Pursuing Meaningful Dialogues through Common Discourse

-- International Law in a Changing World

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Early last year when H.E. President Owada came to see me at the Chinese Embassy in The Hague and invited me to speak at the general session of this Biennial Conference of the Asian Society of International Law, I felt greatly honored and immediately accepted his kind offer even without inquiring what the central theme of the Conference would be; as an international lawyer from the region, I consider it my duty to make joint efforts to assure this event a great success. The choice of the topic for my speech today, namely, "Pursuing Meaningful Dialogues through Common Discourse", was made primarily based on my diplomatic experience and personal observation of current practice of international law, which, I am pleased to say, happened to be in line with the central theme of the Conference.

Asia is a multi-cultural and multi-religious region. By tradition and history, Asian countries came to share certain values and cherish many virtues, which were naturally reflected in their mutual relations and influenced their foreign policies. When China and India agreed on the Five Principles of Peaceful Co-existence, for the first time in April 1954, as the guidelines for the solution of outstanding issues between the two countries[1], both sides could easily trace the Five Principles or *Panchsheel* (in Indian terms) to their respective cultural heritage and civilizational origin, for in the teaching of the Chinese great philosopher Confucius and the Lord Buddha, pursuit of peace and harmony is a lofty cause for human society. This bilateral initiative rose in a time of differences and in the midst of power rivalries. Its call for sovereign equality and non-interference with a view to promoting peace and cooperation was immediately accepted with positive responses by other Asian countries, and further still, by most developing countries. The Five Principles was formally adopted at the Asian and African Conference held at Bandung, expatiated into the Ten Principles of Bandung, later by the Non-aligned Movement, and finally at the United Nations in the form of the 1970 Declaration on the International Law Principles of Friendly Relations and Cooperation among States.[2] Adopted by the U.N. General Assembly the Declaration reaffirmed the Five Principles as the core principles of international relations. For over fifty years, China has firmly adhered to the Five Principles as the basis of its independent foreign policy of peace and built up its diplomatic relations with over 170 countries in accordance with these principles. Obviously, the warm embracement of

[1] For a vivid recollection of the history of the promulgation of the Five Principles of Peaceful Co-existence, see K.R. Narayanan, "The 5oth Anniversary of *Panchsheel*", *Chinese Journal of International Law*, 2004, Vol. 3, No. 2, p. 369

[2] The U.N. accepted the Five Principles as code of conduct in international relations. At the end of 1957 it adopted a resolution on Peaceful Co-existence containing the five principles. Under its influence, the notion of peaceful co-existence helped ease the tension between the two blocs of the Cold War era. At the Soviet and other initiatives, the International Law Association took up the study on the Juridical Aspects of Peaceful Co-existence, the result of which led to the final adoption by the General Assembly of the Declaration on the International Law Principles of Friendly Relations and Cooperation among States in October 1970. Edward McWhinney, "The Renewed Vitality of the International Law Principles of Peaceful Coexistence in the Post-Iraq Invasion Era: The 50th Anniversary of the China/India Pancha Shila Agreement of 1954", Ibid. p. 382;

the Five Principles by most states was not merely due to the embedded cultural values that are universally shared, but also because they echoed the fundamental principles enshrined in the purposes and principles of the U.N. Charter recognized now as the preemptory norms of general international law.

Frankly speaking, for a long time international law was perceived with deep skepticism and criticism by most Asian countries. As was noted by Judge Owada in his inaugural address as the President of the Asian Society of International Law, Asia in fact was the only major region in the world where there was no society of international law on a region-wide basis. Cultural mentality and diversity of the region may offer partial explanation for this lack of institutional initiative, but deeper reasons, in my opinion, can be found in their historic perception of the legal system and their discontent with the contemporary practice of the law.

As is well known, international law, as a product of Western Christian civilization, was first introduced to Asia through colonial conquest by Western powers and its basic tenets of peace, justice and equality were grimly tarnished by the cruelty of colonial and imperial rulings that had been imposed upon many Asian countries. Although after their independence Asian countries identified themselves with the fundamental principles of international law as the basis of international relations, they generally remained dubious about the effectiveness of the existing legal order in maintaining peace and justice against imperialism and hegemonism in international affairs. Besides, it is an irrefutable fact that from traditional international law under Westphalian civilization to modern legal development, normative structure and material substance of international law are primarily Western-centric. Power rivalries between the East and West during the Cold War period did not change the general framework of the legal system. Despite their laudable contributions made during the decolonization process for a new legal order, the developing countries, unfortunately, was only afforded a marginal role in the international law-making process.[3] The phenomenon under traditional international law where "the weak might propose, it was the strong that disposed" is still common in the contemporary international relations[4]. We do not deny that international relations have profoundly changed in the past sixty years, especially in the last two decades, but cultural superiority and selectivity that characterized the old legal system still has lingering effects in international relations; the typical example is the confrontational approach taken in the human rights dialogues between Western countries and the developing countries. The matter is not a question whether we should forget or forgive the past, but how we should treat each other in the dialogues. Obviously various approaches of legal studies undertaken by Asian international jurists with critical analyses of international law[5] are not purely for scholastic exercises to trace the origin or cultural values of international law, but meant to bridge the gap in our understanding of the legal system from a special and pertinent perspective while pursuing meaningful dialogues between different cultures through a common discourse.

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3 See William J. Aceves, "Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution" 39 Columbia JTL (2001), p. 302. Where it argues that for scholars from the Third World, the colonial and imperial past of the international system is perpetuated in the contemporary rules and institutions of international law. Also critical legal studies of the Third World Approaches to International Law (TWAIL), James Thuo Gathii, "Alternative and Critical: The Contributions of Research and Scholarship on Developing Countries to International Legal Theory" 41 Harvard ILJ (2000), p. 273

4 As a comment made about the traditional international law, Oppenheim, P. 38

5 David P. Fidler, "Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law, *Chinese Journal of International Law*, Vol. 2, No. 1, (2003), pp.38-48; Onuma's article on inter-civilizational perspective of international law.

The past two decades have witnessed a wide array of dramatic events with significant impact on the fundamental principles and the existing institutions of international law. Never before has the international community including our region, been confronted with such a large scale of global challenges, from world security to food security, from traditional domain to non-traditional realm, which require, among others, concerted legal response for long-term solutions. Needless to say, Asian countries would spare no efforts in the process.

In the midst of great changes brought about by economic globalization, modern technology and regional integration, one can but observe that international law is paradoxically regarded with both high expectations and deep disappointment. On the one hand, international law proliferates more deeply than ever before into various aspects of our domestic life as well as state relations and, on the other hand, it is apparently suffering from serious public distrust and apathy, a sentiment particularly acute after the Iraqi war. Repeated uses of force in international relations, either legal or illegal under the terms of the U.N. Charter, constantly remind us that searching for effective peace and security mechanisms still present itself as one of the priorities for international law. Although unilaterism continues to pose a common concern, unipolarity resulted from the unrivalled hegemony of one superpower survived from the Cold War, fortunately, did not lead the world from "a decentralized state to a centralized empire", as originally feared (Karl Zemanek); increasing common challenges in a globalized world, among other factors, have helped restrain such a tendency. Nevertheless, power politics is prevalent in international affairs; the harsh realities will test the public confidence in the rule of law and the political theory of balance of power for a multi-polar order is not a simple social engineering. In search for solutions to regional security issues, the Asian way of negotiation, mediation and compromise has demonstrated its cultural wisdom and strength.

In the current efforts to shape the new world order, Western liberalism or neo-liberalism is apparently exerting a prevailing force. The popular pluralism in international legal development has brought about vigor and vitality to the discipline, as more players entered the world stage, representing diversified interests of the international community and contributing to the development of international law. This pluralist tendency, however, also has its unbalanced side. While communal identity is being strengthened at the international level, civil society from developing countries is not equally and effectively represented in the international legal process. In the advocacy for democracy and human rights, we often observe cultural prejudice and double-standards in practice. The question on the relevance of principles of sovereignty and non-interference is not whether we should go with the "trend" to redefine these terms, but a matter that often touches on political and legal fundamentals of states; a question whether a state can genuinely enjoy the right of self-determination to choose its own development path. This seemingly non-issue in many a case invokes heated legal debate.

Asia is part of the international community. With globalization process, its ties with the rest of the world have become much closer and deeper than ever. For over three consecutive decades, Asia has been one of the most dynamic and vibrant areas in the world. Asia's remarkable economic success and social progress are recognized world-wide, with two most populous developing countries, China and India, in the

lead in more recent years. At the same time, we cannot fail to see that Asian region is also fraught with tough issues that are globally challenging: terrorism, security, energy, poverty alleviation, environmental protection, and more recently, economic and financial stability. It would not be exaggerating to say that sustainable development of Asia depends on a stable and constructive world legal order. To promote such a legal order, Asia should duly undertake its responsibility and play an active role in the international law development. In this regard, meaningful dialogues among Asian countries and with its working partners are essential.

When I characterize the dialogues as "meaningful", my point is primarily two-fold. First, legal dialogues should be based on mutual respect and mutual exchanges. Frankly speaking, in the legal field Asian countries, like other developing regions, remain largely at the receiving end of the legal development, which means their influence in the making and shaping of the law is rather limited, both procedurally and substantively. For most part they are still expected to adopt and practice what has been advocated to them as the law. This is particularly evident in the field of human rights, environment and social development. Lack of respect for sovereign equality and cultural diversity often leads to misconception and confrontation. Today when legal discourse has constituted a forceful vehicle for promoting policy goals, legal cooperation has to be strengthened, but such cooperation would bear fruit only when all the parties involved feel the benefit of the joint efforts.

Secondly, to promote constructive and candid dialogues, it is important to focus on the relevant issues that Asian countries are generally concerned with. Indeed, nowadays it is difficult, if not impossible, to distinguish which issues are regional and which are international as we are truly living in a global village and the notion of neighborhood is changing. However, this does not mean we do not have priorities, nor does it suggest that we take unilateral actions. Diverse as they are, Asian countries can identify such issues as their common challenges: security, economic and social development, financial stability, energy and environmental protection, public health and disaster relief. Obviously, regional responses are not sufficient to tackle these issues, but regional input will have a direct bearing on the future international actions. Asian voices, although gaining political momentum, remain low and weak in legal discourse, which to some extent, compromises Asia's influence at the global level.

Asian culture cherishes peace through dialogue, harmony in diversity. This does not mean to say that there are no differences and disputes among Asian countries, but signifies that in handling unresolved issues, Asian countries will, first and foremost, aim at maintaining peace, stability and regional development. In the past decades, particularly in the aftermath of the Cold War, we have witnessed impressive improvement of international relations among Asian countries. In this regard, China takes great pride in the positive development in the North-East Asian region and the great potential to expand such cooperation. During the process, we feel that to develop dispute-settlement mechanisms that are conducive to promoting long term solutions, the first step is to build up mutual understanding and mutual trust. This approach may take longer time, but, compared with hard and fast rules, it will more likely produce lasting effects. This in no way rejects the basic tenets of law, but to the contrary, serves the very objectives of equality and justice for fair solutions. To achieve that goal, we need Asian wisdoms.

In a time of great changes, international legal studies, as in many other cases, have to be reoriented to meet new challenges. I am pleased to see that so many distinguished jurists, both from the region and beyond, are gathering here to exchange views on international law. I am sure that such intellectual interactions will not only improve our mutual understanding, but also enrich our perception on common development.