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The Asian Perspective to International Law in the Age of Globalization

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I. INTRODUCTION

THE Asian perspective to international law was the result of a shared experience of colonialism of the Asian people.[1] It was born of an arduous struggle in the twentieth century to throw off the yoke of colonialism, shared by all Asian people. China and Thailand did not experience colonialism but the system of extraterritoriality[2] which was imposed upon them through force generated sufficient resentment against colonial powers to ensure that they too shared the historical experience of hurt that other Asian states felt. Colonialism was maintained through force that was buttressed by the shaping of an international law that justified subjugation of the peoples of Asia and Africa. There was an innate racial superiority evidenced by notions relating to the standards of civilisation. This enabled the differential treatment of Asian peoples under international law.[3] Colonialism has been dismantled. The

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1 Ram Prakash Anand (ed), *Asian States and The Development of Universal International Law* (Vikas Publications, New Delhi, 1972).

2 Extraterritoriality in this sense meant the creation of enclaves for Europeans within states like China in which the application of Chinese law was excluded and the law of the home states of the Europeans was used instead. These laws were administered by specially set up consular courts.

3 The political philosophers of the age regarded Asians and Africans as intellectual inferiors upon whom the imposition of a colonial system was justified. There are loathsomely racist passages in their writings. Thus Hume stated 'I am apt to suspect the Negroes to be naturally inferior to the Whites. There scarcely ever was a civilized nation of that complexion, nor even any individual, eminent either in action or speculation.' Hume, *Essays Moral and Political* (1753). Kant stated that 'the negroes of Africa have by nature no feeling that rises above the trifling'. Yet, Kant and Hume are held up as the great rationalist thinkers of their period. Some modern international lawyers have revived Kant to provide the impetus for their vision of a democratic peace. (I thank Professor CL Ten of the Department of Philosophy, National University of Singapore for letting me read his unpublished paper, 'Hume's Racism and Miracles' from which the quotes in this footnote are taken. His paper is to be published in the *Journal of Value Inquiry).*

historical hurt that attended it is a matter of the past. A new generation has grown up since the ending of colonialism. Asian cohesion also is a matter of the past as states have gone their separate ways once the first generation of post-colonial leaders had left the scene. Asian states have progressed differently in the economic sphere. There is a glaring disparity in growth. Singapore has achieved levels of growth and per capita income that rival developed states.[4] The largest Asian states, China and India, have demonstrated a scientific and technological capacity that is equal to that of many developed states.[5] Yet many remain mired in poverty.[6] Some remain in the grips of fundamentalist religion. In view of this divergence, is there a still a case for the continuance of an Asian perspective on international law in the present age?

That is the question this article seeks to answer. In doing so, it shows that international law that was shaped in the colonial era was not a neutral discipline but an instrument of naked power, skillfully dressed up so as to hide its objective of controlling the colonized world for the benefit of the colonial powers. Doctrines were made by the founders who were described as universalists but whose mercenary purposes in shaping the content of international law are increasingly coming to be questioned. A lesson to be learnt is that one must beware of self-proclaimed universalists whose mercenary reasons for taking universalist stances must be constantly scrutinized. This is not to be too cynical but in human affairs, self-interest does play a major role. In the craft of international law as fashioned particularly by the English positivists, the successful international lawyer is one who projects his views in a neutralist or universalist garb while hiding its true purpose. Though the projection of power may be the object of the law, hiding such projection is a necessary one as it would otherwise provoke dissent and contempt for the rules so fashioned. Hence, international law of the colonial period was carefully constructed to appear to be a neutral system while cloaking asymmetries of power.

After having established this in the first section, the second section of the article looks at the manner in which the colonies pursuing their struggle to end colonialism articulated counter-doctrines like

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4 The official policy of Singapore is to identify herself as a developing state and as a member of the non-aligned nations.

5 It is estimated that India has more scientists than France. It is evident that much of computer technology in the West functions with expatriate skills provided by Indian and Chinese scientists.

6 In both India and China, while there is a growing middle class which is increasingly divided from the rest of the population, there is still widespread rural poverty.

the principle of self-determination. Once free, these new states began to construct a series of principles of international law that sought to conserve their interests. During this period, it is easy to think in terms of an Asian perspective as Asian states were united in pursuing a package of rules that would have safeguarded their newly won independence as well as have advanced their economic and political interests. The high point of this cohesive approach was the period between the triumph of self-determination as articulated in the Declaration of the Granting of Independence to Colonial People and the struggle towards the establishment of a New International Economic Order. During this period, the Asian cohesion in particular and Third World solidarity held ranks. There was clear evidence that the norms articulated by these groups of states did win acceptance as principles of international law or at the least challenged and weakened the norms of the dominant European system of international law.

The third section of the article discusses the end of the Cold War, the decline of Asian cohesion and the emergence of an agenda that accompanies the New World Order. It details the driving philosophies behind this agenda. It shows how neo-liberalist tendencies have fashioned new directions for international law and that these directions may subject the Asian peoples to situations no different from the past age of colonialism. In this context the final section argues that there is a need for a distinct Asian and Third World response justifying the revival of an Asian perspective of international law. It refuses to accept that a universalist stance is possible as advocated by some and that international law represents a continuous clash of opposing principles of power and justice.[7] This explanation accords with the philosophy of Asian peoples which sees human life itself as an eternal process of balancing the opposite forces of life. The same conflict is represented in international law. In that conflict, the task of the Asian international lawyer is to strive constantly to ensure that equity is done to the people of his region and the other disadvantaged in the world in the face of the might that confronts them. His academic task would be to teach international law in a more exacting manner than it is taught in the developed states. He should, while teaching it to cover the same

7 For an earlier study indicating that international law constitutes a continuous struggle between power and justice, see M Sornarajah, 'Power and Justice in International Law' (1998) 1 *Sing J Int'l & Comp L* 27. The Indian notion of *dharma* and the Chinese concept of *li* heavily influence legal attitudes in the region. There are Western international lawyers who have juxtaposed different notions as being in struggle towards the shaping of international law.

principles and areas as in a course at a university of a developed state, continuously demonstrate the difference in the theoretical bases on which international law could be constructed. He should also show the manner in which the instrumental use of international law could affect the interests of the people of Asia. He should indicate how such uses could be countered through the employment of devices other than power.

II. The Past of International Law

The past of international law, we are told by European writers, was characterised by a conflict with a natural law base for international law and a positivist base. Thus, Alexandrowicz, who has written much on the international law relating to the contact between Europe and Asia and Africa, argued that in the initial period the Asia and African sovereigns were treated in terms of equality with the European sovereigns. The organising principle of the period being one of sovereign equality, the principle was extended to the princes of Asia and Africa. But, this was too happy a picture to project. It could well have been that given the power struggle among the Europeans for colonies, the princes of Asia and Africa were assiduously courted and their parity, which did not last long, was merely a necessity induced by strategy. It certainly was not based on any ideal element that required equal treatment. Even Grotius, who is popularly credited with having placed international law on a natural law footing, was an instrumentalist when it came to affairs in Asia. It has been demonstrated in a recent study that his writings on prize law took positions advantageous to the spread of Dutch power in Asia.[8]

The principle doctrines which were fashioned during this period were aimed at the spread of the imperial power of the European states. The doctrines that were created denied personality to the peoples

8 There is much talk about 'Grotian visions' and the 'Grotian order' both in the literature of international law and international theory. One wonders to what extent these ideal positions were taken in order to advance the power and interests of certain states. The juxtaposition of the Grotian order and the positivist order was commented on extensively by Hedley Bull. The disjuncture between the vaulting normative ambitions of the neo-Grotians contrasted with the focus on power by the positivists and realists greatly troubled Bull. For his writings, see Kai Anderson and Andrew Hurrell (eds), *Hedley Bull on International Society* (Macmillan, London, 2000). Also see Hedley Bull, 'The Importance of Grotius in the Study of International Relations' in Hedley Bull, Benedict Kingsbury and Adam Robers (Eds) *Hugo Grotius and International Relations* (Oxford University Press, Oxford, 1990) pp 65-93.

of Africa and Asia and justified their conquest. The major subterfuge that was resorted to was the manipulation of the idea of civilisational standards. The peoples of Asia and Africa were deemed as lacking in the requisite civilisational standard to enjoy personality in international law by states whose industrial progress could not have occurred if not for the inventions that were thrown up by the civilisations of Asia.[9]

There was a denial of personality also to nomadic people on the ground that states should have settled governance on the models that existed in Europe. The judgment that Europeans made of others who did not conform to their own standards commenced quite early. The nomadic people of Australia and North America were regarded as incapable of possessing land. On the basis of what Justice Murphy of the Australian High Court described as a 'convenient falsehood', the land of these people was regarded as *terra nullius* and colonies founded. Both the right of conquest of the peoples of Asia and Africa as well as the taking of the lands of the aboriginal peoples were accomplished through the establishment of perverse principles. These principles were maintained by the deceit that they were justified by a rigourous analysis of the law which could only be made by the superior intellects of Western international lawyers. 'Highly qualified publicists'[10] who were no more than hired guns of imperial powers mouthed the same platitudes and rose to high eminence within the discipline of international law because of their loyal servitude in supporting injustice. It is necessary to look at this process in nineteenth century international law more closely.

Alexandrowicz has identified the nineteenth century as the period in which the shift in international law theory, abandoning universality and espousing the superiority of Europe over the rest of the world took place. He observed:[11]

> While European-Asian trade was still expanding, European egocentricity left the sovereigns of the East Indies, which had largely contributed to the prosperity of the European economy, outside the confines of 'civilization' and international law shrank to regional dimensions though it still carried the label of universality.

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9 Binary formulae in mathematics, gun powder, paper and printing were discovered in Asia.

10 The writings of 'highly qualified publicists' continue to be a subsidiary source of international law under Art 38(1) of the Statute of the International Court of Justice.

11 Alexandrowicz CH, *An Introduction to the Law of Nations in the East Indies* (Clarendon, Oxford, 1967) p 2; also see Alexandrowicz CH, *The European African Confrontation: A Study in Treaty Making* (Sijhoff, Leiden, 1973).

The eclipse of Asia and Africa from the international scene was achieved through international law theories that denied personality to the states of these regions and justified their subjugation to colonial rule. This enabled the quarrying of the resources of these states to fuel the industrial revolution that was taking place in Europe.[12]

The Eurocentric international law which emerged was devoid of ethical considerations. The exclusion of non-European people from its fold was clearly founded on a reasoning based on racial arrogance which international law may as yet not have succeeded in shaking off. Modern writers of texts on international law observe the fact that international law was the preserve of the European states in the nineteenth century. They avoid accounting for the situation so that the role that their predecessors played in promoting legal fictions that built iniquitous imperial structures could remain well hidden from view. The modern texts which are premised on the basis of a universal international law also find it inconvenient to have to explain that what existed in the nineteenth century was an exclusionary international law built upon a hierarchical relationship which assumed the superiority of Europe. There is reluctance to face up to the 'coercive realities of colonial history'.[13] The universality of modern international law has met with challenges in the works of an increasing number of Asian and African scholars.[14] In a UNESCO sponsored study of international law, Judge Bedjaoui has suggested that much of international law 'had been conceived simply for the use and benefit of its founders, the states that were called "civilized"'.[15] It is an assessment that is unassailable for the rules of international law that are stated in the modern texts

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12 *Western Sahara Case* [1975] ICJ Rep 12.

13 Moore-Gilbert B, *Post Colonial Theory, Contexts, Practices* (1997) p 11. On the conquest of non-Christian territory and religious justifications for conquest given at the time, see Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford University Press, Oxford, 1996) pp 40-66.

14 RP Anand, *New Nations and the Law of Nations* (Vikas Publications, New Delhi, 1978); TO Elias, *Africa and the Development of International Law* (Nijhoff, The Hague 1972); Prakash Sinha S, *Legal Polycentricity and International Law* (Carolina Academic Press, 1996); N'zatioula Grovogui, *Quasi Sovereigns and Africans: Race and Self-determination in International Law* (University of Minnesota Press, 1996); Gathii JT, 'International Law and Eurocentricity' (1998) 9 *EJIL* 184. Some Western scholars accept this view. Also see the writings of Antony Anghie, *eg*, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harv Int'l LJ* 1. E McWhinney, *The International Court of Justice and the Western Tradition of International Law* (Kluwer, The Hague, 1987) at 5.

15 M Bedjaoui M (Ed), *International Law Achievements and Prospects* (1991) at 5.

owe their origins to the practices of European states in the nineteenth century. Modern texts on international law slur over the fact that the origins of international law were steeped in inequity and that many of the rules then formulated continue to be stated without re-examination as to their acceptability to non-European states.[16]

The fashioning of international law through its traditionally recognized sources has also been a function of power. The role of power in the formation of customary principles of international law has been the focus of recent studies.[17] Lacking personality and under control of other states, Africa and Asia could not generate customary international law. Since treaties could not be made by entities without personality, the whole of Africa and Asia did not make treaties that could have contributed to the growth of international law. General principles of legal systems of civilized nations contribute to the formation of international law but the legal systems of Asia and Africa were regarded as insufficiently civilised to contribute such general principles to international law. Writings of highly qualified publicists and judicial decisions were considered subsidiary sources of international law. But, seldom has an Asian or an African been deemed to deserve the honour of being regarded as a highly qualified publicist. European international lawyers, who acted for sectional interests involved in disputes and wrote up their legal opinions as texts published in the journals that they themselves edited were considered highly qualified publicists whose mercenary opinions contributed to the formation of law. Judicial tribunals again consisted of men who were carefully selected and it was seldom that an Asian or an African lawyer not toeing certain lines were appointed to such tribunals. It is still a fact that those who strayed from the fold after their appointments were removed. There was no legal way in which Asia or Africa could participate in the formation of international law as the avenues of such law-making through the sources of international law were tightly closed.

Virtually, every rule of international law facilitated the maintenance of colonial rule by European powers. The law of the sea was dominated by the doctrine of the freedom of the seas which enabled complete access to the seas to the merchant navies as well as to military vessels. Title to territory could be acquired by armed conquest as well as through occupation of the lands of nomadic native people. The native

16 Some writers have rationalised this on the basis that the new states of Africa and Asia are born into the world of pre-existing states and hence have no right to question the existing rules. D O'Connell, *State Succession in International Law* (Cambridge University Press, Cambridge).

17 Michael Byers, *Custom, Power and the Power of Rules* (Cambridge: Cambridge University Press, 1999).

peoples were not regarded as entitled to the protection of international humanitarian law when such a law evolved in the mid-nineteenth century.[18] When European liberal thinkers discussed human rights, addressing the question of whether the peoples of Africa and Asia were entitled to such rights, this was characterized by an innate racism. This is startling in the light of the reputations they were later to enjoy as the shapers of modern European philosophical thinking. When in early twentieth century, self-determination was discussed as a solution to the problems of ethnicity in Europe, care was taken to ensure that the principle should not become a tool for the dissolution of the European empires. It is strange that no text-book addresses this unsavoury past of international law.[19] It is, however, not strange that some Asian international lawyers would also want to conveniently forget about this past of international law, having achieved 'success' within the system that provides them such lucrative servitude.

A. *The Phase of Resistance*

Norms opposite to the norms of Eurocentric international law were articulated largely during the freedom struggles of the Afro-Asian people. In some parts, these were non-violent struggles, dominated by the saintly figure of Mahatma Gandhi. In others, bitter wars had to be fought. Indonesia and Kenya provide examples of protracted and violent struggles towards freedom from colonial rule. The eventual result was the ending of imperialist rule. The principle which ensured this, in terms of international law, was the extension of the principle of self-determination, earlier formulated by President Wilson to redraw the map of Europe to reflect the ethnic identity of states, to the subject peoples of Africa and Asia. The newly independent states hastened the ending of colonialism by using their majority in the General Assembly of the United Nations to enact the Declaration on the Granting of Independence to Colonial Peoples in 1961.[20]

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18 The English settlers committed the total genocide of the Tasmanian aboriginals.

19 Malcolm Shaw, *International Law* (4th Ed, Cambridge University Press, Cambridge 1997) devotes 3 pages to the 'Third World' but deals with it as being relevant only since the Second World War. *Akehurst's International Law* has a more serious treatment of the subject. Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th Ed, Routledge, 1997). Other texts do not even bother to consider the significance of the impact of the Afro-Asian states.

20 The use of the General Assembly, in which the newly independent states achieved a numerical majority, to change laws was at once questioned. Many Western international lawyers supporting the trends initiated by these states argued that these resolutions had a quasi-legislative effect. This view became the dominant view with the passage of time.

The achievement of political independence was insufficient to end European dominance of their former colonies as the multinational companies of the erstwhile imperial powers still dominated the economies of these newly independent states. Efforts were afoot to change the situation through a spate of nationalizations. But to achieve this, the existing law on nationalization which required the payment of immediate compensation had to be changed. This was accomplished, first by the articulation of the principles of economic self-determination and then by the doctrine of permanent sovereignty over natural resources. The latter doctrine was built up through a series of General Assembly resolutions which asserted the right of a state to recover control over its natural resources through nationalization upon the payment of 'appropriate' compensation. These resolutions and practice based upon such resolutions had an impact of altering the law on the nationalization of foreign property.

The newly independent states then sought to change the international economic order through a package of principles that came to be known as the New International Economic Order. This package required the payment of just prices for commodities and the recognition of the doctrines that had already been articulated like the doctrine on permanent sovereignty over natural resources. In the trade area, the NIEO included access on preferential terms to the markets of the developed world. There was an attempt to argue that structural changes needed to be made to the international economy to benefit the developing states of Asia and Africa as these states had been exploited by the developed states during the era of colonialism. The idea closely paralleled the argument of positive discrimination that was found in the constitutional system of the United States and India. In these states, groups that had been disadvantaged due to unequal treatment in the past were given preferential treatment so that there could be accelerated advancement to enable them to catch up with the others.

NIEO's most triumphant aspect was the achievements in the area of the law of the sea. The changes that were sought in this field by the developing states were economic as well as strategic and linked to the NIEO. The claim to an exclusive economic zone in the sea to ensure control over fishery and other resources echoes the notion of permanent sovereignty over natural resources. The articulation of the notion of the archipelagic sea by Indonesia and the Philippines are again instances of conserving resources and advancing security.

In the area of foreign investment too, one sees a clear impact of the NIEO principles. There was an agitation against the role that multinational corporations were playing in the political and economic life of the developing world, especially after the overthrow of the

democratically elected government of Chile allegedly inspired by corporations that the government had nationalized. This led to studies by United Nations appointed commissions. They required that multinational corporations should not interfere in the politics of their host states. They also advocated that multinational corporations may have a positive role to play in the economic development of the host state provided they are properly harnessed by the state to its definite economic objectives. As a result, there were new approaches made to the manner in which multinational corporations were admitted into the host state. Screening mechanisms were set up which sought to ensure that only multinational corporations that had an appropriate place in the economic plan of the state were permitted entry.

The 1970s were the highpoint of the NIEO debates. By the time the 1990s came, the fervour for the NIEO had dissipated. There were triumphant cries of the decline of the NIEO, not the least by Asian international lawyers whose interests lay in running with their erstwhile masters. But, the triumphs of the NIEO have been conserved in a manner that ensures that its principles continue to live through the constitutional systems, treaty practices and even contracts made in the petroleum sector. Thus, the constitution of the Philippines proclaims that the natural resources of the state belong to its people, a reflection of the doctrine of permanent sovereignty over natural resources, an aspect of the NIEO. The investment treaties of the Philippines define foreign investment as subject to the 'laws, regulations and the Constitution' of the Philippines, again reflecting the principle. The entry of foreign investment into the state is controlled by the Board of Investments of that country, the institution of such screening again being a feature of the NIEO. In neighbouring Indonesia, the production sharing agreement which that country pioneered for its petroleum industry and made pervasive throughout the world, reflects the doctrine of permanent sovereignty over natural resources. Those who gleefully pronounce on the decay of the NIEO seldom realise that legal principles of their states keep the gains of the NIEO alive and kicking.

But, the fervour for the NIEO had dissipated simply because it had achieved what it set out to do. There are other examples of its impact besides the ones given in the last paragraph. The doctrinal changes brought about by the Law of the Sea Convention are now accepted as part of customary international law. Singaporean diplomats played a leading role in the making of the Convention.[21] The law on compensation

21 Professor Jayakumar, now the Minister of Foreign Affairs, Professor Tommy Koh, Ambassador at large.

for expropriation is regarded as having been changed. Screening legislation is still maintained in most Asian states to ensure that only foreign investment considered beneficial to the economic development of the state is permitted entry. These ideas continue to live in modern international law and are the direct products of the NIEO. The decline of the NIEO is just wishful thinking of those predisposed to such thinking. The NIEO lives on in the doctrines that it has introduced into international law and practice. As in the celebrated instance of Mark Twain, the decay of the NIEO is greatly exaggerated by those Asian scholars who seek to announce the premature triumph of neo-liberalism.

The articulation of norms opposite to those of the European system had made dents in the international law that was foisted upon the newly independent states. There was no effort on the part of these states to remake a new international law. They were content to remain within the old. Remaking the law would have been an enterprise beyond the extent of their power. They decided wisely in preserving the old order provided changes could be made and set out to change that order. They had accomplished much in the process.

In the teaching of international law at Asian law schools, the Asian practice in articulating these oppositional norms and the impact that they had in changing Eurocentric international law should surely be emphasised. It is necessary to show the role that power played in the shaping of Eurocentric international law and to indicate how counter-norms advanced by Asian and African international lawyers had the impact of changing international law. It is necessary to celebrate and honour the Asian and African international lawyers who made the changes. One must not in the process forget the impact of the Latin American international lawyers who pioneered the making of these oppositional stances from a much earlier age. The heritage of struggle and change should not be forgotten for those who forget history may well see that it repeats itself. For Asia, this may well mean a return to subjugation.

III. The Reassertion of Power and the New Agenda

The differential levels of economic development that resulted brought about a progressive lack of cohesion in the policies adopted by developing states. Consequently, the same vigour for change that the developing Asian states sought could not be maintained. Besides, there was a determined effort to break down the attitude of the developing states as a result of the rise of the new ideology of economic liberalism of Thatcher and Reagan, the dominant figures of the West in the 1990s. The climate was ripe for the reassertion of power. Third World cohesion

had broken down. The prevailing philosophy of economic liberalism emphasized free markets and democratic governance. There was a powerful articulation of the view that international law should be shaped so as to give effect to the philosophy of liberalism.

The argument was that peace was the ultimate aim of world order and international law was the instrument for the achievement of that peace. There was a revival of the Kantian idea that democracies do not go to war with each other. This idea indicated that international law should be tuned to favour democracy.[22] Besides the view that international law must be shaped to favour the imposition of democracy after its ultimate triumph over communism, there is the second view that it must favour the capitalist ideal of free trade and free markets. Again, the argument is that international law must play an instrumental role in promoting economic liberalism. Both are also associated with globalization, the process of the integration of the world that takes place as a result of new technology. Since the law, particularly international law, is seen as an instrument through which global objectives can be achieved, the reasoning is that the aim of the law should be to promote globalization and its antecedent ideas of free markets and democracy.[23]

The role of the law in globalization is to shift matters that were previously regarded as falling within the territorial sphere of states onto the international sphere. Scholte defined globalization 'as a transformation of social geography marked by the creation of supraterritorial spaces'.[24] International law becomes the means through which such spaces are created. It is an evident fact that when states agree to a treaty, they remove the subject matter of that treaty from the domestic sphere of their own laws into the international sphere,

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22 The principal modern essay reinterpreting Kant is by Michael W Doyle. M Doyle, 'Kant, Liberal Legacies and Foreign Affairs' (1983) 12 *Philosophy and Public Affairs* 230. The reinterpretation has been received into international law literature by Fernando Teson and Anne Marie Slaughter. See Slaughter, 'Revolution of the Spirit' (1990) 3 *Harvard Human Right Journal* 1; Slaughter, 'International Law in a World of Liberal States' (1995) 6 *EJIL* 503; Slaughter, 'Liberal International Relations Theory and International Economic Law' (1995) 10 *American University J Int'l Law and Policy* 717; Slaughter, 'The Real New World Order' (1997) 76 *Foreign Affairs* 183. See also Fernando Teson, 'Kantian Theory of International Law' (1992) 92 *Columbia Law Review* 52 and *Philosophy of International Law* (Westview Press, Boulder, Colorado, 1998).

23 The dominant legal thinking within international law has been influenced, particularly in the United States, by the view that international law should be seen as a process that seeks to achieve community goals. The Yale-New Haven approach represents this tradition best.

24 Jan Art Scholte, *Globalization: A Critical Introduction* (St Martin's Press, New York, 2000) p 8.

to be regulated by the rules of the treaty.[25] The increasing subjection of areas such as foreign investment, intellectual property, internal trade and human rights to standards of international law means that there is new space created for international capital. This space is subjected not to the control of the state and its laws but to international regulatory mechanisms created largely through treaty law. The World Trade Organization (WTO) and the new instruments relating to intellectual property, investment and services are the most evident examples.

A new agenda then is afloat. It is driven by the tenets of economic liberalism that require the free flow of capital around the world in the new territorial spaces created by the law. Rapid movement is facilitated by the new technologies as well as the global integration of the world economy. It requires the reinterpretation of many of the existing tenets of international law in order to achieve the aims that are set out in the political philosophy of liberalism. The agenda is that of the more powerful states of the world. They are supported in this by the global institutions which they control. There has been little discussion of the impact of this change on the developing world. The relevance of globalization to the developing world has not received serious attention.[26] The general pattern of international law has been that the law is shaped in accordance with the dictates of the more powerful states in a manner that benefits them. All law has to be acceptable to the strong in any society. Even in a democratic society, the law has to be acceptable to the sections of the community, which by virtue of their numerical strength, have the power to dictate outcomes as to what the rules of the society should be. But, within the international community, it is not numerical strength which matters but the power that economic and military strength provides. The hegemonic power and its allies play the predominant role in the shaping of regimes within the international community and the rules by which it should conduct its affairs. In the new age of globalization, international law will once more be manipulated to advance the objectives which serve the interests of the hegemonic state. Thus, an American international lawyer articulated the role of the United States in shaping international law in the following terms:[27]

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25 A simple proposition stated authoritatively in the *Nationality of Morocco Case* [1923] PCIJ Series B, No 4, p 27.

26 But, see Ray Kiely and Phil Marfleet, *Globalisation and the Third World* (Routledge, London, 1998) and James Mittelman, *The Globalization Syndrome: Transformation and Resistance* (Princeton University Press, Princeton, 2000).

27 Anne-Marie Slaughter, 'Building Global Democracy' (2000) 1 *Chicago JIL* 223 at 225.

> Power in a nuclear era and in an interdependant global economy is also about influence, about our ability to lead and to persuade others to shape the world the way we want to shape it... We must work to shape [international rules] so that they conform to United States interests. That is what we did in 1945. That is what we need to do in 2000.

The statement regards the new millennium as a constitutional moment such as that after the Second World War which necessitated the devising of a new strategy for the use of international law to achieve the objectives of the hegemonic power. Equally, some in developing countries view globalization as 'the imposition of the will of the economic powers of the North on the rest of the world'.[28] Under the cloak of globalization, there is another paradigm shift that is taking place in international law in which the participation of the developing countries is minimal, at best. It is justified by the optimistic prognosis that free markets and democracy will bring prosperity and peace to everyone in the world.

In contrast to the optimistic assessment of globalization, there is also an alternative picture that is emerging. It is manifested in the streets from Seattle to Genoa whenever the leaders of the rich nations or the major global financial institutions like the World Bank meet, in an explosion of violence and protest. Globalization has always provoked a variety of responses.[29] The materialistic motives that underlie it have resulted in moral, religious and social concerns being expressed in opposition to it. Cultural, ethnic and fundamentalist sensitivities are aroused when a uniform set of values is imposed around the world.[30] The lack of concern for the environment and human rights within a profit-driven process generates conflict.[31] The uniformity of culture, usually the culture of the dominant power, is seen as creating animosity and a response of withdrawal into ethnicity and fundamentalism.[32]

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28 Vandana Shiva, 'Ecological Balance in the Era of Globalization' in Paul Wapner and Lester Ruiz (Eds) *Principled World Politics: The Challenge of Normative International Relations* (Rowman & Littlefield Publishers, Maryland, 2000).

29 The view that globalization results in a variety of dissent grouped together under the notion of fragmentation is stated in Alan Little, Globalization and Fragmentation (Oxford University Press, Oxford, 1996).

30 BR Barber, *Jihad* v *McWorld* (Ballantine: New York, 1996).

31 In the Asian context, the examples are the alleged role of Exxon-Mobil in the atrocities in Aceh, and the similar allegations against Freeport-McMoran which have led to litigation in the United States.

32 Walter LaFeber, *Michael Jordan and the New Global Capitalism* (WW Norton and Co, New York, 1999).

The selective human rights norms that are imposed provoke a debate on the cultural relativity of human rights, a debate in which Singapore and Malaysia have participated vigorously.[33]

These trends result in the mobilization of global dissent that the same forces of technology, such as Internet and other means of swift communications which generate globalization, have made possible. This was made evident during the debates on the projected Multilateral Agreement on Investments (MAI). The MAI was an instrument that the Organization for Economic Cooperation and Development (OECD) attempted to draft in order to bring about global standards for the admission, treatment and protection of foreign investment.[34] It provided for the unrestricted right of entry and establishment of investments, national treatment of the foreign investor after entry into the host state, full compensation in the even of expropriation of the property rights of the foreign investor and his right to initiate arbitration unilaterally before an overseas tribunal in the event of a dispute. It spoke entirely of the rights of the multinational corporations which make investments. It spoke nothing of the need to protect the environment from the harm such multinational corporations could bring about in the host countries they operate in or of the human rights abuses that are associated with such investment. There was no effort to impose responsibility for such harm on the multinational corporations. The instrument was based purely on economic liberalism enabling multinational corporations to roam the world in search of cheaper production sites and secure full protection for their operations. The environmental organizations protested once they got wind of the efforts to draft such an agreement. The opposition was quickly organized through electronic groups.[35] It demonstrated a people centred approach to international law that some

33 Senior Minister Lee Kuan Yew has been an articulate champion of a distinct Asian system of values as has been the Malaysian Prime Minister. See generally, Daniel Bell, *East Meets West: Human Rights and Democracy in East Asia* (Princeton University Press, Princeton, 2000) where there is an imaginary discussion of human rights with Senior Minister Lee Kuan Yew. For his own views, see Lee Kuan Yew, *From Third World to First: Memoirs of Lee Kuan Yew* (Singapore Press Holdings, Singapore, 2000).

34 James Salzman, 'Labour Rights, Globalization and Institutions: The Role and Influence of the Organizations for Economic Cooperation and Development' (2000) 2 *Michigan JIL* 769.

35 SJ Kobrin, 'The MAI and the Clash of Globalizations' (1998) 112 Foreign Policy 97 referred to the 'electronically amplified public opposition' to the MAI. The Preamble Collaborative, which co-ordinated the protest, consisted of 600 organisation in nearly 70 countries.

scholars had identified earlier as having emerged in recent times.[36] The opposition to MAI demonstrated the power of civic society organized on a global scale through the electronic media. It resulted in the articulation of further opposition to the agencies of economic liberalism. Widespread demonstrations led to the abandonment of the Seattle meeting of the World Trade Organization. Similar demonstrations in other parts of the world where meetings of financial and trade organizations were held show that there are ideas afloat which detract from the merits of globalization.[37] Some consider the discontent and opposition to globalization as emanating from fringe activists whose views were not well founded.[38] But others regard the violence as symptomatic of opinions that were being overlooked by governments and international organizations.

The less optimistic assessment of globalization sees the new trends as deepening the poverty gap between and within nations, increasing social strife as well as fragmentation and promoting ethnic and religious divisions within societies.[39] The contrary view would have it that

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36 D Grossman and D Bradlow, 'Are We Being Propeled towards a People-Centred International Law?' (1993) 9 *Am J Int'l L & P* 1. Following this article, others now make a distinction between globalisation from above where the rules are devised by states and other powerful agencies and globalisation from below where civic society exerts its influence in fashioning rules. See, *eg,* Richard Falk, *Predatory Globalization* (Polity Press, Cambridge, 1999).

37 The meeting of the World Trade Organisation in Seattle, of the Asian Development Bank in Thailand, of the International Monetary Fund in Melbourne and the meeting of the World Bank in Warsaw witnessed violent demonstrations. They are symptomatic of a more entrenched opposition to globalisation. On 20 Apr 2001, when the Free Trade of Americas Agreement was discussed by American leaders at Quebec City, massive demonstrations took place.

38 Edward Graham, *Fighting the Wrong Enemy* (Institute for International Economics, Washington, 2000).

39 For detractors of globalization, see D Rodrik, *Has Globalization Gone Too Far?* (Institute for International Economics, 1997); J Gray, *False Dawn: The Delusions of Global Capitalism* (Granta Books, London, 1999). The perspectives of the attacks are different. Gray, for example, takes the uncompromising attitude that globalisation has little merit. This is not a position other detractors share. Globalization is here to stay as technology has obviously made the world come closer. Hence, others suggest a measured approach to the problems of globalization. A Giddens, *Runaway World: How Globalization is Affecting Our Lives* (Routledge, London, 1999). There is no indication that policies on trade and globalization will be changed under the new administration of President Bush. Speaking to the Organization of American States, President Bush indicated that the projected Free Trade Agreement of the Americas extending from the Canadian Arctic to Tierra del Fuego and projected to take effect in January 2005 will be supported by his administration. Bush said his administration is 'committed to pursuing open trade at every opportunity'. He said: 'There is a vital link between freedom of people and freedom of commerce. Democratic freedoms cannot flourish

liberalization of markets will bring further disadvantages to developing states, enhancing the profits that the developed states and their corporations have always been reaping from international trade. The creation of regimes of international trade is seen as the creation of rules that ensure the dominance of international trade by the richer states. Much of these rules have entrenched advantages of the developed states by universalizing protection of intellectual property and the movement of services which are areas in which developed states already have dominance.[40] The free movement of investment and watertight protection of the assets of transnational corporations will, it is argued, result in a world dominated by private capital or alternatively by states from which such capital moves. A list of negative impacts of the activity of multinational corporations is made. Their activity results in the depletion of natural resources quarried by these corporations to make their finished products. They export unsafe practices and hazardous technology because of tight controls over standards of production in their home states.[41] It is alleged that human rights are violated by the alliances that these transnational corporations make with undemocratic regimes in the developing states.[42] Between these two diametrically opposed views,[43] there are different shades

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unless our hemisphere also builds a prosperity whose benefits are widely shared. And open trade is an essential foundation for that prosperity'. *Washington Post*, 18 Apr, 2001.

40 The Trade Related Intellectual Property Measures (TRIPS) creates a regime of protection for intellectual property, as the General Agreement on Trade in Services (GATS) does for services and Trade Related Investment Measures (TRIMS) does for certain areas of foreign investment. These are new disciplines attached to the World Trade Organisation created after the Uruguay Round.

41 CA Petonsk, 'In Search of Ethical Principles for Environmental Law and Development' (1996) 15 *Stanford Environmental Law Journal* 9.

42 There is a considerable amount of litigation which has resulted from such allegations. The most spectacular case has been *Doe* v *Unocal* (1998) 27 F Supp 2d 117 where it was alleged that Unocal, the American energy company, was associated in the human rights violations committed by the government of Myanmar. There is an increase in the type of such litigation in recent times in the United States because of the existence of an old statute, the Alien Torts Act. For other litigation, see *Jota* v *Texaco Inc* (1998) 157 F 3d 153; *Aquinda* v *Texaco inc* (1995) 945 F Supp 625 (SDNY).

43 Whereas the first view is driven by those committed to the ideologies of free markets and democracy, the second harbours a greater diversity of approaches. There is a Marxist approach which is bent on demonstrating the negative factors to intermediate views which take a more balanced approach, identifying both the positive and the negative aspects of the phenomenon. For Marxist views, see *Threat of Globalism* (Race and Class Special Issue, 1998). Since the phenomenon of globalization cannot be reversed, it is obvious that the effort should be channel its course in a manner that benefits humanity than sections of it.

of opinion as to the eventual effects of globalization. Whichever view is taken, it is undeniable that globalization will have definite impacts on the future course of international law.

Intense debate also takes place as to the effects of globalization on the system of sovereign states. The views range from the emergence of a borderless world which makes state sovereignty redundant to those which dismiss such dramatic conclusions as unsupported by evidence. If a borderless world does emerge, the regulatory function of international law will be strong. There is obvious evidence of this in certain areas such as money-laundering, a phenomenon made possible due to the instant methods of transferring money around the world electronically. Creating rules for Internet or electronic commerce is another instance where new rules are called for by some on the basis that such commerce takes place in cyberspace that is subject to no state's jurisdiction. It is clear that such phenomena have to be regulated through international mechanisms that do not have regard to borders of states. Environmental pollution and other environmental hazards do not recognize borders and hence have to be subjected to international control.[44] The emergence of international regimes regulating certain sectors of global activity may lend support to the view that such activity is borderless and that it has to be regulated through international legal principles. But, sovereignty does remain relevant as most activities remain territorially based and subject to state control. The latter view sees the continuing relevance of the state, despite globalization, as there is a need for the state to arbitrate between its people and the external agents of globalization.[45] The state will use its sovereign power to ensure that it retains control over much activity that affects its economy and its people through the use of domestic laws.

States are not the only actors in the drama of globalization. In addition to the sharp differences that are brought about between developed and developing states as to the issues arising from globalization, there is also the emergence of non-governmental organizations which have grown as a result of concern with environmental depletion which globalization has brought about. They have thrived on issues relating to activities of multinational corporations affecting environmental and human rights standards. The diminution of the rights of workers consequent on the liberalization programmes initiated by the developing

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44 Pollution of the Rhine and forest fires caused by farmers in Indonesia affecting other states are instances.

45 Stephen D Krasner, *Problematic Sovereignty: Contested Rules and Political Possibilities (Columbia University Press, New York, 2001).*

countries to attract investment has attracted their attention.[46] The repression of these rights on the ground that attracting foreign investment requires stability also has invited the condemnation of these groups. These non-governmental organizations, though motivated by the different interests of sustainable growth and promotion of human rights, are in broad agreement with the aims of the developing states in opposing the adverse consequences of globalization. The cause of the developing countries has thus acquired vocal and powerful support from groups which are within developed states and have the means of advocating the concerns of the developing states effectively. The failure of the Multilateral Agreement on Investments as a result of the concerted action of these non-governmental organizations evidenced their potential role in international affairs as representing the views of large sections of the people of the world. The role of civic society in bringing about positions on important conflicts generated by globalization will affect outcomes in these conflicts. As a result, these non-governmental organizations will have an impact on the manner in which international law is shaped. The old fallacy that international law is law between states will come to be increasingly challenged as globalization demonstrates that there are other actors besides states such as multinational corporations and non-governmental organizations which exert significant power in shaping international relations. An alternative explanation of these trends is that the South in the old North-South debates has itself become globalized as a result of the poverty gaps caused by globalization in the developed states. Consequently, the unemployed and the poor in the North are articulating the interests which the South has traditionally espoused.[47]

As a result of the emergence of these new actors, the wishes of the hegemonic power will not always triumph. The agenda of the hegemonic power in shaping international law will be met through the bringing of pressure through organized demonstrations and political agitations to supplant the set of norms preferred by the dominant groups with another set of norms expressing concern for diametrically opposed interests. The MAI episode demonstrated this clearly. Whereas the capital exporting states and transnational corporations wanted an

46 Ethan Kapstein, *Sharing the Wealth: Workers and the World Economy* (WW Norton, New York, 1999).

47 Caroline Thomas, *Globalization and the South* (St Martin's Press, New York, 1998).

MAI which ensured free entry and protection for foreign investment, the civic groups wanted the agreement to reflect the social responsibility of multinational corporations for the environment and for human rights. There will be opposing norms articulated largely on the basis of justice, supported by the organized power of the people across the world to secure advantages for these norms. Given the fact that in democracies such power does have an impact, the developed states themselves will be prone to accommodating some of these norms in the package that results from this clash of interests.

A. *The Relevance of International Relations Theory*

The opposing perspectives on globalization will affect the law. As already seen, the optimistic perspective of globalization is guided by the philosophy of economic liberalism and it will seek to have its objectives realized through the law. This contemplates a situation in which public power represented by the hegemonic state and its supporters and private power represented by multinational business will coalesce to bring about international regimes that are favourable to their interests. This globalization from above will be foisted on the whole world through the use of law by the weight of sheer economic and military power. International relations theory will explain this on the basis of the realist theory that power cannot be contained in its objective of securing its own interests. Others may observe the inequities involved in the situation but would argue that one can merely observe them as silent spectators as power has always acted in this manner and that history shows that it cannot be contained.[48] Rationalization of the changes that take place will also be provided on the basis that economic liberalism will benefit the whole world and not only the hegemonic power and the other developed states which act in alliance with it.

International relations theory will also demonstrate how institutions are constructed in order to advance what may be regarded as ideals of the international community. This new constructivist theory has closer relations with international law in that it seeks to show how goals which are desired by the international community are constructed through normative structures in many areas. Since the norms identified by the constructivist school resemble international law, the proximity of this theory that is gaining a measure of acceptance within the international relations field is clear. This school relies largely on areas such as the environment, human rights and trade in constructing the

48 S Krasner, *Problematic Sovereignty: Contested Rules and Political Possibilities* (Columbia University Press, New York, 2001).

normative theory.[49] Since these areas are relevant to globalization, one can see the new theory as coterminous with the progress of modern globalization. The creation of new regimes for the governance of areas of international activity also results in theorizing about how constitutionalisation of these areas takes place and how mechanisms for compliance with these norms are created. Again, new regime theories are formulated to explain the phenomena. These theories also bring international relations and international law closer. They are explanations that generally favour the activity that is desired by the hegemonic power and the imposition of a normative order favoured by the hegemonic power.[50]

B. *The Emergence of a Normative Theory*

But, the second perspective,[51] which does admit that globalization is inevitable, will seek to resist such imposition and ensure that the rules of the world are fashioned by having regard to notions of what is just. According to this view, ethical considerations will play a role in the shaping of legal propositions.[52] Some see the onset of globalization as providing a new moment for a rethinking of the bases of international politics. There is a revival of concern with the ethical constraints on the conduct of policy in international relations. This is on the assumption that the ending of the Cold War has freed space for ethical considerations to be taken into account in the shaping of the future world.[53] This

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49 The literature is surveyed in Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887.

50 For literature on international relations and international law, see Michael Byers (ed) *The Role of International Law in Politics* (OUP, 2000).

51 A third perspective that globalisation is a myth need not be taken into consideration here. It is a well-argued thesis. It is based on the argument that the world had a more open economy in the early twentieth century. It is not a theory that needs to be considered for the purpose of developing views as to the use of international law in periods of globalization.

52 Ethical positions could be taken by those who support economic liberalism. Thus, the World Bank, faced with increasing criticism that it is motivated solely by economic considerations, has taken to promoting the 'rule of law' which is but a guise through which it protects values such as binding contracts and protection of property. These are no different from the values that economic liberalism promotes, dressed up in ethical garb.

53 Christopher Brown, 'Justice and International Order' in Terry Coates (Ed) *International Justice* (Ashgate, London, 2000) p 27. He argued (p 37) that the ending of the Cold War has 'liberated some conceptual space and the change in the world economy-the alleged move towards globalization-has also led to a willingness to re-examine some of the assumptions of the discipline'.

trend has been matched in international law by a new surge in concern with the ethical foundations of international law.[54] The demand is that law should be guided by considerations such as the eradication of poverty, the promotion of economic development, the protection of the environment and the enhancement of human rights. The position may not be taken by developing states as many of them are yet to recover from the spell of economic liberalism. Neither is there sufficient solidarity among them to pursue stances as vigorously as they used to do during the 1970s when they promoted the agenda of a New International Economic Order in unison.[55] The unity may well re-emerge if the success that has been brought about by the liberal policies that developing states have adopted proves to be ephemeral. The signs are there that in many areas, such as international trade and environmental protection, developing states' position seems to be coalescing once more. The lip service paid to economic development in the declaration of states at the conclusion of the Doha Ministerial Meeting of the WTO indicates that the developing world may yet unite on many issues, particularly those relating to trade. But, more important is the fact that there is an emergence of forces within developed states as well as developing states that have come together in the face of the harshness and divisions which globalization has generated. It has brought together a coalition of people from across the globe united by their concern for poverty, environmental depletion and violation of human rights. It could well be argued that the concept of the Third World has undergone a change. The change is that the vast gaps between rich and the poor and the schisms brought about by concern for the environment and the eschewal of the notion of material profits at all costs has moved the Third World into the First World. This creates large groups of environmentalists, the angry poor and human rights

54 Impetus was provided for this in the writings of Richard Falk. Also see Paul Wapner and Lester Ruiz (Eds) *Principled World Politics: The Challenge of Normative International Relations* (Rowman and Littlefield Publishers, Maryland, 2000). For a survey of the tussle between competing notions, see M Sornarajah, 'Power and Justice in International Law' (1998) 1 *Sing J Int'l & Comp L* 21.

55 The New International Economic Order referred to a package of economic reforms on a global scale which developing countries promoted during the 1970s and 1980s largely through resolutions at the General Assembly of the United Nations. These related to structural changes they demanded in the areas of international economics and international investment. This solidarity was broken due to change in circumstances and the success of liberal economics in the 1990s. On the New International Economic Order, see M Bedjaoui, *Towards a New International Economic Order* (Holmes and Meier, New York, 1979).

activists within the developed world willing to espouse the causes that are argued by the developing country. A powerful electoral lobby exists within the developed states which lends support to the causes advanced by the poor of the world. The division is mirrored among the international lawyers within the North many of whom see the justice in the causes argued by the South.[56] The non-governmental organisations, which have espoused global causes, now provide a powerful counter to the economic liberalization model behind the dominant variety of globalization that the developed states and business interests seek. This globalization from below is made possible by the same technology that facilitates the globalization that brings together the powerful. The growth of civic society and the global integration of the peoples and their power is made possible by internet and other devises that also promote the globalization of capitals and markets. Whereas the claims to a New International Economic Order were state-centric, the new movement is centred upon civic society and can therefore be regarded as a people-based movement. There is a visible impact of the movement. When the leaders of the Americas met in Quebec to agree on the Free Trade Agreement of the Americas, they decided to include clauses on labour and the environment in the new agreement, though there will be difficulty in the making of a final draft on these contentious issues.[57]

The New International Economic Order (NIEO) had sought to address the problem of structural injustices in the international order but it was displaced effectively by the onset of economic liberalism in the 1980s. The NIEO was entirely constructed at meetings of non-aligned states and through General Assembly resolutions, forums at which only states had rights of participation. In the new phase of justice related arguments, the impetus is driven, not by states alone, but by coalitions of people who have been able to agree and agitate for their goals through the means provided by new technology. This people driven movement against economic liberalism is the new opposition

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56 Richard Falk, *Predatory Globalization* (Polity Press, Cambridge, 2000).

57 There was also to be a clause on democracy, indicating economic liberalism linkage between free trade and democracy. The linkage did not exist in the history of the United States, itself, which though a democracy, espoused free trade much later. The clause is to read: 'any unconstitutional alteration or interruption of the democratic order in a state of the hemisphere constitutes an insurmountable obstacle to the participation of that state's government in the Summit of the Americas process'. This may exclude military coups but whether the state would be excluded from trade preferences or simply barred from attending summits is not clear from the language. 'Hemisphere leaders back free trade zone' *Washington Post,* 23 Apr 2001.

to the alliance of private and public power that drives globalization. To that extent, it has a unique feature and one may argue that the international law it may construct is truly democratic in origin. At least, it is more widely reflective of a larger cross-section of the peoples of the world than the international law constructed by the power elites of the developed states.

Unlike in the past ages of globalization,[58] the conflict in the present age will be felt within the principal hegemonic state itself. The United States, unlike the hegemonic states in the past, has a history which makes it conscious of the need for justice in human affairs. It was the first colony to have caste away colonialism through a militant struggle. The American Declaration of Independence was not designed as a document that served the American colonies seeking freedom from English rule but as a solidarist statement that served the whole of humanity. It was a national expression of universal rights. America fought a civil war based on essential notions of justice. It was President Wilson's espousal of self-determination which had the indirect effect of triggering off independence movements in the colonies.[59] While, of course, military and mercantilist considerations may seem paramount and national interests will continue to dictate the fashioning of American foreign policy, there is etched in the psyche of the American people a core of underlying principles of justice which will ensure that excesses of power are not permitted.[60] Its history demands the United States to march to the drum beats of idealism. This internal conflict will play a strong role in restraining the tendency to give full expression to mercantilist and self-interested views that drives economic globalization. There will be people within the United States who will reach out and identify themselves with the struggles of the disadvantaged people of the world whose plights have been made more intense by the harmful

58 It could be that this exception is uncalled for. Even in the past age of globalization, there were liberal tendencies such as the anti-slavery movements within England. Towards the later stages, colonialism was more speedily ended because of the Labour Party's changing attitudes. There were prominent men such as Edmund Burke who spoke out against the imposition on colonial rule on India. But, it is undeniable that the United States begins its age of globalization with a psyche that contains a more pronounced conflict.

59 Woodrow Wilson confined the notion to Europe as international politics of the time required it to be so limited but in articulating it couched it in universalist terms. James Mayall, *World Politics: Progress and Its Limits* (Polity Press, Cambridge, 2000) at 19.

60 President Clinton quoted de Tocqueville: 'America is great because America is good, and if America ever ceases to be good she will no longer be great....' (Speech before fund-raising dinner for the Democratic National Committee, 14 Mar 1994).

effects of globalization. They will lend their considerable weight to require the alleviation of this situation by political agitation, creating and giving of material support to global movements[61] and litigating such matters before their domestic courts.[62] The events of 11 September 2001 will not change this analysis. The United States will live down such events and emerge from them as before, a nation in which much debate on social and political events take place.

Such conflicts, both internal and external, will result in the refashioning of theories and principles of both international law and international relations. Neither of the two major contending views will have absolute supremacy in the new age of globalization. The clash that occurs will ensure that some form of accommodation is reached which will be more reflective of the legal position. To this extent, the modern age of globalization will be markedly different from the ages of globalization which preceded it, where the views of the powerful always prevailed. The fact that ethical considerations matter in the modern age and are espoused by civic groups within the developed world will ensure that a people-centered approach will eventually have a role in ensuring that the rules advanced by the powerful do not triumph absolutely as they would otherwise have done. This is particularly so as globalization has also ensured that the concerns of humanity are espoused more pervasively by groups within the developed world. As argued, there will, more importantly, be groups within the hegemonic power, the United States, which have shown a vigorous tendency to espouse causes in other states. These groups have shown an active concern with such matters as global poverty, the environment and human rights. The impact of their power within the developed states is evident in advertisements by multinational corporations to convince the public that they have taken measures to protect the environment. Such is the extent of this reaction, that leading oil companies claim in their advertisements that they are seeking to make themselves redundant by enhancing the uses of solar energy. They also have internal codes of conduct on the environment and human rights so that the argument for binding regulation on these matters on an international scale could be forestalled.

Unlike in the previous age of globalization when the nations of Africa and Asia had no means of articulating their views, the present age

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61 Thus, the Sierra Club and the Human Rights Watch are American organisations concerned with global environment and human rights.

62 The spectacular rise of litigation in American courts against American companies involved in human rights violations in other states is illustrative. See, *eg, Jota* v *Texaco* (1998) 157 F 3d 153.

ensures that they have adequate scope for doing so. They are able to act in fora, such as the General Assembly of the United Nations and in other international bodies to state their interests and shape attitudes to international law. Their views in shaping the law have had some limited success in the past.[63] But, the future furnace for such developments will be the pressure that is exerted by global movements for the securing social justice to all peoples rather than the elite-driven states of the developing world which are now gripped in the vortex of economic liberalism. It could well be argued that these states, ruled by their elites, are in a network that supports globalization through the ideology of economic liberalism to the detriment of their people and justify their continued rule by relying on the statistical evidence of economic flows that have been generated. Since these economic flows do not remove social inequalities but benefit the elites alone, movements against the trend have to be generated by people rather than states. As the situation is perceived not in local terms as in the past but as flowing from international trends, these movements attack the agencies of globalization as being the cause of their problems.[64]

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63 The success is not spectacular. One area worthy of study is the law of the sea. Here changes were made largely at the instance of the developing states in bringing about an exclusive economic zone ensuring that the resources of the surrounding seas are reserved for the states. But, these have been victories on paper as the states often lack the resources to exploit or police the exploitation of these seas. Also, on the important issue of the exploitation of the deep sea-bed, the views of the developing states did not succeed. The United States was willing to regard all the changes made in the Law of the Sea Convention as customary international law except the provisions on the deep sea-bed. It did not sign the convention despite changes made to the chapter on the deep sea-bed. Though the eventual acceptance of the principle of self-determination is credited to the freedom struggles of the colonised peoples, yet, it can be argued that the colonial powers had become sufficiently weakened at the conclusion of the Second World War to want to have another bout of violence. Another principle, the permanent sovereignty over natural resources, which was championed by the newly independent states, has become so watered down that the original aims of the proponents of the doctrine were not entirely achieved. The impact of the states of Africa and Asia on international law should not be overestimated. Yet, their impact has been significant, at least in some areas, such as the law of the sea and the international law on foreign investment. It is interesting to note that there is similar ferment as to the lack of protection of interests of women in international law resulting from the male dominance in the formation of its rules. There have been calls for revision to accommodate the feminist interests.

64 The instances of global networks which attack globalization include the Third World Network centred in Malaysia, The traditional civic groups such as Oxfam, which had earlier confined themselves to poverty, now attack globalization, perceiving it as a trend that enhances poverty.

C. *International Law as an Instrument of Power*

If the law is merely the instrument which purveys the interests of the powerful, then, there is a need to ensure that the use of the law as a technique of power is visibly seen to be so. Further, it is to be resisted in situations where it leads to injustice to the less powerful. If considerations of justice and fairness do not shape the legal outcomes in international and domestic life, then, the issue is whether that type of law has a role to play and whether such law should be replaced.[65] The notion that an ideal element guides and shapes legal outcomes is what leads to the acceptance of the law, particularly by the disadvantaged many in the world. If on the other hand, meaningful goals are to be achieved in bringing progress to human life through the espousal of normative prescriptions through the law, there is a need to enhance such a use. The function of the law must always be seen as the promotion of just ends within the community. Those who use law to promote power do not deny that the law must serve the interests of justice. They merely seek to dress up the interests of power as consistent with those of justice. They promote a wide belief in the view that the laws they make are just. No human community has justified the use of law except in terms of its capacity to achieve justice and has always recognized that there is legitimacy in overthrowing unjust laws. The touchstone of the law in the age of globalization must also be the ends of justice it will serve. Where the ends of power are dressed up as just, then, one principal task of scholarship in international law must surely be to unwrap such a dress so that the real interests that motivate the particular set of laws could be seen. It is, regrettably, a task that is seldom performed.

It is an evident fact that the history of international law is replete with instances in which it has been used to stabilize power. The main tradition within international law has been the successful practice of cloaking power behind the façade of the law. The more successfully this can be accomplished, the better is the standing of the international lawyer who performs the task. He will make it to the ranks of 'the highly qualified publicists'[66] very quickly. The so-called science of

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65 In a different context, Franck has developed the thesis that fairness legitimises norms of international law. Thomas M Franck, *Fairness in International Law* (OUP, 1995).

66 The opinions of 'highly qualified publicists' are regarded as subsidiary sources of international law in the Statute of the International Court of Justice. Most of these opinions are given by men who have served governments of their states or are academics who have taken views that are partial to the interests of these governments. Sadly, it is difficult to succeed materially unless such a course was adopted. Most highly qualified publicists are no more than mere hired guns.

international law, which positivists take pride in, is based on the effective camouflaging of power. The more effective a legal viewpoint is in cloaking the power-play and the perversions that underlie legal outcomes, the more scientific it is considered to be. Those who cry out against the legal solution are considered to be engaging in mere rhetoric. So, the legal high-ground is captured through sophistry. The practices have been systematized through carefully built up theories which justify the exercise of power. Many of its principles were formulated in a period of colonialism when three quarters of humanity were denied any personality by the legal theories that shaped the law. These include theories of human rights which are supposed to continue to be the origin of the modern international law of human rights. The question is whether yet another age of globalization should take place on the basis of such law and vast sections of humanity must continue to be denied justice by the purveyance of power through the law.

But, those who seek to deny an international law that is centred on power must advocate an alternative. The principles on which a new order is to be established must be identified. From the point of view of the developing country international lawyer, the advancement of economic development, the eradication of poverty, the recognition of the dignity of every person within the context of her society should be the aim of international law. But, one has to concede that international law cannot be dictated by the achievement of these objectives alone. There will always be a conflict with other competing objectives, many of which are shaped by the interests of power. The outcome in this conflict will usually favour the interests of power. Yet, the effective representation of the interests of the weak may ensure the tempering of the outcome. On occasion, it may even lead to the triumph of the rule favoured by the weak simply because the justice of the rule comes to be universally accepted or because coalitions within the powerful states favouring the rule will tilt the balance towards its acceptance.

IV. Conclusion

The clashes that are taking place in the context of globalization have an impact on the manner in which international law is taught in Asian law schools. There is an onus not only to indicate past history and the impact that resistance of Asia has had on international law, but also to show the relevance of this past to the present. The present age of globalization shows similar schisms which call for the shaping of the international law in a manner that takes into account the interests of the developing states. A course on international law at an Asian university which fails to take these events into account will fail in the

task of creating international lawyers relevant to the future of Asia. To impart an understanding of the movements generated by globalization and the different responses to these trends should be the objectives of any course. When so equipped, the future Asian international lawyer could serve his people with a better understanding of the global events that affect them. Universalist pretensions, on the other hand, will merely teach him to study international law out of a text written by international lawyers of Europe or the United States. This would be irrelevant to the understanding of the manner in which the leaders of his region had shaped the law in the past or of the present trends that affect his region. This tradition breeds a sense of helplessness in the face of injustice. The better course is to demonstrate how in the recent past, Asian states have shaped international law to suit their interests. Also, to show how in the present age of globalization trends towards domination through the law could be resisted and diverted in a manner that serves the interests of the people of the Asian region.

The dominant theme of economic liberalism drives Western perspectives on international law. That perspective is to a large extent detrimental to the interests of developing states. The total liberalisation of trade and movement of capital has already resulted in an Asian economic crisis. The responses to it have not been uniform, Malaysia in particular, resorting to capital controls rather than the prescriptions of the International Monetary Fund. There is no evidence to show that the Malaysian efforts have not been successful. But, at the same time, there has been widespread criticism of the prescriptions of the International Monetary Fund based upon notions of economic liberalism. There must be sufficient sovereignty left in all states to ensure that they safeguard their interests as they see fit rather than have to follow the prescriptions of an institution dominated by hegemonic states.

So too, the other aspect of the liberal drive that prescribes democracy and a value system of human rights that favours highly individual rights will be opposed by many Asian states.[67] Again, the freedom must be saved for the Asian people to decide which way they will go rather than have that way prescribed for them or forced upon them by others. Asian problems relating to development and ethnicity are different from those which faced Europe. The solutions to these problems must be fashioned by the Asian people. Dictators in India and the Philippines were brought to book by the people not by pressure from outside.

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67 See generally, Joanne Bauer and Daniel Bell (Eds) *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999).

It is this freedom of choice that must be preserved. International law must create that space for the people to operate. The task of the Asian international lawyer is to search for solutions for the problems of his people rather than to look to foreign philosophies which in the past helped to secure their serfdom.

The interventionist policies are further enhanced through broad notions relating to the use of force. The British volte-face on the validity of the doctrine of humanitarian intervention has paved the way to a new round of expansionary doctrines which would undermine the restraint on the use of force. There has been much discussion in the literature on the right to intervene forcibly to establish democracy.[68] The events of 11 September 2001 will result in even wider formulations of doctrines on forcible intervention. The bombing of Afghanistan is based on the need to arrest terrorists and prevent terrorism, in itself a laudable objective. The danger is that terrorism is a concept that is undefinable and the opportunity for selective intervention that it presents is immense. The less powerful have a continuous need to reassert the non-use of force as the fundamental principle of international law.

Economic liberalism and its concomitants bring in new hegemonic approaches into international law. These approaches are often inconsistent with the interests of the Asian states as well as those of other developing countries. There is a need to confront them by maintaining a vigorous opposition to the norms preferred by the powerful states. The Asian perspective that was devised in the post-colonial context must be kept alive in order to ensure that the interests of the weaker Asian states are safeguarded.

68 Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (Cambridge University Press, 2000).