LATCRIT AND TWAIL

ANTONY ANGHIE*

I am very honored to be here. This is the second LatCrit Conference I have attended, as I was also present at the 2005 conference in Puerto Rico. I was impressed by the energy, enthusiasm, and the rich and powerful presentations made by the speakers at the 2005 conference. This occasion is no different. I have already learned a great deal from the outstanding panels I have attended.

My own field is international law. I am a member of the Third World Approaches to International Law (TWAIL) group of scholars, and I suggest in this short presentation that there is a great deal of commonality between the goals and purposes of LatCrit and TWAIL. Considering the issue now, it is striking to me that both projects emerged at roughly the same time—LatCrit held its first conference in 1996 and TWAIL held its first conference in 1997. Then, in 2000, at an important conference organized by Professor Ruth Gordon at Villanova University, a group of scholars from various traditions, including LatCrit, explored the connections between critical race theory and TWAIL by focusing on the issue of race in international law scholarship.[1]

Many LatCrit scholars have made important contributions to our understanding of various issues in international law. The work of scholars such as Keith Aoki, Tayyab Mahmud, Elizabeth Iglesias, Berta-Hernandez Truyol, Carmen Gonzalez, and Ernesto Hernandez-Lopez come to mind. Indeed, LatCrit as a movement has initiated important studies into various aspects of international law. I am both delighted and impressed to note that, in keeping with its ambition to

---

* Antony Anghie is the Samuel D. Thurman Professor of Law at S.J. Quinney College of Law at the University of Utah.

1. *See generally* Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827 (2000).

relate theory to praxis, LatCrit has initiated a North-South exchange program that fosters an examination of the relationship between justice at the national and international levels.

Many of the major themes and issues that animate LatCrit and which have resulted in its emergence and development over the years are familiar to TWAIL scholars, even if not expressed in quite the same lexicon. In their own way, TWAIL scholars have also attempted to address several of LatCrit's preoccupations, such as the challenges of departing from the tradition of "imperial scholarship," articulating principled alternative futures, and the focus on "anti-subordination" that is such a constant and powerful theme of LatCrit.[2]

In this brief presentation, I will elaborate on and exemplify another shared concern of TWAIL and LatCrit studies—the concern to excavate subordinated knowledges. For me, this involves a number of interrelated tasks, including examining doctrines and rules from the perspective of the most disadvantaged as part of an ongoing effort to understand how rules that are seen as neutral, objective, and fair could be anything but when examined in terms of their effect. I also suggest the value of studying history in a critical manner. It is something of a truism that history is written by the victors. But how might we see "history" if that history is written from the perspective of the victims?

Sovereignty is the foundation of the discipline of international law.[3] Indeed, international law is commonly understood as the law that governs relations between sovereign states. My interest lies in understanding what historical narratives support conventional approaches to international law and in trying to recover other histories in order to suggest a new analytical framework—a set of ideas that might make us better appreciate and illuminate the ways in which these ostensibly neutral doctrines have affected (and continue to

---

2. I am indebted to the detailed accounts of the methodologies, politics and histories of LatCrit that are provided in Berta Hernandez-Truyol, Angela Harris & Francisco Valdes, *Beyond the First Decade: A Forward-Looking History of LatCrit Theory, Community and Praxis*, 17 BERKELEY LA RAZA L.J. 169 (2006); Margaret Montoya & Francisco Valdes, *"Latinas/os" and Latina/o Legal Studies: A Critical and Self-Critical Review of LatCrit Theory and Legal Models of Knowledge Production*, 4 FLA. INT'L U. L. REV. 187 (2008).

3. WILLIAM R. SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW 4-5 (6th ed. 2011) (citing Anne-Marie Slaughter, *Leading Through Law*, WILSON Q., Autumn 2003, at 37 (2003)).

affect) the lives of the people who are often the victims of these processes.[4]

I suggest that the conventional history of international law is based on three fundamental premises. The first premise is that international law is created through the history and experience of the West or, even more particularly, Europe. This idea is powerfully reinforced by the notion that sovereignty itself, the very foundation of the discipline, was created in Europe, particularly, the model of sovereignty that emerged with the Peace of Westphalia that ended the savage Thirty Years War that destroyed much of Europe, extending from Sweden to the Balkans.[5]

The second closely-related premise is that the non-European world is peripheral to the making of international law. That is, doctrines such as sovereignty were created in the European world and then extended out to encompass the non-European world. International law is meant to be universal in its scope. Within this framework, international law only achieved its complete form and identity once the doctrines created in Europe were applied throughout the world. This is what basically occurred in the latter half of the nineteenth century. To say that imperialism was peripheral to the discipline is not to say that it was a subject neglected by (until relatively recent times) the Western writers of international law. On the contrary, virtually all the great writers of the discipline have written quite extensively on the topic of imperialism and international law. However, these writers generally treated imperial issues as practical rather than theoretical. The whole phenomenon of imperialism raised important questions about how natives were to be governed. But these questions, at least as perceived by these scholars, were not of the first *theoretical* importance. They did not impinge on the great questions that preoccupied these scholars and on which their reputations were to be made. Within this conventional scheme, the

4. This may then be seen as an exercise in "interrogating critically." The observations of Francisco Valdes are very illuminating and apposite here: "To interrogate critically is to question the multiple array of assumptions, imperatives and effects—unspoken as well as spoken—that drive the status quo." Francisco Valdes, *The Constitution of Terror: Big Lies, Backlash Jurisprudence, and the Rule of Law in the United States Today*, 7 NEV. L.J. 975, 976 (2007).

5. *See generally* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 9-34 (7th ed. 1997).

non-European world was characterized as somehow inherently lacking sovereignty. Accordingly, international law plays the benevolent role of incorporating the non-European world into the Western system of sovereignty. This may have necessitated imperial rule initially, but the task of international law was completed in two different stages—first, when the entire world was encompassed by the one system of European international law, and second, when previously colonized states finally emerged, through the process of decolonization, as sovereign, independent states.

The third related premise is the notion that the major issue confronting the discipline of international law is how law can be created among equal and sovereign states. Put differently, is international law really "law" when the international system lacks an overarching sovereign that can legislate and enforce the law? Specifically, how can *international* law be created in a system of horizontal authority in which all sovereign states are equal, at least juridically? This problem of the binding nature of international law has haunted the discipline since John Austin, a nineteenth-century jurist, proclaimed that international law was simply a form of morality because the international system lacked a governing, central sovereign.[6] Yet, it is unclear why Austin's definition of international law (of all other possible definitions) has acquired such authority over time. Nevertheless, the legacy of Austin's argument has been enduring and it has manifested itself in at least two forms. First, as all of you who have studied international law have probably found out, it is customary to begin international law courses by attempting to address the challenge of defining the field and by presenting the reassuring argument that international law really is "law," even if not in the way that domestic law is "law." Indeed, many of the most classic texts of international law begin by addressing this problem. Second, all the great scholars of our era have attempted to address this fundamental challenge and all the issues it raises. It represents a sort of "Everest" as scholars attempt to provide a theory as to why international law is binding even if it does not comply with the Austinian model. While empirical studies may reveal that most countries abide by international law most of the time, the concept of "legitimacy" may be used to suggest why states would abide by

6. *See generally id.*

principles of international law even though such principles could not be strictly enforced.

By contrast, I suggest that each of these premises or structuring principles is either wrong or seriously inadequate in terms of its characterization—both in the role of non-European peoples in the making of international law, and in terms of appreciating the effects of international law on non-European peoples.

I offer an alternative set of propositions. First, I suggest that international law was not created in Europe and then transferred to the non-European world. Rather, international law was created out of the imperial encounter. That is, sovereignty was structured in such a way as to empower one side, the West, and disempower the other side, the non-West. The conventional argument suggests that the non-European world was somehow lacking sovereignty and this sovereignty had to be gradually bestowed upon them by Europe. But how was it decided that non-European peoples were lacking in sovereignty in the first place? I argue that the sovereignty doctrine, as it emerged from the imperial encounter, plays the crucial role of stripping non-European peoples of their sovereignty. Once this is done, these people, dispossessed of the legal personality that would enable them to participate in the international system and claim rights within it, can be the object of conquest and violence by imperial European states. While this conventional approach to sovereignty presents it as a benevolent process that extends out to empower the marginalized and disempowered, I would argue that the sovereignty doctrine has mechanisms of exclusion built within it that are continuously developed, refined, and adapted by encounters with the new "others." These "others" are the new challengers to the ever-expanding reach of international law and the powers it represents. This process of empowerment/disempowerment is an enduring one.

My argument is that doctrines such as the sovereignty doctrine, the foundation of international law, are based on particular identities, which is not a great revelation for international lawyers, who insist—and in some cases celebrate—the fact that international law was very explicitly based on European values. International law was based on the *jus publicum Europaeum*, the public law of Europe. However, this European identity did not emerge in splendid isolation. Imperialism, far from being peripheral to the discipline, is central to its very existence and character. It could not be otherwise. Historically, it

was only through the process of imperialism that non-European states were incorporated into a system of law that was essentially European. Equally important, in the violence of this encounter, European international law devised doctrines that would diminish and de-legitimize non-European peoples. Further, it was vital for these European states to formulate the doctrines and principles that would enable them to take control of the resources of those people and would justify colonial governance over them. It is from these colonial origins that international economic law and arguably, international human rights law emerged.

Similarly, the great theoretical question that has preoccupied the finest minds of the discipline is the question of how order is created among equal and sovereign states. This question owes its beginnings in many ways to the model of sovereignty inaugurated by the Treaty of Westphalia. But this model is seriously inadequate because it reflects the realities of Western experience, which are somehow posited as "universal" or as somehow ontologically true. Simply, the "order among sovereign states" question cannot capture the realities of non-European peoples precisely because those non-European peoples were decreed to be lacking in sovereignty. Within the "order among sovereign states" model, non-European peoples and societies can only be relevant once they acquire sovereignty. But even such an approach disregards the processes by which the ostensibly "equal" non-European entities became sovereign—processes that could have required numerous compromises resulting in the weakening of these entities in ways that would continue to affect their supposed enjoyment of the rights that accompany sovereignty.

But how do we write a history that is adequate for the purposes of telling the story of the relationship between European and non-European peoples? What are the themes and principles that emerge if we use that history as exemplary and formative to the source of the doctrines and principles of international law? As I have argued above, such a history, if approached critically[7] might indicate that sovereignty should be seen not as a doctrine of empowerment, but of exclusion.

---

7. A critical approach is necessary for there are many histories of international law that address the issue of imperialism, but often in completely mainstream ways, as a story of triumph and self-correction.

To better illustrate these themes and arguments that may seem rather abstract, I suggest focusing on what I regard as the founding moment of modern international law. It is not the Treaty of Westphalia, but an event that occurred much earlier—the first voyage of Christopher Columbus:

> Sir, [a]s I know you will be pleased at the great victory with which Our Lord has crowned my voyage, I write this to you, from which you will learn how in thirty-three days I passed from the Canary Islands to the Indies with the fleet which the most illustrious king and queen, our sovereigns, gave to me. And there I found many islands filled with people innumerable, and of them all I have taken possession for their highnesses, by proclamation made and with royal standard unfurled and no opposition was offered to me. To the first island which I found I gave the name *San Salvador*, in remembrance of the Divine Majesty, Who has marvelously bestowed all this; the Indians call it 'Guanahani'. To the second, I gave the name *Isla de Santa Maria de Concepcion*; to the third *Fernandina*; to the fourth *Isabella*, to the fifth, *Isla Juana*, and so to each one I gave a new name.[8]

Let us consider what happened here. The passage begins by suggesting the hierarchies of the medieval world order, with God and the sovereign being duly acknowledged. Yet Columbus is completely lost and disoriented; he believes he has reached his destination in the Indies, when he has actually landed in an entirely different and distant continent. But even in the midst of this confusion, his fundamental, primary instinct as a European explorer remains admirably intact—he seeks to "take possession" of these peoples and land.

Law enters into the picture in the second sentence: in order to take possession, a legal ritual is required—a "proclamation made" and "with royal standard unfurled." But what law could exist as between such incommensurable societies?[9] Columbus seems to anticipate and address the issue, however, by suggesting that the Indians consented

---

8. CHRISTOPHER COLUMBUS, LETTER FROM FIRST VOYAGE, *reprinted in* THE FOUR VOYAGES OF COLUMBUS: A HISTORY IN EIGHT DOCUMENTS, INCLUDING FIVE BY CHRISTOPHER COLUMBUS 2 (Cecil Jane ed. & trans., 1988).

9. For a superb analysis of this issue to which I am indebted, see STEPHEN JAY GREENBLATT, MARVELOUS POSSESSIONS: THE WONDER OF THE NEW WORLD 54 (1991).

to the whole process when he stated: "and no opposition was offered to me." What is striking here is the way in which Columbus appears to simultaneously provide the Indians with an opportunity speak, but promptly proceeds to speak for them (all this is encompassed by the phrase "and no opposition was offered to me.") Columbus is engaged in a conversation with himself. It is also notable that even though Columbus acknowledges that the Indians can speak, have their own language, and a system of order ("the Indians after all, call their islands 'Guanahani'"), he proceeds to erase the existence of the Indians by replacing their language with his own—"and so to each one I gave a new name."

This renaming of the islands seems to go beyond merely providing parallel, alternative, Spanish names. What occurred, in these few sentences, was the creation of a new world and a demonstration of the ways in which European law was used to dispossess people. What occurred here was nothing less than the loss and acquisition of sovereignty. Importantly, this was a trade mission, and the manner in which it was pursued raises a number of questions relating to the relationship between imperialism and trade in this primordial instance of globalization.

We—LatCrit and TWAIL—need to make the experiences and perspectives of the disadvantaged (who are the subject of our concerns) the basis of our inquiry. It is out of this experience that we may fashion a vocabulary, set of principles, methodology, and even an epistemology that may be adequate for the purposes of contesting and undermining traditional narratives and structures. Through the simultaneous project of contestation and reconstruction, we may make some sort of headway in the ambitious and difficult task of achieving some sort of justice.

LatCrit and TWAIL have much in common, and I expect there is a great deal each project can learn from the other in the future. Globalization has resulted in the continuous erosion, if not disappearance, of the distinction between the national and the international. And the "War on Terror" has raised a number of further-fraught issues about the relationship between national and international law.[10] All these major developments suggest that the achievement of justice at local and international levels is inextricably

10. *See generally* Valdes, *supra* note 4.

intertwined. My friend, Keith Aoki, with his usual prescience, has provided us with an analytic framework and a research agenda:

> [T]here are lessons to be learned from considering how racialized spaces are produced within the United States by some of the forces driving globalization, and thus understandings of race in the United States, while historically contingent, have deep structural ties to the global experience arising out of colonialism and imperialism and their aftermath. Finally, realizing these convergences and divergences between the international and the domestic underlines that any transformative agendas that ignores or discounts the salience of the global will fall short, or conversely, any set of transformational agendas that fail to grapple with important localisms such as race in a sophisticated way will likewise fall short.[11]

I look forward to further engagement between our two projects.

11. Keith Aoki, *Space Invaders: Critical Geography, the 'Third World' In International Law and Critical Race Theory*, 45 VILL. L. REV. 913, 955-56 (2000).