Introduction

The empires of our time were short lived, but they have altered the world forever; their passing away is their least significant feature.[1]

The colonizer constructs himself as he constructs the colony. The relationship is intimate, an open secret that cannot be part of official knowledge.[2]

The themes and concerns that animate this book emerged from my experiences as a research assistant working for C. G. Weeramantry who was then Chief Commissioner of an Inquiry established by the Government of Nauru to examine the history of the phosphate mining that took place on the island. The League of Nations placed Nauru under a mandate and appointed three partner governments, Australia, New Zealand and the United Kingdom to be the mandatory powers. In effect, however, Nauru was administered by Australia, acting on behalf of the partner governments, first as a mandate territory under the League and then, as a trusteeship territory under the United Nations. Nauru was rich in phosphates and the Australian administration commenced mining the phosphates very shortly after assuming control over Nauru. The mining operations, which was very destructive to the territory, had been opposed by the people of Nauru, who asserted that they held the three partner governments responsible for the damage caused. Upon becoming an independent state, Nauru continued to maintain this claim, which was consistently denied by the partner governments. Finally in 1986, Nauru established a Commission of Inquiry and gave it the task of examining the legal, historical and scientific aspects of the phosphate industry, and the feasibility of rehabilitating the worked-out phosphate lands. Acting

[1] V. S. Naipaul, *The Mimic Men* (Harmondsworth: Penguin Books, 1980), p. 32.
[2] Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge, MA: Harvard University Press, 1999), p. 203.

upon the conclusions of that Inquiry, the government of Nauru sought compensation from the partner governments for the exploitation of the phosphates and for the massive environmental damage that had been caused to the territory of Nauru as a result of the mining.

It is surely the fantasy of every student who has ever participated in the Jessup international law mooting competition to research a dispute that could eventually be presented to the International Court of Justice; and the central issue involved in this case could hardly have been more compelling to me: was it possible for a formerly dependent territory to bring a claim in international law for what in essence was colonial exploitation? Professors Ian Brownlie, Barry Connell, James Crawford, V. S. Mani and C. G. Weeramantry were all involved in analysing and advising on this matter, and my fellow research assistant, Deborah Cass and I were in the extraordinarily fortunate position of witnessing how these expert international lawyers approached the issues and constructed the case that was later argued before the International Court of Justice.

While the needs and demands of the Inquiry consumed my immediate attention, what I found both curious and disturbing, as I researched the questions arising from the dispute – and this involved examining many aspects of the relationship between colonialism and international law – was the fact that international law had not only legitimized colonial exploitation, a fact well established by many Third World scholars but, in addition, it appeared to me, had developed many mechanisms to prevent any claims for colonial reparations. The acquisition of sovereignty by the Third World was an extraordinarily significant event; and yet, various limitations and disadvantages appeared to be somehow peculiarly connected with that sovereignty. In any event, 'Third World' sovereignty appeared quite distinctive as compared with the defining Western sovereignty. What, then, were the links, the nature of the relationships connecting sovereignty, colonialism and international law? This was the question I took with me to my graduate studies, and it gave specific form to a more general question that distinguished Third World scholars had asked for many years and that had begun to preoccupy my own work: how is it possible to construct an international law that is responsive to the needs and aspirations of the peoples of the Third World? When I wrote about the case when it was finally argued before the International Court of Justice, I tentatively formulated the arguments that colonialism was central to the development of international law, and that sovereignty

doctrine emerged out of the colonial encounter. This book further explores and elaborates on the basic themes presented in that initial article.[3]

These are the beginnings of this book, which examines the historical relationship between international law and the 'Third World'[4] – the contemporary term for those non-European societies and territories which were colonized from the sixteenth century onwards by the European Empires, and which acquired political independence since the 1940s. My broad argument is that colonialism was central to the constitution of international law in that many of the 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. In making this argument, I focus on the colonial origins of international law; I attempt, furthermore, to show how these origins create a set of structures that continually repeat themselves at various stages in the history of international law. In so doing I seek to challenge conventional histories of the discipline which present colonialism as peripheral, an unfortunate episode that has long since been overcome by the heroic initiatives of decolonization that resulted in the emergence of colonial societies as independent, sovereign states.

I examine the relationship between international law and colonialism by focusing on the civilizing mission, the grand project that has justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe. I argue that in the field of international law, the civilizing mission was animated by what I crudely term the question of 'cultural difference'. The imperial idea that fundamental cultural differences divided the European and non-European worlds was profoundly important to the civilizing mission in

[3] Antony Anghie, 'The Heart of my Home: Colonialism, Environmental Damage, and the Nauru Case', (1993) 34 *Harvard International Law Journal* 445–506.

[4] The term 'Third World' might be anachronistic and misleading, but I will use it nevertheless. For some recent works which point in very different ways to the usefulness of the term, see B. S. Chimni, 'Third World Approaches to International Law: A Manifesto', in Antony Anghie, Bhupinder Chimni, Karin Mickelson and Obiora Okafor (eds.), *The Third World and International Order: Law, Politics and Globalization* (Leiden: Brill Academic Publishers, Martinus Nijhoff, 2003), pp. 47–75 at pp. 48–51; Karin Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse', (1998) 16(2) *Wisconsin International Law Journal* 353–419; Balakrishnan Rajagopal, 'International Law and Third World Resistance: A Theoretical Inquiry' in Anghie, Chimni, Mickelson and Okafor, *The Third World*, pp. 145–172.

a number of ways: for example, the characterization of non-European societies as backward and primitive legitimized European conquest of these societies and justified the measures colonial powers used to control and transform them. Equally, however, the assertion of this dichotomy between the two worlds, the civilized and the uncivilized, posed several novel problems for the European jurists who sought to account for the colonial project in legal terms. How could it be claimed the European civilization, in all its avowed specificity, was somehow universal and binding on non-European states?

International lawyers over the centuries maintained this basic dichotomy between the civilized and the uncivilized, even while refining and elaborating their understanding of each of these terms. Having established this dichotomy, furthermore, jurists continually developed techniques for overcoming it by formulating legal doctrines directed towards civilizing the uncivilized world. I use the term 'dynamic of difference' to denote, broadly, the endless process of creating a gap between two cultures, demarcating one as 'universal' and civilized and the other as 'particular' and uncivilized, and seeking to bridge the gap by developing techniques to normalize the aberrant society. My argument is that this dynamic animated the development of many of the central doctrines of international law – most particularly, sovereignty doctrine. The dynamic is self-sustaining and indeed, as I shall argue, endless; each act of arrival reveals further horizons, each act of bridging further differences that international law must seek to overcome. It is in this way that international law extends itself horizontally, to encompass the entire globe and, once this is achieved, vertically, within each society, to ensure the emergence of civilized states.

Despite what I claim to be the centrality of colonialism for the generation of international law, the relationship between international law and the colonial encounter has not been seen in this way. Rather, many international lawyers, from both the First and the Third world[5] write as if 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 – as if, in

[5] Mohammed Bedjaoui, one of the foremost Third World jurists, appears to subscribe to this view when stating that 'The New World was to be Europeanized and evangelized, which meant that the system of European international law did not change fundamentally as a result of its geographic extension to continents other than Europe'. Mohammed Bedjaoui, 'General Introduction', in Mohammed Bedjaoui, *International Law: Achievements and Prospects* (Boston: Martinus Nijhoff, 1991), p. 7.

short, the doctrines of international law solved the problem of difference by preceding it.

This understanding of the colonial encounter is characteristic of the traditional approach to international law, which understands the discipline in terms of the fundamental question of how order is created among sovereign states. For the traditionalists, international law may be broadly explained as an attempt to resolve this primordial problem, which acquired an especially threatening character when seized upon by the nineteenth-century positivist John Austin to make his famous argument that international law was not law properly so called because it did not emanate from a single, global sovereign. The attempts to resolve this problem, and the critiques of these attempts have, on the whole, constituted the central theoretical debate of the discipline.[6] The defining character of this problem to the whole discipline of international law is further reflected by the structure of many of the major textbooks of international law, which introduce the subject by outlining the problem and offering some sort of solution to it by suggesting the different ways in which international law could be regarded as law.[7]

European states were sovereign and equal. The colonial confrontation, however, particularly since the nineteenth century when colonialism reached its apogee, was not a confrontation between two sovereign states, but rather between a sovereign European state and a non-European society that was deemed by jurists to be lacking in sovereignty – or else, at best only partially sovereign. My argument, then, is that what passes now as the defining dilemma of the discipline, the problem of order among states, is a problem which, from the time of its origins, has been peculiar to the specificities of European history. And, further, that the extension and universalization of this European experience, which is achieved by transmuting it into the major theoretical problem of the discipline, has the effect of suppressing and subordinating other histories of international law and the peoples to whom it has applied. Within the axiomatic framework which decrees that European states are sovereign while non-European states are not, there is only one means of relating the history of the non-European world: it is a history

[6] The works of John Austin, and the response of nineteenth-century jurists to this charge, are examined in chapter 2.

[7] This is usually done under the rubric of something like: 'Is International Law Really Law?' See Louis Henkin, Richard C. Pugh, Oscar Schachter and Hans Smit, *International Law* (3rd edn., St Paul, MN: West Publishing Co., 1993).

of the incorporation of the peoples of Africa, Asia, the Americas and the Pacific into an international law which is explicitly European, and yet, universal. This task having been accomplished, the Third World having been granted all the powers of sovereignty, imperialism becomes only a matter of historical interest. This is the history I examine, not with a view to furthering it, but in an attempt to illuminate the tragedies and violence inherent[8] in the project of the civilizing mission, and its continuing operation in international law. My broad argument is that the very mechanisms by which the civilizing mission is furthered prevent its fulfilment, and that, further, the process of incorporation that is conventionally understood to be empowering and liberating for the Third World is, in significant ways, debilitating and excluding.

My approach to the colonial encounter differs from the traditional approach on a number of counts. First, I focus on the civilizing mission and the problem of cultural difference, and not on the issue of order among sovereign states. A focus on the problem of order among sovereign states cannot illuminate the prior question of how certain states were excluded from the realm of sovereignty in the first place. Secondly, I argue that the application of sovereignty doctrine to the colonies cannot be properly understood as the simple extension of sovereignty, as it developed in Europe, into the peripheral colonies. According to this version of the conventional history, the European model of sovereignty, established by the defining event of the Peace of Westphalia, was gradually extended to the non-European peripheries.[9] My argument, by contrast, is that sovereignty was improvised out of the colonial encounter, and adopted unique forms which differed from and destabilized given notions of European sovereignty. As a consequence, Third World sovereignty is distinctive, and rendered uniquely vulnerable and dependent by international law. Thirdly, I adopt a historical approach to sovereignty doctrine, seeking to show how the colonial encounter shaped the underlying structures of the doctrine. My broad argument, then, is that doctrinal and institutional developments in international law cannot be understood simply and always as logical elaborations of a stable, philosophically conceived sovereignty doctrine, as an outcome of the continuing attempt to create order among sovereign states. Rather, we might see

[8] Dipesh Chakrabarty, 'Postcoloniality and the Artifice of History: Who Speaks for "Indian" Pasts', in Ranajit Guha (ed.), *A Subaltern Studies Reader, 1986–1995* (Minneapolis, MN, University of Minnesota Press, 1997), p. 263.

[9] See Nathaniel Berman, 'In the Wake of Empire', (1999) 14 *American University International Law Review* 1521–1554 at 1523.

these doctrines and institutions as being generated by problems relating to colonial order.

Broadly, then, this approach enables an exploration of the problems and politics of who was sovereign and why, the relationship between ideas of culture and sovereignty and the ways in which sovereignty became identified with a specific set of cultural practices to the exclusion of others. What does it mean to say that 'international law governs sovereign states' when certain societies were denied sovereign status? What are the processes by which this denial was justified and enforced? What continuing effects follow from this exclusion? How does an understanding of these processes of denial offer a means of reinterpreting contemporary understandings of sovereignty doctrine? The practices of racial discrimination, economic exploitation, territorial dispossession and cultural subordination were all central to the imperial project, and it is by raising these broad questions of the relationship between colonialism and international law that I seek to explore their enduring significance for the discipline. The traditional approach tends to disregard the historical dimension of sovereignty, focusing instead on the powers and competences of the sovereign in attempting to adjudicate between competing sovereignties. The inequalities that were inherent in the colonial encounter are a thing of the past.

My account of the relationship between colonialism and international law also differs in certain respects from the extraordinarily important work done by pioneering Third World scholars such as, R. P. Anand, Mohammed Bedjaoui and T. O. Elias who have closely scrutinized the relationship between colonialism and international law.[10] Each of these figures, representatives of the 'New States', worked on articulating Third World perspectives and formulating a new international law by which the Third World could advance its own interests. At least two strategies characterized these efforts. First, many Third World jurists attempted to demonstrate that some of the fundamental principles of international law – relating, for example, to treaties and to equity – were also to be found in African or Eastern systems of thinking and statecraft and indeed, originated not in the West, but the colonial world itself.[11] In

[10] See chapter 4.

[11] This effort was provoked by comments of the sort made by J. H. W. Verzijl, 'the actual body of international law, as it stands today, is not only the product of the conscious activity of the European mind, but has also drawn its vital essence from a common source of European beliefs, and in both these aspects is mainly of Western European origin'. Cited in Bedjaoui, 'General Introduction', p. 9.

adopting this approach, these writers stressed the existence of certain universal principles regarding the character and exercise of authority. Secondly, many of these writers denounced classical international law as being the product of imperialism and a means by which European interests were promoted and maintained.[12] The law regulating the nationalization of alien property was classically cited as an example of this imperialist international law.[13] The project, then, was to excise these colonial aspects of international law from the system of international law and to recreate a new, open and non-colonial international law.

It is now hardly disputable that classical international law was complicit in the imperial project and the exploitation which accompanied it. If, however, the colonial encounter, with all its exclusions and subordinations, shaped the very foundations of international law, then grave questions must arise as to whether and how it is possible for the post-colonial world to construct a new international law that is liberated from these colonial origins. The question is an old one: can the post-colonial world deploy for its own purposes the law which had enabled its suppression in the first place? It is approached here from the different perspective offered by focusing on the impact of the colonial encounter on the underlying structures of international law.

It is by adopting this approach that I attempt to question conventional histories of international law, in an effort to understand why peoples living in Third World societies continue to be, on the whole, the most disadvantaged and marginalized. The study of history is in many respects a practical exercise, a means of facilitating and furthering the reconstructive project which a number of scholars, working within the traditions of Critical Race Theory, Feminism, Lat-Crit theory or Third World Approaches to International Law, have in common, the project of creating an international law that is responsive to the needs of variously disadvantaged peoples.

As against conventional histories, then, what may be required is the telling of alternative histories – histories of resistance to colonial power, history from the vantage point of the peoples who were subjected to international law and which are sensitive to the tendencies within such conventional histories to assimilate the specific, unique histories of non-European peoples within the broader concepts and controlling structures of such conventional histories. My work is indebted to the pioneering efforts of post-colonial scholars, working within a number of

[12] *Ibid.*, pp. 5–11. [13] See chapter 4.

disciplines, who have attempted the task of interrogating conventional histories of imperialism.[14]

In sketching a history of the relationship between colonialism and international law, I have focused principally on the period from, roughly, 1870 to 2003. However, chapter 1 examines the writing of Francisco de Vitoria, the sixteenth-century Spanish jurist whose work, *De Indis Noviter Inventis* (hereafter, *De Indis*), is widely regarded as the first international law text.[15] My argument is that we can see in the works of Vitoria some of the crucial themes and issues that continue to preoccupy the discipline. Vitoria addresses the problem of accounting for the Spanish conquest of the Indies by using the doctrinal and jurisprudential resources of natural law. Vitoria first characterizes the Indian as primitive and therefore lacking in full legal personality, and then proceeds to outline a series of legal principles, based on natural law, which justify Spanish intervention in the Indies for the purposes of civilizing the Indians. Vitoria's work exemplifies, I argue, the formulation and operation of the dynamic of difference, and this at the very beginning of the discipline international law. The dynamic precedes, indeed generates, the concepts and dichotomies – for example, between private and public, between sovereign and non-sovereign – which are traditionally seen as the foundations of the international legal order. Despite Vitoria's significance as the first international legal jurist, the importance of his work has not been generally recognized as outlining, in clear and stark terms, the colonial origins of international law. My purpose in studying Vitoria is to establish my analytic framework, my methodology as it were, and to use some of the themes and concepts evident in his work to study subsequent periods.

Chapter 2 deals with the late nineteenth century, the apogee of colonial expansion. The international lawyers of the period, such as John Westlake and Thomas Lawrence, characterized themselves as positivists, as radically different from their naturalist predecessors. Nevertheless, the positivists used their new vocabulary of sovereign consent and recognition to exclude the non-European world as backward and

[14] My approach is indebted to the pioneering work of post-colonial scholars, including Edward Said, *Orientalism* (New York: Pantheon Books, 1978); Edward Said, *Culture and Imperialism* (New York: Knopf, 1993); Spivak, *A Critique of Postcolonial Reason*; Homi Bhabha, *The Location of Culture* (London: Routledge, 1994); David Scott, *Refashioning Futures: Criticism After Postcoloniality* (Princeton: Princeton University Press, 1999); Chakrabarty, 'Postcoloniality and the Artifice of History'. For a good overview, see Bart Moore-Gilbert, *Postcolonial Theory: Contexts, Practices, Politics* (New York: Verso, 1997).

[15] See the discussion in chapter 1.

uncivilized and to elaborate a legal framework that justified colonization as a means of accomplishing the civilizing mission. The dynamic was reconstructed in this way in the positivist era.

Chapter 3 focuses on the jurisprudence of the inter-war period (1919–39) and traces in general terms the shift from positivism to the new jurisprudence of pragmatism that was related to the emergence of the first major international institution, the League of Nations. My particular focus is on the Mandate System of the League of Nations that provided the international system with a new means of managing colonial relations through the technologies developed by international institutions. The Mandate System commences the task of promoting self-government among colonized peoples, and consequently can be seen as the beginning of the great project of decolonization that was taken up and completed by the United Nations. I focus on how colonial problems, as they were understood in the League period, shaped the character and identity of these institutions and, correspondingly, how these institutions shaped the governance of the non-European societies to which they applied. I argue that a study of this history illuminates the operations of contemporary international institutions such as the World Bank and the International Monetary Fund (IMF) which exercise an extraordinary influence on Third World states and peoples.

Chapters 4–6 basically trace developments since the emergence of the United Nations, and might be simply summarized in terms of the key, governing themes of each, which deals with a particular period: decolonization, globalization and terror. The colonial confrontation was characterized by resistance and rebellion by the non-European states that were colonized by the great Empires. However, it was only in the United Nations period that the independent societies of the Third World were able to use the newly acquired resources of sovereignty to develop their own internal polities, on the one hand, and to advance their interests in the international system on the other. Chapter 4 examines both the internal and external dimensions of the newly emergent post-colonial state. In the internal sphere, the state sought to control and assimilate minorities in order to create a coherent nation-state. Here, I argue, the civilizing mission is reproduced by the post-colonial state itself in its application to minorities. In the international sphere, I examine the attempts of the new post-colonial states, acting together as the Third World, to advance their interests by exercising their recently acquired sovereignty to create a 'New International Economic Order' (NIEO). Having traced the way in which the colonial encounter affected the