move on to look at whether this is still the case today or if this has changed and at the same time we have to ask ourselves how international law is going to evolve in this world of globalisation. Brett Bowden is quoting Lauterpacht when saying that "Modern international law knows of no distinction, for the purposes of recognition between civilized and uncivilized States or between States within and outside the international community of states."[26] If we accept this as true, we would have to agree that nowadays all states, whether European or non-European, developed or developing, are on an equal footing within the international legal system. This would imply that international law has left its colonial past behind and moved forward into the twentieth century with the aim of granting equal rights and opportunities to every state in this world. The establishment of international institutions and regimes like the United Nations or the Human Rights movement seems to support this claim. Over the past century the world has witnessed a significant growth in the desire and effort to improve the situation of the Third World countries and to construct "a new secular international law"[27]. Attempts at "separating international law from its colonial past and reconstructing an anti-colonial international law"[28], according to Antony Anghie, have been made by lawyers of the inter-war period and "the succession of the League of Nations by the United Nations [then ultimately] marked the beginning of a new initiative towards the creation of an international society based on the rule of law"[29]. Finally, the Declaration of Decolonisation in 1960 then was the ultimate step for non-European states to – at least formally – achieve the status of a sovereign member of the international society.

However, although the establishment of the United Nations and most of the subsequent legislation has been considered as the "end of formal colonialism"[30], there are also counter-arguments to the claim that nowadays "international law is universal in its geographic scope and application"[31]. Several authors have argued that the basic framework of modern international law has not changed much compared to the international law of a hundred years ago.[32] Although the former colonies are now sovereign and claim that they "are no longer merely *objects* of international law; [but that they] are *subjects* of international law"[33] there is still doubt whether the sovereignty enjoyed by these states carries the same rights as that of Western states. Furthermore, it is doubtful whether the international institutions that were initially set up to deal with the administration of Europe's colonies and that were

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then later used to try and accommodate the newly formed states into this system of European international law, are nowadays truly objective, or whether they are, at the bottom, still the Western-dominated organisations that are there to protect and further the interests of the West.

Overall, it has been shown that to say that international law is colonial, is a reasonable claim to make. This has been proven by highlighting the key points in the history of the development of international law, which started out as a Christian-European concept, based on Western norms and values and was then imposed on the non-European states during the age of colonialism. Precisely this international law has been used by the West over several centuries to first of all deny the Third World states their claim to sovereignty and therefore membership of the 'family of nations' and then to further European interests in Asia, Africa and the Pacific. The language of international law only reinforced this divide and ensured that the hierarchy between the civilised Europeans and the barbaric non-Europeans was kept – arguably right up until the present day. Hence, on the whole, it can be concluded that international law is colonial – it is a play in which the leading parts are played by the colonisers and the non-Europeans are merely the spectators who have to accept the outcome of this, whatever that may be.

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