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Asia and International Law
The Inaugural Address of the First President of the Asian Society of International Law, Singapore, 7 April 2007

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International lawyers in Asia have long felt the need to establish an Asian Society of International Law. The American Society of International Law was founded a century ago in 1906; its European counterpart was established in 2004. In Africa, there is an African Society of International and Comparative Law. Asia, in fact, was the only major region of the world which had no international law society on a region-wide basis.

With Asia now being one of the most important and vibrant regions of the world in international affairs, it has risen as an active and influential player in international relations. This is apparent in fields such as peace and security, international trade and investment, human rights and the environment, as well as many other fields of international activities. There is today an acute need for the nations of Asia, as well as academics and practitioners working in or on Asia, to have their voices heard on these important issues, to contribute to the development of international law on a global basis, and to consolidate the rule of law in various fields of present-day international relations. There is by now ample room for Asia to contribute to the world not only in the economic and political fields, but also in the social, legal, and other intellectual fields.

We international lawyers in many countries in Asia have long felt that it is essential to create a concrete framework for interaction with our colleagues in the other countries of the region. It is also important that international lawyers jointly and co-operatively raise the consciousness of the political and business leaders in the region on the importance of the rule of law. The hope had often been expressed that an Asian Society of International Law would be such a forum, where Asian perspectives on important international law issues could be presented and discussed. Close collaboration and co-operation between this Society and other regional academic societies would also be beneficial in promoting the research of international law across different regions.

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It was against such a background that some like-minded colleagues decided in 2003 that the time was ripe for the establishment of an "Asian Society of International Law". With a view to bringing this shared vision to concrete reality, we embarked upon the work for the preparation of the creation of the Asian Society of International Law. Six preparatory meetings were held: Singapore (July 2004), Tokyo (October 2004), Beijing (March 2005), Seoul (December 2005), Bangkok (July 2006), and Tokyo (October 2006). Scholars and practitioners working in the field of international law from China, India, Indonesia, Japan, Malaysia, Nepal, the Philippines, the Republic of Korea, Singapore, Sri Lanka, Thailand, and Vietnam convened to plan the framework for the Society as well as research for the promotion of international law in Asia. These efforts culminated in the launch of the Asian Society of International Law at the Inaugural Meeting of the Society at the National University of Singapore in 2007.

The objectives of the Society are primarily: (a) to serve as a centre of activities among international lawyers in Asia for study and research in the discipline of international law; (b) to foster and promote Asian perspectives of international law in research and education; (c) to provide a forum, especially for younger international lawyers in Asia, for intellectual interaction in the field of research and practice in international law; (d) to increase public awareness of the importance of international law in Asia; and (e) to co-operate with other sister institutions in other parts of the world—international, regional, and national societies working in the field of international law.

In order to give effect to its objectives, the Society will organize biennial conferences, regional seminars, subregional workshops, and other meetings. It will also undertake publications for the Society, notably including this new *Asian Journal of International Law*. In addition, it will collect and disseminate information relating to research, academic activities, and state practice in the field of international law in this part of the world.

I wish to underline that in organizing its functions, the Society places special emphasis on serving as a common forum for interaction among scholars and practitioners alike in Asia, and more broadly in other regions, on issues relating to the region. We also particularly encourage younger international lawyers (including both scholars and practitioners) to bring in new blood to the Asian community of international lawyers, with a view to creating new momentum for promoting the study of international law in this part of the world.

In this context, I would like to emphasize that our Society aims to be open and inclusive rather than exclusive. Both its membership and its leadership, while focused on Asian scholars and practitioners, are open to anyone interested in our activities, especially in relation to international law issues in the Asia-Pacific region.

I. THE GENESIS OF THE LAW OF NATIONS

When we look back over the history of international law, we recall that it used to be customary in Europe for many years to perceive of international law as the "law of *European* nations". It may not be possible to trace with accuracy the precise genesis

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of this perception back to its original source, but it seems less difficult to identify some elements in the evolution of the concept that led scholars to this perception of the law of nations. It essentially emanates from the idea that the "law of nations is a product of the cultural life and the legal conscience of the nations of European civilization".[1]

Based on the results of recent scholarship in this field, it is submitted that behind this assertion there lie two intertwined elements that fostered such a perception. One is the conception of the law developed theoretically as a doctrine born in the tradition of Christian theology, as represented especially by such names as Francisco de Vitoria and Francisco Suárez, which was rooted in the concept of the *jus naturale* of Christian origin.[2] The other is the concept of the law developed historically as a doctrine nurtured in the expansionist milieu of nineteenth-century Europe, which was founded on the notion of the "community of European nations sharing a common civilization".

An illustration of the first element can be found as early as in the doctrine developed by Francisco de Vitoria (1480–1546). Earlier, Pope Innocent IV (1243–1254), who is described as "the greatest lawyer that ever sat upon the chair of St. Peter"[3] because of the influence he had on his jurisprudential successors such as Francisco de Vitoria and Hugo Grotius,[4] claimed that the Pope, as the vicar of Jesus Christ, "can grant indulgences to those who invade the Holy Land for the purpose of recapturing it although the Saracens possess it … [for] they possess it illegally".[5] While inheriting the legacy of Christian theology, the Spanish theologian Francisco de Vitoria tried to theorize the Spanish conquest of the Americas against the alleged rights of the inhabitants of the New World on a broader basis of natural law.[6] He tried to justify the Spanish action by taking the position that "the issue was less one of faith and more one of protecting certain natural rights".[7] However, Vitoria's acceptance of the "natural rights" of the Amerindians was characterized not only by "Europe's concern to define the rights of all with whom it came into contact in legal terms" but also by "its unchanging demand that the basic elements of what later became known as a standard of 'civilization' be enforced".[8] In this sense, I submit that Vitoria is to be regarded as a protagonist for natural rights as fostered *within the legacy of Christian Europe*.

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1. Friedrich VON MARTENS, *Völkerrecht: Das Internationale Recht der Civilisirten Nationen* (1909) at 181, para. 41 (translation by author).
2. Amanda PERREAU-SAUSSINE and James Bernard MURPHY, eds., *The Nature of Customary Law* (Cambridge, New York: Cambridge University Press, 2007).
3. Frederic William MAITLAND, "Moral Personality and Legal Personality" in H.A.L. FISHER, ed., *The Collected Papers of Frederic William Maitland*, vol. III (Cambridge: Cambridge University Press, 1911) at 310.
4. Brett BOWDEN, "The Colonial Origins of International Law, European Expansion and the Classical Standard of Civilization" (2005) 7 Journal of the History of International Law 1 at 4.
5. Pope Innocent IV, Documents 40: "Commentaria Doctissima in Quinque Libros Decretarium", quoted in Bowden, *ibid*.
6. *Ibid*., at 10.
7. Gerrit W. GONG, *The Standard of "Civilization" in International Society* (Oxford: Clarendon Press, 1984) at 36. For a more benevolent view of Vitoria as a universalist, see James Brown SCOTT, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (Oxford: Clarendon Press, 1932) at ix.
8. Gong, *supra* note 7 at 37.

Hugo Grotius, who is widely regarded as the "Father of the Law of Nations" for his contribution to the construction of the modern law of nations, based on the law of nature, also observes the following in his chef d'oeuvre, *De Jure Belli ac Pacis*:

> In two ways men are wont to prove that something is according to the law of nature … Proof *a priori* consists in demonstrating the necessary agreement or disagreement, of anything with a rational and social nature … Proof *a posteriori*, in concluding, if not with absolute assurance, at least with every probability, that that is according to the law of nature which is believed to be such among all nations, or among all those that are more advanced in civilization …[9]
>
> Not without reason did I speak of the nations "more advanced in civilization"; for as Porphyry rightly observes, "some nations have become savage and inhuman and from them it is by no means necessary that fair judges draw a conclusion unfavourable to human nature".[10]

It is my submission that in these teachings of the classical school of international law one can discern a seed of the process in which the first element of the doctrine of *jus naturale* in the context of Christian theology would develop into the theorization of a doctrine which led to the second element of the Eurocentric view of the international community at the time of an expansionist Europe.

I suggest that a link between the two in this context becomes more apparent in Montesquieu, the philosopher of the Enlightenment, when he states in his *De l'Esprit des Lois* (1748) the following on the law of nations:

> All nations have the law of nations; and even the Iroquois, who eat their prisoners, have one. They send and receive embassies; they know the laws of war and peace: the trouble is that their law of nations is not founded on true principles.[11]

Interestingly, it is he also who found a distinction between the "savage" and the "barbarian". It would be permissible to suggest that from this position of Montesquieu on the distinction between the savage and the barbarian as distinguished from the civilized, it was only one small step further to reach the famous thesis advanced by James Lorimer, a well-known authority of international law in the nineteenth century. It was he who made the distinction between "civilized humanity", "barbarous humanity", and "savage humanity", and who questioned the applicability of the "law of nations" to the different groups according to this distinction.[12] Thus Lorimer opined as follows:

> As a political phenomenon, humanity, in its present conditions, divides itself into three concentric zones or spheres—that of civilized humanity, that of barbarous humanity and

9. Quoted in Lassa OPPENHEIM, *International Law*, 8th ed., Herscht LAUTERPACHT, ed. (London: Longmans, Green & Co., 1955) at 85.

10. Hugo GROTIUS, *De Jure Belli ac Pacis*, trans. Francis W. Kelsey (Washington, DC: Carnegie Endowment for International Peace, 1925) at 42.

11. Charles Louis de Secondat MONTESQUIEU, *The Spirit of the Laws*, trans. and eds. Anne M. COHLER, Basia Carolyn MILLER, and Harold Samuel STONE (Cambridge/New York: Cambridge University Press, 1989).

12. James LORIMER, *The Institutes of the Law of Nations*, vol. I (Edinburgh/London: William Blackwood and Sons, 1883) at 101–2.

> that of savage humanity. To these … belong, of right, at the hands of civilized nations, three stages of recognition—plenary political recognition, partial political recognition, and natural or mere human recognition …
>
> It is with the first of these spheres alone that the international jurist has directly to deal … He is not bound to apply the positive laws of nations to savages, or even to barbarians, as such; but he is bound to ascertain the point at which, and the direction in which, barbarians or savages come within the scope of partial recognition.[13]

When examined in this way, it seems fair to conclude that in the history of the European perception on the law of nations a continuum of thinking is discernible from the concept of the law of nations based on the law of nature as theorized by Vitoria and Grotius to the ideology of the law of nations as "the law of European civilized nations" as advanced by Lorimer. This ideology served the purpose of providing a theoretical basis for the call of the "civilizing mission" of Europe (e.g. "*la mission civilizatrice*" for France, as advocated by Victor Hugo) as a justification for the expansion of Europe to Asia and Africa, especially in the nineteenth century, which became particularly conspicuous in the writings of theorists of international law of the period.

In the same vein, Henry Wheaton, the well-known American publicist of international law in this period, based his theory of international law on the idea that international law was founded on the principles of Christian morality, as reciprocally practised between the Christian states of Europe. In Wheaton's view, "public [international] law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin".[14]

By comparison, John Westlake, Whewell Professor of International Law at Cambridge in the second half of the nineteenth century, while sharing the dominant view of the period that full recognition before international law and membership in civilized international society had to be limited to the society of states having a European civilization, made the following point:

> Throughout Europe and America, if we except Turkey, habits, occupations and ideas are very similar … The same arts and sciences are taught and pursued, the same avocations and interests are protected by similar laws, civil and criminal, the administration of which is directed by a similar sense of justice …
>
> [In contrast] Turkey and Persia, China, Japan, Siam and some other countries have civilisations differing from the European … The Europeans or Americans in them form classes apart, and would not feel safe under the local administration of justice which, even were they assured of its integrity, could not have the machinery necessary for giving adequate protection to the unfamiliar interests arising out of a foreign civilisation.[15]

In saying this, Westlake makes it clear that "[w]e have nothing here to do with the mental or moral characters which distinguish the civilised from the uncivilised

13. *Ibid*.
14. Henry WHEATON, *Elements of International Law*, 3rd ed. (London: Sampson Low, Son and Company, 1863) at 16–17.
15. John WESTLAKE, *The Collected Papers of John Westlake on Public International Law*, ed. Lassa OPPENHEIM (Cambridge: Cambridge University Press, 1914) at 101–2.

individual, nor even with the domestic or social habits". For him, what was important in this context was the question of "*the prime necessity [of] a government* under the protection of which [Europeans] [might] carry on the complex life to which they [had] been accustomed in their homes".[16] And it was this test that Japan would come to face in the crucial years of the second half of the nineteenth century, when the fateful encounter with this "Community of Civilized Nations" fell upon Japan.

II. ENCOUNTER OF ASIA WITH THE LAW OF NATIONS

It was against this historical background that the encounter between the East and the West came about to change the fate of the region. In many cases, it took the form of colonial domination, to which many of the Asian nations fell victim. Thus the Philippines became a colony of the Spaniards; Indonesia was also colonized by the Dutch; India, Malaya, and Burma came under British rule; and Indochina fell under French domination. China also became a target of the colonial appetite. In this situation Japan was also exposed to the impact of this aggressive advance by European powers.

It is often believed that in this context the experience of Japan was very different from those of many fellow Asian nations. When in the latter half of the nineteenth century the real impact fell upon Japan with the demand for the opening up of Japan to the world, Japan decided to engage in systematic efforts to turn this challenge into an opportunity, through her assiduous learning and digestion of things European, in order to secure her place within this "Community of Civilized Nations".[17]

I do not believe, however, that it is accurate to say that this process of incorporation of "modern" Japan into the "Community of Civilized Nations" of the day was achieved entirely on the basis of "Europeanization" in the sense of her total assimilation and acceptance into the orbit of European civilization. In fact, the process of the "modernization" of Japan, at any rate in its civilizational sense, has been an unfinished history of the intellectual struggle to reconcile and amalgamate the two seemingly different civilizations of the West and the East. Japan, instead of engaging in the "clash of civilizations", has tried hard to assert her identity and her proper place within this "Community of Civilized Nations" through identifying something common and universal that she could accept as the basis of the "modernization" of Japan in continuum with her past.

This process has not been at all easy; in fact, I do not believe that it has been a total success. A famous professor of law at the Tokyo Imperial University of the Meiji period lamented, expressing a serious concern, that "with the coming into existence of the new Civil Code, the traditional virtues of loyalty to the sovereign (chû) and piety to the parents (kô) would perish".

This spiritual agony of the intellectuals of Japan has been even more dramatically articulated in the field of literature—a domain where intellectual expression of the

16. *Ibid*., at 143, emphasis added.

17. For a fuller treatment of this subject, see OWADA Hisashi, "The Encounter of Japan with the Community of Civilized Nations" (Inaugural Presidential Lecture at the University of Leiden, 3 July 2006), online: Leiden University 〈http://www.leidenuniv.nl/tekstboekjes/content_docs/oratie_owada.pdf〉.

"Zeitgeist" of society takes a concrete form. A number of the most representative writers of modern Japan have focused their attention on the dilemma of "living with two civilizations" in the existential sense, as exemplified by the works of Natsume Soseki, Tanisaki Junichiro, and Yokomitsu Riichi, to name only a few.

This intellectual struggle continues to this day in my view. In fact, I believe that one of the basic factors which makes the process of globalization today, as distinct from that of internationalization in the Meiji period of Japan, so difficult lies precisely on this point. To my mind, globalization for Japan, even today, involves not a *quantitative change in society* but a *qualitative transformation of society.*

It is fascinating in this respect to find that through the period of the encounter of Japan with the West in the mid-nineteenth century, when the Japanese intellectuals were confronted with a totally novel concept of "the law of nations" of the West, they tried hard to understand and grasp the concept by looking for a comparable frame of reference in their own cultural heritage. In fact they tried to identify this concept of "the law of nations" as one which should have its rational meaning as a concept of universal validity, and tried to understand it in the context of their own intellectual tradition by assimilating it to the concept of "the way of heaven" in Confucian philosophy, representing a universal value in human behaviour that should be common to both the East and the West.

It cannot be denied that this attempt on the part of Japan led her later into disillusionment and eventually into a blind alley which contributed to the subsequent course of history of Japan with tragic results. It is also true, however, that the experience of these Japanese elites, who approached the "modernization" of Japan in a highly intellectual way, gives us an interesting precedent. They tried to comprehend the meaning of what was "specific" by identifying what was "universal" in that specificity. To borrow the words of Lévi-Strauss, a well-known social anthropologist who started the structuralist school of anthropology, the scientific approach of structuralism in anthropology should consist in the "quest for the invariant, or for the invariant elements among the superficial differences".[18] It is my personal belief that this approach of "the quest for the invariant and universal elements among the superficial differences" should represent the essence of the process of Asia's approach to the "Community of Civilized Nations".

III. TOWARDS THE UNIVERSALIZATION OF INTERNATIONAL LAW

The world has changed almost beyond all recognition from the world of those days. It is no doubt true that the atomistic structure of the international system composed of independent sovereign states still remains essentially valid. In this structure, these sovereign states claim to be both the representative of the public interest of the community in their norm-creating capacity, and at the same time the representative of private interests of their own in their norm-receiving capacity. As French jurist

18. Claude LEVI-STRAUSS, *Myth and Meaning* (New York: Schocken Books, 1979) at 8.

Georges Scelle aptly defined this phenomenon, the functions of a state in the international system consist in the "*dédoublement fonctionnel*" or the "duality of the functions" of the sovereign states in the international system.[19]

Nevertheless, I wish to submit that this essential characteristic of the traditional international system is at this juncture in history going through a major structural transformation in this respect. It can even be said that we are entering into a new chapter in the history of international relations in the modern era. The whole structure of the modern international system, centring around the principle of supremacy of the sovereign states as the essential components of international society, may even have to be re-examined and reconstructed in the light of a new structural transformation of the system. In essence, the basic premises of international law as a body of norms governing the system of interstate relations, established and consolidated since the time of the Peace of Westphalia, are being seriously challenged. Admittedly, this is going to be a long and slow process, which may take decades or even centuries. But there is no denying that it is a steady, ongoing process. In a word, what is emerging as a harbinger of this development, is a wave of societal transformation of international society from a community of nations to a community of mankind on a global scale.

The most fundamental factors that are at the root of this emerging change in the international system in my view are twofold. One is the emergence of the rapidly growing reality of societal integration in the world, described broadly as "globalization", which is transforming international society qua society. This process of societal integration, which is the essence of "globalization", has to be clearly distinguished, in my view, from the traditional process of growing interstate interdependence, which has been going on for a long time since the latter half of the nineteenth century, known as "internationalization". By contrast, this new reality of societal integration seems to be a novel phenomenon, to the extent that it is a movement which creates activities that defy national borders and operate on a global scale, irrespective of the existing system of governance based on a network of national regulatory frameworks. This new phenomenon of globalization has come to create an increasing challenge to the existing institutional framework for the management of the international system built on the principle of the national partition of competence within the Westphalian legal order.

An indication of the problem can be found in the increasingly apparent inadequacy of the present system for the management of the global economy. It is not only issues of macroeconomics, which belong to the traditional domain of sovereign states, but also issues such as how to harness the activities of the so-called "mega-multinationals" operating in a global market, but subject primarily to national regulatory frameworks which have been exclusively devised on considerations of "national public policy", as distinct from an "international public policy", that are on the agenda of international law today.

The problem, however, is not limited to the area of economic activities. The issue of how to manage the global environment, as the bleak prospect for the future of the

19. Georges SCELLE, *Précis de droit des gens: principes et systématique*, vol. 1 (Paris: Sirey, 1932) at 43.

"Kyoto Protocol" dramatically demonstrates, is another indication of the same phenomenon in the field of social problems. Even in the political field, which used to be the monopoly of the sovereign state, the devastating experience of September 11, 2001, was dramatic evidence that revealed the impact of globalization in the political field and the total inadequacy of the present system to cope with such a new development.

The other equally important factor at the root of this change in the international system is the growing awareness in the world of the importance of the primacy of human beings as individuals and of the growing relevance of these individuals with pluralistic values to the international system. The traditional international system, which has been founded on the atomistic notion of a community consisting of nation-states as the most basic element in a system founded on the principle of sovereign equality, is thus being exposed to new challenges. The absolutist model based on the principle that sovereign states are the sole actors in the norm-creating process in the international system with the claim that they, and they alone, can represent the social values of the international community that form part and parcel of its public order, is revealing its inadequacy. This point is typically illustrated by the dilemma that we are confronted with in the present system in dealing with an authoritarian regime which arbitrarily suppresses the individual rights of its citizens in the name of "the reason of the state", as reflected in the debate on humanitarian intervention and the responsibility to protect.

IV. THE ROLE OF THE ASIAN SOCIETY OF INTERNATIONAL LAW

All these new developments point to the importance and the relevance of the Asian Society of International Law. Asia is no longer a secluded, passive bystander to these developments, just as Europe or Africa can no longer claim a position of an independent world of its own, cut off from the rest of the globe.

Asia has a lot to contribute to the world and a responsibility to contribute a lot to the world, not only in terms of its natural resources, but more importantly in terms of its human resources, through intellectual interaction within the region and with other regions of the world. In our quest for commonly shared and universal values that should form the basis of international law and a global public order for this world community, Asia has a role to play. The demise of the Cold War has put an end to the age of "divided international law in a divided world". Diversity in tradition and culture should enrich the process of the universalization of values, rather than the clash of values. The future of the Asian Society of International Law will depend upon whether we can successfully meet this challenge. Together with you I look forward to the day when we can congratulate ourselves for having been "present" at the creation of this Society.