

UNIVERSITY OF AUCKLAND

Intensive LL.M Course

Imperialism and International Law (Law Publ 743)

Visiting Lecturer Tony Anghie

1. Course Description:

This course examines the relationship between imperialism and international law from historical, methodological and doctrinal perspectives by studying cases, classic texts, and contemporary scholarly debates regarding post-colonialism and third world approaches to international law. The historical approach examines the processes of colonization, decolonization and globalization through close readings of a number of texts, ranging from the sixteenth century to the present, that deal with relations between European and non-European societies. The theoretical approach explores the question of how the relationship between colonialism and international law has been traditionally understood, and the strengths and weaknesses of these understandings. The doctrinal approach examines the particular legal principles and doctrines that have been used to account for relations between European and non-European states. Throughout the course we will focus on various broad themes. How does a study of the relationship between imperialism and international law illuminate contemporary international relations? How has the non-European world responded to the challenges of colonialism? What are the analytical tools that must be developed for the purposes of understanding the relationship between imperialism and international law? How do issues of race and exploitation shape the character of international law? What does international justice mean, and how can it be achieved? We will also study current debates about the character of globalization, the issue of reparations for colonial exploitation and slavery, and American foreign policy.

2. Materials:

There is no single text book for this case. The materials consists of a compilation of writings, cases and legal instruments that are available from the Postgraduate Manager.

3. Engagement:

This course will involve close readings of the prescribed materials, many of them classic texts of international law. It will take the form of a seminar and rather than a class, and requires active participation in the discussions. Class presentations and exercises will also be incorporated into the course.

4. Assessment:

Assessment will be based on a research paper 12,000-15,000 words in length, due approximately 12 weeks after the conclusion of the course.

5. Contact:

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Unit One: Introduction

- Peter Malanczuk, Akehurst's Modern Introduction to International Law (1997) pp. 5-30
- Dipesh Chakrabarty, 'Postcoloniality and the Artifice of History', extract from The Post-Colonial Studies Reader, edited by Bill Ashcroft et.al (1995) pp. 383-388
- Niall Ferguson, 'Hegemony or Empire', Foreign Affairs, September/October 2003, pp. 154-161
- Assorted short pieces relating to current discussions of Empire
- Letter of Columbus, 'The Four Voyages of Columbus' edited by Cecil Jane

Notes and Issues:

-The extract from Malanczuk is a relatively recent overview of the history of international law. What are the basic themes and issues that he focuses on when presenting this history? What are the fundamental problems that international law has attempted to deal with? What are the doctrines that international law has developed for this purpose? What are the key events presented here as central to the development and progress of international law? What are Chakrabarty's concerns about the ways in which history is written? And the histories of non-European peoples in particular? What implications do Chakrabarty's views have for how we should approach the history of the relationship between international law and the non-European world? Why has 'Empire' re-emerged as a subject of contemporary relevance and debate? How do these contemporary discussions and analyses relate to the themes and issues that we see presented in Malanczuk and Chakrabarty?

Unit Two: Francisco Vitoria and the Colonial Origins of International Law

- Francisco de Victoria, *De Indis Et De Ure Belli Relectiones* ('On the Indians Lately Discovered') extracts.
- Robert A. Williams Jr, The American Indian In Western Legal Thought, (1990) pp. 96-108
- Georg Cavallar, The Rights of Strangers: Theories of International Hospitality, the Global Community and Political Justice Since Vitoria (2002)

Notes and Issues:

Vitoria's text is regarded as one of the foundational texts of international law. The text consists of a series of lectures. I have taken extracts from Vitoria's text, but I have also

included the 'Summaries' of the other sections so that we might get a sense of Vitoria's overall argument. The basic issue he is trying to resolve is the question of Spanish title over the Indies. Note his list of 'illegitimate titles' and compare that with his own account of how legitimate title could be established over the Indies. How does he characterize the Indian? The Spanish? What is the relationship between religion and his system of law? What are the circumstances in which war can be waged on the Indians? What are the rules that have to be observed in such a war?

We will concentrate on reading Vitoria's text-but I have also included some commentary by current scholars regarding Vitoria and his work. Skim Williams and Cavallar. Who do you agree with, based on your own reading of Vitoria?

Unit Three: Hugo Grotius, War and Colonialism:

-Hugo Grotius, *De Jure Belli ac Pacis* (The Rights of War and Peace) Chapter II , pp. 31-54

-Richard Tuck, *The Rights of War and Peace* (1999) pp. 89-109

-Martin van Gelderen, Vitoria, Grotius and Human Rights, in Wolfgang Schmale (ed.) *Human Rights and Cultural Diversity* (1993) p. 214-231

Notes and Issues:

Grotius's writings are very diverse and far ranging. The chapter from his classic work *The Rights of War and Peace* is extracted here to give us a sense of his method and approach, and his use of different types of authorities to advance his arguments regarding war. Tuck and van Gelderen serve to give us a broader understanding of Grotius's works and how they relate to many themes that we will be examining later.

In what circumstances can a state go to war? What role does law have to play in the conduct of war? How does Grotius characterize the 'sovereign' and the rights of the sovereign? What is the basis of the natural law system Grotius expounds? How does Grotius understand religion and the relationship between natural law and religion? What are the connections we might make between Grotius's ideas about war and colonialism, as suggested by Tuck and van Gelderen? Does Grotius suggest that his system applies to non-European states?

Unit Four: Kant and Perpetual Peace

-Immanuel Kant, 'Perpetual Peace: A Philosophical Sketch' in *Kant:Political Writings* (edited b Hans Reiss) (1997) pp. 93-130

Notes and Issues:

-What are the basic elements in Kant's construction of a Perpetual Peace? What is his view of the law of nature? Of human nature? Of the state? What is the relationship between the internal character of a state and its external behavior? What are the implications of Kant's theory for the non-European societies we have encountered in earlier classes? What is Kant's understanding of imperialism and what is the relationship between imperialism and perpetual peace?

Unit Five: Colonialism and Nineteenth Century International Law

- Wheaton's Elements of International Law (5th edition) 1916, 1-23
- John Westlake, 'Chapters on the Principles of International Law', extracted in Philip Curtin (editor), Imperialism, pp. 46-63
- T.J.Lawrence, The Principles of International Law (7th edition) (1923)145-166
- Gerrit Gong, The Standard of 'Civilization' in International Law (1983), pp. 54-76

Sample Treaties:

- The Treaty of Nanking
- A Typical Blank Treaty
- The Treaty of Waitangi
- The Treaty between Japan and Korea

Notes and Issues:

Wheaton offers a useful overview of the history of international law as it appeared to a 'nineteenth century' sensibility. He traces one of the crucial developments of this period, the shift from 'natural law' to 'positive law' (pp. 14 onwards). John Westlake, Whewell Professor of International Law, was one of the most eminent international lawyers of the late nineteenth century. Gong's work provides a sort of overview of period that is studied, and I suggest you skim Gong and then read the other works.

How does Wheaton characterize the history of international law-and what is distinctive about the method of international law he proposes? What is his view of natural law? What does the shift from natural law to positive law entail, and what implications follow for non-European peoples? How does Westlake characterize the sovereignty of non-European peoples? What are the different ways in which territory may be acquired? What implications do these doctrines have for non-European peoples? What is the relationship between the jurisprudential technique of nineteenth century international law and these doctrines? What are the elements of nineteenth century treaties, some of which are extracted in these works?

Unit Six: Colonialism and the League of Nations-The Mandate System

- Article 22 of the League Covenant;
- The Mandates for Irak and Nauru
- H. Duncan Hall, Mandates, Dependencies and Trusteeships (1948) 44-52; 91-106
- President Bush, Speech to the UN General Assembly, September 2003 (extract)

Notes and Issues:

What historical factors led to the creation of the Mandate System? How did the authors of the Mandate system understand the relationship between colonialism and international law? What doctrines and mechanisms were developed by the Mandate System to deal with colonial problems? How does Article 22 of the League Covenant characterize the relationship between mandate powers and mandate peoples? What do the Mandates for Irak and Nauru suggest about the way in which international institutions sought to protect colonial peoples? How does the League of Nations approach to 'colonial problems' differ from the nineteenth century approach?

Unit Seven: Self-Determination and Third World Nationalism

- UN Declaration of Principles of International Law Concerning Friendly Relations Among States-General Assembly Resolution 2625
- U.O.Umozurike, Self-Determination in International Law (1972) pp.177-203
- Ruth Gordon, 'Saving Failed States: Sometimes A Neocolonialist Notion', 12 American University Journal of International Law and Policy 953, (1997) (extracts) 953-974
- Frantz Fanon, 'Concerning Violence' from The Wretched of the Earth (translated by Constance Farrington) 1963, pp.63-84

Notes and Issues:

-GA Resolution 2625 outlines the basic elements and concerns of the doctrine of self-determination. What is the relationship between self-determination and colonialism? What obligations are imposed on states in relation to self-determination? The Umozurike reading gives an outline of the law of self-determination, how it evolved, its relationship to the mandate system etc. Ruth Gordon's article also traces the relationship between the mandate system and self-determination. 'The Wretched of the Earth' is one of the classic works of third world nationalism. What is Fanon's vision of third world nationalism? What are the strengths and weaknesses of this type of politics? What insights does this work provide into the psychology of colonialism? Can the problems Fanon describes be overcome through self-determination?

Unit Eight: Development and The New International Economic Order

- R.P.Anand, 'Attitude of the Asian-African States Toward Certain Problems of International Law', 15 Int.& Comp.L.Q. (Jan. 1966) pp. 54-75

- UN General Assembly Resolution 1803, Permanent Sovereignty Over Natural Resources (1962)
- Charter of Economic Rights and Duties of States, G.A.Res. 3281 (1974)
- Norbert Horn, 'Normative Problems of a New International Economic Order', 16 (4) J.World Trade L. 338-351 (1982)
- Edward Kwakwa, 'Emerging Development Law and Traditional International Law- Congruence or Cleavage?' Geo.J. Int'l and Comp.L. 431-455 (1987)
- Texaco Overseas Petroleum et.al v. Libyan Arab Republic, 17 I.L.M. 1 (1978)

Notes and Issues:

-R.P.Anand's work sets out some of the basic concerns of the 'New States'. Resolution 1803 (1962) and The Charter of Economic Rights and Duties (1974) represent the attempts of the Third World to create a new set of international economic law principles. Horn's article is a critique of these efforts. Kwakwa examines the attempt to make 'development' a central aspect of international law.

-What were the basic problems facing the Asian-African states after their independence? What was their attitude towards international law? Skim the Charter of Economic Rights and Duties: what sorts of principles was the third world intent on making international law? How did the West respond? What was the relationship between this 'New International Economic Order' (NIEO) and the old international economic order? And the old international economic law? What does the *Texaco* suggest by way of how the NIEO was received into international law and the legal strategies used to meet the third world claims? Please read the *Texaco Case* carefully in the context of the earlier materials.

Unit Nine: Human Rights, Imperialism and Culture

- Universal Declaration of Human Rights
- Extracts from Henry Steiner and Philip Alston, International Human Rights Law in Context (2d edition); includes readings by Kausikan, YashGhai and Jack Donnelly.
- Makau wa Mutua, 'Savages, Victims and Saviors: the Metaphor of Human Rights', 42 (1) Harvard International Law Journal (2001) pp. 209-219.
- Humanitarian Intervention: A Forum, The Nation, July 14 2003.

-Notes and Issues

-Are Human rights as set out in the Universal Declaration of Human Rights universal? Are human rights doctrines simply a mechanism by which the West imposes its values on the rest of the world? Is there a 'third world' approach to human rights? Note that Kausikan and Mutua offer contrasting critiques of international human rights law. Is humanitarian intervention yet another means of using human rights as a means of invading the non-European world? Also, please keep in mind the reading we have already done that relates to this topic-Kant, Vitoria etc.

Unit Ten: Internal Colonialism: Minorities and Indigenous Peoples

- United Nations, Draft Declaration on the Rights of Indigenous Peoples, 1994/45
- United Nations, Declaration of the Rights of Peoples Belonging to National or Ethnic, Religious or Linguistic Minorities (1992)
- Paul Keal, European Conquest and the Rights of Indigenous Peoples, (2003) pp. 113-136

Notes and Issues:

-How do the practices of imperialism and colonialism apply to minorities and indigenous peoples? Should the concept of 'self-determination', apply to minorities and indigenous peoples? How do the various UN instruments characterize the rights of indigenous peoples and minorities? What are limits and problems associated with this conceptualization?

Unit Eleven: Globalization and Imperialism?

- Richard J. Barnett and John Cavanaugh, Global Dreams (extracts)
- David Held, 'The Great Globalization Debate: An Introduction', in The Global Transformations Reader (David Held and Anthony McGrew, eds.), Polity Press
- B.S.Chimni, 'Third World Approaches to International Law: A Manifesto' in The Third World and International Order: Law, Politics and Globalization (2003) pp. 47-72
- David P. Fidler, 'A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies and the Standard of Liberal, Globalized Civilization', 35 Texas International Law Journal 387 (2000), pp. 387-414

Notes and Issues

-What is globalization? How does it affect political, economic and cultural structures? Is globalization simply westernization? Or capitalism? How does globalization differ from previous systems of international relations? What are the opportunities and challenges that third world states confront as a result of globalization? What role do international institutions such as the World Bank and IMF play in this process? In what ways do globalization and imperialism resemble each other? How do Chimni and Fidler characterize the relationship? Do you agree with them? What role do international institutions play in furthering globalization?

Unit Twelve: Liberal Empire and the War on Terror

- Robert Cooper, 'The New Liberal Imperialism, The Observer, 7 April 2002
- Charles Karuthammer, 'The Unipolar Moment Revisited: America, the Benevolent Empire' in The Iraq War Reader, edited by Micah L. Sifry and Christopher Cerf (2003)
- President George W. Bush, The National Security Strategy of the United States, September 2002. (extracts)
- Memorandum, Alberto Gonzales to the President, February 25, 2002 (extracted from 'The Torture Papers: The Road to Abu Ghraib, Greenberg and Dratel, eds. 2005)
- Memorandum, Colin Powell to Counsel to the President, (extracted from the 'Torture Papers)
- Sworn Statement of Detainees, from The Torture Papers.
- Niall Ferguson, Cowboys and Indians, New York Times, May 24 2005.
- Captain Elbridge Colby, 'How to Fight Savage Tribes', American Journal of International Law, 1927, pp. 279-288

Notes and Issues:

-What are the arguments in favor of a return to imperial rule? Does this 'new liberal imperialism' seem a very different and more acceptable type of imperialism? Is America an imperial power? If so, what sort of an imperial power? How should we assess the policies outlined in the National Security Strategy (NSS)-what does it suggest about America's role in the world, and what implications does it have for global order and existing international law? What contrasts and comparisons may be made between the war on terror/ the war in Iraq relate to older colonial wars?

Unit Thirteen: Third World Approaches to International Law

- James Gathii, 'Eurocentricity and International Law', European Journal of International Law
- Dianne Otto, 'Subalternity and International Law: The Problem of Global Community and the Incommensurability of Difference' in Laws of the Postcolonial, edited by Peter Fitzpatrick and Eve Darian-Smith (1999)
- Balakrishnan Rajagopal, 'International Law and Third World Resistance: A Theoretical Inquiry' in Third World Approaches to International Law: Law, Politics and Globalization (2003)
- Vasuki Nesiiah, 'The Ground Beneath Her Feet: TWAIL Feminisms', Third World Approaches to International Law: Law, Politics and Globalization (2003)
- Joel Ngugi, 'Making New Wine from Old Wineskins: Can the Reform of International Law Emancipate the Third World in the Age of Globalization?' 8 U.C.Davis Journal of International Law and Policy, Winter 2002 (extracts)

Notes and Issues:

These works represent recent attempts to rethink the position of the 'third world' in international law. What are the analytic resources and concepts that the different authors

use for this purpose? What are the criticisms that the authors make of conventional approaches to international law? What do these works suggest about what measures can be taken to create a just international system?

Unit Fourteen: Case Study- Colonial Reparations and the Nauru Case

Background Information:

- The Historical Background to the Nauru Case
- `A Pacific Island is Stripped of Everything', New York Times

Applicable Law:

- Article 22 of the League of Nations
- The Nauru Island Agreement
- The Mandate for Nauru
- The Trusteeship Provisions of the UN
- The Trusteeship Agreement for Nauru
- `Nauruan Customary Law' from Christopher Weeramantry, Nauru: Environmental Damage Under International Trusteeship (1990)

Notes and Issues:

- Given the damage caused to Nauru, what legal remedies might international law offer to the people of Nauru? What does the Nauru Island Agreement seek to achieve? How does it relate to other legal instruments governing Nauru, such as the Trusteeship Provisions and the Mandate provisions? What is the relationship between Nauru customary law and the international instruments applicable to Nauru? What difficulties could Nauru face in advancing its claim? What defenses can be used against Nauru?

Unit Fifteen: Overview and Conclusions

- Pratap Bhanu Mehta, `Empire and Moral Identity' 17(2) Ethics and International Affairs (2003)

-This article focuses on the US, but the broad themes outlined here offer perhaps a larger perspective on the effects of Empire for the Imperial center itself.

