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The Colonial Nature of International Law

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DAVID GARDNER, JUN 8 2010

"International law was principally a consequence of imperial expansion."[1]

In this paper I will argue that international law is colonial. In order to argue this effectively I will start by defining international law and colonialism. After which, I will show how international law is a colonial relic, having been developed at a time of colonialism, with roots in the Greek and Roman Empires. I will then argue that international law is not based on an 'inherent natural law', and thus that it is merely a tool for the imposition of western political ideas upon the world as a whole. Finally, I will argue that international law is colonial in the sense that by ceding sovereignty to be governed by law, sovereigns are being colonised by the western, primarily, European legal system.

For the purpose of this paper I define 'international law', as the law of states, made for states. It is the law, which governs sovereign powers. "In considering the nature and development of international law ... states are the primary subjects of international law." [2] Equally, "colonialism is a practice of domination, which involves the subjugation of one people to another." [3] Colonialism is the creation and building of colonies in a territory by the people of another territory. It is the process where, the sovereignty over the colony is claimed by the coloniser. Colonialism brings with it the removal of a subject's sovereignty. Colonialism implies inequality and subjugation, while international law should be equal and universal. In being universally applicable to all, international law could not be considered simply as a method of imposing one's values on weaker states.

Bederman suggests that, "while the modern international system can be traced back some 400 years, certain of the basic concepts of international law can be discerned in political relationships thousands of years ago." [4] Nicolson argues that even the earliest developing man may have dealt with one another on such matters as hunting grounds and ending battles. [5] If this were the case, one of the first laws governing such relationships, and consequently one of the first examples of inter-territorial law may have been the inviolability of a messenger or negotiator; potentially an early example of diplomatic immunity. However, such examples from ancient civilisations are geographically and culturally restricted, and one can not logically argue, without being overly reductionist, that such examples are the origins of modern international law.

There has been much discourse surrounding this question from a merely historical point of view. Historians may argue that law was developed at a time of colonialism dating back to the Chinese, Greek and Roman Empires. "The Romans had a profound respect for organisation and the law." [6] The early Roman, *jus civile*, applied solely to Roman citizens. However, such laws were unable to provide a legal framework for expanding sovereigns. *Jus gentium*, was later developed for this purpose; it was designed to govern relations between foreigners and Roman citizens. Shaw explains that "the instrument through which this particular system evolved was the officially known as the *Praetor Peregrinus*, whose function it was to oversee all legal relationships, including bureaucratic and commercial matters, within the empire" [7]. However, it must be remembered that there was no acceptance of other nations on a basis of equality or universality, and thus *jus gentium* remained solely a domestic law for colonies under control of the Roman Empire. Such empires did develop import axioms and theories of law, which have since

The Colonial Nature of International Law

Written by David Gardner

become integral to international law but they did not establish an international law, due to the fact that they acted with disregard to external rules in their dealings with those territories that were not already part of their respective empires.

One of the most influential of Greek concepts taken up by the Romans was the idea of natural law[8]: the argument that there is a body of rules of universal relevance. Grotius, like many others believed that laws were constructed by men, but ultimately they reflected essential natural law. Grotius maintained that natural law came from an essential universal reason, common to all man. He argued that law was not imposed from above, but rather derived from principles. Due to his argument that the ideas and precepts of the 'law of nature' were rooted in human intelligence, he maintained that such rules could not be restricted to any nation or any group but were of worldwide relevance. Advocates of international law argue that international law is based on natural law and is, therefore, universally applicable to all. In principle, there is a strong case to be made for a law that is inherent in all man. Basing international law on natural law is mistaking an a posteriori argument for an a priori truth, and would perpetuate the spread of and dominance of western academic thought through what is essentially a socially constructed belief and not an a priori given. The classic problem associated with natural law is, who decides what natural law is? Using a putative theory as a basis for law, means that natural law will always be interpreted through one's self-interest. It is intrinsically subjective to interpret natural law and this led O'Connell to argue that natural law "will be constantly found to be aimed at a particular state or group of states; and for this reason, if for no other, the power element is obvious in international law." [9]

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, are often criticised as being based too heavily on the West's importance of liberalism and individualism. Accepting such rights as intrinsic norms, rather than western social constructions is to risk undermining alternatives. For states to commit to one single declaration of international law would "require sacrificing diverse cultures and their unique way of viewing the world" [10]. Commitment to a single declaration of international law would mean the loss of culture, and from some perspectives, it would mean commitment to a law that "has supported imperialism, militarism, male supremacy, racism, and other pathologies of human history" [11]. Within O'Connell's view is the argument that international law has allowed, and at times required, the subjugation of people and suppression of distinct cultures in a similar way that colonialism did at a time of imperialistic expansion. As a result, international law is not universal, is not based on a given natural law, and is subject to the manipulation and interpretation of powerful states, consequently "international law perpetuates current power structures" [12].

Concrete rules of international law are derived from what states actually do, and what precedents they set, rather than what the 'law of nature' suggests they ought to do. Morgenthau argues that "the great majority of the rules of international law are generally observed (because) it is in the interests of the state to oblige." [13] Where national self-interest demands action contrary to international law, the only obligation on states is to act in their own self-interest. Such a realist argument suggests that if states are economically rational they will only comply with international law if the cost, such as war, economic sanctions or trade embargoes outweigh the benefits of such a move. However, such enforcement methods allow the perpetuation of power to manifest itself in selective enforcement and shows that the cost of contravening international law to the most powerful is too small to force compliance as it they themselves who created such laws. Equally, imposing sanctions on 'criminal countries' may be to the detriment of the 'policing' body. An interesting example is the comparison between the differing enforcement policies adopted by the international community against China and Uzbekistan. Recently, there has been much media attention about numerous counts of Human Rights abuses in China, as well as their emotive treatment of Tibet: yet, no trade sanctions, punishments or international court appearances have resulted. This is unlike in Uzbekistan, where after a "bloody crackdown" [14] in 2007, heavy economic, diplomatic and arms sanctions were imposed on the central Asian state with a low GDP [15], compared to a powerful emerging super-power. It could be argued that western powers and international organisations, did not impose sanctions on China, due to the large amount of exports from and the economic importance of China, in the international system, while a weaker state such as Uzbekistan is forced to abide by international law due to its less powerful position in the international system. In this case, we see that international law, although allegedly universally applicable to all, may only be enforced upon certain states and that "international law is used by the already powerful to protect that power" [16].

The Colonial Nature of International Law

Written by David Gardner

Post-modern critiques of international law hold a lot in common with classical realist arguments. They maintain that if international law is not law, in that one has the choice to subscribe to it. It is not international morality, as morality is a societal construct. Then law is merely an aspect of politics, which can be manipulated to one's self-interest and politics. If we accept colonialism as "a practice of domination, which involves the subjugation of one people to another", which brings with it the removal of a subject's sovereignty, then international law is arguably colonising the states, who consent to international law. Bodin argued in *De Republica* that to be sovereign a prince must be "freed from laws"[17], yet in consenting to international law, it seems that states are ceding their sovereignty and thus, I would argue, are being colonised by international law, and socially constructed western values. Such values are being imposed on weaker states, who are not powerful enough to contest international law. The threat of becoming outcast in the global system is one that means "the strong do what they can and the weak suffer what they must"[18].

As I have shown, the origins of international law are rooted in colonial empires. Such empires, primarily in the west, developed domestic law and treatise, which formed the basis for an adoption of international law. International law is not objective, nor is it universal and despite being constructed on western values, it has, however, become widely adopted by 'sovereign' states. Ultimately, I have argued that international law is colonial.

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The Colonial Nature of International Law

Written by David Gardner

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The Colonial Nature of International Law

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