

UNIVERSALISING INTERNATIONAL LAW BY CHRISTOPHER WEERAMANTRY
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*Universalising International Law*¹ is a thought-provoking contribution to the debate about international law in the post-September 11 world. While United States President George W Bush has attempted to monopolise international law to justify the ‘war on terror’, Christopher Weeramantry argues that a system of law that remains mono-cultural has no claim to being either international or effective. His book outlines an interdisciplinary project for universalising international law through a thorough engagement with cultures excluded by the Western-dominated system. The project, however, is based on a curious reading of the origins of modern international law, which underestimates the pervasiveness of the colonial and tends to equate culture with religion.

Weeramantry has enjoyed a long and distinguished career as a scholar, public servant and jurist, including serving as a judge on the International Court of Justice between 1991 and 2000. His writings and judgments have taken a strongly humanist stance, and he has conceived peace as the central objective of international law. He has championed human rights, campaigned for nuclear weapons to be outlawed, and argued that non-Western legal cultures can contribute to the legitimacy of the international rule of law.² This book brings together the key themes of his contribution. Its origins lie in the speeches, lectures and judgments that he has given over the past 15 years. Often a collection of this nature risks losing the reader in too diffuse an argument, but this is not the case with this volume.

The essays brim with the enthusiasm of an author who knows he is addressing a varied international audience, including Prime Ministers, educators, students, judges and members of the public. The main argument is coherently developed, demonstrating Weeramantry’s consistency and dedication to his cause over many years. The 17 essays are organised into four sections. In Part A, Weeramantry outlines his overall argument. He elaborates the implications of the universalising process for the sources of international law in Part B, then in Part C he explores its implications for the development of an international law of universal peace. Finally, in Part D, Weeramantry examines the potential application of the universalising process to three critical fields: sustainable development, the environment, and nuclear weapons.

Weeramantry presents international law as an almost spectral form that, having coalesced in the 16th and 17th centuries, then hovers over the future world.

¹ Christopher Weeramantry, *Universalising International Law* (2004).

² See Christopher Weeramantry, *Islamic Jurisprudence: An International Perspective* (1988). I am indebted to the author as it was reading this book that sparked my interest in Islamic law and my subsequent work on colonialism/postcolonialism and Islamic law.

As he puts it:

When international law commenced its modern career in the 16th and 17th centuries, it was cast largely in the Graeco-Judeo-Christian mould. Since then it has moved towards greater universalization. Many more universal perspectives drawn from all the world's cultural traditions can and must be fed into it as it develops to suit the needs of the 21st century.³

Thus international law takes on aspects of a religious and philosophical culture which, although already formed, is open enough to accommodate other cultural inputs. The problem with modern international law, therefore, is that it has not been completed. In Weeramantry's view, it appears as the foundation for a building that is capable of integrating various designs into its final form.⁴ The universalising process involves international lawyers working with scholars in other disciplines, engaging with and researching the possible contributions of those world cultures that were excluded from the foundational periods.⁵

The problem with this approach is that it splits the religious and philosophical discourse of international law from its historical and political origins. While Weeramantry focuses on the philosophical and religious aspects of the form, he underplays its colonial content. This is clearly demonstrated when he outlines the periodisation of modern international law. He defines the first phase, in the 16th and 17th centuries, as 'mainly philosophical' — this phase apparently precedes colonialism.⁶ The second 'colonial' phase only commences in the 18th century and comes to an end at the conclusion of the First World War.⁷ Severing the connection between the philosophical and colonial phases is critical for Weeramantry, as he wants the reader to regard natural law as the real content of international law — a system based on moral principles.⁸ According to this view, international law became corrupted by the colonial experience. It appears as the innocent, compromised by history. Weeramantry argues that the colonial states developed 'self-serving rules', which meant '[i]nternational law as thus adapted from its original natural law contours served well the needs of the world empires'.⁹ It was only after the 17th century that, in a break from its nature, international law 'was able to cast a cloak of legality over the subjugation of conquered peoples, the appropriation of their wealth, the expropriation of their territories and even such practices as the slave trade'.¹⁰

By locating international law's origins in philosophy, Weeramantry is able to argue that the universalising project can be conducted at that level — without being compromised by colonialism. He acknowledges that this philosophy is culturally specific to 16th and 17th century Europe, however he sees it as essentially moral, offering a legal system which is free from the violence of conquest. Its natural law content is open to the universal and can be embraced by those from non-Western cultures. International law in this account can be

³ Weeramantry, *Universalising International Law*, above n 1, 2–3.

⁴ *Ibid.* 2.

⁵ *Ibid.* 6.

⁶ *Ibid.* 4.

⁷ *Ibid.* 4–5.

⁸ *Ibid.* 4.

⁹ *Ibid.*

¹⁰ *Ibid.*

rescued from the corruption of colonialism. Moreover, now that colonialism has come to an end, there is an opportunity to add other non-European philosophical contributions to create a genuine multicultural and universal international law. For Weeramantry, these contributions are for the most part to be drawn from religion. The main task he suggests is the integration of Islam, Hinduism, Buddhism — and Sikhism, Judaism, the Baha'i faith and Confucianism — with the already dominant Christian discourse.¹¹

It is striking how Weeramantry sees our multicultural world in terms of religion. Political ideologies, nationalism, internationalism and secularism in general do not seem to play a role in the universalising process. While it is clear that religion has become more prominent within states in international relations in the past three decades¹² — although not in Europe¹³ — it is highly problematic to assume that religion constitutes the primary aspect of individual identity or the defining characteristic of culture. In any event, religion as a category is notoriously difficult to refer to in the singular. Religions are divided and sub-divided by myriad competing theological trends, and also by politics. Osama bin Laden and the Iranian Nobel Peace Prize Laureate, Shireen Ebada, simply do not represent the same culture despite both identifying as Muslims.

Strangely, having made the case for the effort of integrating excluded religious cultures with European natural law, he argues that they all 'converge in their teachings on the central question of peace'.¹⁴ Indeed, in ch 12 ('Religious Perspectives for Peace'), Weeramantry goes about proving this with quotations from a variety of sacred works. What is interesting is that he demonstrates that these key texts all place a high priority of peace and the sanctity of human life — even in warfare. If this is the case then the universalising project seems somewhat pointless as there appear to be common core values that may be introduced into international law via *any* of these religious systems. Is Weeramantry's point here that natural law has many voices?

Although the exercise is instructive and useful in acquainting scholars and the public with a wide range of religious/cultural contributions, Weeramantry does not deal with the main obstacle to creating a genuinely universalised international law. The key issue is politics. International law has been forged by politics through which philosophy and theology have been put at the service of those in power. The imprint of colonialism is not difficult to trace in international law. It is encoded in its doctrines and present in its institutions. Colonialism was based on the systematic suppression and exclusion of the vast majority of human beings from participation in their own future. It denied them legal standing of any kind. The employment of international law in the service of colonialism was not a deformation of a pure system.

¹¹ Ibid 17–30.

¹² See generally Mark Janis and Carolyn Evans (eds), *Religion and International Law* (1999).

¹³ Europe has seen a drastic decline in religious affiliation and observance in the past two decades, except amongst migrant communities. Christianity has increasingly become a cultural category which incorporates certain moral values, historical narratives and of course a calendar. As a result it plays little role in politics, even in countries with a state church or 'Christian Democratic parties'. Even as a cultural category, however, it is connected to notions of superior civilisation with a glorious past.

¹⁴ Weeramantry, *Universalising International Law*, above n 1, 368.

It is, in my view, simply impossible to separate the origins of international law from colonialism. Indeed, it can be argued that it was colonialism that necessitated the development of modern international law.¹⁵ Europe's Imperial nations required a legal system that would both regulate relations between themselves and legitimate conquest and its consequences. The actual discourse of this international law may well have taken the form of natural law theology but its role was quite clear. It is erroneous to think of international law in the 16th century as being 'before colonialism'. As Antony Anghie has convincingly argued, two of the earliest works of international law in the 16th century, Francisco de Vitoria's *De Indis Noviter Inventis* and *De Jure Bellis Hispanorum in Barbaros*, deal with the legal problems of conquest and the status of the colonised subject.¹⁶ As he says, it is 'hardly possible to ignore the fact that Vitoria is preoccupied with a colonial relationship'.¹⁷

International law was a legitimising force of colonialism. As European colonialism became more assured and widespread, so its legal system aggressively took root. The Peace of Westphalia in 1648 did not establish the doctrine of state sovereignty as such, but rather granted a monopoly of legal personality to the European powers. The development of the laws of the sea guaranteed the freedom of the high seas to these powers for colonial expansion and trade. The legal regulation of war did not aim to establish peace, but rather to provide sovereign states with legitimate reasons for waging it. Along with this went the right of conquest. International law divided the world into the civilised and the uncivilised, permitting civilised states to occupy the uncivilised. Even now in the 21st century, the *Statute of the International Court of Justice* bears the hallmark of this, as art 38(1) still proclaims that one of the sources of international law is the 'law of civilised nations'.

European colonisation brought about a profound 'Europeanisation' of the world. This was not just effected through the occupation of existing polities, but the dramatic transformation of peoples and territories.¹⁸ Through acts of genocide, forced removal of populations, slavery and European settlement, whole continents were remade in Europe's image. The maps of North and South America, Africa, Central and South Asia and Australia record this process. As Weeramantry concedes, all these acts were sanctioned by law.¹⁹ They were, however, sanctioned by precisely the natural law that he believes is so open to being universalised.

Moreover, the colonial process has not exactly ended in the neat way that Weeramantry suggests. He writes of 'a multitude of new states, long deprived of their sovereignty, [which] were released from the bondage of colonialism to become full-fledged members of the community of nations', in the period after

¹⁵ See, eg. Peter Fitzpatrick, *Modernism and the Grounds of Law* (2001).

¹⁶ These are two lectures published in 1557. See Antony Anghie, 'Francisco de Vitoria and Colonial Origins of International Law' in Eve Darian-Smith and Peter Fitzpatrick (eds), *Laws of the Postcolonial* (1999) 89.

¹⁷ *Ibid.*

¹⁸ More significantly, this 'Europeanisation' included the imposition of knowledge and culture; see generally Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (1999).

¹⁹ Weeramantry, *Universalising International Law*, above n 1, 4.

1945.²⁰ Yet most of these states were completely new, possessing populations and territorial delimitations with identities assigned by colonialism. This was not the resumption of the pre-colonial polities. This reality is reflected in the legal doctrine of self-determination which began with granting peoples living under colonial regimes the right of self-determination.²¹ In its *Advisory Opinion on Western Sahara*,²² the ICJ makes clear that being a colonial territory gives rise to a right of self-determination.²³ Pre-colonial legal relations are not decisive. Also, by using the doctrine of *uti possidetis*, the international legal system has (mostly successfully) policed the boundaries created by colonialism. Thus the doctrine of self-determination represents a new legal right that frees peoples from colonial rule, yet also sanctifies the effect of colonialism on those societies.

The colonial imprint of international law is also apparent in the way in which the US sees its relations with the rest of the international community.²⁴ Like the European colonial powers at the beginning of the last century, the US conflates its own national interest with the international interest. The US has long equated threats to its national interest with threats to international peace and security — such as the establishment of the Castro regime in Cuba.²⁵ This has become more pronounced after September 11 as the US poses as the universal defender of democracy, human rights and the rule of law.²⁶ Indeed, in this US account, even the Iraq war was fought not so much without UN approval, but due to the inability of the organisation to rise to its international obligations. It is perhaps significant that none of the UN Security Council resolutions after the war challenged this position — they actually granted legitimacy to the occupation administration and then provided the means for the transitional Iraqi regime.²⁷ Where once Imperial Britain and France claimed responsibility for the civilising mission, the US now claims an obligation to rid the world of terrorism through imposing, by force if necessary, international standards of human rights and democracy.

Universalising International Law is a challenge to international lawyers to engage in creating an international legal order that reflects the world in which we live. Few can disagree with this objective. However, Weeramantry does not address the reliance of international law on political power and its distribution in international society. I have contended in this review that modern international

²⁰ Ibid 109.

²¹ See *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UN GAOR, 15th sess, 947th plen mtg, UN Doc A/RES/1514 (XV) (1960). *Resolution 1514* states that: 'All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.

²² [1975] ICJ Rep 12.

²³ Ibid 30–7.

²⁴ I am not arguing necessarily that the US is a new Imperial power — rather that international legal discourses equip it with important legal privileges that derive from colonial origins.

²⁵ See Kim van der Borgh and John Strawson, 'Cuba and the Axis of Evil: An Old Outlaw in the New Order' in John Strawson (ed), *Law after Ground Zero* (2002) 59.

²⁶ See especially Dominic McGoldrick, *From '9–11' to the 'Iraq War 2003': International Law in the Age of Complexity* (2004) 87–121.

²⁷ See *Resolution 1483*, SC Res 1483, UN SCOR, 58th sess, 4761st mtg, UN Doc S/RES/1483 (22 May 2003); *Resolution 1500*, SC Res 1500, UN SCOR, 58th sess, 4808th mtg, UN Doc S/RES/1500 (14 August 2003); *Resolution 1511*, SC Res 1511, UN SCOR, 58th sess, 4844th mtg, UN Doc S/RES/1511 (15 October 2003).

law is not merely implicated in colonialism but is a product of it. International law has served power in carrying out some of history's greatest brutalities. The officials, soldiers and, indeed, lawyers who participated in them were often regarded as heroes rather than war criminals. Some are still drawing their pensions in Paris and London. It is extraordinary that the governments of the former colonial powers cannot even bring themselves to acknowledge what today would be called crimes. There are no monuments to the victims, no days of remembrance. Without dealing with this past we will be unable to extricate ourselves from the postcolonial present of which the tragedy of Iraq is so symbolic.

It is ironic that George W Bush is responsible for sparking a popular debate about international law with progressive possibilities. In the mass demonstrations before the Iraq War one of the most popular slogans was that the war was 'illegal'. Since the war, interest in international law in the mass media has risen. A sceptical public has become increasingly concerned about powerful Western governments claiming the right to make drastic decisions. The legitimacy of the Iraq war is still questioned and the stories about Iraq's weapons of mass destructions disbelieved. The same public is revolted by the treatment of prisoners in Guantanamo Bay and at Abu Ghraib. In this new atmosphere the conditions may have been laid for work on the reconstruction of theoretical and political basis of international law. Christopher Weeramantry's book forces readers to think about the fundamental questions at an opportune time. However, it is only by exploring the relations between politics and international law that we can really universalise it. While students still learn that the 'law of civilised nations' is a source of international law, I fear we are all drinking from a poisoned well.

JOHN STRAWSON*

* BA (Kent), LL.M (London); Director of the Encountering Legal Cultures Research Group, School of Law, University of East London.