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The End of the History of Liberalism and the Last "Transcivilizational" Man? Onuma's Attempt to Define a "New" International Law

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I. DEALING (AGAIN) WITH THE WESTERN PERSPECTIVE ON INTERNATIONAL LAW

Must a non-Western perspective on international law necessarily come from outside Western Europe, the US, or Japan? Is it even possible for an essay to be written from a non-domestic or regional point of view? Can we, for example, address an issue concerning international law from the perspective of a transnational or non-regional culture or ideology, and is this necessarily a better option? Can we imagine a treatise of international law from a purely philosophical perspective? Do we have only one option, that is to say, to offer our personal opinion, which mixes up and combines various influences, so that the best we can do is to try to relativize this opinion, review it, and put it in perspective?

Not only because Yasuaki Onuma's book is the first "treatise or textbook of international law written by an Asian international lawyer in Asia[1] … published by either Cambridge University Press or Oxford University Press" (p. 1), but also because the purpose of the book is to reassess the main themes of international law from a "transnational" and even "transcivilizational perspective", the work raises these questions in the reader's mind. It is of course not the first to do so, but it may be the first English-language *treatise or textbook* of international law to do so in such an in-depth manner. It can therefore be understood as a treatise written by an author who is attempting to democratize the numerous contemporary studies that criticize the Western perspective on international law and insist on the contribution of non-Western

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1. Onuma's precise wording may be motivated by Bin CHENG, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 1994).

countries—especially the "semi-peripheral zones of Asia, the Middle East, and the Americas".[2]

However, Onuma's book also undoubtedly displays the considerable difficulty inherent in such an attempt,[3] or more accurately the impossibility of adopting a non-Western perspective without assuming a revolutionary point of view, a point of view that most Western lawyers describe as philosophical, political, or ideological, and, in a sense, as an erroneous or entirely subjective perspective.[4] Indeed, although the transcivilizational perspective on international law claimed by Onuma seems to imply a revolutionary stance, his book seems more reformist in nature and only a few criticisms appear to be "truly" transcivilizational. At least two of these need to be highlighted.

II. TWO "TRULY" TRANSCIVILIZATIONAL CRITICISMS

As one might expect, the most visible transcivilizational criticism relates to the (usually Western-oriented) history of international law. In the sections of the book dedicated to this theme (pp. 55 *et seq.* and 149 *et seq.*), the author accepts the classical view that today's international law is a product of European and then Western modernity (pp. 16, 31, 55 *et seq.*), but rejects the idea that there was indeed *international* law "*in the geographical sense* of the term" before the Berlin Act (1885) and the Shimonoseki Treaty between China and Japan (1895) (p. 81). Similarly, he is of the opinion that this law was not "*globally valid in the formal sense*" before "most nations representing humankind" became "subjects of international law", namely before people in decolonized countries freely recognized such a law in the 1960s (pp. 57, 63). In the same way again, a truly global law of the sea only arose after World War II (p. 320).

The author also dispels the myth, or rather the implicit assumption, that Western international law was spread on a blank page, and recounts the story of a European and, subsequently, Western *Grossraum* struggling with two competing spheres of influence—the Islamic and the Chinese—and progressively overcoming and replacing them (pp. 63 *et seq.*, 82 *et seq.*, 149 *et seq.*). This new presentation is convincing, but one may be surprised by the (complete) absence of sub-Saharan Africa and the (almost complete, see the footnote on p. 63) absence of the Americas and of the non-Chinese Asian political powers. The decision not to say a word about them is questionable both because European states primarily overcame independent political powers (which were sometimes fairly similar to domestic legal orders) and not only *regional* normative spaces, and because, for instance during the period 1433–1521, "one may identify in

2. Douglas HOWLAND, "Disturbances from the Periphery: On Arnulf Becker Lorca, *Mestizo International Law*", (2015) 7 Monde(s) Histoire Espaces Relations Archives 173. See more generally Arnulf Becker LORCA, *Mestizo International Law: A Global Intellectual History 1842–1933* (Cambridge: Cambridge University Press, 2014).

3. Compare it with the departure from Eurocentrism in Bardo FASSBENDER and Anne PETERS, "Introduction: Towards a Global History of International Law" in Bardo FASSBENDER and Anne PETERS, eds., *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) at 1–24, and the critical remarks of the book by Rose PARFITT, Stefan B. KIRMSE, Nahed SAMOUR, Will HANLEY, and Anne-Charlotte MARTINEAU, "Book Review Symposium" (2014) 1 European Journal of International Law 287.

4. With a more or less corresponding conclusion, see Rémi BACHAND, *Les subalternes et le droit international—Une critique politique* (Paris: Pedone, 2018) at 255.

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pre-Columbian America an international legal order rather than just a group of scattered phenomena".[5]

Unlike the criticism of the traditional presentation of the history of international law, the second truly transcivilizational criticism does not relate to a particular area. In a way, it may be argued that it is the main thesis of the book. According to this thesis (if it may be summarized subjectively), contemporary Western lawyers as well as Western governments place an undue emphasis on the role of international judges (and secondarily NGOs and transnational corporations) as international lawmakers, whereas non-Western lawyers and governments place their hopes in the capacities of nation states to rule their countries and regulate their relationships with strangers. More specifically, "the ideas, notions or concepts that people use as cognitive and interpretative frameworks of international law have basically been constructed by male international lawyers of powerful Western nations" (pp. 52–3), and "Western nations … have always been characterised by a *legalistic culture*" (p. 39). When "international lawyers assume that law should primarily work in the judiciary", they "*tacitly follo[w] West-centric (in particular, Anglo-American) domestic law model thinking*". This model shall be rejected (pp. 23, 41 *et seq*., 52, 151, 559, 582 *et seq*.) because "litigation is a pathology, not a physiology of law" (pp. 8, 26, 457) and because "*[l]aw without court is normal in many societies in human history*" (p. 550).[6] Consequently, "the study of international law in the twentieth century seems to have been excessively judicial-centric for gaining a comprehensive picture of international law" (pp. 116, 252, 258, 408, etc.). For instance, "the ICJ is not an important organ in interstate conflict settlement" (pp. 27, 117, 559–60, 579, 662) and, more broadly, most international judges do not resolve most inter-state disputes (pp. 557, 571, 662). In practical terms, "there are a significant number of cases where judicial judgments cannot solve the underlying conflict" (pp. 545, 580 *et seq*.). Furthermore, many "commonly perceived features of law [righteousness, consistency, universal applicability, rigidity, and formality] work [at times] negatively against conflict resolution" (pp. 585 *et seq*.). In the case of the Senkaku Islands disputed by China and Japan, "simply projecting today's concepts of 'territorial sovereignty', 'state territory' and other concepts of international law onto the past does not necessarily contribute to the management and resolution of the conflict" (note 18 on p. 314).

Two important aspects of the modern and liberal understanding of law are thus rebutted: the belief that a "law without court" is absurd or meaningless because law is primarily an adjudicative tool, and the belief that without (a formal contract or) a judicial decision, each party to a dispute will necessarily stick to his/her subjective, irrational legal interpretation and that their conflicting views will inevitably be the seeds of an armed conflict. According to Onuma, "*[e]ven if there is no judiciary with compulsory jurisdiction over all states in international society, this will not lead to the conclusion that each state is the ultimate judge of the legality of an act of a state*"

5. Robert KOLB, *Esquisse d'un droit international public des anciennes cultures extra européennes* (Paris: Pedone, 2010) at 55 (our translation).

6. All italics in the quotations are those of the original author.

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(p. 89). "[P]revention, rather than settlement, of international conflicts is the most important task for international law to carry out" (pp. 313, 534) and "international law plays a significant role as a *justificatory, legitimating and communicative tool rather than as adjudicative norms*" (pp. 8, 48 *et seq*., 116 *et seq*., 585). Finally, states (or other actors) may have unwaveringly different views, and international law could be used for the sole purpose of preventing an armed conflict rather than erasing this range of different opinions.

Even if international law is commonly used by citizens, NGOs, or corporations and not only by states and international organizations, "the strength and significance of the state will persist in the twenty-first century world despite fashionable discourse critical of state-centrism", and "contemporary people are still living *within the basic cognitive framework of the state and the sovereign states system*". "Accordingly, the persistence of positivism may not be surprising." Furthermore, "*for the overwhelming majority of humankind*, the twenty-first century will be the *era of nation-state building*" (pp. 13, 17–18, 88–9, 91), partly because "no non-state actor can *replace* a state to maintain order in the most fundamental way" (p. 186).

After such a harsh and seemingly radical critique of the West-centric history of international law, of the liberal concept of law and the post-modern idea of the future of international law, one would think that the author holds the same critical views about many international norms, institutions, and prevalent ideologies. This is not the case, however. On the contrary, the book seems to repeat the most influential and, at the same time, disputable narratives deriving from the Western perspective. And as its explicit purpose is to propose a "multi-centric international law", it is particularly prone to wrongfully suggesting that Western options or judgements are universal.

III. THE REITERATION OF PROBLEMATIC NARRATIVES DERIVING FROM THE WESTERN PERSPECTIVE

It may come as a surprise that, from the outset of the book, the author explicitly endorses a "transcivilizational perspective" that outlines the "plurality of civilizations and cultures that have long existed throughout human history" (p. 19 and chapter 1), as well as explicitly declaring himself to be a "chil[d] of Grotius, Kant and Marx and therefore 'Europea[n]' in the figurative sense of the term" (p. 13), without discerning any difficulty in completing his project while adhering to a particular, "non-transcivilizational" position, and, more specifically, to the prevalent one. Even though he rightly affirms that "everyone is a culturally and civilizationally hybrid being" (pp. 7, 14), and despite being fully aware of his status as an "Asian international lawyer in Asia" (pp. viii, 1–2, 7), he also assumes that he is a "modern perso[n] whose intellectual personality has mainly been constructed by modern European civilization" (p. 13). More accurately, since the 1970s he has been a human rights activist (p. 8) and an international lawyer who "ha[s] learned more from Hugo Grotius' *De jure belli ac pacis* (Grotius 1646) than from any work written or taught by Asian thinkers such as Buddha, Muhammad, Confucius or Mencius" (p. 7).

Even if we accept the possibility of becoming a universal mind or at least a free, original spirit after receiving a Western-style education, the book as a whole shows that Onuma "adopt[s] a European horizon of 'progress' and 'modernity'".[7] In other words, he thinks that modern and liberal representations, norms, and institutions are much better than those that were widespread both in the West before the rise of modernity and in the rest of the world before Western colonization, and that are still widespread outside the West. Furthermore, he refers to these classical or "non-modern" schools of thought as "pre-modern", just as he almost always calls most non-Western states "developing countries".[8] According to his view, all regional normative systems prior to Western colonization were a less satisfactory option than the colonizer's international law, because "[w]hether in Europe or Africa, or anywhere, the *pre-modern ordering principle of human relations was basically hierarchical*" and "based on a discriminatory idea of hierarchy between humans", while "[i]n contrast, modern European international law recognized its member entities as *equal sovereign states*" (p. 92). In a similar way, all classical systems had and still have "'traditional' vices" like "ancestor worship, sexual discrimination based on legends and predominant interpretations of religious doctrine, segregation of and discrimination against various types of minorities" (p. 529), while what distinguishes the modern way of thinking is the importance of the secular principle of equality. "[F]rom the seventeenth to nineteenth centuries … the idea of equality came to be sacrosanct" (pp. 92–3), and the influence of the West was logically characterized by the conscious decision to place this principle at the core of international customary and treaty law.

It is hard not to detect a sense of irony in the "traditionally modern" affirmation of the inferiority of non-Western nations' normative systems, because of their ignorance of the crucial importance of the equality of all humans and nations. More fundamentally, the linear, homogeneous, and "progressive" presentation of the history of the world's different civilizations and trends of thoughts (some of them being "slow" or "late", and others being "on time" or even "ahead") is typically a product of modern Western thought, rooted in the model of the stages of change invented by Turgot and Adam Smith in the mid-eighteenth century,[9] and in the nineteenth-century Hegelian philosophy of history. And it is a particularly ideological, normative, and unequal representation. In practical terms, it is the basis of global hierarchies (which are supposed to be obvious or natural but are in truth debatable) and the ultimate justification for many of the worst imperialistic, paternalistic, and oppressive practices.

If we do not first deconstruct the myth of a world that follows a unique path of progress (towards Christianity, Western-style law, the market economy, capitalism,

7. Martti KOSKENNIEMI, "A History of International Law Histories" in Fassbender and Peters, eds., *supra* note 3 at 970, about the "histories of *ius gentium*, natural law, and the law of nations surveyed" in the chapter.

8. However, China and Japan at the beginning of the nineteenth century are more cautiously termed "non-Western parties" or "territories" (p. 425).

9. See Ronald L. MEEK, *Social Science and the Ignoble Savage* (New York: Cambridge University Press, 1976); Ronald L. MEEK, "Smith, Turgot, and the Four Stage Theory" (1977) 3 History of Political Economy 9; Christian MAROUBY, *L'économie de la nature—Essai sur Adam Smith et l'anthropologie de la croissance* (Paris: Seuil, 2004).

human rights, etc.), and more specifically a progress that is exhaustively predeterminable by a small group of self-proclaimed superior people, it is impossible to obtain a critical distance from Western-centrism. Without such a preliminary work, we cannot explain how civilizational pluralism has been interpreted, *by Western people becoming increasingly modern during the eighteenth and nineteenth centuries*, as the persistence of old worlds designed to disappear, and as the symptom of a delay that non-Western nations needed to overcome. Without such a critique, we cannot show how the duty to speed up the end of history (or rather *a certain version* of the end of history) became the basis of colonization, or how Western governments (including Japan) still justify their dominance over international law-making.

And this is precisely what a transcivilizational history should show. It should demonstrate first that, in practice, the difference between modern and "non-modern" thought or social organization is or was a geographical one (between the West and the "non-West") and that its formulation in terms of "retarded" (savage, barbarian, or underdeveloped) nations and advanced (civilized or developed) ones places a sort of "temporal" inequality and domination at the heart of the system of modern international law. Second, it should show that, theoretically, the difference between classical and modern thought is a philosophical and political one, and that modernity and liberalism is not the pure recognition of an obvious fact or of an unavoidable future, but rather a rejection of classical thought based on still questionable grounds and possibly a wrongful or overly absolute rejection.

Onuma's endorsement of modern and liberal thinking has in our judgement two main problematic consequences. First, it appears to lead him to misinterpret the significance of the modernistic turn of European political philosophy during the seventeenth century, and to almost overlook the consequential modernistic turn of European international lawyers (or the meaning of such a turn) during the nineteenth century. Onuma repeatedly opposes Western thought to the teachings of Muhammad, Buddha, or Confucius (for instance on pp. 7 and 13), but never to the Bible or to Plato and Aristotle, as if their (true or presumed) belonging to the West makes it impossible for them to stand in radical opposition to modern thinking. Western thinking is reduced to modern thinking and prior thinkers to heavy-handed pioneers of modern thought. However, the origin of modern political thinking and legal positivism (Machiavelli, Hobbes, Spinoza, etc.) is neither an opposition to Islamic or Confucian thought nor the mere continuation of "pre-modern" thinking. It is a deliberate, radical opposition to what Western people considered to be their own thinking and beliefs, namely Greek and scholastic philosophies, the Catholic Church and, implicitly, the Bible itself. Perhaps because Onuma forgets to outline it, he also forgets, or at least greatly underestimates, how much nineteenth-century international legal doctrine (especially in the latter two-thirds of the century) is ultimately influenced by modern and positivist political thought, and the extent to which it marks a break with prior international legal doctrine, which generally had its basis in classical or religious political thought.

In Onuma's book, we read, for instance, that the notion of the *mission civilisatrice*, which was very commonly used during the nineteenth century to justify colonization, is a "pre-modern idea", probably deriving from Roman Law (p. 305 or p. 93), even though the justifications for this ideal were in almost all cases modern eighteenth- or

nineteenth-century theories concerning evolution, civilization, trade, the rule of law, progress and stages, etc. The roots of nineteenth-century Western colonization in *modern* and not *classical* theories are ignored or erased. Similarly, the equality of nations is presented as a "novel idea" that "modern European international law" tried to impose against a hierarchical *jus gentium* (p. 92 and p. 93, note 79). However, the equality of nations or humans was one of the core concepts of the "classical" *jus gentium*, for instance of Emer de Vattel or Francisco Vitoria's *jus gentium*, because these doctrines were influenced by Christianity and classical natural right. In Onuma's narrative, the great setback of the principle of the equality of nations in nineteenth-century legal thought almost entirely disappears. This setback is obvious, however, if we compare, for instance, Francisco Victoria and Emer de Vattel on the one hand, and James Lorimer and Henry Wheaton on the other. In this narrative, even the inescapable fact that nineteenth-century colonization was not unequivocally more civilized than previous colonization becomes inexplicable, as does the considerable academic support for colonization during this century. This is also probably why Onuma adopts an interpretation of Victoria's *De Indis* (which is influenced by debatable analyses of Carl Schmitt but not all that uncommon for the last decades) and which transforms Victoria into the father of colonization (pp. 75–6). We do not have enough space to explain the reason for this here, but we consider this interpretation to be wrong and, notably, a sign of modern ignorance of the way in which classical thinkers expressed themselves, especially when they risked torture and death by writing about sensitive political and legal issues.[10]

The second problematic consequence of Onuma's endorsement of modern and liberal thinking is that, as current international law and international institutions are largely the products of European modernity and of the liberalism of the US, they are always, according to the author, more or less justified and may simply need to be adjusted. Even if Onuma rightly considers that "the task of the study of international law is not limited to simply interpreting rules of existing international law by tacitly assuming that international law is something good" (p. 9), he provides a concrete rationale for most current international norms and institutions. For instance, even if one "should avoid deification" of human rights (pp. 360, 406, 419), they are "something good" (p. 360) or "a great idea and institution" (p. 421) that "should definitely be universalized in the twenty-first century world" (p. 421). Similarly, even if "the current situation has revealed various negative consequences of excessive deregulation", "[i]t is true that rigid international legal regulation is neither possible nor desirable for the smooth functioning of global economies" (pp. 461–2). Perhaps that is why his narrative of international economic law before World War II (pp. 424 *et seq.*) is strangely less critical than his presentation of the "History of International Law" in general (pp. 55 *et seq.*). It is also surprising that the author does not very often stress (although he sometimes does) the origin of many economic international practices, rules, and categories in colonial or unequal interstate relations of the nineteenth

10. On this topic, see in particular Leo STRAUSS, *Persecution and the Art of Writing* (Chicago: University of Chicago Press, 1952) at 214; and Leo STRAUSS, *What is Political Philosophy?* (Chicago: University of Chicago Press, 1959) chapter 9.

century. More broadly, even if Onuma is acutely aware of the role of power relations in the establishment of international institutions (pp. 435 *et seq.* or pp. 455 *et seq.*) or in treaty-making (pp. 452 *et seq.* or p. 475), and if he offers an interesting account of the criticisms of NGOs or non-Western states (e.g. pp. 439, 443, 455 *et seq.*, 465 *et seq.*), he also considers that the founding of international economic organizations (such as the WTO, pp. 431–2, or the IMF, p. 458) is globally reasonable, and that the basic principles of international economic law are quite unavoidable, though they mainly reflect the prevalent Western ideology.

It is true that, in almost all the chapters (see for instance the parts of the book dedicated to nationality (pp. 328 *et seq.*) or to the use of force (pp. 588 *et seq.*), Onuma sets current international norms, institutions, and ideologies in their historical, political, and geopolitical contexts, and helpfully relativizes them or on the contrary insists on questions or texts (such as the 1993 Vienna Declaration) he considers to be underestimated. These relativizations, criticisms, inflections, and reform proposals are almost always interesting. However, they usually come from an internal point of view; they sometimes reflect the view of different non-Western countries but rarely an autonomous perspective. Onuma does not propose a new "transcivilizational" law. There is nevertheless one chapter that could help to do so, or which at least includes a strong critique of Western productivist and consumerist lifestyle and of the bases of liberal thinking (esp. pp. 489, 515, 529, 531).

IV. POTENTIAL SOLUTIONS SUGGESTED BY THE BOOK

One chapter that stands in sharp contrast with the others is the one dedicated to the environment. By globally developing an enduring modern, liberal perspective while proceeding to challenge that perspective in a chapter on ecology, Onuma's book is probably representative of a major trend of political and legal thought. Although the headings of the chapter have anthropocentric overtones (men should "protect[t] the Global Environment" against themselves rather than respect nature because they are part of it, p. 482), and even if the author is cautious when he stresses that "international environmental law is generally characterized as relatively 'underdeveloped' or still 'developing' law" (p. 481), the critique of "*Materialistic Civilization*" (p. 482 *et seq.*, 509, 515, 520) and of its basic representations is a strong, global one: "[the] *widely shared belief in the progressive and materialistic well-being of humanity* led to overall economic development activities on a global scale, which resulted in serious environmental damage" (p. 515); "one has to reconsider the problematic feature of the modern idea that regards nature merely as an object to be conquered by humankind" (pp. 484–5, 529); "[t]he protection of the global environment may require a transformation from this materialistic civilization into a civilization with a conservationist lifestyle" (p. 484), or into "*a more holistic civilization of the twenty-first century appreciating the spiritual dimensions of humanity*" (p. 520). "In such an intellectual undertaking, the inter-generational succession of values and virtues, which has fallen into disregard due to the prevalence of ways of thinking that prioritize materialistic values among the same generation, should be re-established. Reappraisal of the

significance of passing wisdom from old to young, and respect for the elderly and ancestors is also encouraged" (pp. 484–5). It is also noteworthy that the author refuses to draw a sharp distinction between nature and human culture, and insists that "[t]he critical need to protect the environment is not limited to the natural environment, but encompasses the cultural environment" (p. 514, and also p. 492).

From a legal point of view, this new approach implies the creation or reintroduction of holistic concepts such as "common heritage and concerns of humankind" (p. 497), "global environment as inter-generational common interest" (pp. 488 *et seq.*), and "inter-generational equity" (pp. 528 *et seq.*). It implies reliance on specific obligations such as *erga omnes* ones (p. 497), innovative law-making processes (p. 485), or special ways of allocating responsibilities (for instance the famous "*common but differentiated responsibilities*", p. 498). Furthermore, we need to move on from the idea "that the freedom of individuals should be given the utmost respect" and that the "damage suffered arising from such free activities should be remedied through *ex post facto* reparations", towards the idea that "the *ex post facto* approach for damage based on classical liberalism is inadequate" because "the environmental damage caused by these large-scale activities is often too huge to make remedies possible" (p. 489), or because "*ex post facto* remedies by pursuing state responsibility or civil liabilities is not sufficient to protect the environment" when it comes to "elements of the global environment [that] are *irreparable* once damaged or lost" (p. 502). In contrast, "the primary focus should be on the *prevention* of environmental damage" (pp. 489, 502).

Onuma's decision to include the "Protection of Cultural Heritage" (pp. 514 *et seq.*) in a chapter dedicated to "The Global Environment", and several thought-provoking remarks demonstrate the profundity of his ecological reflections. Nevertheless, they also suggest that more sweeping conclusions should have been drawn in the chapter concerning the global economy (all the more so since the author observes that the "norms of multilateral environmental agreements … often contradict the GATT obligations included in the 1995 WTO law" (p. 524)), and perhaps even throughout the entire book. Indeed, the ecological imperative forces Western thinkers to survey the bases of modern and liberal thinking (and, for Western lawyers, the bases of modern and liberal international law). More generally, though, they invite all nations and civilizations to jointly engage in self-criticism and creative solutions.