1 Introduction

I The project

Why has international law, from the perspective of the Third World, been so disappointing? What is it about international law that makes it simultaneously so full of promise, and yet again and again a contributor to the failure of projects articulated in its name? And in the face of these disappointments, why do so many people from both inside and outside the discipline mount what are often devastating critiques of international law – its uses by the powerful, its implication in imperialism, its capacity to facilitate exploitation, its other manifold dark sides – only to conclude with a plea for the reinterpretation of international law, or its retrieval for the powers of goodness? These puzzles were the impetus for this book.

Specifically, I take seriously the idea that many critics from both North and South maintain a strong faith in international law, despite firmly comprehending its complicities with powerful actors, both historical and current. This 'critical faith' let us call it, is much more interesting to me than a belief that international law, and human rights in particular, are on the side of the angels and that unhappy outcomes must be understood as 'distortions' of that law. It is also more historically grounded as a starting point than a pragmatic quest for 'policy-relevance'. Though for different reasons, each such approach turns away from international law's more problematic aspects and refuses to engage with its imperial history and well-documented intimacy with the powerful.

What this critical faith suggested to me was that international law itself has a dual quality. Specifically, it has both an imperial and counter-imperial dimension. And so I determined to explore precisely this quality of duality. My intuition was that if the dual quality were

'real', it would manifest itself not only in the approach of the scholarly work of international law's 'critical friends', but would also play out in the institutional life of international law. Thus I began to explore concrete instances of when international law had been used to challenge established relations of power and exploitation in order to understand what the terms of those challenges were, and what the results of the challenge have been. The most obvious place where such concrete instances have played out is in the successive efforts by states in the Third World to use international law to promote their goals.

Indeed, ever since the establishment of the contemporary institutions of international law at the end of the Second World War, the Third World has been trying to use international law to effect social, political, economic and legal change. This book seeks to explore some of those attempts and to discover what the outcomes of such experiments have been. In order to do this, it takes three significant examples, or 'telling instances', of such attempts and tells the story of each of them. The examples are decolonisation, the claim to Permanent Sovereignty over Natural Resources, and the call, at the end of the Cold War, for the (re)establishment of a rule of international law.

What we discover in the telling of these stories is that, in each case, the attempt to use international law was inspired and enabled by international law's promised universality. However, that same promised universality served to constrain, and ultimately to undermine the radical potential of the Third World demands. This happened because those attempts were subsumed within a pervasive rationality that successfully made a claim for the universality of a particular, or 'provincial' set of values[1] originating in and congenial to the North. Central to the way the values in question were successfully posited as universal and held in that position, were the concepts of development and economic growth.

The three stories mark something other than moments of assertion and failure. In my telling they become moments of assertion by the Third World, and the capture and transformation of the asserted claim into something else through the operation of a particular rationality, one we could now think of as a rationality of rule. Thus complicated, the stories shift from being 'decolonisation', 'the claim to Permanent

[1] I am following Chakrabarty in the use of the term 'provincial': Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press, 2000).

Sovereignty over Natural Resources' and 'the assertion of a rule of international law' into three somewhat different narratives. The first is the channelling of decolonisation into the formation of the developmental nation state. The second is the transformation of the claim to Permanent Sovereignty over Natural Resources into the protection of foreign investors. And the third is the transformation of the asserted rule of *international* law into the internationalisation of the *rule of law* as a development strategy.

The ruling rationality is thus revealed to be a transformative dynamic. What we discover when we critically redescribe the stories in this way is that the flipside of each Third World assertion is the production of an ever-expanding sphere of intervention in the Third World. The episodes in the expansion of the operative domain of this logic are chronologically sequential: they begin at the moment of inception of the current international legal order and end in the post-Cold War era of 'globalisation'. The telling instances fit together cumulatively to suggest an intensification of the rationality of rule.

However, the intensification of this rationality does not signify a global harmonisation of social and regulatory forms, whether or not one were to view such convergence as a good thing. Instead, it denotes a series of increasingly violent, and almost consistently failed, interventions in the Third World.[2] These interventions take place *in the name* of producing conformity with certain idealised social, political and economic models, but are not directed at their actual reproduction. So although the rationality is transformative, the effect has not been actually to reproduce the institutions of the North, but to enable the exercise of control through the implementation of ongoing 'reforms', which are justified by reference to the 'ideal' institutions of the North.

Although it has older roots, the rationality I am tracking was inaugurated in its current form with the contemporary institutions of international law at the end of the Second World War. Its general contours are visible throughout the history of international law since that time. In diagnosing the inauguration of this specific rationality, I differ from both of the most prominent positions on the question of decolonisation and the inception of the current international legal order. On one hand, the mainstream of the international community celebrates

[2] For a compelling catalogue of these occidental failures and repetitions, see William Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (Oxford, New York: Oxford University Press, 2006).

this period in retrospect as the moment when everything changed. It is seen as the end of overt imperialism and a purely European international law, a key or originating moment of the 'real' or 'true' universalisation of the international community, and the incipient reflection of that in international law.[3] On the other hand, many Third World scholars[4] would question this assertion and argue that in this shift little, if anything, changed. According to their argument, a retrospective analysis requires that we see imperialism as continuing beyond this period under another name.

In contrast to both positions, I suggest that this was not a moment of either/or, but rather a moment of both/and. That is, international law was neither still imperial nor newly liberatory – and yet it was both. There was both a continuity with, and a break from, the overtly imperial period in that what *was* genuinely a universalisation of international law – manifested most obviously in the extension of formal sovereignty to the former colonies – did not bring the new equality it promised. Instead, it effected a shift from the old mode of power to a new rationality in which the operative mode of power was precisely the promise of a new universality for international law and the new institutions.

The argument presented here complements compelling accounts in other disciplines, which describe a transition from the old imperialism to the ascendancy of US power and the onset of the Cold War. In such analyses we see described a hybrid shift in power which we might think of as a transition, in Rist's phrase, from a colonial imperialism to an 'anti-colonial imperialism'.[5] But while the explorations of this shift

[3] See for example, C. Wilfred Jenks, *The Common Law of Mankind* (London: Stevens, 1958) 63; B. V. A. Röling, *International Law in an Expanded World* (Amsterdam: Djambatan, 1960) 15; R. P. Anand, 'Attitude of the Asian-African States toward Certain Problems of International Law' (1966) 15 *International and Comparative Law Quarterly* 55. See also, F. V. Garcia-Amador, 'Current Attempts to Revise International Law: A Comparative Analysis' (1983) 77(2) *American Journal of International Law* 286, 289. For a similar argument to mine, about the establishment of the United Nations, see Mark Mazower, *No Enchanted Place: The End of Empire and the Ideological Origins of the United Nations* (Princeton, Oxford: Princeton University Press, 2009).

[4] By this I mean, inter alia, the self-identified group of TWAIL, or Third World Approaches to International Law scholars as well as several other scholars of international law with connections to or sympathies for the Third World: see generally, Antony Anghie, Bhupinder Chimni, Karin Mickelson and Obiora Chinedu Okafor (eds.), *The Third World and International Order: Law, Politics and Globalization* (Leiden: Brill Academic Publishers, Martinus Nijhoff, 2003).

[5] Gilbert Rist, *The History of Development: From Western Origins to Global Faith* (trans. Patrick Camiller) (London, New York: Zed Books, 1997) 75.

carried out in other disciplines are highly persuasive, a close analysis of the place of international law in that transition is often absent. At best, international law is typically cast as secondary, or epiphenomenal, to the change – power drove it, international law reflected it. Indeed, in such analyses the Cold War's relation to international law and its institutions is often depicted as one of obstruction; in that story the advent of a bipolar world prevented the ideals institutionalised in the Charter of the United Nations (UN) from assuming any political or institutional significance.

In contrast, in my view the logic of contemporary international law can be seen to be homologous with, rather than contradictory or irrelevant to, the logic and imperatives of the Cold War. And international law was much more than a secondary phenomenon of the shift in the way power operated. I suggest that we need to recognise a new mode of power born from the lineages of decolonisation, modern developmentalism and the 'universalisation' of international law in a Cold War climate. Tracking the metamorphoses of that mode of power through to its present manifestations invites at the very least a rethinking of current strategies directed at harnessing the political potential of international law.

II The structure

Chapter 2 offers a historical and theoretical account of the rationality being traced in this book. It begins with the institutional shifts that signalled the advent of that rationality of rule and moves onto its theorisation, encompassing a theoretical account of international law and the place of the twin concepts of development and economic growth in relation to it. Chapters 3, 4 and 5 respectively are an exploration of our three telling instances or examples, each forming the subject of one chapter.

Chapter 3 tells the story of our first example and the moment when the ruling rationality outlined in Chapter 2 begins its trajectory. In Chapter 3 I consider certain aspects of the way decolonisation was effected through international law and the relationship between that process and the concept of development. Specifically, I argue that the 'universalisation' of international law which is commonly said to have occurred after the end of the Second World War was not the neutral inclusion of all peoples within the international legal order, but rather a process by which a particular form of socio-political organisation

was normalised, even as difference was seemingly accommodated by the international community.

So launched, our rationality of rule is traced in Chapters 4 and 5 through the second and third telling instances of its operation. The second instance considers the way in which political demands made during the 1950s and 1960s, for Permanent Sovereignty over Natural Resources (PSNR) were transformed through the operation of the same dynamic into the regulation and protection of foreign direct investment. The third instance considers the by now somewhat exhausted calls at the end of the Cold War for a new international order based on the rule of international law, and the way those demands were reshaped into the internationalisation of the rule of law as development strategy, another example of the operation of the ruling rationality identified here. This last instance is also the moment in which I suggest the dynamic I am describing surfaces and becomes visible.

By and large, each of Chapters 3, 4 and 5 makes the same sequence of moves. The first is to consider the conditions of possibility of each claim in its political–economic context. The second is to ask what the claim was trying to achieve and why the claim was cast in terms of international law. This question itself has two aspects. One is to ask what made it *possible* for international law to serve as the political surface of the claim, or site of contestation. The other is to consider why it may have been *necessary* for the claim to have been made in legal terms. The answers to these questions are two sides of the same coin. Briefly put, it is the universal promise of international law that makes the political assertion possible in each example. But, on the flip side, the successful universalisation of international law during the imperial period created for it a juridical monopoly still enjoyed by international law. The monopoly both demands that all claims be inaugurated in its terms and ensures a continuing capacity to define the meaning of legality. This maintains for itself that monopoly of meaning, and continually reissues the currency of the demand.

The third move in the study of each telling instance is to consider the terms of the North's response. As I shall show, in each case the response was made in terms of a posited universality. That is, the values advanced by the First World were said to be 'universal', generally applicable and of common benefit. And although these values were themselves particular, that they were (successfully) positioned as 'universal' allowed the claims of the *Third World* to be understood as both 'particular' per se, or as purely 'relative' to the universal narrative.

As such, those values were explicitly inimical to the common interest. The specific occidental values advanced as universal were successfully held in that 'universal' place by the concepts of development and its twin: economic growth. These two concepts took up (and continue to take up) an ostensibly exterior position in relation to international law, occupying a position of rational truth, and offering it values without seeming to do so. This combination of exteriority, superiority and, ostensibly, objectivity means that development and growth operate in something like a 'transcendent' position in relation to international law. This position is rendered invisible by the commonly held understanding of international law as *secular*, a way of seeing international law that doesn't look for concepts operating in a transcendent, or godlike, position. Because this positioning was unacknowledged, within the institutional setting of international law the twin concepts of development and growth were both removed from political contestation in and of themselves, and worked to secure the particular values being put forth by the 'developed' world *as* 'universal'.

Finally, in each instance we see how the rhetorical elevation of a parochial set of values to the status of the universal, and their conceptual stabilisation via development and growth, was made secure through the juridification of those values in positive law. This juridification was facilitated by the specific institutional structure of contemporary international law, and in particular the split between the 'economic' and 'political' institutions and their differential structures of control. The passage of these chapters brings us chronologically to the eve of the current moment.

The implications of the study are slightly different depending on where you stand. For international lawyers today, the dynamic being explored in this work has a strong, continuing explanatory value. Indeed, in the ostensible shift from the retreat of sovereignty in 'globalisation' to the reassertion of sovereignty in the face of the new 'terror', what we are witnessing is not a change from a deterritorialising logic of capital to the reassertion of a territorially oriented, sovereign logic of state-craft, but rather an intensification of the mode of power inaugurated with post-Second World War international law and an increase in the visibility of its violence. 'Fragmentation', 'Constitutionalisation' and 'Global Administrative Law', perhaps the three key heuristics of our time, could each be seen as analytics that refract consideration of international law through a different facet of the mode of power I bring to light here. What could look like

'fragmentation' from above, for example, might look like proliferation from below. 'Constitutionalisation' is the name lawyers give to the project of producing an empire of right, implicitly secured by a developmental frame, and much 'Global Administrative Law' could be seen as the projection of a technical web of administrative expertise over a depoliticised world.

For workers and scholars in the 'development' field, the study reveals the way in which development as an idealised history of the West has given coherence to the categories of international law by underpinning their claim to universality. So, whilst international law is usually understood as an institutional means to bring about development, in this book we will reverse that understanding to show that the concept of development is a cornerstone supporting the edifice of contemporary international law. This idealised story-turned-concept produces a 'community' of states that is both hierarchical and inclusive. Its inclusivity takes the form of the promise of eventual equality, secured and measured by the 'scientific' concept of GDP. Because GDP secures the promise, economic growth stubbornly remains the secret beating heart of development, despite the numerous stakes driven through it. The misrecognition within international institutional engagements, of the discursive function of development and its relationship to international law, goes some way to explain the puzzling way in which over the last sixty years, the development project has expanded, deepened and failed to bring about its promised ends all at the same time.

If the diagnosis presented here is persuasive, for both development worker and international lawyer alike it suggests the need to rethink how one might engage strategically with international law and institutions in the interests of those differentially subjected to the transformative violence currently administered through its institutions. Such rethinking would have to address the possibility that the political limitations of human rights are too great to address the violence of that project, and that the challenges presented by the environmental limits to growth cannot be overcome by realignments of the development concept with a view to 'sustaining' the current paradigm.

In light of this, I will conclude the book with some tentative final thoughts about how a reflexive engagement with the critical instability at the heart of international law might lead to a praxis directed toward its 'decolonisation'. Briefly put, this praxis would make use of the double-sidedness of a claim to universality as an operative mode of power. But it would entail a rejection of the transcendent or exterior

and superior positioning of development and economic growth vis-à-vis international law. It would also mean rejecting the promise of new 'grounds' offered by a neo-Kantian normative horizon (re)founded in a putatively genuine universality. Instead, it would demand a situated embrace of what Zerilli, following Laclau, calls 'a universalism which is not one',[6] or a strategic engagement with an open or 'empty' universality.

[6] Linda Zerilli, 'This Universalism which is Not One' in Simon Critchley and Oliver Marchart (eds.), *Laclau: A Critical Reader* (London, New York: Routledge, 2004) 88–110, 102.

2 Inaugurating a new rationality

I The new international institutions

The rationality I am tracing in this book is embedded in the institutional structure of contemporary international law. It operates through a dynamic relation between the formal institutions, the ideational sites of the academy and 'practice', broadly speaking, and the actions of both state actors and non-governmental organisations. These branches and sites are not disparate fragments of a kaleidoscopic field as may sometimes be understood, but rather operate as what we might think of nodes in the 'ideological–institutional complex' we know as international law. The rationality subordinates attempt to (re)define meanings for ostensibly universal categories by working through this complex and the dynamic relation between its parts. Key to those parts is the institutions understood respectively as the 'political' and 'economic' institutions of international law.

As we shall see, the dynamic relation operates together with law's necessarily constitutive function to cast and recast certain issues or questions as properly belonging to one set of institutions rather than another – the 'economic' rather than the 'political', for example. The dynamic is given impetus and logical coherence by the concepts of development and economic growth that secure the institutional–ideological complex through the way they take up an exterior and superior, or what we might call 'transcendent', position in relation to international law.

Through the combination of this ongoing movement, and its transcendent securing, a particular content is ascribed to the universal and held in that 'universal' position. The international economic and political institutions are both at work in this complex, thus any