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Asia and International Law—Common Ground and Regional Diversity

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Abstract
From a conceptual viewpoint, the legal universe has found its almost perfect configuration in our time. Almost all of the peoples of the world are members of the United Nations and as such are entitled to co-operate in shaping the direction and content of policies at the global level. Before World War II, and even a considerable time after the horrendous events unleashed by that war, many nations had no say in international matters. They were placed under colonial rule, which meant that their voices were not heard—or heard only through the mediation of the powers that acted as their wards and guardians. That situation of structural discrimination has changed dramatically. All the peoples of the world have reached sovereign statehood and have been admitted to the world forum.

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1. This is obviously an optimistic assessment.

(and also Germany) as a former "enemy state" under Article 53(2) of the UN Charter, a characterization which has become obsolete and accordingly has lost any substantive meaning.[2] Thus, one may ask whether the assumed specificity of Asian perceptions of international law has become a non-topic. It will be suggested that this is indeed partly the case—but only partly, in some fields, and not in all fields of international law.

Before taking up the challenge, however, another preliminary observation may be submitted. "Asia and International Law", the title words of this study, describe the scope of the reflections to be deployed in an extremely wide fashion. According to common knowledge, Asia constitutes a far less homogeneous unit than Europe. Does Asia have any unity at all? It certainly cannot be subsumed under the concept of "Third World", given the disparity of the state of development of its different components. In the West, Asia starts at the doorstep of Europe with Turkey, a country that does not really know whether its destiny is tied more to Europe or to Asia,[3] and after a long journey of almost nine thousand kilometres, Asia ends in Japan. The countries of the Middle East are dominated by Islam; they have truly specific societal features and constitute therefore a cultural universe of their own, again with many internal variations, shades, and nuances. India, halfway between the Mediterranean Middle East and the Pacific Far East, presents itself as a nation with a highly complex mix of cultural and ethnic characteristics. Lastly, at the Far-Eastern end of our journey, China and Japan have experienced development that has moulded them as unique entities, each acquiring a profile with incomparable peculiarities.[4] Many other nations have also grown distinct identities. Therefore, extreme caution is required in handling the concept of "Asia" or "Asian culture", since any commentator might be unable even to identify the object referred to. In any event, the complexity of the *problématique* shall not be ignored.

I. HISTORY OF INTERNATIONAL LAW

Broad agreement exists among authors of international law that the modern concepts of international law, as they are still being used today, had their origin in the European world of the seventeenth century.[5] This does not mean that in earlier centuries there was a total lack of well-ordered relations among governmental entities, as characterized by the conclusion of treaties and the exchange of ambassadors. Roberto Ago, the former Italian judge at the International Court of Justice (ICJ), emphasized

2. According to the *2005 World Summit Outcome*, GA Res. 60/1, UN Doc. A/RES/60/1 (2005), references to "enemy States" in arts. 53, 77, and 107 of the UN Charter should be deleted.

3. At the United Nations, Turkey participates fully in both the Western European and Others Group (WEOG) and the Asian Group, but for electoral purposes is considered a member of WEOG only.

4. For David P. FIDLER, "The Asian Century: Implications for International Law" (2005) 9 Singapore Year Book of International Law 19 at 25, Asia starts out in the West with India.

5. In the classic treatise by Lassa OPPENHEIM and Hersch LAUTERPACHT, *International Law*, 8th ed., Vol. I (London: Longmans, 1955) at 6, one can read that international law "is in its origin essentially a product of Christian civilization, and began gradually to grow from the second half of the Middle Ages"; see also at 48. Similar statements have been made by Wilhelm G. GREWE, *The Epochs of International Law* (Berlin; New York: de Gruyter, 2000) at 9–10; Henry WHEATON, *Elements of International Law with a Sketch of the History of the Subject* (Philadelphia: Carey, Lea, and Blanchard, 1836) at 22–32.

many times the co-existence of different civilizations around the Mediterranean Sea after the Roman epoch.[6] But the fine network of legal rules and concepts which still serve as the anchors of the present-day system of international law saw its emergence only after the Thirty Years War in Germany. Accordingly, the international system is frequently called the "Westphalian" system, a name derived from the two cities of Münster and Osnabrück where in 1648 the great peace treaties were signed. It is well known that the European nations that dominated the world through their commercial fleets and navies during the eighteenth and nineteenth centuries did not, during that epoch, recognize the governmental entities that existed in Asia as states at the same level of legal parity.[7] After 1840, China was reduced by those powers to the status of a semi-colonial country. Only in the second half of the nineteenth century could some progress be observed. Japan entered into treaty relations with Western nations starting in 1854,[8] and the Ottoman Empire was admitted to that "club" in 1856. It is clear, however, that the distance from the European system of international law did not mean the total absence of legally regulated trans-boundary relationships. Onuma Yasuaki has persuasively described the prevailing view of the Sino-centric world in which the Europeans originally played only a marginal role as barbarians.[9] In other words, there existed over many centuries two different systems side by side, largely ignoring one another.[10]

This parallelism can be seen as a sign of arrogance on the side of the Europeans, who felt superior to all the other peoples of the world. However, another interpretation is even more plausible. It may well be that the great seafaring nations, the British, Dutch, and Portuguese, cultivated such a feeling of cultural hegemony, trying deliberately to brush aside any legitimate claims of the kingdoms and principalities in the Asian region, because full recognition as equals would have hampered their strategies of conquest. As far as German legal literature is concerned, it retained the terminology of "European international law" even during the first half of the nineteenth century. The main reason for this terminological confinement was nothing other than simple ignorance and parochialism. The authors who wrote books on international law knew very little of the world beyond the boundaries

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6. Roberto AGO, "Pluralism and the Origins of the International Community" (1977) 3 Italian Yearbook of International Law 3 at 30. See also the condensed observations by Arthur NUSSBAUM, *A Concise History of the Law of Nations*, 2nd ed. (New York: Macmillan, 1954) at 60–6.

7. Thus, in the *Island of Palmas* case, arbitrator Max Huber wrote that since "native princes or chiefs of peoples [are] not recognized as members of the community of nations", contracts concluded by them with states "are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties". See *Island of Palmas Case (Netherlands/United States of America)*, Award of 4 April 1928, [1949] 2 RIAA 829 at 858. For a modern interpretation of the status of pre-colonization governmental structures see the *Western Sahara* case, Advisory Opinion, [1975] I.C.J. Rep.12 at 38–40, 63–8. See also *Case Concerning Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)*, [2002] I.C.J. Rep. 303 at 404–7.

8. *Japan-United States Treaty of Amity and Friendship*, 31 March 1854 (Kanagawa Convention).

9. ONUMA Yasuaki, "When was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilizational Perspective" (2000) 2 Journal of the History of International Law 1 at 66.

10. See also ONUMA Yasuaki, *A Transcivilizational Perspective on International Law* (Leiden; Boston: Martinus Nijhoff, 2010) at 305–14.

of Europe. Thus, Johann Ludwig Klüber, explicitly mentioned by Onuma Yasuaki in his impressive article about the origins of international law,[11] has a little chapter on "The European States" in his 1821 treatise on "European International Law", where he lists the existing European states one by one.[12] It is quite obvious that the author would not have been able to say anything about the states outside the geographical area of Europe. Indeed, he does not even mention the United States. On the other hand, twenty years later, August Wilhelm Heffter advanced another justification for excluding the nations outside Europe from the scope of international law by arguing that a guarantee of reciprocity was lacking in bilateral relations.[13] Heffter's argument indeed smacks more of cultural superiority than the rather dry handling of the matter by Klüber. In any event, however, before Germany reached its national unity in 1871, the individual German states pursued only fairly modest colonial ambitions.[14] The Hanseatic cities of Bremen and Hamburg were mainly interested in finding reliable partners in the world whenever their tradesmen established commercial contacts with foreign countries. In sum, from a German viewpoint, the insistence on the European character of international law was based on factual observations. From the German perspective, inter-state relations did not take place across the oceans during the seventeenth and eighteenth centuries before the founding of the United States and the emancipation of the Spanish colonies in Latin America. They were simply confined to Europe *ratione territorii*. Only in the last decades of the nineteenth century did "transoceanic" international law become a living reality and be seriously analysed as a challenge to traditional concepts of European superiority. When the independent nations of the world came together for the two Hague Peace Conferences of 1899 and 1907, European insularity had been definitively overcome.[15]

II. THE COPERNICAN REVOLUTION

However, this is not an inquiry into the history of international law. What matters is the current position. Are there still any specificities that require us to consider the Asian region, in whole or in part, as a region which has a special position under international law? Is Asia different from Europe not only in terms of language, ethnicity, or customs, but also in legal terms? Essentially the answer must be "no". The UN Charter brought about a dramatic change in 1945 post World War II.[16] After having fought a successful

11. *Ibid*., at 38.
12. Johann Ludwig KLÜBER, *Europäisches Völkerrecht*, Vol. 1 (Stuttgart: Cotta'sche Buchhandlung, 1821) at 59.
13. August Wilhelm HEFFTER, *Das Europäische Völkerrecht der Gegenwart* (Berlin: Schroeder, 1844) at 11.
14. The German state of Brandenburg-Prussia maintained from 1683 to 1717 the colony of Groß Friedrichsburg in the territory of what is today Ghana.
15. Gustavo GOZZI, "History of International Law and Western Civilization" (2007) 9 International Community Law Review 353 at 354–65.
16. Rightly stressed by V.S. MANI, "Centrifugal and Centripetal Tendencies in the International System: Some Reflections" in Ronald St. MACDONALD and Douglas M. JOHNSTON, eds., *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Leiden; Boston: Martinus Nijhoff, 2005), 241 at 245.

battle against military occupation and annexation as well as the inhuman treatment of millions of human beings, the victorious powers could not possibly restore the system as it had previously existed. Peace and human rights were incompatible with discrimination and colonialism. Therefore, at San Francisco, sovereign equality—the key concept of the new world order—was ushered in by the UN Charter in Article 2(1).[17] Regarding non-self-governing territories and peoples still under foreign domination, the Charter specified that the colonial powers would "develop self-government, take due account of the political aspirations of the peoples, and assist them in the progressive development of their free political institutions".[18] Although this was miles away from a straightforward recognition of the right of self-determination,[19] it opened up the way for forward-looking developments. On the basis of the general spirit of the Charter, the groundbreaking General Assembly Resolution 1514 (XV) was adopted in 1960. It proclaimed that "all peoples have the right to self-determination".[20] This programme was swiftly implemented and completed in the following years. It came more or less to its close with the fall of the apartheid regime in South Africa in 1994. In Asia, the former colonies of Hong Kong and Macao were reintegrated into China as Special Administrative Regions in 1997 and 1999 respectively. Thus, colonialism is a word of the past. It does not afflict the contemporary world.

A. *Scrutiny of the Law of the Past*

With the advent of new states, the traditional substance of international law had to be scrutinized for unfair advantages to the Western powers. There was a general feeling in the 1960s that a body of law that had been mainly created and practised by the European nations could not be just towards the newcomers. The International Law Commission (ILC) was one of the main bodies tasked with performing this review. A first survey was carried out in 1949.[21] However, it soon turned out that the areas of legitimate dissatisfaction were more limited than originally anticipated. In fact, the configuration at the time of the "classical" European international law was not principally one that was marked by the polarity between the powerful European nations and generally weaker colonial peoples and territories. It had accommodated the varied relations among the European states. What seemed to be fair and adequate

17. Sovereignty has kept its de jure and de facto significance to this very day notwithstanding all the ongoing integration processes at the international level. See Attila TANZI, "Remarks on Sovereignty in the Evolving Constitutional Features of the International Community" in Mahnoush H. ARSANJANI, Jacob Katz COGAN, Robert D. SLOANE, and Siegfried WEISSNER, eds., *Looking to the Future: Essays on International Law in Honour of W. Michael Reisman* (Leiden; Boston: Martinus Nijhoff, 2011), 299.

18. *Charter of the United Nations*, 24 October 1945, 1 U.N.T.S. XVI [*UN Charter*], art. 73(b). See arts. 73–4 more generally.

19. The peoples under colonial domination were not recognized as interlocutors on a level of parity. All the relevant decisions were left to the colonial powers. No deadline for the granting of independent sovereignty was set.

20. *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 1514 (XV), UN Doc. A/4684 (1961).

21. See United Nations, eds., *The Work of the International Law Commission*, 7th ed., Vol. I (New York: United Nations, 2007) at 33.

in the relationships between European states was not necessarily inappropriate for the relationships between European states and non-European states. In particular, the principle of sovereign equality of states had an almost boundless potential of emancipation and was of course readily and eagerly accepted by the countries of the Third World as the basis of their new status in the world.[22] Accordingly, not everything that originated from a European-dominated world could be called defective and be in need of reform. Instead, a careful scrutiny of the issues truly deserving critique and subsequent transformation was necessary.

The basic axiom of *pacta sunt servanda*, a formal principle which may be presented as the embodiment of justice itself, had many times been abused before World War II. The fairness inherent in a treaty depends to a large extent on the distribution of factual power between the contracting parties. The conclusion of "unequal treaties" was a frequent occurrence in the nineteenth century. China in particular was many times compelled to accept agreements that provided for unilateral advantages to the benefit of the European party involved. As long as no account was taken of the factual inequality of the parties at the time of the conclusion of the treaty concerned, a mighty nation could dictate the conditions of the regime to be legally consolidated. In this regard, the Vienna Convention on the Law of Treaties (VCLT) eventually clarified the legal position. In consonance with the principle of non-use of force as articulated by Article 2(4) of the UN Charter, Article 52 of the Vienna Convention provides that treaties procured by the threat or use of force are "void".[23] Although there has never been recourse to this ground of nullity,[24] Article 52 has a tremendous symbolic and concrete significance. Governments know that they are unable to obtain any advantages by putting another state under undue pressure, such as the threat of military intervention. Threats of all kinds have not ceased just for that reason, but international law does maintain its moral integrity by denying legal validity to agreements extorted under such conditions. The new spirit permeating international law has also brought about the disappearance of all unequal treaties of the pre-United Nations era.[25]

Obviously, Article 52 applies to all classes of treaties, and therefore also to peace treaties. When an armed conflict comes to its end, one encounters most of the time a victorious party on one side and a defeated party on the other, except for instances where peace is the result of exhaustion on both sides. For the victor, it is always tempting to impose its will on the defeated party. In our time, the danger inherent in this unequal configuration is less obvious than before the establishment of the United Nations. In all matters of peace and security, the Security Council, under the mandate

22. Georges M. ABI-SAAB, "The Newly Independent States and the Rules of International Law: An Outline" (1962) 8 Howard Law Journal 95 at 103 ("the hard won prize of their long struggle for emancipation"). This still applies today. See, for instance, the praise of sovereignty by DUAN Jielong, "The Concept of the 'Harmonious World': An Important Contribution to International Relations" in YEE Sienho and Jacques Yvan MORIN, eds., *Multiculturalism and International Law: Essays in Honour of Edward McWhinney* (Leiden; Boston: Martinus Nijhoff, 2009), 59 at 61.

23. See comments by Lucius CAFLISCH, "Unequal Treaties" (1992) 35 German Yearbook of International Law 52 at 70–77.

24. Olivier CORTEN, "Commentary on Art. 52 VCLT" in Olivier CORTEN and Pierre KLEIN, eds., *Les Conventions de Vienne sur le droit des traités*, Vol. II (Bruxelles: Bruylant, 2006), 1867 at 1894.

25. But see the review of practice by Caflisch, *supra* note 23 at 60–67.

given to it by the UN Charter, is charged with a monitoring role.[26] This again must be called a major step in the right direction. It is well known that the Treaty of Versailles,[27] which put a formal end to World War I, was inconsiderately imposed on Germany. Germany was not admitted to the negotiations on its substance. Once the text was finalized, Germany was provided, on 7 May 1919, with an opportunity to make representations in writing. The German government availed itself of this opportunity but almost nothing was changed. One month later, on 16 June 1919, Germany was given an ultimatum to accept the Treaty within five days; otherwise military hostilities would continue. On 22 June 1919, the German Reichstag adopted the Treaty and two delegates of the Reichstag put their signature to the document on 28 June 1919.[28] With hindsight, one can say without any hesitation that this utter lack of regard for legitimate German interests constituted the greatest diplomatic blunder of the entire twentieth century. The unfairness of many of the clauses of the Treaty favoured the strengthening of the extreme right wing of the political spectrum and laid the seeds for the coming to power of Adolf Hitler and his criminal Nazi party. A nation having won an armed conflict should never exploit its victorious situation. Fortunately, the VCLT has acknowledged this basic requirement of justice and equity.

As far as customary international law is concerned, a comprehensive process of review of the traditional rules has taken place through the United Nations. In this process, it has turned out that the areas of concern were fairly limited. There could be no doubt that the traditional breadth of the coastal territorial waters of only three miles favoured the fishing fleets of the nations that had become engaged in fishing far away from the coasts of their home countries. The general recognition of the exclusive economic zone under the 1982 United Nations Convention on the Law of the Sea rightly put an end to rules that were unfairly tilted in favour of such industrial uses of the oceans.[29] In addition, the traditional rules on the protection of foreign investment, mainly framed by capital-exporting countries, could not remain unchanged. The traditional Hull Rule, according to which compensation for expropriation must be prompt, adequate, and effective,[30] could not be maintained since it would have prevented colonial countries from restructuring their national economies after the end of foreign domination.[31] It is significant that the Republic of

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26. Taking into account the pitfalls inherent in art. 52 of the Vienna Convention on the Law of Treaties, it has been preferred in recent times to impose the conditions of peace by a resolution of the Security Council, the most important example in point being Resolution 687, UN Doc. S/RES/687 (1991) on Iraq.

27. Of 28 June 1919, reprinted in: Wilhelm G. GREWE, ed., *Fontes Historiae Iuris Gentium—Sources Relating to the History of the Law of Nations*, Vol. 3/2 (Berlin; New York: Walter de Gruyter, 1992) at 683.

28. Christian TOMUSCHAT, "The 1871 Peace Treaty between France and Germany and the 1919 Peace Treaty of Versailles" in Randall LESAFFER, ed., *Peace Treaties and International Law in European History* (Cambridge: Cambridge University Press, 2004), 382 at 383.

29. *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 397 (entered into force 10 September 1964), arts. 55–75.

30. See, for instance, Ian BROWNLIE, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003) at 509.

31. Whereas the radical contestation of the protection of foreign property by the *Charter of Economic Rights and Duties of States*, GA Res. 3281 (XXIX), UN Doc. A/RES/29/3281 (1974), art. 2(2)(c) found

Guinea charged the Democratic Republic of the Congo with having unfairly deprived one of its nationals of their possessions before the ICJ.[32] Third World countries insist that property legitimately acquired deserves legal guarantees. Diplomatic protection with a view to defending the assets of nationals cannot be dismissed as a privilege of a few powerful countries only.

Of course, the principle of sovereign equality does not do away with factual inequalities. Liechtenstein will never have the same stature as China or the United States, nor will Chad ever have a decisive say in international politics. The world economic system has been shaped by the large industrialized states and it cannot be denied that many Third World countries are lagging far behind.[33] Without any persuasive justification, however, some authors have decried sovereign equality as a fiction without any real substance. Such critique has become a leitmotif of the movement known as "Third World Approaches to International Law" (TWAIL).[34] One of the guiding manifestations of this movement is a statement made by Makau Mutua on the occasion of the 94th Annual Meeting of the American Society of International Law in 2000 where, in a fierce attack on international law in its entirety, he declared: "The regime of international law is illegitimate. It is a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West", and categorized those voices from the Third World that supported the existing world order system as "collaborationalist intellectuals [of a] betrayal class".[35]

Such criticism[36] would appear to be short-sighted and out of touch with reality.[37] The point of international law is that even a small state is protected by the principles of non-use of force and non-intervention, that it may participate in the work of the United Nations, and that it enjoys treaty-making power as well as the legal advantages that flow from sovereignty, in particular, immunity. On the other hand, the powerful states, apart from their privileged position as permanent members of the Security Council, have no more rights and no more extensive rights than even the micro-states. In the global order, the United States and China are not better protected by the law than the other members of the United Nations. On the other hand, power

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no general international recognition, the compromised formula embodied in *Permanent Sovereignty over Natural Resources*, GA Res. 1803 (XVII), UN Doc. A/5217 (1962), has provided guidance to international practice.

32. *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, Judgment of 30 November 2010, online: ICJ 〈www.icj-cij.org〉. (Concluding that the Respondent had not violated any of the pecuniary interests of the Guinean citizen involved, the ICJ had no need to express itself on the guarantee of private assets under general international law.)

33. The de facto existing economic disparity is one of the main criticisms voiced by B.S. CHIMNI, "Third World Approaches to International Law: A Manifesto" (2006) 8 International Community Law Review 3.

34. See, for instance, David KENNEDY, "The TWAIL Conference: Keynote Address" (2007) 9 International Community Law Review 333 at 335, 338.

35. Makau MUTUA, "What is TWAIL?" (2000) 94 American Society of International Law Proceedings 31.

36. Another one of the basic texts has been authored by Chimni, *supra* note 33. On the history of this movement see Karin MICKELSON, "Taking Stock of TWAIL Histories" (2008) 10 International Community Law Review 355.

37. For a persuasive rejection of such criticisms, see Marcelo G. KOHEN, "Commentary on Art. 2(1) UN Charter" in Jean-Pierrre COT, Alain PELLET, and Mathias FORTEAU, eds., *La Charte des Nations Unies: Commentaire article par article*, 3rd ed. (Paris: Economica, 2005), 399.

does affect the reach of law. After the United States' 2003 invasion of Iraq, it seemed for a moment that the Western superpower could establish itself as the hegemon of the world. Only a few years later, the international community now notes that in terms of economic and military power the United States and China are factually located at a level of parity. No political analyst would subscribe to the concept of a unipolar world any longer. In this regard, sovereign equality has kept its paramount importance also for the United States as a country which in the near future may have to share its place at the top with other states.[38]

Rejection of the World Trade Organization (WTO) system of international commercial relations and other economic and financial mechanisms cannot be the panacea for curing the deepening gap between rich and poor nations.[39] One must certainly agree with the adherents of TWAIL that the practical effects of those systems must continually be kept under strict supervision. It is obvious that the distribution of wealth generated by the world economy produces from time to time results that are outright scandalous.[40] Poverty is and remains one of the major challenges the international community has to address, as explicitly recognized by the United Nations Millennium Declaration.[41] On the other hand, the liberalization of international trade has created massive employment precisely in many less-developed countries, China and India being the main cases in point. It must also be observed that most states adhere to treaties of their own free will. On the strength of their membership, they are able to press not only for superficial changes but even for fundamental reforms.[42] In any event, the rules of general international law are not tainted by any structural deficiency. As far as the relevant treaty regimes are concerned, there is certainly room for improvement, which can be obtained through hard processes of negotiation. It should be added that increasingly Western nations, too, feel the pressures of global markets which do not fluctuate under commands given to them.[43]

B. *Asian Participation in Legal Activities*

A close glance at international practice shows that Asian states have effectively made use of the international legal space. As far as law-making is concerned, attention may be focused on the Manila Declaration on the Peaceful Settlement of Disputes,[44] an

38. See comment by Christian TOMUSCHAT, "Multilateralism in the Age of US Hegemony" in MacDonald and Johnston, eds., *supra* note 16 at 31–75.

39. See criticism by B.S. CHIMNI, "International Institutions Today: An Imperial Global State in the Making" (2004) 15 European Journal of International Law 1 at 7–9.

40. See Obiora Chinedu OKAFOR, "Poverty, Agency and Resistance in the Future of International Law in an African Perspective" in Richard FALK, Jacqueline STEVENS, and Balakrishnan RAJAGOPAL, eds., *International Law and the Third World: Reshaping Justice* (London; New York: Routledge, 2008), 95.

41. *United Nations Millennium Declaration*, GA Res. 55/2, UN Doc. A/RES/55/2 (2000).

42. For a sober analysis of the achievements of Third World countries see 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 38–56.

43. See Christian TOMUSCHAT, "Word Order Models: A Disputation with B.S. Chimni and Yasuaki Onuma" (2006) 8 International Community Law Review 71.

44. Adopted by *Peaceful Settlement of Disputes Between States*, GA Res. 37/10, UN Doc. A/RES/37/10 (1982).

initiative of the non-aligned countries, where Asian members played a leading role. Great contributions have continually been made by the Asian-African Legal Consultative Organization, which since its inception has successfully attempted to keep a vigilant eye on the work of the ILC.[45] It should also be recalled that the codification of jurisdictional immunities of states, which culminated in 2004 with the adoption of a convention,[46] had been entrusted in the ILC to two special rapporteurs from Asia—initially Sompong Sucharitkul, who was then followed by Motoo Ogiso. Regarding the complex topic of "International liability for injurious consequences arising out of acts not prohibited by international law", Sreenivasa Rao from India led the ILC to a concrete result after a protracted period of discussion.[47] In sum, the contribution of Asia to the law review process of the post-colonial period has left its indelible hallmark on the body of international law. Asia cannot any longer be called an outsider. It has become one of the most active supporters of international law.

The same can be said of Asia's participation in international adjudication.[48] As one of the five permanent members of the Security Council, China has for most of the time had a judge at the ICJ.[49] Even more conspicuous is Japan's achievement. Oda Shigeru, obviously enjoying to an astounding degree the confidence of the international community, served as a judge for three consecutive terms, from 1976 to 2003. Rightly, his extraordinary merits were honoured by an extremely rich two-volume *Festschrift* in 2002.[50] His successor, Owada Hisashi, was entrusted by his colleagues with the office of President of the Court after the departure of Rosalyn Higgins. Shi Jiuyong, Nagendra Singh, R.S. Pathak, and C.G. Weeramantry also count among the prominent judges of the Court whose opinions have shown new orientations in an interdependent world of solidarity and co-operation. Hence, Asia has also been able to position itself at the forefront of developments in the field of international adjudication.

In sum, the conclusion of the preceding observations is that Asia can today be considered as being fully integrated in the system of the traditional rules of inter-state law.[51] One might even say that a country like Japan counts among the staunchest supporters of that body of law which, under the auspices of sovereign equality, has removed any vestiges of historical alienation. Modern international law provides an appropriate framework for the full enjoyment of the exercise of self-determination. On the other hand, most Asian states, and Japan in particular, are also prepared

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45. The adoption of the *Declaration on Territorial Asylum*, GA Res. 2312(XXII), 14 December 1967, is largely owed to its efforts.

46. *United Nations Convention on Jurisdictional Immunities of States and their Property*, GA Res. 59/38, UN Doc A/59/508 (2004).

47. See *Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*, taken note of by GA Res. 61/36, UN Doc. A/61/PV.64 (2006).

48. An excellent overview is given by OWADA Hisashi, "The Experience of Asia with International Adjudication" (2005) 9 Singapore Year Book of International Law 9.

49. There was an interruption between 1967 and 1985.

50. ANDO Nisuke, Edward MCWHINNEY, and Rüdiger WOLFRUM, eds., *Liber Amicorum Judge Shigeru Oda* (The Hague: Kluwer Law International, 2002).

51. I agree with Saeid MIRZAEE-YENGEJEH, "International Law as a Cultural Perspective: Towards a Convergence of Civilizations" in MacDonald and Johnston, eds., *supra* note 16 at 191.

to extend a helping hand to economically weaker nations. After the United States, Japan is the second largest contributor to the budget of the United Nations, and its share in financing initiatives for the development of Third World countries is also impressive.

III. HUMAN RIGHTS

There is one field of modern international law where a global assessment encounters many more difficulties. Human rights entered international law at a relatively late date. Before World War II, the prevailing opinion was that individuals were subject to the jurisdiction of their national governments and that third states lacked any justification for intervening in that relationship. The atrocities committed during World War II convinced the international community to abandon this traditional view. The UN Charter elevated "promoting and encouraging respect for human rights and for fundamental freedoms" to the rank of one of the primary purposes of the world organization.[52] Human rights have steadily gained ground since. The Universal Declaration of Human Rights was adopted on 10 December 1948[53]—with the active support of no less than twelve Asian countries[54]—and in 1993 the World Conference on Human Rights determined that "the promotion and protection of all human rights is a legitimate concern of the international community".[55] More recently, the World Summit Outcome of 2005, adopted by consensus, again renewed the commitment of the international community to human rights.[56]

In sum, at first glance, everything seems to be in full harmony. All states profess their respect of human rights, and almost no reservations are expressed at the level of declarations that have a primarily political character. However, one should not be misled by superficial appearances. States are very sensitive to human rights because they do not stop at their outer limits. According to a classical saying, within the system of traditional international law states interact like billiard balls, touching one another only at their surface.[57] Human rights cannot be squeezed into this model. They make requests on the internal order of states, directing them to organize their governmental structures in specific ways. Thus, human rights stand virtually in contrast to the principle of self-determination. The autonomy gained by sovereign equality, the basis of which is democratic self-determination, is immediately restricted by requirements following from international human rights law. And the scope of matters for which governments can be made accountable by the international community under the profile of human rights becomes extremely wide.

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52. *UN Charter*, *supra* note 18, art. 1(3).
53. Among the most influential members of the Commission on Human Rights were Charles Malik from Lebanon and Hansa Mehta from India.
54. Afghanistan, Burma, China, India, Iran, Iraq, Lebanon, Pakistan, the Philippines, Thailand, Syria, and Turkey. Saudi Arabia abstained from voting.
55. *High Commissioner for the Promotion and Protection of All Human Rights*, GA Res. 48/141, UN Doc. A/Res/48/141 (1993), para. 3(a).
56. *2005 World Summit Outcome*, *supra* note 2, paras. 119–45.
57. This is the classic realist metaphor first used by Arnold Wolfers. See Arnold Wolfers, *Discord and Collaboration: Essays on International Politics* (Baltimore: The Johns Hopkins Press, 1962) at 19–24.

Human rights cover almost all fields of governmental activity. Wherever decisions are taken that in some way or other affect individual human beings, human rights invariably come into play.

This configuration can be seen in two different ways. On the one hand, one may emphasize the negative aspects, such as the loss of national freedom of action.[58] On the other hand, the prevailing view is that indeed the international community must have a right of supervision vis-à-vis political systems in which not infrequently the ruling elites do not at all represent the aspirations of their peoples or where from time to time the internal checks and balances break down, leaving individual human beings defenceless against mighty executive power structures.

Some of the discrepancies that have arisen in the field of human rights are hardly concealed by the actors involved. To date, China has abstained from ratifying the International Covenant on Civil and Political Rights (ICCPR),[59] and it is more or less compelled to distance itself from that instrument as long as it maintains its official ideology according to which the Communist Party is the leading political group of a country which does not tolerate any competitors.[60] Under the present conditions, acceptance of the ICCPR could not be seen as a serious gesture and would rather delegitimize the Covenant, given the obvious tensions between the principle of non-discrimination on political grounds in Article 2(1) and the authoritarian structure of the Chinese Constitution.[61] From the group of Islamic countries, too, some have quite deliberately remained aloof from the Covenant, of which they reject two basic components: the principle of equality between men and women and the freedom of religious faith. Numerous reservations characterize their ratifications of the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child; mostly, the precedence to be granted to the teachings of the Koran is stressed in those reservations.[62] It is clear that the often proclaimed universality of human rights, the centrepiece of the human rights idea, according to which human rights accrue to every human being by virtue of the sole fact that they constitute the basic requirements of a life in dignity, undergoes a

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58. This seems to be a view widely held by Asian governments, see YEE Sienho, "The Role of Law in the Formation of Regional Perspectives in Human Rights and Regional Systems for the Protection of Human Rights: The European and Asian Models as Illustration" (2004) 8 Singapore Year Book of International Law 157 at 163. See also observations by Antony ANGHIE, "The Evolution of International Law: Colonial and Postcolonial Realities" in Richard FALK *et al.*, eds., *supra* note 40 at 45.

59. *International Covenant on Civil and Political Rights*, 16 December 1966, GA Res. 2200A (XXI), UN Doc. A/6316 (entered into force 23 March 1976) [*ICCPR*].

60. Compare *Constitution of the People's Republic of China*, 4 December 1982, art. 1 and *ICCPR*, *ibid.*

61. Unfortunately, when China was reviewed under the UN procedure of Universal Periodic Review in February 2009, it rejected all suggestions to ensure the independence of the judiciary and to take care that lawyers could defend their clients without fear of harassment. On the other hand, it accepted a suggestion by Cuba to "avoid the impunity for people who are qualifying themselves as human rights defenders with the objective of attacking the interests of the state and the people of China"; see *Report of the Working Group on the Universal Periodic Review—China*, UN Doc. A/HRC/11/25(2009), at para. 114, section 34.

62. For recent studies on the Islamic concept of human rights, see e.g., Mashood A. BADERIN, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2003); Syed Jafar ALAM, "Towards a New Discourse: Human Rights in Islam and Vice Versa" (2007) 47 Indian Journal of International Law 257, 262ff.

hard test in the face of such realities. On the other hand, India, as well as the ASEAN countries,[63] seems to have joined the mainstream view of human rights.[64]

In the preparatory stages of the 1993 World Conference on Human Rights, an attempt had been made to sort out the difficulties impeding the acceptance of the concept of the universality of human rights by establishing a common denominator through dialogue and negotiation.

The Asia countries met for such a preparatory meeting in Bangkok from 29 March to 2 April 1993. Regarding the concept of universality, the following proposition was adopted:

> That while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.[65]

This formulation also found its way in a slightly amended fashion into the 2005 World Summit Outcome:

> While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, all States, regardless of the political, economic and cultural systems, have the duty to promote and protect all human rights and fundamental freedoms.[66]

These statements may be interpreted as a trivial acknowledgement of the fact that human rights will have to be accommodated in the most diverse contexts from which they will unavoidably be influenced. On the other hand, they might also be used as a pretext to relativize firm conventional obligations undertaken under any of the human rights treaties. In this regard, the writer notes that the Bangkok Declaration grants more leeway to states than the corresponding clause of the World Summit Outcome, which hastens to stress that the relevant political, economic, and cultural system of a country does not open up uncontrollable margins of appreciation.

In this connection, the question of specific "Asian values" arises as well. Does Asia in general keep some distance from individual rights, favouring instead the concept of duties to be complied with by everyone, by individuals as well as by governments?[67] On this issue, there seems to be a gap between governments and NGOs, which view the

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63. In 2009, during the ASEAN Summit, the ASEAN Intergovernmental Commission on Human Rights, or AICHR, was inaugurated and launched in Cha-am, Hua Hin, Thailand. The basic parameters of the AICHR seem to be the human rights as conceived of at the universal level.

64. See e.g., Rahmatullah KHAN, "Universality of Human Rights" in R.K. DIXIT *et al*., eds., *International Law: Issues and Challenges*, Vol. II (New Delhi: Indian Society of International Law, 2010), 315 at 316.

65. *Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights*, UN Doc. A/CONF.157/PC/59 (1993), para. 8 [*Bangkok Declaration*]. For a cogent political analysis of this Declaration, see Michael C. DAVIS, "Human Rights in Asia: China and the Bangkok Declaration" (1995–6) 2 Buffalo Journal of International Law 215.

66. *2005 World Summit Outcome*, *supra* note 2, para. 121.

67. Famous is the letter written by Mahatma Gandhi on 25 May 1947 to the then Director-General of UNESCO, Julian Huxley, where he stated: "I learnt from my illiterate but wise mother that all rights to be deserved and preserved came from duty well done." See UNESCO, *Human Rights Teaching*, Vol. IV (Paris: UNESCO, 1985) at 4.

states' insistence on the concept of duties more as a pretext than as a true philosophical position.[68] In any event, like all the other continents, Asia needs to protect the rights of the individual.[69] And it would seem to be a vain undertaking to roll back the wheel of history. The notion of human rights cannot be made to disappear. The only—and eternal—question is how to find an adequate balance between individual rights and freedoms and the requirements of the common interest.

In any event, for a lawyer it is indispensable to take a clear stance. The "trivial" interpretation of the relevant clauses of the two human rights declarations of 1993 and 2005 cannot be called into question.[70] It would be self-defeating to deny that human beings have to lead their lives under the most diverse circumstances. But human rights treaties would be essentially undermined if their substance was unconditionally subordinated to widely differing historical, cultural, and religious circumstances. It is simply an error to believe that traditions are necessarily good, deserving to be kept. Human rights derive their legitimacy from ideas of enlightenment which acknowledge the value and dignity of the individual human being. Equality and non-discrimination belong to the central pillars of the entire edifice of human rights. Therefore, to deny women full equality in their status as citizens and as actors in civil life cannot be justified any longer if a state has ratified the ICCPR; it is debarred from invoking the Bangkok Declaration to support treatment to that effect. Slavery, the burning of widows, or female genital mutilation are practices which deny the dignity of others.[71]

On the other hand, there can be no doubt that not all Western trends and fashions partake of the minimum consensus supporting the human rights concept. From the very outset, the assumption that human rights is a Western concept was erroneous.[72] Western countries had undeniably an edge in formulating specific requests opposed to governments as legal entitlements. The relevant examples are all well known: the 1776 Virginia Bill of Rights, the 1789 French *Déclaration des droits de l'homme et du citoyen*, and the American Bill of Rights of 1789 and 1791. But this does not indicate a black hole in places where no similar efforts were made to synthesize citizens' basic entitlements in one comprehensive instrument. Whenever human beings come together to found a common polity, the rights and duties of the rulers and the ruled must be defined and circumscribed. From its specific experiences, every human community can make a contribution to a standard applicable to all.

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68. For a vigorous critique of governmental positions on this issue, see Yash GHAI, "Human Rights and Governance: The Asia Debate" (1994) 15 Australian Yearbook of International Law 1.

69. A drastic picture of the lack of human rights protections in many Asian countries is given by Annapurna WAUGHRAY, "Human Rights in South Asia: Abuse and Degradation" (2001) 10 Asian Yearbook of International Law 25.

70. *Bangkok Declaration*, *supra* note 65; *Vienna Declaration and Programme of Action*, World Conference on Human Rights, UN Doc. A/CONF.157/23 (1993) [*Vienna Declaration*].

71. Khan, *supra* note 64 at 317, has reported that in *Tungana v. His Majesty's Government*, the Nepal Supreme Court referred to the Convention on the Elimination of All Forms of Discrimination Against Women when ruling that sexual intercourse without the consent of the partner could amount to rape.

72. Christian TOMUSCHAT, "Human Rights in a World-Wide Framework: Some Current Issues" (1985) 45 Heidelberg Journal of International Law 547 at 550; Christian TOMUSCHAT, *Human Rights: Between Idealism and Realism*, 2nd ed. (Oxford: Oxford University Press, 2008) at 85 (rejecting the assumption that human rights is a Western concept).

This intercivilizational method has rightly been advocated as providing the common ground susceptible of being affirmed by all nations.[73] Such commonality should not be endangered by excessive demands. It is a matter of common knowledge that, in particular, serious controversies have arisen in connection with sexual practices. In this regard, each society has to find the right balance for itself. It amounts to Western arrogance to contend that non-discrimination on the basis of sexual orientation constitutes a universal principle. Asian countries do not seem to have found uniform solutions either. Activists may propagate the views which they feel to be correct and desirable. But they should not invoke for their political purposes the authority of international treaties which have refrained from addressing this delicate issue.

IV. CONCLUDING OBSERVATIONS

Asia and international law is a topic much too vast to be satisfactorily addressed in a short article that was originally designed as a conference presentation. Only a few perspectives could be demarcated. Lastly, one should be aware of the fact that no human community is an eternally stable unit. All human communities interact with one another. In our time, no group is hermetically secluded from the outside world. Through the manifold processes of interaction, human communities and their members change in the course of time, assuming new features and abandoning old habits.[74] Additionally, as Onuma Yasuaki has rightly pointed out, in our time human beings have the unique chance to develop several identities. Nobody is only the citizen of his or her country, like an obedient soldier.[75] Accordingly, collective identities also change faster and more extensively than ever before in human history. Human communities are not immovable granite blocks. In trying to find the right answers to newly emerging problems, one should always be conscious of this dynamism which often makes traditional answers unsuitable for the challenges of our time.[76]

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73. See Onuma, *supra* note 10 at 432–62.
74. Rightly underlined by Ghai, *supra* note 68 at 6, 21.
75. ONUMA Yasuaki, "A Transcivilizational Perspective on Global Legal Order in the Twenty-first Century: A Way to Overcome West-centric and Judiciary-centric Deficits in International Legal Thoughts" in MacDonald and Johnston, eds., *supra* note 16, 151 at 162.
76. Thus, Fidler, *supra* note 4 at 19–35 reflects on new governmental structures for Asia in the form of a "Concert of Asia".