ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS, 2005)

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Antony Anghie's book *Imperialism, Sovereignty and the Making of International Law* ambitiously seeks to retell the history of international law from the standpoint of the developing world.¹ This book covers five centuries of international law, through three different but related approaches: an historical approach which documents modern international law from colonial times to the present; a jurisprudential-philosophical approach which attempts to tease out the important concepts and theories behind international law; and a political approach which seeks to understand international law from the perspective of great-power politics, economic development, globalization and nation building.

The upshot of Anghie's argument is that the Western colonial enterprise of the past, far from being extinct, is still very much in existence, encrusted within the very fabric of international law and its institutions. This colonial residue, he argues, is even at work within all the major schools of international jurisprudence-naturalism, positivism and pragmatism. Anghie's main project is to sort and characterize the protean nature of colonialism and to demonstrate how it manifests and legitimates itself within the modern world.

To do this, Anghie identifies three broad historical phases that are outlined below. The first is the period of colonialism properly so-called that corresponds to the age of contact between Europe and the New World from the sixteenth to the seventeenth century. During this time, European nations engaged in a brazen colonial project that involved the forceful assimilation of native peoples, the institutionalization of slavery, and the imposition of European standards of thought, culture and religion upon indigenous populations. The rationale used to justify this system was the dichotomy between the civilized and non-civilized world: it was, in effect, the mission of the "civilized" European world to transform the non-civilized world.

The penultimate phase begins roughly in the second half of the nineteenth century and ends at the outset of the Second World War. This period can be best described as the age of "sanitized colonialism" in which the brute force of the previous period gave way to a more indirect approach to colonial rule.² Anghie cites as an example from this period, the League of Nations' mandates whose purpose was, in theory, to provide internationally supervised protection and guidance for the fledgling governments of former colonies. But Anghie argues that the mandate system was really a concealed continuation of colonialism where the old dichotomy between civilized and uncivilized was now described along economic lines as the difference between the developed West versus the undeveloped former colonies. It became the civilizing mission of the developed

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1 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

2 *Ibid.* at 170-171.

world to raise the economic standard of the undeveloped world through industrialization and urbanization.³

Anghie's third period coincides with the events that shaped the post-World War Two era such as the establishment of the United Nations and the birth of nascent sovereign states out of the ruins of the European colonial regimes. At first glance, these developments would appear to cast the final blow to the old colonial regimes; instead, Anghie shows that despite their sovereignty, developing nations still remain to this day highly vulnerable to Western economic power. Terms such as "economic development" and "sustainable economies" are examples, according to Anghie, of the lexicon of the new economic imperialism.⁴

According to Anghie, international legal theory has been complicit in the colonial enterprise. He traces the origins of modern international legal jurisprudence to the Spanish theologian Francisco Vitoria who first dealt with the problem of indigenous peoples in the New World. Vitoria argued that the chief purpose of international law was to reconcile the differences between these two civilizations. Anghie claims that Vitoria's theories actually laid down the civilized and uncivilized dichotomy: native peoples were not only considered primitive in Vitoria's scheme, but were incapable of forming sovereign states.

After Vitoria, Anghie avers that international law doctrines perpetuated this civilized and uncivilized dichotomy through variations designed to respond to the needs and ethos of each particular era. In the nineteenth century, for instance, developments such as modern science, industrial expansion, and the movement towards more market-oriented economics corresponded with the adoption of legal positivism by international lawyers. Anghie summarizes the various ways that positivism legitimized conquest and dispossession of non-European peoples.⁵ For example, the positivists promoted the Westphalian model of sovereignty in which treaty-making and the use of force were considered legitimate manifestations of sovereign will.⁶

It was during the mandate system that positivism gave way to pragmatism—a new philosophy that sought to not merely integrate the non-Western state into the international community, but to cultivate the socio-economic and political conditions for it to develop. Anghie distinguishes positivism from pragmatism by claiming that while the former focused exclusively on law, the latter was a fusion of rules, laws, policies and administration.⁷

Anghie concludes his work by submitting that post-World War II international law and jurisprudence still have not shed their colonial vestments; instead, what is different today is that developing nations have acquired sovereignty and are made to appear as equals with Western nations.⁸ But this is far from reality. To support this, Anghie identifies several legal mechanisms employed in the

3 *Ibid.* at 173.

4 *Ibid.* at 208-211.

5 *Ibid.* at 26.

6 *Ibid.* at 105.

7 *Ibid.* at 188-189.

8 *Ibid.* at 5.

post-World War II era to force the will of the first world on to the third world. Among them, is the exploitation of resources of the developing world through the use of unfair contracts. Third world governments are in a position of unequal bargaining power: in fact, without the infusion of Western expertise and capital, third world governments are unable to tap resources for sustained economic development.⁹ Not surprisingly, Anghie views such organizations like the IMF and World Bank as promoters of the gap of difference between the first and third worlds.¹⁰

The final chapters deal with the impact of globalization and the effects of the U.S.- led War on Terrorism on international law. Anghie describes the War on Terror as involving several concepts: namely, pre-emptive self-defense, the rogue terrorist-supporting state, humanitarian intervention, preemptive warfare, and the global promotion of democracy. To Anghie these doctrines only reinforce the civilized/uncivilized dichotomy and resurrect old policies from the past. He illustrates how Iraq and Afghanistan are being deprived of some aspects of sovereignty, as they are placed within treaty arrangements analogous to the mandate system.¹¹

The U.S. has justified humanitarian intervention campaigns and pre-emptive war through notions of human rights and national self-defense. Anghie calls these policies and arguments "defensive imperialism." If this form of imperialism, Anghie warns, attains legitimacy under international law, it threatens to undo the incremental progress made by the U.N. system in achieving a somewhat more equitable international system.¹²

While Anghie's analysis provides a diagnosis of the root historical causes of the plight of modern international law, he provides very little in terms of a concrete plan to reform and amend the system so to be more just and equitable.¹³ In fact he writes in the final chapter that it is not his intention to overturn the Westphalian model of international order.¹⁴ This then begs the question: does he in fact believe that the system can be reformed from within without supplanting it entirely, or is it forever trapped in its colonial mindset? Furthermore, if one were to attempt to reform international law, where does she begin; should one look to reconstructing international law by looking to world history before the age of European conquest, and is such a task even possible?

Although Anghie maintains that his project is novel because he examines international law from a non-Western critical perspective, his approach is still very much confined to a Western tradition imbued with discussions of imperialism, post-colonial theory and Western hegemony. It is because Anghie's analysis is so engrossed in a Western way of thinking about international relations that he fails to consider in depth the socio-political changes occurring within individual third and even first world states with respect to the development of indigenous

9 *Ibid.* at 223.

10 *Ibid.* at 263-268.

11 *Ibid.* at 278-287.

12 *Ibid.* at 294-296.

13 *Ibid.* at 317.

14 *Ibid.* at 315.

culture. Consider the growing legal recognition and self-determination of the aboriginal peoples of the former British colonies of Canada and Australia where there has been a movement towards incorporating and respecting the indigenous law as a distinct entity within the respective federal systems.¹⁵ Consider also the revival of Islamic and Shariah law in Egypt, Malaysia and Pakistan. Would Anghie say that this phenomenon is only a reaction against ever-expanding Western cultural imperialism? Furthermore, Anghie does not discuss the influential human rights initiatives undertaken by indigenous and colonized peoples. Many of these movements are not simply replicating Western liberal ideals but are very much imbued with the traditions and spiritual beliefs of indigenous cultures.¹⁶ For example Mahatma Gandhi of India and Aung San Suu Kyi of Myanmar are historical figures who have wielded their native cultural values in a political forum against oppression.¹⁷ Suu Kyi's conviction that human rights and democracy are important values arises not from a reading of Rousseau or J.S. Mill but from her belief in Buddhism and Burmese culture.¹⁸ The point here is to refute Anghie's rather simplistic contention that sovereignty and nation building were imposed on to the post-colonial world without any indigenous input.

In contrast to Anghie's cynical view of international law, Thomas Franck offers a more optimistic coverage of the field. Franck claims that the international community is a unified group of nations on a path towards a more equitable and fair international legal system. He points to the fact that most states observe systemic rules most of the time in their relations with other states; as well, he offers examples where notions of equity and justice are being imported with greater frequency into international discourse.¹⁹ Franck argues that the true marker of an international legal system is fairness, and the two components of fairness for him are legitimacy and distributive justice.²⁰ Both these components, he argues, are value-neutral in that regardless of cultural and ethnic differences, each nation will view a legal system as fair if it meets these two criteria.

Franck's argument is, in many ways, diametrically opposed to Anghie's cynical tone on the possibility of access to justice within the international legal system. Anghie's work suggests that justice is out of reach for most third world nations because of their unequal bargaining position *vis a vis* Western states.²¹ But is there not an effective recourse for developing nations to receive justice through bodies

15 See generally Catherine Bell & David Kahane, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2005). This book discusses the growing trend of incorporating aboriginal law into informal legal practices like dispute resolution, mediation etc.

16 Farish Noor, "Beyond Eurocentrism" in Martha Meijer ed., *Dealing with Human Rights: Asian and Western Views on the Value of Human Rights* (Bloomfield, CT: Kumarian Press, 2001) 49. The author argues (more in line with Anghie) that it is becoming increasingly difficult for non-Western regimes to adopt their own indigenous principles into law because of pressures from the West.

17 *Ibid.* at 55.

18 *Ibid.*

19 Thomas Franck, "Fairness in International Law and Institutions" Oona Hathaway & Harold Hongju Koh, eds, *Foundations of International Law and Politics* (New York: Foundation Press, 2005) 152 at 164-167.

20 *Ibid.* at 152-153.

21 *Supra* note 1 at 303.

such as the ICJ? Does Anghie simply assume that such institutions are part of the post-colonial project of Western domination? Anghie concedes that international institutions like the ICJ have been effective in asserting and defending third world rights and sovereignty against first world nations through cases such as the landmark *Nicaragua v. The United States of America*.²² Yet, even in light of these decisions, Anghie argues that effective sovereignty is still lacking for much of the developing world. Furthermore, great powers have succeeded in legally by-passing third world sovereignty through doctrines such as self-defense.

Some of the problems with Anghie's analysis arise largely from his confusion over dualism and monism. At times he implies that third world nations are really monistic in that their municipal legal systems cannot be removed from the tentacles of the Western-dominated international order. Their founding moments of independence in the twentieth century simply replicated Western models of government and law. Further, through the use of various legal mechanisms, much municipal law can be overridden by international law. From this line of reasoning then, we are brought to the rather absurd conclusion that every facet of legal life within a third world country is at the behest of the international legal order; third world states are simply automatons reacting to the West's will. Anghie's reasoning here borders on fatalism, in the sense that he supports the premise that the third world lacks the will and self-determination to overcome the historical handicaps.

Moreover, Anghie fails to consider any serious difference between politics, economics and law; for him the triad is lumped together as part of one ensemble. He does not define in more precise terms what he means by law and politics. This is problematic for determining how much of the problems of the third world are due to the treaties and customs of international law as opposed to the market forces of globalization, and great power politics.

Lastly, he characterizes the developing world as one giant impoverished monolith lying outside of Europe and North America. Because of this he fails to consider in depth the diversity of culture and geopolitics within the different regions of the developing world. And while it is true that poverty is an acute problem inside much of the developing world, Anghie in some ways simplifies the economic experience of all developing nations as the products of colonialism. While his theories hold true to some extent for the African experience, they do not account for the meteoric rise of other developing economies such as China, India, Vietnam, and Brazil in the early twenty-first century; the colonial project may indeed have produced some economic beneficial effects such as a rising GDP, increases in per capita income, a larger tax base etc.

In line with this, Anghie's scheme does not account for the very real possibility that such rising economic powers like post-colonial India and China will exert dominating influence over the development of international law in the future. What type of new world order will be created by the rise of these Asian behemoths? Will they assume more of a leadership role commensurate with their economic status, and if so will they break the "colonial cycle" of despair and alienation in the developing world or will they further it by employing the imperialist

22 Judgment, [1986] I.C.J. Rep 14.

methods of their Western counterparts? Questions such as these are insoluble at the moment and obviously beyond the scope of Anghie's work, however they do raise important discussion points concerning the future of international law.