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IS THERE AN ASIAN APPROACH TO INTERNATIONAL LAW?

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I

Introduction: Questions and Theses

The founding of the Asian Society of International Law (ASIL) in 2007 is, among other things, a reflection of the growing role and interest in international law in the region, albeit the Society for the Development of International Law in Asia (DILA-founded in 1989) and national societies of international law (for example in India, Japan, Korea and Philippines) have existed in the region for decades[1]. The starting of new journals and the growing scholarship in international law in the region also manifests this trend[2]. ASIL is also in many ways an institutional expression of the increasing influence of the Asian region, in particular the emerging economies of China and India, in international relations and in the international law making process. The general trend of regionalization of international relations has also contributed to the felt need for an ASIL to promote cooperation in the region. In this backdrop of growing interest in international law in the Asian region the paper explores the theme of a distinctive Asian approach to international law over and beyond a third world approach to international law (TWAIL) that has now been articulated for over six decades[3]. The paper proceeds by asking the following general questions:

[1] The aims and purposes of DILA are:

- promotion of the study and analysis of topics and issues in the field of international law, in particular from an Asian perspective;
- promotion of the study of, and the dissemination of knowledge of, international law in Asia;
- promotion of contacts and cooperation between persons and institutions actively dealing with questions of international law relating to Asia.

See http://dilafoundation.org/dilas-constitution DILA publishes the Asian Yearbook of International Law.

[2] The new journals include Chinese Journal of International Law and East Asian Journal of International Law. Other journals such as the Asian Yearbook of International Law, Japanese Yearbook of International Law, Indian Journal of International Law, Singapore Journal of International and Comparative Law, Philippine Journal of International Law have existed for some time.

[3] For a summary discussion of the five decades of scholarship see (Chimni 2002; Chimni 2005; Anghie and Chimni 2005).

- Given the enormous diversity of the Asian region can a coherent Asian approach to international law be articulated? Are there dominant strands of thinking associated with Pan-Asianism?

- What is the meaning of "civilization"? Does the idea of a civilizational approach to international law offer a conceptualization that is helpful?

- What are the distinctive elements of Asian cosmologies, epistemologies and ontologies?

- What has been the contribution of Asian States to the evolution and development of international law?

- On what basis should a transcivilizational dialogue between Asian civilizations and other civilizations proceed?

- What features of Asian civilization can enrich the structure and process of international law?

I advance the following broad theses:

- Both an essentialist cultural/civilizational explanation and a crude materialist understanding of an Asian approach to international law need to be rejected[4].

- There are no pure western or non-western ideas, cultures and civilizations. The "Asian Civilization" or rather "Asian Civilizations" like all other civilizations is a complex configuration of diverse and multiple cultures and innumerable interpretations of it.

- The relationship of Asian cultural/civilizational values to foreign policies of Asian States is mediated by deep global structures including the sovereign state system. These structures define the limits to a cultural/civilizational approach to international law.

- An Asian approach to international law must distinguish between the civilizational values embedded in the life world and struggles of Asian peoples and the practices of Asian States. Three consistent themes that emerge from the lived experiences of the Asian peoples are anti-imperialism, the demand for the democratization of international relations, and the need for greater contact between peoples in the Asian region.

[4] The meaning of the term "civilization" in *The New Oxford Dictionary of English* is given as 'the society, culture, and way of life of a particular area, and of "culture" as 'the customs, arts, social institutions of a particular nation, people, or other social group' and 'the attitudes and behavior characteristic of a particular social group'. It is not easy to distinguish between the two concepts that are often used interchangeably. More significantly, both are essentially contested concepts to which a range of meanings can be attached.

- Only the simultaneous critique of "western" ideas and concepts, including advancing alternative ideas/concepts, and their enrichment through non-western practices, can produce transcultural universal categories of international law.

- The civilizational values of Asian peoples may include non-western approaches to knowledge and ways of living that can inform and illuminate not only an Asian perspective on international law but along with the interpretations and practices of other civilizations transform contemporary international law into a truly multicivilizational law.

- Asian States have made a contribution to the evolution and growth of international law doctrines and rules that needs to be recognized as a part of the process to further the goals of global justice.

- In so far as developing countries in the Asian region are concerned the core of their approach to international law is in its main features articulated by TWAIL.

II

Asia, Civilization, and Asian Civilization: Preambular Thoughts

Asia as a Region

The Asian region is described as 'a mosaic of divergent cultures and political regime types, historical estrangements, shifting power balances, and rapid economic change' (Ikenberry and Mastanduno 2003: 2). The countries in the region have historically had extensive relations with each other facilitated by the fact that 'Asia was more stable than Europe in the period 1300-1900' (Ibid: 169). Asian countries are not only united by centuries of cultural and economic exchange but also by their colonial experience. Speaking at the Asian Relations Conference held in New Delhi in March 1947, five months before the independence of India, Jawaharlal Nehru noted how 'this mighty continent' had become 'just a field for the rival imperialisms of Europe' making Asian countries mere 'petitoners in Western courts and chancelleries' (Nehru 1961: 248 and 251). Among the unfortunate outcomes of colonialism was Asia becoming a terrain on which the first and second world wars were extensively fought. It is perhaps at least one reason that Asia is the only region outside North America and Europe to find a permanent place in the UN Security Council viz., China.

The story of western dominance over Asia can be traced back to the arrival of Vasco da Gama at the port of Calicut in India in 1498. According to the historian K.M. Pannikar, 'the changes it directly brought about and the forces it generated in the countries of Asia in contact with Europe for a period of 450 years, and subjected to Western domination for over a century, have effected a transformation which touches practically every aspect of life in these countries' (Pannikar 159: 313). The western impact was, in other words, pervasive and influenced economic, social, political and cultural practices and institutions in Asian countries. On the other hand, colonialism led to 'the isolation of countries of

Asia from one another' (Nehru 1961: 250). Therefore, even before gaining independence Asian leaders of freedom movements expressed the need to end th e lack of sustained engagement and rebuild, as Nehru put it, a 'new Asia of our dreams' (Ibid: 253).

The attempts at Pan-Asianism began in the first half of the twentieth century. Leaders such as Nehru and Sun Yat-Sen were seeking unity to end the reign of imperialism in the region. Thus, for example, 'at the two Pan-Asian People's conferences in Nagasaki (1926) and Shanghai (1927), the delegates from China held fast to the progressive notion of Pan-Asianism by demanding that the Japanese government abrogate its imperial pretensions' (Prashad 2007: 27). Asian unity in the post colonial era has been propelled by the need to safeguard the independence and freedom of newly independent states and can be described as the fundamental basis of contemporary Pan-Asianism. As one observer notes of the landmark Bandung Conference in 1955, the twenty nine Afro-Asian States that attended the landmark event were united by their common colonial and anticolonial history (Ibid: 33). In this view, 'unity for the people of the Third World came from a political position against colonialism and imperialism, not from any intrinsic cultural or racial commonalities' (Ibid: 34). The Bandung States were however conscious that if the objective of building a new Asia (and Africa) was to be achieved there was a need to understand each other better. Therefore the Bandung Communique directed the countries toward 'the acquisition of knowledge of each other's country, mutual cultural exchange, and exchange of information' (Ibid: 45). Subsequently Asian states became an integral part of the Non Aligned Movement (NAM) that was inaugurated in Belgrade in 1961, and in which Asian States have played a crucial role. NAM came to occupy centre stage in the period of the cold war and its principles continue to play not an insignificant role in the post cold war era[5].

What is "civilization"?

These reflections on the Asian region raises the fundamental question as to whether there is a civilization milieu in Asia, going beyond the political project of anti-imperialism, economic independence, and world peace that influences the approach of Asian peoples, states and scholars to international law? What does it really mean to talk of a multicivilizational approach to international law to which Asian civilization can contribute? To respond to these questions it is important at first to clarify the meaning of "civilization".

Dallmayr, drawing on the work of the German thinker Hans Gadamer, marks out two significant features of any "civilization".

[5] In the process of uniting Asia Nehru saw an important role for India as 'she is the pivot of Western, Southern and South-East Asia' (Nehru 1961: 3). But his internationalism traveled byond the region and he noted the 'special responsibility' of Asia to the peoples of Africa. He made a major contribution to NAM and its thinking.

First, that '[a]s a result of historical sedimentations, "civilization" is an intricate, multi-layered fabric composed of different, often tensional layers or strands; moreover, every layer in that fabric is subject to multiple interpretations or readings, and so is the inter-relation of historical strands' (Dallmayr 2005: 34).

Second, 'reflecting diverse historical trajectories, different civilizations manage their own complexity and multiplicity in different ways—prompting them to resort to differentiated cosmologies, ontologies, and epistemologies' (Ibid). Thus, to begin with, all civilizations and cultures tell a story of borrowings that inter-mix with local cultures in complex ways yielding multiple interpretations that together go to produce what may be termed a composite civilizational culture. To put it differently, 'the origin of ideas is not the kind of thing to which "purity" happens easily' (Sen 2005: 132)[6].

The "Asian Civilization" or rather "Asian Civilizations" (Chinese, Japanese, Indian etc) is like all other civilizations a complex configuration of diverse and multiple cultures and innumerable interpretations of it. That is to say, a number of civilizations with internal differentiation constitute the Asian Civilization. It has been formed and shaped by centuries of interaction, albeit colonialism disrupted the integrity of this process. The colonial era saw its social, cultural and political practices and institutions influenced more by western civilization. In sum, it is today not easy to separate the features of Asian civilization from the influences of other civilizations, both from within and outside the region. Indeed, any attempt at a simplistic portrayal of an Asian civilization (as of any other civilization) risks the trap of essentialism. It points to the need to eschew a culturalist explanation of the behavior of Asian states. Culturalism, as Bayart points out, 'commits three methodological errors': 'it maintains that a culture is a corpus of representations that is stable over time; it sees this corpus as closed in on itself, and it assumes that this corpus determines a specific political orientation' (Bayart 2005: 65). None of the propositions that Bayart critiques can describe the Asian or for that matter any other region. Furthermore, the political orientation of Asian states is determined by a range of material factors including deep global and national structures and the reigning idiom of diplomatic practices.

At the same time, it would be equally simplistic and wrong to reject the idea of heterogeniety. Each civilization has a certain quality that sets it apart from other

[6] Sen tells the story of the spice Chilli which is a basic ingredient of Indian cooking. It was brought to India from the "new world" by the Portuguese. But as he notes this does not make Indian cooking any less Indian. Chilli has now become an Indian spice. Likewise, Santos cites Pieterse who writes that 'what is held to be European culture or civilization is genealogically not necessarily or strictly European' (Pieterse 1989: 22-23). Using the work of Martin Bernal (1987) Santos further points out that:

> 'It [i.e. European civilization] is a cultural synthesis of many elements and currents, many of them non-European. Bernal has undertaken a deconstruction of the concepts of "classical civilization" to show its non-European foundations, the contributions of Egypt and Africa, Semitic and Phoenician civilizations, Mesopotamia and Persia, India and China, regarding language, art knowledge, religion, and material culture. He also shows how these Afro-Asiatic roots of Ancient Greece were denied by nineteenth-century European racism and anti-Semitism'.

See also Sen 2005: 133.

civilizations. Even as the trap of essentialism is avoided the answer does not lie in endorsing a radical convergence or a crude materialist theory that does not attribute any significance to cultural/civilizational factors. Thus for instance it is perfectly legitimate to think about an Asian way of thinking that can bear on the international legal process, albeit there is no easy response to the question as to what precisely is Asian thinking that is embedded in Asian civilization.

Asian Thinking: Key Questions

The complexities involved in framing a possible response may be teased out through drawing on an insightful essay entitled "Is there an Indian way of thinking?" by Ramanujan, late professor of literature at Chicago University. He noted that the question "Is there an Indian Way of Thinking" can translate into a number of questions and equally varied responses depending on where the stress is put in the question (Ramanujan 1990: 41). The different accents he said could include the following:

Is there an Indian way of thinking?
Is there *an* Indian way of thinking?
Is there an *Indian* way of thinking?
Is there an Indian way of *thinking*?

The same can be said of an Asian approach to international law. We may ask:

Is there an Asian approach to international law?
Is there *an* Asian approach to international law?
Is there an *Asian* approach to international law?
Is there an Asian *approach to international law*?

The Ramanujan accents caution us against a facile approach to an Asian approach to international law by ruling out singular responses and showing us the different and multifarious ways the question can be approached. There may be, in other words, different ways of conceptualizing the idea of Asian Civilization and its impact on international relations and law.

Meaning of Asian Thinking: Preliminary reflections

The idea of Asian thinking must, on the basis of hitherto discussion, come to terms with four overlapping recognitions:

First, there is no idea that is purely western, that is, untainted by intercourse with other civilizations and worlds.

Second, there is no uniquely original non-western, or in the case of countries that had been colonized a pre-colonial culture, which can be retrieved because we know that 'every rediscovery is at least partly a reinvention' (Bhargava 2007: 246).

Third, the idea of 'postcolonial revenge' that calls for the rejection of all western thought is debilitating as there is no easy way of stepping outside them, especially after the colonial era. It accounts for the fact that often the very act of retrieval is tainted with western ideas.

Fourth, there are yet non-western practices that even though not purely non-western are non-western nevertheless; this is what Nandy means when he states that "India is India; India is not non-West".

If these propositions are true then it is only a dialectic of simultaneous critique and non-western enrichment of "western" concepts that can offer a response that does not handover non western cultures to votaries of narrow cultural nationalism and takes the discourse of global justice forward (Ibid: pp.245 ff).

Dialectical synthesis

This is what Gandhiji did with "western" ideas; he adapted them to his own ends with interpretations thoroughly imbued with local symbolism and content. Thus for example, while arguably the national freedom struggle was inspired by, among others, western liberal thinkers, Gandhiji gave the struggle for national liberation a completely new meaning when he talked of the need to save the oppressors from themselves and their narrow and distorted interpretations of ideas that are western. Gandhiji recognized, and this is a crucial insight of the world of oppression, that 'once the hegemony of a theory of imperialism without winners and losers was established, imperialism had lost out on cognitive, in addition to ethical, grounds' (Nandy 1998: 87). Likewise, what was striking about the Indian thinker Sri Aurobindo's spiritual vision, on which I have more to say later, was that his 'response to colonialism included a cultural self-affirmation which had a greater respect for the selfhood of the 'other' and a search for a more universal model of emancipation…' (Ibid: 85). In other words, 'while the colonial system only saw him as an object, he could not see the colonizers as mere objects. As a part of his struggle for survival, the West remained for Indian victims like Aurobindo an internal human reality, in love as well as in hate, in identification as well as in counter-identification' (Ibid: 87). It is this move to inclusiveness that is distinctive about some non-western modes of thought and should crucially inform all transcivilizational discourse. In the case of Indian civilization, as shall be seen later, an inclusive cosmopolitanism has been a defining feature since Ancient times[7].

Traditional cosmologies or alternative modernities?

Besides the reconfiguration, redefinition and adaptation of western ideas there are traditional cosmologies that need to be retrieved to see if they offer more suitable responses to problems that international law addresses. In response to the question "Is There an Indian Way of Thinking" Ramanujan proceeded to identify features of the traditional (as opposed to modern) Indian way of thinking (the different cosmologies,

[7] It has of course co-existed with hierarchical and oppressive features such as the caste system.

ontologies and epistemologies that Dallmayr talks about) that may be mentioned merely to show the possibility of one distinctive Asian approach to international law.

He noted *first* that in the Indian way of thinking there are different logics at play in different domains of social practices (e.g., science and astrology) that gives rise to the question of inconsistency (Ibid: 44). However, in the Indian way of thinking there are different ways of knowing divergent social and scientific practices; different epistemologies come into play to address different objects of knowledge. The tolerance of co-existing epistemologies strengthens the value of plurality.

Second, there is in the Indian way of thinking an "inability to distinguish self and non-self', for example, self and nature indicating an organic view of the relationship between man and nature (Ibid: 45).

A *third* feature he identified was the 'lack of universality' (the Kantian mode) and the stress on particularism in its thinking (Ibid: 46). The Indian traditional culture was, in his view, distinguished by being context-sensitive ('the preferred formulation') as against being context-free, be it in the domain of ethics, music or medicine. Of course he recognized that all societies have some of both i.e., universalism and particularism, but in the case of India context-sensitive was the dominant trend (Ibid: 55).

Ramanujan noted things were changing with 'modernization', but only to yield alternative modernities; the theme of provincializing Europe is a persistent theme today in the non western world. It is obviously difficult to generalize the features of Indian thinking across all Asian cultures or to suggest that they are not in some form present in all civilizations. More significantly, it requires an extensive exercise, entirely outside the scope of this paper, to show how these features have influenced the Indian approach to international law. But at the level of people's struggles the refusal to distinguish between 'self and non-self', as I shall note presently, has played an important role in the realization of the goal of sustainable development?[8]

From time to time opinions have also been expressed that suggest the presence of an Asian way of thinking. Nehru, for example, noted that while it is true that 'Asia is a huge continent and the peoples of Asia are all different from one another, as they were reared in different cultures and traditions' there is 'in spite of all this … such thing as Asian Sentiment' (Nehru 1961: 265)[9]. Thus Nehru observed for instance how in Asia truth was given priority over power politics (Nehru 1961: 263). Asian peoples had, in his view, 'a better understanding of the inner problems of mind and spirit' and therefore 'are in a somewhat better position to understand our neighbours in Asia than those nations who have an entirely different cultural heritage' (Nehru 1961: 267). Nehru was here not

[8] My principal references to Indian scholarship and thinking in the paper are because of my greater familiarity with them.

[9] He observed that there was no 'one Asian way, because Asia is a big continent, offering different viewpoints' (Nehru 1961: 281).

subscribing to a form of orientalism by opposing the spiritual east to the materialist west. Indeed, he rejected such a depiction but this did not mean that there was nothing distinctive about Asian cultures. The stress on truth is not insignificant as it came to be translated into an insistence on principled conduct in international relations. Thus NAM is in fundamental ways opposed to the politics of power sanctioned by realist theories. Of course it cannot be said that modern Asian states have always been more principled in the conduct of international relations than Western States. Neither have their conduct towards their own people been always salutary. After all some Asian states have had an imperial past, are presided over by authoritarian regimes and others have committed horrific acts against their own people.

Differentiating civilization of states and peoples

Yet if we focus on the social practices of Asian peoples rather than states, in particular their struggles against all forms of domination and injustice, the argument of a distinctive Asian outlook can perhaps be sustained. For the culture of Asian states, even when embedded in a certain civilizational milieu, is constrained by the structure of the world economy, the chosen path of national development, and the received wisdom of "modern" diplomacy and statecraft[10]. That is to say, States are both controlled by the character of the international economic system and individual States and their socialization into modern forms of diplomacy and communication that tend to filter non-western cultural influences. This does not mean that civilizational influences and attributes are entirely eliminated from the international legal process but there presence is muted. The distinction between the culture of peoples and States also ensures that non-democratic States in the Asian region are not able to lay claims of being heirs to invented traditions and civilizational values to legitimize undemocratic practices. Unlike States, peoples and social movements are not captive to particular understandings of "national interests" or diplomacy and their struggles are more informed by local cultural values; their thinking and protests are imbued with local knowledge and symbolism that need to be retrieved and brought to bear on the international legal process[11]. Thus, for example, the Chipko movement in India in the early 1970s, which saw women hug trees in order to stop them from being felled, is an example of a particular understanding of self and nature that is embedded in Asian civilization values. The message of the Chipko movement was that 'environmental destruction and social injustice are two sides of the same coin' for the cutting of trees directly affected forest produce and the lives of women in the region (Agarwal nd). The Chipko movement also captured the essence of the Ramanujan thesis that in traditional Indian societies there was no distinction made between self and non-self that is nature.

[10] Nehru understood as early as 1947 that 'ultimately, foreign policy is the outcome of economic policy, and until India has properly evolved her economic policy, her foreign policy will be rather vague, rather inchoate, and will be groping' (Ibid: 24). He also recognized that the universal freedom he sought 'cannot be based on the supremacy of any particular class' (Ibid: 253).

[11] Of course it must at the same time be recognized that a range of social fractures inform the concept of peoples and can thus equally yield regressive social practices.

What Asian values are not: the human rights debate

On the other hand, one has to be wary of civilizational values "invented" by state structures to legitimize authoritarian responses and used by the west to portray a particular (negative) image of Asian civilization. The obvious reference is to the thesis on Asian values and human rights. The idea of Asian values, it may be added, gets reinvented from time to time to justify the oppressive practices of one or another Asian State (Avonius and Kingsbury 2008). There are two kinds of falsehoods involved in depicting a certain view of human rights as Asian values.

First, there is the problematic story of individual liberty and freedom being values that have only been part of western societies and that too from time immemorial. As Sen points out: 'The claim that the basic ideas underlying freedom and tolerance have been central to Western culture over the millennia and are somewhat alien to Asia is, I believe, entirely rejectable' (Ibid: 136). He explains:

> In the reading that sees the Western tradition as the natural habitat of individual freedom and political democracy, there is a substantial tendency to extrapolate backwards from the present. Values that the European Enlightenment and other relatively recent developments have made common and widespread can scarcely be seen as part of the long-term Western heritage - experienced in the West over millennia. There has, of course, been championing of freedom and tolerance in specific contexts in the Western classical tradition, but much the same can be said of many parts of the Asian tradition as well – not least in India, with the articulations associated for example with Ashoka's inscriptions, Sudraka's drama, Akbar's pronouncements or Dadu's poetry, to name just a few examples (Sen 2005: 135).

Second, there is the matter of how the Asian values debate is being used to evaluate the quality of Asian civilization[12]. A closer look at the emergence of the idea of "Asian values" reveals a case of "reverse orientalism". By reverse orientalism is understood a process that 'entailed the attribution of a set of cultural values to East and Southeast Asian societies by Western social scientists in order to contrast the recent dynamic progress of Asian development with the stagnation and social disorganization of contemporary Western economies and societies' (Hill 2008: 481). More specifically, Hill traces 'the construction of 'Asian values' to a search in the west for surrogates to the Protestant ethic that is later developed 'into a canonization of Confucianism as the new motor of Asian capitalist development' (Ibid: 492). While this understanding may be debated it allows some Asian States to claim the idea as their own and interpret it in particular ways to achieve the ends of power[13]. One result is that it has allowed the West to disparage Asian civilization.

[12] Thus, for instance, among the 'negative rules of cultural method' Thompson et al list "Asian values' as an example (Thompson et al 2006: 322).

[13] Chang and Grabel point out that 'Confucianism is now seen as a kind of magical culture that fosters the development of a competent corps of civil servants, high level of savings and educational investment, and a

III

"Unique" Asian Civilizational Values and Practices: Some Candidates

Bearing in mind the absence of purity of ideas, the dangers of essentialism, and the distinction between the cultures of States and peoples, three attributes of Asian civilization may be worthy of mention as representing a dominant strand of thinking in Asian civilizations viz. the philosophy of non-violence, an inclusive vision of cosmopolitanism, and the stress on spiritualism, all necessary elements in building a just world order[14].

The Principle of non-violence

An important contribution of the Asian way of thinking is the discourse of non-violence. From Buddha to Gandhi the idea of non-violence (integrally linked to that of truth) has been a part of the thinking and heritage of Asian civilization. To be sure, such thinking is part of other civilizations as well; what is distinctive in the case of Asia is the dominance it has acquired in thinking about world politics and its translation into practice in a range of cultures that constitute the Asian civilization. Thus, in his speech to the General Assembly on November 3, 1948 Nehru had emphasized to the international community how Gandhiji had taught us that 'it was not good enough to have a good objective, that it was equally important that the means of attaining those objectives were good; means were always as important as ends' (Nehru 1961: 162). This lesson as he noted 'has sunk deep into our souls', especially of Asian peoples (Ibid: 166). We know Gandhi inspired Martin Luther King, Nelson Mandela and others. Post-colonial States have also not been entirely impervious to its influence. The Indian elite and State has embraced the idea of non-violence but the search for national security in a turbulent region and the pursuit of the economic interests of the bourgeois classes has somewhat undermined the influence of the principle in the framing of national security policies. The idea of non violence itself has however the potential of creating a shared and just world in which all civilizations and cultures thrive. It helps imagine alternative futures in which civilizations will influence each other unaccompanied by domination and violence.

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pliant population. This new view of Confucianism differs markedly from the view that predominated until the 1950s. The latter presented the culture as inimical to economic development. For example, at the time it was widely argued that the old Confucian social hierarchy, a hierarchy that placed bureaucrats at the top of the social order and artisans and merchants at the bottom, induced talented people to choose bureaucratic over business or engineering careers' (Chang and Grabel 2004: 40-41).

[14] In a certain way these values are mentioned here in the same general way that it is said that cooperation through international institutions is a contribution of the culture of United States: 'one hallmark of American Hegemony is its organization around international institutions' (Ikenberry and Mastanduno 2003: 9); after all cooperation through international institutions pre-dates American hegemony even as it has gathered momentum in the era of US domination. It however contrasts with Asia where there is 'the lack of international institutions' (Kang 2003: 163)

Inclusive cosmopolitanism

Historically, it is worth noting, that elements of Asian culture, as in the case of Sanskrit language and culture (to mention one important historical episode), spread unaccompanied by violence (in contrast to the spread of Latin which was disseminated through imperialism). This inclusive or what may be termed Sanskrit Cosmopolitanism can be described as a unique feature of the Asian region[15]. Sanskrit culture was not spread through, to quote Pollock, 'the actions of a conquest state. It was made, instead, by the circulation of traders, literati, religious professionals, and freelance adventurers. Coercion, cooptation, juridical control, and even persuasion are nowhere in evidence. Those who participated in Sanskrit cosmopolitan culture chose to do so, and could choose to do so' (Pollock 2000: 603. See also Pollock 2006). Pollock goes on to state, and I take the liberty of quoting at length:

> The space of Sanskrit culture and the power that culture articulated were never demarcated in any concrete fashion; the populations that inhabited it were never enumerated; nowhere was a standardization of legal practices sought, beyond a vague conception of moral order (*dharma*) to which power was universally expected to profess its commitment. Nor was any attempt ever made to transform the world into a metropolitan center; in fact, no recognizable core-periphery conception ever prevailed in the Sanskrit cosmopolis. Every center was infinitely reproducible across cosmopolitan space, such that the golden Mount Meru and the river Ganga could be and were transported everywhere. As a result, people in tenth-century Angkor or Java could see themselves no less than people in tenth-century Karnataka as living not in some overseas extension of India but inside "an Indian world." The production of this kind of feeling beyond one's immediate environment, this vast cosmopolitanization of southern Asia, has rightly been described as "one of the most impressive instances of large-scale acculturation in the history of the world." It comprised the synthesis and circulation of a wide range of cultural and political practices through borrowing, lending, and perhaps even the convergent production of comparable forms across a vast space. This entire culture-power complex was invented on the fly, so to speak, which makes the very idea of "Indianization" or "Sanskritization" a crude sort of teleology, erroneously presupposing as cause what was only produced as effect. Moreover,

[15]'A little before the beginning of the first millennium' Sanskrit 'embarked on an extraordinary process of spatial dissemination and expressive elaboration. Within four or five centuries, Sanskrit would be found in use for literary and political discourse in an area that extended from today's Afghanistan to Java and from Sri Lanka to Nepal. There was nothing unusual about finding a Chinese traveler studying Sanskrit grammar in Sumatra in the seventh century, an intellectual from Sri Lanka writing Sanskrit literary theory in the northern Deccan in the tenth, or Khmer princes composing Sanskrit political poetry for the magnificent pillars of Mebon and Pre Rup in Angkor in the twelfth. Near the end of the cosmopolitan epoch, the poet Bilhana--who had himself traveled in search of patronage through the subcontinent from Kashmir to Gujarat to Banaras and south to Karnataka--could announce that "there is no village or country, no capital city or forest region, no pleasure garden or school where learned and ignorant, young and old, male and female alike do not read my poems and shake with pleasure." His boast may have exaggerated the social circulation of his work, but he was describing the universe for which Sanskrit poets and intellectuals had been writing for the preceding thousand years' (Pollock 2000: 599).

> the processes of identity formation, cultural choice, and political governance involved in the invention of the Sanskrit cosmopolitan order can be very unfamiliar to us. Power, for example, was interested in culture but not in a way that necessarily reduced culture to an instrument of legitimation, as Weberian sociology might lead us to suppose a priori. Here and elsewhere, we need to theorize Indian cosmopolitanism from its effects (Pollock 2000: 603-04).

Thus Sanskrit cosmopolitanism presents to us a model of transcivilizational relationships that is benign and productive and projects a global future in which all civilizations can coexist and contribute to the growth of the others. This vision is the opposite of the clash of civilization thesis that implicitly sees the answer lie in the triumph of one or another vision of cosmopolitanism.

Role of spiritualism in creating just world order

Asian civilization with its stress on spiritualism has also introduced it as a central element in the shaping of a just world order. Unfortunately, at present, 'the visions of the future of world order that find a place in contemporary writings and scholarship are essentially those advanced by western thinkers (from Kant to Held). The work of non-western thinkers and visionaries hardly finds a mention in them' (Chimni 2006: 197). Sri Aurobindo, leader of the first phase of the Indian freedom movement who later turned to spiritualism, is a good example of an extraordinary vision of the future of the world order that has been ignored (Ibid). According to Sri Aurobindo human unity was inevitable but minus the value of spiritualism would only yield mechanical human unity. His view contrasts with that of Kant whose basic idea was that 'even without any inner, moral improvement, man will improve his outward legal conduct. In the end, a moral attitude will come to prevail' (Jaspers 1963: 106). Sri Aurobindo surely recognized that for a democratic world state to be established appropriate normative and institutional conditions need to be created. But in his view this normative and institutional architecture had to be informed by the idea of spiritual transformation of individuals and collectives. It deserves to be pointed out, that his thinking does not fit the neat stereotype of materialist west and the spiritual east. Sri Aurobindo combined materialism and spiritualism in a unique mixture and departed from the idea that 'the empirical world and finite individuals are illusory' (Mohanty 2001: 67). In short, he was concerned with the limits of reason rather than its rejection in calling for spiritual transformation being the basis of a future democratic world order and state.

IV

Transcivilizational Dialogue and International Law: Meaning and Implications

Meaning of transcivilizational dialogue

Having looked at Asian civilizational values that can contribute to the framing of a just international law it is time to look at what Onuma terms a transcivilizational approach to international law that relies on a 'cognitive and evaluative framework based on the deliberate recognition of plurality of civilizations that have long existed in human history' (Onuma 2008: Chapter 1: 10). He rightly clarifies that such an approach 'is not an alternate theory or methodology. Nor does it mean some civilizational-centrism' (Ibid: 20). He contends that 'we must *re-conceptualizie* the notion of civilization as a functional notion. When we see and evaluate problems on international law, we must seek to make explicit cultural and/or civilizational assumptions of ourselves and other actors, and to see and evaluate them by taking these factors into consideration, not regarding these factors as unchangeable, monolithic entities but as changeable, functional variants' (Ibid: 21). He clarifies that he is 'not claiming a cultural or civilizational determinism. On the contrary, the trans-civilizational perspective … opposes any substantiation or reification of civilizations or cultures. It does not assume the monolithic entity of culture or civilization…. humans do not belong exclusively to a particular culture or civilization. In most cases human beings sense, think and behave according to plural civilizations and cultures simultaneously' (p.28). These formulations are in accord with our understanding of "civilization". Onuma also rightly argues that 'even when the policy makers calculate their national interest "rationally," such rational calculation is still influenced by their cultures, religions and other civilizational factors' (p.29). In his view 'by deliberately adopting the trans-civilizational perspective as supplementing and modifying international and transnational perspectives, we can enhance our ability to understand complex ideas and phenomena on international law in the 21st century' (Ibid).

An important issue that arises here is how is the proposed dialogue between civilizations to be conducted? If the dialogue between civilizations is to be productive it must be, as Dallmayr notes, 'both intra- and inter-civilizational, establishing linkages across both historical and geographical boundaries' (Ibid: 35). It must be 'open-ended and hospitable to multiple and expanding horizons' (Ibid). It should eschew the tradition of "orientalism" which was an 'effort to dominate and "talk down" the other, in such a manner that the "Occident" was "never called into question (or never allowed to be questioned)' (Ibid: 36). To avoid this problem the 'civilizational dialogue must jettison self-aggrandizing or assimilationist agendas', a good example being Sanskrit cosmopolitanism (Ibid). In sum, Dalmayr concludes that 'civilizational dialogue will have to be a mutli-lingual discourse carried on in multiple tonalities, including the tonalities of politics, religion, philosophy, and ecology (and subsidiarily—economics and the internet)' (Ibid: 38). In the final analysis as he goes on to note 'only by fostering commitment to social justice and public responsibility can globalization serve not only as

the pacemaker of a mega-market and (possibly hegemonic) mega-state but as the gateway to global or inter-civilizational equity and peace' (Ibid).

Principle of recognition: Contribution of Asia to Development of International Law

To achieve the goals of global equity and justice a first principle that should inform a transcivilizational dialogue is what Nancy Fraser terms the principle of recognition; the other principles being the principles of representation and distributive justice (Fraser 2009). In the context of international law it means for instance the recognition of the historical contribution of Asia to the doctrines and rules of international law?[16] There are several areas of international law where rules were present and observed in pre-colonial Asia, yet the Asian contribution to international law has rarely been acknowledged. Three areas of international law may be mentioned to illustrate the contribution of Asia to the evolution and growth of international law.

Law of the Sea

In formulating his thesis on freedom of the seas Grotius was, as Anand has pointed out, 'aware of the long tradition of freedom of navigation in the Indian Ocean' and got 'helpful cue from the Asian state practice of freedom of commerce and trade between various countries and peoples without any let or hindrance' (Anand 1984: 56). Alexandrowicz elaborates:

> Historians have often overlooked one aspect of the problem which was significant to Grotius, that is the impact of the study of the actual regime of the Indian Ocean, which he carried out in the archives of the Dutch company, on the formulation of the doctrine of mare liberum, at a time when mare clausum was more prevalent in European state practice than the ideal of the freedom of the high seas (Alexandrowicz 1967: 44).

Indeed, according to Anand, freedom of the seas 'is one principle which Europe acquired from Asia through Grotius…' (Anand 1984: 61).

International Humanitarian Law

The practice of Asian States has also contributed to the evolution and consensus on international humanitarian laws. In the *Nuclear Weapons* case Judge Weeramantry recorded the strong presence in non-western cultures of international humanitarian laws, to argue that the recognition of this historical reality would greatly strengthen their normative pull. In other words, by invoking the presence of international law in non-western civilizations, Judge Weeramantry sought to reinforce the universality of international humanitarian laws. As he observed, and I quote:

[16] For a brief application of the Fraser theory of justice to international law see Chimni 2007.

> It greatly strengthens the concept of humanitarian laws of war to note that this is not a recent invention….it is deep rooted in many cultures - Hindu, Buddhist, Chinese, Christian, Islamic and traditional African….The multicultural traditions that exist on this important matter cannot be ignored in the Court's consideration of this question, for to do so would be to deprive its conclusions of that plenitude of universal authority which is available to give it added strength - the strength resulting from the depth of the tradition's historical roots and the width of its geographical spread[17].

International Environmental Law

To turn to a final example, in the *Gabcikovo-Nagymaros* (Hungary/Slovakia) case (1993) Judge Weeramantry took pains to show how the idea of sustainable development was deeply embedded in non-western cultures of Asian and other developing societies and cultures (Weeramantry 1993: 94ff). He referred in some detail to the ancient irrigation based civilization of Sri Lanka as an example of sustainable development practices (Ibid: 95 ff). He concluded that sustainable development 'is one of the most ancient of ideas in the human heritage' (Ibid: 107). Therefore, it greatly strengthened and enriched the modern principle of sustainable development to draw from the consensus and practices in all cultures. More recently Benvenisti has argued in the context of resolving disputes relating to international water resources that 'ancient Asian traditions can inform decision-makers as to the management of specific treaty regimes as well as the evolution of international law in general. National courts engaged in reviewing policies related to the management of internal resources and international courts resolving international conflicts can benefit from a close look at past solutions' (Benvenisti 2008: Para 2)[18].

[17] *ICJ Reports*, 1996, p.478. Cited by French, op cit, at 63. Elsewhere, in an essay on "Buddhism and Humanitarian Law" Weeramantry writes:

> There is little doubt […] that despite its total prohibition of war, Buddhism is replete with principles, approaches, and insights which would considerably enrich the contemporary humanitarian law of war. In particular, its discussions of the causes of war, escalation of conflict, psychology of aggression, techniques of conciliation, and the rationale for the humane treatment of others, irrespective of origin, class, race or nation can all be used to good effect in the continuing development, and the universalization of international humanitarian law (Weeramantry 2007: 13)[17].

[18] Benvenisti notes that 'The key to sustainability was the fact that the collective decision-making process took into consideration the interests of all users of the resource. It precluded decisions that burdened some users for the benefit of others. It precluded decisions that burdened future generations. Because the interests of future generations were taken into account, the management of these resources proved sustainable, and in fact survived in many instances until this day. Nowadays, we can theorize about the usefulness of such collective action mechanisms. But it took modern scholars a long time to realize the reasons for that success and to try to revive it' (Benvenisti 2008: Para 15; See however Peters 2004).

Principle of representation: Enriching the principle of democratic governance

The second principle that comes into play, following the Fraser formulation of the meaning of global justice, is the principle of representation. It points to the democratization of international relations *inter alia* through taking cognizance of the social and cultural practices of non-western civilizations in giving meaning to norms or categories of international law. If 'genuine, concrete, transcultural universals' are to be produced in the world of international law there must be constant efforts at bringing to bear divergent civilizational practices on the relevant norms and categories. Thus, to take an example of a norm of international law that may be described as "western" in origin i.e., the principle of democratic governance, its content is today being shaped by transcultural social practices and interpretations that have injected the principle with divergent content. From India to Japan to Venezuela the meaning of democracy is being imbued with content that makes the category of "democracy" universal in the true sense of the term.

Refugee Protection: Need for Trans-civilizational dialogue

To take a different example to assess the role of transcivilizational dialogue, allow me to turn to the area of refugee protection. The key issue here is whether we can point to cultural factors to explain Asian exceptionalism in the area of refugee protection and further whether it offers insights into how to better promote refugee protection? It is not generally known that only five countries in Asia have signed or acceded to the widely ratified (about 145 States) 1951 UN Convention on the Status of Refugees viz., Cambodia, China, Japan, Philippines, and South Korea. In fact no country in the South Asian Region is party to the 1951 Convention despite being host to millions of refugees. Neither is there in the Asian region, as in the case of Africa, a regional convention on the status of refugees; at best there is the not so influential 1966 (subsequently revised) AALCO soft law text on refugees (AALCO 1966). Neither for that matter are their national legislations on the status of refugees. What explains the Asian exceptionalism? There are both material and cultural explanations that can be suggested[19]. The material explanation is that unlike Africa which saw the 1951 Convention and the 1969 OAU Convention on the Status of Refugees as instruments in the struggle against colonialism, especially against the apartheid regime in South Africa, Asia did not relate the refugee regime with the cause of decolonization. Asian states also felt that Western States did not address refugee flows in the Asian region at the time the 1951 Convention was adopted (e.g., refugees from the partition of India). Neither were the concerns of Asian states taken cognizance of (e.g., the need for burden sharing) in the Convention. A possible civilizational explanation for Asian exceptionalism is that there has been a long tradition in different cultures of Asia of offering safe haven to persons fleeing threats to their life and freedom. Law is therefore not perceived as the principal response and solution to the status of refugees. Asian cultures tend to rely on societal values that encourage the upholding of the dignity of "strangers" to safeguard the rights of asylum seekers. What a transcivilization dialogue should endeavor to do in this background is to encourage a

[19] See generally Davis 2006: 562.

conversation on *the ideal and optimal mix of legal and societal values* to safeguard the interest of asylum seekers.

VI

Final Reflections

Four points may be made by way of conclusion. *First*, both cultural essentialism and reductionist materialism are unhelpful in understanding and framing an Asian approach to international law. The relationship of civilizational values to foreign policy of States and international law is mediated by deep social structures and the character of the state in question. On the other hand, it is not altogether without merit to talk of the influence of Asian civilizational values on how states in the Asian region approach international law. The civilizational practices of Asian peoples can, in combination with the contributions of other civilizations, render contemporary international law into universal international law.

Second, international law must take cognizance of civilizational values embedded in the collective struggle of Asian people for social and cultural transformation. These include the philosophy and practice of non violence, a vision of inclusive cosmopolitanism, and the need for a uniting spiritualism in shaping the future of the world order. The history of the idea and spread of Sanskrit cosmopolitanism in the first millennia is an inspiring example of an inclusive vision that should inform a transcivilizational dialogue on the future of a just global order.

Third, as a way of furthering the goal of a truly universal and just international law there is a need to recognize the contribution of Asian states to the evolution and growth of international law. The founding spirits of international law were, as in the case of Grotius, aware of Asian practices and relied on it to formulate their own understanding of international law doctrines and rules. Among areas that Asian states have made a contribution are law of the sea, international humanitarian law and international law of sustainable development.

Fourth, in important ways, in so far as developing countries in the region are concerned, the Asian approach to international law has been articulated by TWAIL. The themes of anti-imperialism, democratization of international relations, and greater cooperation between Asian peoples are an integral part of the TWAIL understanding.

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