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Meaningful Dialogue Through a Common Discourse: Law and Values in a Multi-Polar World

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The theme of the Second Biennial Conference of the Asian Society of International Law—"International Law in a Multi-Polar and Multi-Civilizational World: Asian Perspectives, Challenges, and Contributions"—touched on a number of interesting aspects of international law. Three basic issues arise from this topic. First, how do we evaluate the current state of international law from an Asian perspective? Second, in an increasingly globalized world, why do we need a *regional* society of international law? And finally, what purposes do we expect this society to serve?

In the post-Cold War era, the most evident change in international legal discourse is the universal assertion of values as the basis to promote the rule of law in international relations. Obviously, values are related, among other things, to culture. Any analytical inquiry into values and law in international relations should therefore begin by tracing the origin and impact of the international legal system. The Asian Society of International Law came into being at a time when international law, both in theory and practice, was increasingly confronted with these new challenges.

Although regional perceptions might contribute to a more nuanced understanding of global efforts in dealing with these challenges, the very idea of truly "international" law renders the regional approach controversial. Some scholars have argued that international law should always be either national or global, as regionalism was historically often manipulated by big powers to pursue imperialism and hegemony and therefore should not be encouraged. This interesting observation actually further questions how regional efforts can help identify common values in promoting international legal development in a multi-polar, multicultural, and multi-religious world.

In the past twenty years, international law has witnessed great proliferation and fragmentation—and yet most of the changes are, as always, primarily Western-oriented or Western-dominant, reflecting the basic values of Western liberalism.

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The impact of the developing world, including Asia, remains marginal. This does not necessarily lead to the conclusion that the values that are advocated by the West—such as the rule of law, human rights, and democracy—are not shared by all states. The key issue is whether such values are the only common ones upon which the normative framework of international relations should be built. Given diverse cultures and civilizations among states, this is not a matter of perspective, but more importantly, a search for a new world order.

I. HISTORICAL PERSPECTIVE

During the period of decolonization, when newly independent countries, including many Asian states, entered the world stage, they immediately accepted the fundamental principles of international law as the legal basis of their foreign policy. Sharing the values embedded in these principles such as peace, equality, and justice, these newly independent states applied the principles to maintain and protect their sovereignty and territorial integrity against imperialism and hegemonism.

Asia is a multicultural and multi-religious region. By tradition and history, Asian countries came to share certain values and cherish many virtues, which were naturally reflected in their mutual relations and influenced their foreign policy. When China and India agreed on the Five Principles of Peaceful Co-existence for the first time in April 1954 as the guidelines for the solution of outstanding issues between the two countries, both sides could easily trace the Five Principles or *Panchsheel* (the Indian term) to their respective cultural heritage.[1] The pursuit of peace and harmony is a lofty cause for human society taught by both the Chinese philosopher Confucius and the Lord Buddha.

This China–India bilateral initiative rose in a time of differences and in the midst of power rivalries. Its call for sovereign equality and non-interference with a view to promoting peace and co-operation was immediately accepted with positive responses by other Asian countries, and further still, by most developing countries. The Five Principles were formally adopted at the Asian and African Conference held at Bandung—growing into the Ten Principles of Bandung[2]—later accepted by the Non-aligned Movement, and finally incorporated into the United Nations 1970 Declaration on the International Law Principles of Friendly Relations and Co-operation Among States.[3] Adopted by

1. The Five Principles of Peaceful Co-existence were inserted into the preamble of the *Agreement Between the Government of the Republic of India and the Government of the People's Republic of China on Trade and Inter-Course between the Tibet Region of China and India* signed between China and India at Peking on 29 April 1954. For a vivid recollection of the history of the promulgation of the Five Principles of Peaceful Co-existence, see K.R. NARYANAN, "The 50th Anniversary of Panchsheel" (2004) 3(2) Chinese Journal of International Law 369.

2. *Declaration on the Promotion of World Peace and Cooperation* adopted at the Asian–African Conference, Bandung, Indonesia on 24 April 1955.

3. *Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), UN Doc. A/8028 (1970) 121 [Friendly Relations Declaration]. The UN accepted the Five Principles as the code of conduct in international relations. At the end of 1957, it adopted a resolution on Peaceful Co-existence containing the Five Principles. Under its influence, the notion of peaceful co-existence helped ease the tension between the two blocs of the Cold War era, at least in normal terms. At Soviet and other initiatives, the International Law Association took up the study on the Juridical Aspects of Peaceful

the UN General Assembly, the Declaration reaffirmed the Five Principles as the core principles of international relations. For over fifty years, China has strictly adhered to the Five Principles as the basis of its independent foreign policy of peace and has built its diplomatic relations with over 170 countries in accordance with these principles. Obviously, the warm embrace of the Five Principles by most states was not simply due to the embedded cultural values that are universally shared, but also because they echoed the fundamental principles enshrined in the purposes and principles of the UN Charter recognized now as the peremptory norms of general international law.

Frankly speaking, for a long time international law was perceived with deep scepticism and criticism by most Asian countries. As Judge Owada Hisashi noted in his inaugural address as the President of the Asian Society of International Law in 2007, Asia in fact was the only major region in the world where up till now there was no society of international law on a region-wide basis. The diversity of the region might offer a partial explanation for this lack of institutional initiative, but deeper reasons, in my opinion, can be found in Asia's historic perception of the international legal system, and discontent with the contemporary practice of the law. From the Westphalian origins of international law to modern legal development, both the normative structure and the material substance of international law have been primarily Western-oriented.

As is well known, international law as a product of Western Christian civilization was first introduced to Asia through colonial conquest by Western powers. Its basic tenets of peace, justice, and equality were grimly tarnished by the cruelty of colonial and imperial governance imposed upon many Asian countries. Even though Asian countries identified themselves with the fundamental principles of international law as the basis of international relations after gaining independence, they generally remained dubious about the fairness and effectiveness of the international legal order in maintaining peace and justice against imperialism and hegemony in international affairs.

II. CONTINUED DISPARITY

Power rivalries between the East and the West during the Cold War period did not change the general framework of the legal system. Despite the laudable contributions made during the decolonization process towards a new legal order—the push for a New International Economic Order,[4] permanent sovereignty over natural resources,[5]

Co-existence, the result of which led to the final adoption by the General Assembly of the *Declaration on the International Law Principles of Friendly Relations and Cooperation Among States* in October 1970. See Edward MCWHINNEY, "The Renewed Vitality of the International Law Principles of Peaceful Co-existence in the Post-Iraq Invasion Era: The 50th Anniversary of the China/India Pancha Shila Agreement of 1954" (2004) 3(2) Chinese Journal of International Law 382.

4. See e.g., *Declaration on the Establishment of a New International Economic Order,* GA Res. 3201, UN Doc. A/9559 (1974).

5. See e.g., *Declaration on the Permanent Sovereignty over Natural Resources,* GA Res. 1803, UN Doc. A /5217 (1962).

and the Declaration on Friendly Relations,[6] among others—the developing countries continued to be afforded only a limited role in the international law-making process.[7] The phenomenon under traditional international law where "the weak might propose, it was the strong that disposed"[8] is still a common phenomenon in contemporary international relations. Although international relations have profoundly changed in the past sixty years, especially in the last two decades, the cultural superiority and selectivity that characterized the old legal system continue to have lingering effects in international relations; the typical example is the confrontational approach adopted in the human rights dialogues between Western and developing countries.

The matter is not a question of whether the developing countries should forget or forgive the past, but where and how to start dialogues among states. Obviously, various critical legal studies undertaken by Asian international jurists are not purely scholastic exercises to trace the origin or cultural values of international law. They are meant to provide a special and pertinent perspective of the international legal system while pursuing meaningful dialogues between different cultures through a common discourse.[9]

The past two decades have witnessed a wide array of dramatic events with significant impact on the fundamental principles and the existing institutions of international law. Never before has the international community, including our region, been confronted with such a large scale of global issues—from world security to food security, from the traditional domain to the non-traditional realm—which require a concerted response.

In the midst of great changes brought about by economic globalization, modern technology, and regional integration, one can observe that international law is paradoxically regarded with both high expectations and deep disappointment. On the one hand, the role of international law in dealing with both the traditional and non-traditional challenges of international relations seems on the wane, as it poses more legal uncertainties than provides advisable solutions. Such fundamental principles as sovereign equality, non-interference in internal affairs, and non-use of force are frequently disregarded as no longer applicable or relevant and even deemed

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6. Friendly Relations Declaration, *supra* note 3.

7. See William J. ACEVES, "Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution" (2001) 39 Columbia Journal of Transnational Law 302, which argues that for scholars from the Third World, the colonial and imperial past of the international system is perpetuated in the contemporary rules and institutions of international law. For further critical legal studies of Third World Approaches to International Law (TWAIL), see James Thuo GATHII, "Alternative and Critical: The Contributions of Research and Scholarship on Developing Countries to International Legal Theory" (2000) 41 Harvard International Law Journal 273.

8. A comment made about traditional international law in Robert JENNINGS and Arthur WATTS, eds., *Oppenheim's International Law*, 9th ed. (Oxford: Oxford University Press, 1992) at 38.

9. See, e.g., David P. FIDLER, "Revolt Against or from Within the West? TWAIL, the Developing World, and the Future Direction of International Law" (2003) 2 Chinese Journal of International Law 29 at 38–48; see ONUMA Yasuaki, "A Trans-Civilizational Perspective of International Law" (Lectures in Public International Law, Hague Academy of International Law, 30 July–3 August 2007), online: Peace Palace Library 〈http://www.ppl.nl/summercourses/readinglist.php?year=2007&lecturer=onuma&maintopic=Public%20International%20Law〉.

obsolete. On the other hand, international law is experiencing a most volatile period of change, affecting both political processes at home as well as international discourse. Furthermore, terms like the rule of law, democracy, human rights, and global governance have become the catchwords of the day.

Even more seriously, international law apparently suffers from public distrust and apathy, a sentiment particularly acute after the 2003 Iraq war. Repeated use of force in international relations constantly reminds us that searching for effective peace and security mechanisms remains one of the priorities for international law.

In shaping the new world order, controversies over sovereignty and non-interference, human rights, international criminal justice, climate change, and environmental protection, in the final analysis, are questions of values. In a multi-polar—or preferably, multicultural—world, where economic and social development vary from state to state, international law, both in form and in substance, should reflect some basic values that are shared by all states, such as peace, equality, and common development. When we talk about Asian traditional and cultural values, we do not mean to claim that there should be such international principles that only reflect "Asian values". This clarification, on the other hand, does not negate cultural relevance in identifying common values.

Western liberalism and neoliberalism have had great influence in modern international law. The popular pluralism has brought more non-state actors onto the world stage and more traditionally "internal issues" are being addressed by international law. This, while adding vigour and vitality to the international legal order, has a tendency to imbalance. When the rule of law, democracy, and human rights are being advocated at the international level, they often tend to represent essentially one type of ideology, one form of culture, and one kind of political system. (The word "representation" is deliberately chosen because such values are normally interpreted and applied according to the prevailing choices of a certain group of states and imposed on others—the so-called "West and the rest".) Although such values are generally reflected in international principles, when they are placed in a certain political context and defined with certain political connotations, the issue often depends on their interpretation and application in foreign policy. When conflicting interests and agendas emerge between states, these values could be used as a camouflage to serve the particular goals and the national interests of their advocate. That is why, in the field of human rights, we often have to point out the practice of double standards. In the area of development, conditionalities attached to international aid have seriously jeopardized the mutual trust and co-operation between the recipient and donor states. When peace is of secondary importance to prosecution under international criminal law, it may be even harder to achieve meaningful "justice". The relevance of principles of sovereignty and non-interference is not whether these terms should be reviewed and redefined in the abstract; rather it is a matter that touches on the political and legal fundamentals of states, raising the question of whether each state can genuinely exercise its sovereign right to determine its own path of development.

Ideology and cultural superiority are hardly new phenomena in international law. Nevertheless, international lawyers as well as the general public—including those

from the West—are now more vocal and critical about such matters, which is a positive development in international law.

III. ASIA'S CHALLENGES

As part of the international community, Asia is expected to play a greater role in international law. With globalization, Asia's ties with the rest of the world have become ever closer and deeper. In recent decades, Asia has been one of the most dynamic and vibrant areas in the world. Its remarkable economic success and social progress are recognized worldwide, with the two most populous developing countries, China and India, in the lead in more recent years. At the same time, we cannot fail to see that the Asian region is also fraught with tough issues that are globally challenging: terrorism, security, energy, poverty, environmental degradation, natural disasters, and, more recently, the economic and financial crisis. It would not be exaggerating to say that the sustainable development of Asia depends on a stable and constructive world legal order. To promote such a legal order, Asia should duly undertake its responsibility and play an active role in international legal development. In this regard, intellectual exchanges among legal scholars as offered by the Asian Society of International Law would help enhance meaningful dialogue among states.

In the legal field, frankly speaking, Asian countries remain largely at the receiving end; their influence in the making and shaping of the law, both procedurally and substantively, is rather limited. Although their economic growth is tremendous, their voices in the legal dialogues are minimal. For the most part they are passive and defensive. This low profile is particularly evident in the fields of human rights, the environment, and social development. Legal discourse has not yet become a significant part of international dialogue within Asia. Now that international law and institutions have become important vehicles for promoting policy goals, legal co-operation within Asia has to be strengthened.

Indeed, nowadays it is difficult, if not impossible, to distinguish what issues are regional and what are global as we are truly living in a "global village" and the notion of "neighbourhood" is changing as well. Yet these changes do not mean Asia does not have its own priorities, nor do they suggest that Asia should take unilateral actions in coping with new challenges. Diversified as they are, Asian countries can identify such issues as their common concerns: security, economic development and financial stability, energy and environmental protection, public health, and disaster management. Obviously, regional responses are not sufficient to tackle these issues, but regional input will have a direct bearing on future international action.

When we assert that Asian culture cherishes peace through dialogue and harmony in diversity, we do not deny that there also exist differences and disputes among Asian countries—some left over by history, some caused by conflicting interests. In the two decades after the Cold War, international relations in Asia have greatly improved. In this regard, China takes great pride in the positive developments in

North-East Asia. International co-operation at the regional level in various fora and through different mechanisms is flourishing. The prospects are so promising that their impact on the international order is now discernible. With a greater mix of cultures in international society, the international legal order will transform and, in this regard, Asian peoples are expected to play an important role in the diversification of power and values.[10]

It goes without saying that intellectual exchanges should first and foremost be carried out among Asian countries. To be meaningful, equality and mutual respect must be emphasized among dialogue partners and issues pertinent to Asia for peace, development, and co-operation must be discussed.

Despite the differences that may exist, the most important first step is to build mutual respect and trust among different parties by adhering to the fundamental principles of international law. Any legal institutional design for the settlement of disputes should first and foremost aim at the peace and stability of the region. The promotion of human rights and democracy has to be founded on a balanced economic and social development of each state. Global governance should not aspire to a world government or a model government, but to promote closer international co-operation among states. This understanding does not suggest that we can easily embark on a smooth path to build up a new international legal order. On the contrary, it would be a long and hard process that requires consistent and persistent efforts from all states.

During the process, the participation of the major powers is often portrayed as having the potential for great power rivalry in the region, particularly with rising economies such as China and India. As a developing country, China fully appreciates what a superpower means in international relations. In Chinese philosophy, we follow the maxim: "Don't do to others what you do not wish others to do to you."[11] While rejecting the power theory, it is agreed that as the region grows, Asia as a whole will participate more actively in international affairs and undertake fair and equitable responsibility for the future international legal order, its ideas, and systems. In a time of great change, international legal studies, as many other areas, have to be re-oriented to meet new challenges. It is hoped that the Asian Society of International Law will be of service to the region.

10. These themes were particularly discussed at the 2009 Biennial Conference of the Asian Society of International Law, Tokyo, 1–2 August 2009.

11. See, particularly, David NIVISON, *The Ways of Confucianism: Investigations in Chinese Philosophy* (Chicago: Open Court, 1996) at 59–78.