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Transcivilizational International Law Against the System of International Relations: Onuma Yasuaki's Normative Choice

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In Onuma Yasuaki's research, international law must, as a necessary condition, be interpreted from a historical perspective. The historical reconstruction enables him to point out a precise relation between the past and the future of international law, highlighting the distance that separates the age of natural law and the subsequent positivist period from the instability of the current international legal order.

At the root of this instability is the crisis of the West-centricity of the contemporary international order, suggesting the need to rethink this order from a transcivilizational perspective. But what is the meaning of this concept?

According to Onuma, the transcivilizational perspective charts a middle course between two opposite perspectives—one of them West- and state-centric, the other instead centred on the role of the actors in civil society who view themselves as representatives of the "global community". It constructs a "cognitive and evaluative framework based on the recognition of the plurality of civilizations and cultures that have long existed throughout human history".[1] Onuma adds that if we take account of civilizations and the cultures they consist of, we need to take a relativistic and functionalistic approach. This means that there are always cultural and civilizational factors that shape international law. A fundamental question thus arises: In what way have civilizations historically influenced the successive normative orders of international law?

By taking this perspective, Onuma can clearly point out the twofold aim of his book: on the one hand, he sets out to analyze the functioning of international law conceived as a "social construct", proceeding from a precise concept of the law as historically determined and from the values espoused by the members of the international society; at the same time, he seeks to present a corrected concept of international law which aims to rectify erroneous historical interpretations of it, outlining a *normative*

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1. Yasuaki ONUMA, *International Law in a Transcivilizational World* (Cambridge: Cambridge University Press, 2017) at 19. See also Yasuaki ONUMA, *A Transcivilizational Perspective on International Law* (The Hague: Hague Academy of International Law, 2010) at 80.

standpoint from which to shed light on realities that reveal themselves to be unjust or illegitimate.

In order to see how Onuma works towards this twofold aim, it helps to highlight three aspects of his work: (1) his historical approach, and his discussion of (2) the relation between globalization and international human rights law and (3) the question of war and the use of force.

I. THE HISTORICAL APPROACH

From the Middle Ages to the nineteenth century there existed a multiplicity of regional systems,[2] each of them with its own concept of international law. What distinguished these systems was their self-proclaimed universality: sixteenth- and seventeenth-century scholars such as Vitoria, Vasquez, Gentili, and Grotius thought that natural law could be universally valid for the whole of humanity.

This also held true of the Chinese legal regional system, or Sinocentric Tribute System of East Asia, which emerged as an international projection of Chinese domestic law, for it was conceived as a universal legal system, on the reasoning that "all the world under Heaven was (is) the realm of the emperor".[3] It was based on the tributes that Asiatic rulers or the rulers of other countries had to pay to the emperor if they wanted to trade with the Chinese empire.

The system was grounded in the acknowledgement of the emperor's virtue, and depending on whether or not a country made this acknowledgment, it would be judged civilized or barbarous.

The same universality was claimed by Islamic international law, or Siyar, conceived in the eighth century through the work of Shaybānī, a scholar belonging to Abū Ḥanīfa's circle in the city of Kūfa:[4] it held itself up as a normative system that through the Islamic state could govern the whole of mankind.

Each of these regional systems had some peculiar properties that could not be reduced to the normative criteria of the Western system. Thus the Siyar was grounded not in the Western principle of territoriality but in that of personality, for it was based on the relations the community of believers had with unbelievers, apostates, and rebels.[5]

The coexistence among these regional systems lasted until the second half of the nineteenth century, when the Chinese and Islamic systems both collapsed, the former with the two Opium Wars (1840 and 1857–60), the latter starting with the 1856 Treaty of Paris. As a result, the European international legal system asserted itself over the whole international society.

2. See Yasuaki ONUMA, "When Was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilizational Perspective" (2000) 2 Journal of the History of International Law 1 at 8.

3. *Ibid*., at 12.

4. See Majid KHADDURI, *The Islamic Law of Nations: Shaybānī's Siyar* (Baltimore, MD: Johns Hopkins Press, 1966) at 28.

5. *Ibid*., at 40.

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That was a transformation from a multiregional system of normative orders into a globalized system, giving rise to a monoregional normative system with a pretence to universality.[6]

This regional system, whether universally imposed or deliberately imported in such a way as to serve an anti-Western function,[7] had a limited historical run, lasting until the second half of the twentieth century, when decolonization set in motion the process that led to the crisis of Western hegemony.

Onuma points out two trends that can favour a transformation based on a transcivilizational perspective. The first is "the resurgence of non-Western nations with massive economic and increasing military power", which could redraw many arrangements and the administration of many of the most important decision-making mechanisms in the international society that were still West-centric (two examples being the chief executive organ of the World Bank and the International Monetary Fund). The second, and more important one, is what he calls the "human-rightization" of international policy.[8]

Onuma's historical reconstruction is framed with a precise question in view: Will non-Western peoples be able to have an international law that they can recognize as their own?[9]

The question is whether the Western monoregional globalized system can be transformed into a transcivilizational one. The question arises in view of the fact that Onuma views international law as based on a "shared normative consciousness", and from this claim it follows that either (a) non-Western peoples should accept the Western system of international law or (b) West-centric international law should change into a transcivilizational law, one that acknowledges different civilizations and cultures. This second avenue finds support, for example, in the attempt that has been made to adapt the Islamic Siyar to the present day.[10]

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6. The claim to universality advanced by West-centric international law bears comment, for it co-existed with colonial law, which consisted of three elements: metropolitan law, the local law of the colony, and the specific law expressing an extreme form of discrimination against non-Western people. See Oliver Le Cour GRANDMAISON, *Coloniser exterminer: Sur la guerre et l'état colonial* (Paris: Fayard, 2005) at 252. In this double standard of Western law lay its "heart of darkness". As Onuma rightly observes in *International Law in a Transcivilizational World*, this was "a system of power disguised in the form of law" (Onuma, *supra* note 1 at 83).

7. See Arnulf Becker LORCA, "Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation" (2010) 51 Harvard International Law Journal 475, arguing that nineteenth-century Western international law has not been *imposed* on non-Western peoples but has been *appropriated* by non-European jurists, who applied it to non-Western peoples by changing its rules in ways that are functional to their countries' interests.

8. It is worth noting, however, that international human rights law can be used to legitimate a state's hegemonic interventions and violate the right to sovereignty of other states. We can appreciate, then, that some frontally conflicting trends are afoot in the process that, from a transcivilizational perspective, is transforming international law into a law of the global community. See Onuma, *supra* note 1 at 87.

9. See Onuma, *supra* note 2 at 66. See also R.P. ANAND, "Review Article" (2004) 6 JHIL 1 at 13. The question first came into focus in the late 1950s in the work of scholars pointing out the need for a multicultural international law. A prominent example is C.W. JENKS, *The Common Law of Mankind* (New York: Frederick A. Praeger, 1958) at 87.

10. See Nahed SAMOUR, "Modernized Islamic International Law Concepts as a Third World Approach to International Law" (2012) 72 ZaöRV 543, rereading the concepts in the Siyar so as to bring them to bear on a Third World critique of contemporary public international law, which gives legal form to the subordination of the Muslim World.

II. THE RELATION BETWEEN GLOBALIZATION AND INTERNATIONAL HUMAN RIGHTS LAW

If we are to properly assess the possibility of transforming international law into a transcivilizational legal system, we need to take up the question of human rights.

The 1948 Universal Declaration of Human Rights was proclaimed to be precisely what its name suggests, namely, a universal declaration, but at that time many African and Asian countries were still under colonial rule and could not express their own understandings of human rights. Moreover, when the Declaration was being negotiated and drafted, views were expressed calling this proclaimed universality into question. More to the point, the representative of Saudi Arabia rejected the universality claimed for the Western concept of freedom of thought, conscience, and religion, which includes the freedom to change one's religion (Article 16 of the Draft Declaration, Article 18 in the final draft) and for the right to marry and to found a family (Article 14 of the draft document, Article 16 in the final document). The Saudi representative argued that the drafters of the Declaration could not "proclaim the superiority of one civilization over all others or to establish uniform standards for all the countries in the world".[11]

As a counterpoint to the Western conception, the Islamic world subsequently drafted its own Universal Islamic Declaration of Human Rights, proclaimed in 1981 by the Islamic Council of Europe, and the Cairo Declaration on Human Rights in Islam, adopted in 1990 by the Organization of Islamic Cooperation. While these declarations are built on an Islamic foundation, the Arab approach to human rights is markedly different from the Islamic one, because it tends to be secular, making it possible to find common ground with the Western tradition. This approach can be found in the Arab Charter on Human Rights,[12] adopted in 1994 by the League of Arab States [LAS] and in the subsequent Arab Charter of January 2004.[13]

According to Onuma, the contrast between the human rights interpretations of different civilizations was resolved with the 1993 Vienna Declaration and Programme of Action, which "succeeded in formulating the global common ground reached at the end of twentieth century, opening the door to transcivilizational human rights in the twenty-first century".[14] Indeed, the Vienna Declaration acknowledged the different cultural backgrounds of national and regional particularities and acted as a normative basis that could make it possible to arrive at a "common normative consciousness among different people over the world".[15]

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11. William A. SCHABAS, ed., *The Universal Declaration of Human Rights: The Travaux Préparatoires* (New York: Cambridge University Press, 2013) at 2466.
12. In the Preamble of the Arab Charter we can read that the Arab Nation is entrusted with realizing "the everlasting principles established by the Islamic Shari'a and the other divine religions enshrined in brotherhood and equality amongst human beings".
13. In March 2003, the LAS Council issued a resolution asking the Arab Standing Committee on Human Rights to modernize the Arab Charter by bringing it into line with current international human rights standards. See Mervat RISHMAWI, "The Revised Arab Charter on Human Rights: A Step Forward?" (2005) 5 Human Rights Law Review 361 at 363.
14. See Onuma, *supra* note 1 at 370.
15. *Ibid*., at 376.

As Onuma rightly points out, however, this Declaration lacks the institutional mechanisms needed to protect human rights, a problem compounded by the fact that different regional systems for protecting human rights can come into conflict with the universal human rights guarantee. The problem, in other words, is how to interpret human rights in a globalized world.

But an even deeper problem is that the Vienna Declaration does not clarify how the "global common ground" it envisions for human rights can be arrived at. One way to achieve this result has been put forward by leading scholars such as R. Panikkar and Sousa Santos, whose approach, which they call "diatopical hermeneutics", proceeds from an acknowledgment that no civilization or culture is complete: each has its own *topoi*, and the effort we need to embark on is therefore to make them complementary.[16]

In the twentieth century, a process was started in which human rights contribute to a "human-rightized" global politics, but this transformation has been only formal. That is because the most likely human rights violator is the state,[17] making it necessary to supplement domestic law with international law. But as long as international human rights law is equated with *interstate* law, it won't be possible to resolve the basic contradiction emerging out of a situation in which the human rights guarantee is dependent on the state: in the international relations system, in other words, the effort to move towards a transcivilizational international law stands in contradiction to the persistence of the state's interests.

Here we arrive at the core of Onuma's investigation, which takes us to its outer boundaries, the place where, as Kelsen would say, we get to "the farthest reach of the law".[18]

It is necessary to look at this conclusion in greater depth. What Onuma envisions is a future multicentric and multicivilizational world, and the only way to secure a legitimate basis for this new global order is through a transcivilizational international law.[19]

Onuma identifies two parallel trends: first, the human-rightization of global politics, and second, the conflict between established powers and emerging new powers, as happened at the end of the nineteenth century between the US and the British Empire, for example, and in the present day between the US and China.

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16. See Boaventura de Sousa SANTOS, "Toward a Multicultural Conception of Human Rights" (1997) 18 Zeitschrift für Rechtssoziologie 1, and Raimundo PANIKKAR, "Is the Notion of Human Rights a Western Concept?" (1984) 81 Cahier 28. This hermeneutical approach rejects the dichotomy between universalism and relativism and offers multiculturalism as a third way between these alternatives. See also Abdullahi A. AN Na'IM, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (New York: Syracuse University Press, 1996).

17. See Onuma, *supra* note 1 at 417.

18. Hans KELSEN, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer reinen Rechtslehre* (Tübingen: Mohr Siebeck Verlag, 1920) at 353.

19. As Onuma had previously argued: "For international law to be truly global in the sense that its legitimacy is voluntarily accepted by peoples all over the world, it must be accepted not only by existing states … but also by peoples with diverse civilizational backgrounds." Onuma, *supra* note 2 at 66. On this approach, see also Christian TOMUSCHAT, "World Order Models: A Disputation with B.S. Chimni and Yasuaki Onuma" (2006) 8 International Community Law Review 71 at 79.

The first trend is driven by the ideal of achieving respect for the human rights of individuals and minorities; the second one, by contrast, is driven by the powers and interests of states. Could these two orders find a common ground? Or will they remain two parallel, separate, conflicting domains? Onuma cannot offer a definitive answer. He is well aware that this conflict appears not to admit of any solution: "It may take decades for the changing power constellations in the global economy to bring out *better results not only in terms of economic development but also in terms of other values such as democracy, human rights, fairness, amicable relations between humans*, etc."[20]

In view of this conflict, according to Onuma, there necessarily arises for international law a *normative* task that consists in looking beyond "visible and explicit international legal phenomena" so as to embrace a global or transcivilizational perspective, making it possible to evaluate and criticize the passive normative stance that international law takes to the global economy.

At play is the opposition between law and power: the effort to protect the rights of individuals and minorities against the power system of the states' political and economic interests. But Onuma still claims a normative power for law:[21] only by exploring these "normative ideas" can international law, "as a legal and social science", respond to the needs of our time.[22]

III. THE QUESTION OF WAR AND THE USE OF FORCE

This normative, transcivilizational approach is one that Onuma also brings to bear on the question of the use and regulation of force and the goal of achieving peace.

War, according to Carl Schmitt,[23] is the fundamental question of international law. Onuma takes up this view by commenting that, for many lawyers, to solve the problem of war is to find the criterion for defining the structure of international law. The history of international law is in good part a history of the efforts of humanity to govern the use of force and limit armed conflict.

But, Onuma also observes, laws prohibiting the use of force or condemning recourse to war as a way to solve international controversies are routinely violated: this is true of domestic law as well as of international law, a case in point being the Kellogg-Briand Pact of 1928. What we are looking at here is, once more, a combination of two opposite forces, in that the progress of law which Kant theorized as envisioning a trend

20. See Onuma, *supra* note 1 at 478 (italics in original).

21. In a previous essay he had written: "Law as a normative idea … has a power to induce people to realize the values and interest that law prescribes. The power of the ideas of human rights and democracy in domestic and international political arenas are typical examples." Yasuaki ONUMA, "International Law and Power in the Multipolar and Multicivilizational World of the Twenty-first Century" in Richard FALK, Mark JUERGENSMEYER, and Vesselin POPOVSKI, eds., *Legality and Legitimacy in Global Affairs* (Oxford: Oxford University Press, 2012) at 170.

22. See Onuma, *supra* note 1 at 479.

23. "The *concept of war* … has become the touchstone of all international law." Carl SCHMITT, *Writings on War,* Timothy Nunan, trans., ed. (Cambridge: Polity Press, 2011) at 62.

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towards peace is constantly running up against the impossibility of achieving any "perpetual peace".

In his final considerations Onuma turns to the current debate in international law that is being devoted to the use of force. And specifically he takes up the question of the responsibility to protect and the correlative right to be protected—a doctrine that has yet to be recognized as international law, because it lacks an *opinio juris* with any wide support within the international community. Thus, in 2005, several Third World or developing countries intervened in the UN General Assembly to argue that the responsibility-to-protect doctrine essentially serves the function of enabling the stronger states to assert their interests over the weaker ones by limiting their sovereignty.[24]

Even so, Onuma takes a positive view of the debate on the responsibility to protect and the correlative right to be protected, arguing that in this debate we have the condition for normatively asserting, in global politics, a *human-centred* perspective capable of supplanting a *state-centric* one.

This is going to be a steep challenge, to be sure, because, as suggested, what international law prescribes runs aground in the reality of things. But, as Onuma points out, "international law is constantly changing in response to changing realities".[25] In fact, international law has contributed to establishing a broad *normative consciousness* regarding the prohibition on the use of force and the imperative to reject a non-discriminatory concept of war, and at the same time the global community needs global legitimacy, making it necessary to heed the voices of non-state actors, and indeed of the bulk of humanity, namely, of non-Western people.[26]

So, against the hypocrisy involved in placing a prohibition on the use of force, and despite the cynicism that this prohibition can easily attract, Onuma's necessary conclusion is that of a strong activism for affirming the rights of every human being in a transcivilizational perspective. I totally agree with this conclusion.

24. See Plenary Meetings 86, 87, 89, 90 of the 59th session of the UN General Assembly (2005): UN Docs. A/59/PV.86, 87, 89, 90.

25. See Onuma, *supra* note 1 at 660.

26. *Ibid*., at 160.

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