Towards Bridging the Locational, Cultural and Historical Divide in Global Law-making Process: Some Reflections

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INTRODUCTION

In recent decades it is possible to decipher an increasing global activity in terms of law-making. Several new international legal instruments in diverse fields have come into existence within a reasonably short period of time. States, non-state actors and international organizations have been increasingly triggering this global law-making mechanism. They have created some kind of urgency to the entire process by using variety of soft-law instruments and techniques.[2]

Global law-making process is now a complex and quick affair. It is complex as it happens now through different layers and with varied soft and hard law processes. Sometimes it becomes difficult to identify the precise legality and legal validity of an instrument or its source. Even the binding nature of some of these instruments in terms of obligations created by them is unclear. Interestingly, States no longer have any monopoly in triggering this mechanism of law-making. They merely seem to provide the legitimacy to the entire process by approving the final outcome.[3] Negotiations for such treaties are held elsewhere within a small group of stakeholders, not necessarily (and not always) within the pubic glare. Stakeholders, as stated above, may not necessarily be States. The timeline for completing this entire treaty or law-making process at the global level is

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[2] See generally Jose E. Alvarez, International Organizations as Law-makers (Oxford University Press: 2005).

[3] B.S.Chimni, "International Institutions Today: An Imperial Global State in the Making" European Journal of International Law, (2004) vol.15, No.1 pp. 1-37;

taking a very short period. In fact, it is shrinking and indeed it is shrinking very fast. It just happens within few years. Before States could realize the consequences of the event and its implications, treaty is negotiated, binding obligations created. It is finally `either take it or leave it' kind of syndrome. States are left only with the option of weighing up options. Does the joining a treaty regime outweighs the disadvantages of not joining at all? In the era of globalization even States have lesser options. So, States eventually join the treaty regime irrespective of its implications for them. Strangely, some time States are not even fully aware of these implications or else they might come to know about it much later. It could safely be asserted that the existing and the emerging global law-making process have largely taken away the power of discretion and anticipation for many States.[4]

This process at the global level has been happening continuously. The negotiations for the conclusion of an international criminal statute in the decade of 1990s within International Law Commission (ILC) took only few years, perhaps less than a decade.[5] Contrast this with the framework treaties that have been negotiated within the framework of the ILC. It has taken nearly two decades or more to finalize framework treaties on various topics, such as for example, state responsibility, jurisdictional immunities, non-navigational uses of international watercourses. Even ILC, which is a body of global independent experts chosen by the General Assembly of the United Nations to codify and unify the existing state practice in any area of emerging international law, cannot afford to take such a long time any more. Even the Sixth Committee (Legal) of the United Nations considers these matters quickly and the international legal instruments are concluded within a shorter span. In other words, it is clear that the global law-making process even within state-centric set ups such as United Nations and its related bodies are taking less and less time to finalize and conclude a treaty or an international instrument. It could, therefore, be argued that this, indeed, should be good for the global governance both in terms of cost and effectiveness.[6]

This kind of argument, nevertheless, raises several questions. This shrinking timeline in global law-making process has its own implications

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[4] Dennis Dijkzeul and Yves Beigbeder (eds.), *Rethinking International Organizations* (New York: 2002)

[5] See the *Annual Reports of the International Law Commission*

[6] Edith Brown Weiss "International Law in a Kaleidoscopic World" Asian Journal of International Law, 1 (2011) pp. 21-32

despite the increasing emphasis on cost and effectiveness. Does it not affect the democratic governance at the global level taking into account particularly the diverse needs of different stakeholder states and other entities? How does one understand the global law-making process? Should one understand it in a mere technical sense? Or else, should that be something more than a mere technical and procedural understanding of a law-making or treaty-making process? We all know that such a global law-making process has several diverse state parties whose understanding and perception of a legal concept or legal language in a given case would differ substantially. Such an understanding would be dependent upon several factors – it could be locational, cultural and historical. This paper will, albeit briefly, attempt to identify some of these issues in the context of current global law-making process and proposes to argue for techniques that could allow space for them to bridge this gap.

GLOBAL LAW-MAKING PROCESS: WHAT IT IMPLIES

Some traditional international lawyers could argue that there is nothing like a `global law-making process'. According to them it is the prerogative of the States to decide and negotiate the treaties and it is they who are responsible for the law-making process. It is also possible to argue that there is no organized process that is put in place for the global law-making process.[7] In the domestic legal parlance, it is the Parliament or any other similar body that seeks to fulfill this law-making function. At the global level there is no single unified body like a Parliament that provides this legal basis for law-making process and mechanism. There are several international bodies and entities, besides the United Nations, that continue to trigger this law-making mechanism. Sometimes States, suo motto, could trigger this mechanism taking into account their own perceptible objectives. More importantly, such a law-making process is initiated or triggered by some dominant States. Power, invariably, plays an important role in this regard. It has been argued and shown that some dominant states with a view to further their common or unilateral goals and national

[7] Hilary Charlseworth and Christine Chinkin, *The Boundaries of International Law* (Manchester University Press::2000)

interests could use several strategies. Global legal strategy is one of them and an important one as well.[8]

The global legal strategy, if there is one, is based on the exercise of power. That takes us to the discourse on global or hegemonic power that dictates the terms of engagement in international affairs. Justifications for the creation of certain kinds of international law arise from certain contexts wherein dominant powers are at play. At a more basic level, as usually argued and stated, law is an instrument of state policy. Dominant actors create policy and turn that into law, whenever and wherever necessary. According to several international legal historians that has been the story of evolution of international law. Besides creation of international law, this is also true in case of implementation. Law requires implementation as it creates definite consequences in terms of rights and obligations to third parties. Unlike in the past, the present global law-making process is keen on creating rights and obligations for the third parties. States have lost their prerogative in the process to create the terms of engagement for the third parties. On the contrary, it is now created and decided by the international legal instruments. Take for example, the obligations that have been created within the realm of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), an international legal instrument which is an integral part of the World Trade Organization (WTO) Agreements. Domestic implementation of TRIPs Agreement by the States creates and confers rights and obligations for the third parties other than its own citizens. That was the primary basis for which TRIPs Agreement was used and incorporated into the WTO framework of agreements.

Global law-making process simply exists and is increasingly becoming too intrusive. Dominant states seem to understand its depth and importance. However, the nature of global law-making strategy has somewhat changed. More soft law instruments are used as a basis for triggering this mechanism. Guidelines, principles, declarations and such other related instruments provide the basis for the development of a soft law instrument. Even certain kinds of non-binding treaty instruments that allow states some flexibility provide the inputs for global law-making process. States are usually comfortable with such soft law instruments with no binding obligations. Such soft legal instruments provide time and space to the

[8] Detlev Vagts "Hegemonic International Law" 95, American Journal of International Law (2001), p.843

States to adjust themselves to the emerging new realities at the global level.[9]

The turning of the soft law into hard law is a matter of time and determination depending upon the backing of certain number of dominant States. The convergence of national interests of the dominant state-actors across would be the decisive factor. That happens in various ways and most importantly happens in more informal ways. There are no structures or institutional mechanisms for finalizing this transformation or metamorphosis of the soft law into a hard law instrument. In the first place, a mere policy framework is placed say for example, within the ambit of G8 or G20 Ministerial meetings. The key States in these groupings, such as G8 or G20, would agree broadly on the policy framework and also agree to work in tandem in other formal and legal bodies on the concretization of the idea into a legal formulation. Before other states who are not part of this strategy for law-making could understand the consequences, the soft law instrument would have transformed into a hard law obligation requiring appropriate domestic implementation. Other states are left with very little or no option but to join the path lay down by the dominant state actors.

According to several international legal scholars, particularly those who have been examining the working of the international institutions, the role played by the international and regional institutions in the global law-making process also needs consideration. International institutions, specifically their Secretariats are increasingly becoming influential and powerful. They are posing questions and putting up new drafts for discussion among States.[10] Civil society groups and other international non-governmental organizations are assuming new roles within and outside their home country in influencing or shaping the decisions of the dominant States. They are also putting up new drafts and resolutions and also pointing out the problems and prospects in concluding or for not concluding a treaty. Global law-making process has been moving now quickly and in several directions. It has also been affecting or upto a point challenging some of the basic themes under international law, namely the sovereign equality of States.

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[9] Pemmaraju Sreenivasa Rao, "The Role of Soft Law Instruments in the Development of International Law: Some Random Notes", *Commemorative Essays*, Asian-African Legal Consultative Organization (AALCO:2007) see www.aalco.org

[10] See generally conclusions provided by Jose E.Alvarez, n.2, p.585

SOVEREIGN EQUALITY OF STATES: DOES IT REALLY MATTER?

The available literature on state sovereignty is too many.[11] This scholarship on sovereignty moves in different strands – from its erosion to formation of new dimensions of sovereignty. However, I propose to limit myself to the idea of sovereign equality of states in the context of global law-making process. On a more simple plain, sovereignty has been regarded as an attribution of absolute power within the territorial limits of a State. A State, as we all know, is a unique entity. The traditional definition of a State under international law is a descriptive one and requires it to have the following namely, (a) a defined territory; (b) population; (c) capacity to enter into international relations; and lastly (d) it should be recognized by the international community as a state. The last proposition is debatable and States do not entirely agree with this condition. All States, big or small, are equal within the international community. As stated above, notionally and historically they are not regarded or cannot be regarded as equals.[12]

What is the main attribution of sovereignty? Perhaps it could be attributed to the unique identity of the territory and a population that lives within that territory. Sovereignty is the recognition of the fact that the population lived in that territory for a very long period (perhaps thousands of years) and developed its own way of living and managing its own affairs. That should be recognized. The living patterns, language and culture are all unique to any given state and that those attributes of a State should be respected. Similarly, States have their own legal traditions and cultures that have been developed over long period of time. That needs recognition as well.

Does this concept of sovereign equality really matter in the context of global law-making process? As stated above, the entire processes of law-making in the global context seem to increasingly negate this concept. The evolution of a legal concept on any given subject matter is unique to a specific state, though it is possible to discern a measure of commonality among them. States understand these legal concepts in their own way taking into account their domestic realities. How to respect that, specially the cultural and civilizational aspects in the global law-making process? The idea of recognition of the diverse nature of domestic legal systems has

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[11] Generally see R.P.Anand, Sovereign Equality of States (*Recueil de cours*: Hague Academy of International Law: 1986)

[12] Benedict Kingsbury, "Sovereignty and Inequality", 9 *European Journal of International Law* (1998) p.599

been echoed in various ways. The fragmentation of international law has been very well accepted. In fact, a study within the ambit of ILC requires it to carefully look at the issue of norm creation under international law. The idea of fragmentation of international law itself has been developing into an interesting, yet separate stream of study.[13]

For this reason, the codification process of international law is a tedious and cumbersome one. States take some time to understand the alien legal concepts and take more time to respond to it by looking at various other alternatives. Sometimes states chose not to respond for lack of proper understanding. Even a non-response is also a response in one sense. Such non-responses are deliberate and in some ways are calibrated to suit their own requirements. States do behave in certain ways and as to why they decide and chose to behave in certain ways also needs close, but a separate scrutiny. It would be worthwhile to examine impact of some of these issues such as locational, cultural and civilizational aspects in the context of global law-making.

LOCATION: GEOGRAPHY AS A FACTOR

In my view, the relationship between international norm creation and the location of State in a specific geographic area has not been comprehensively addressed, although some peripheral references have been made. For long it is argued that international law has been the product of few European states. The discourse on Euro-centric nature of international law has a long history. [14] Scholars perceive this history from different ways. Many new states that came into existence Post Second World War look at this argument of euro-centric nature of international law differently and would look at it from the perspective of colonial subjugation. As for international law, when it was being formed, these states simply did not exist and they ask - should they respect or abide by a law that did not exist for them in its formative stages? That had been the debate in India, in

[13] M. Koskenniemi, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law – Report of the Study Group of the International LawCommission, UN Doc. A/CN.4/L.682, 4 April 2006, at 12.

[14] R.P.Anand, *New States and International Law* (Vikas Publishing House: New Delhi), 1969

particular in the Indian Journal of International Law since 1950s.[15] During those times, there were hardly any debates or discourse on international legal issues except to look at its acceptability. Issues concerning location of a State in a given geographical area did not matter much. But, when one is talking about the global law-making process, I propose to argue that location of state in a specific place far away from the negotiating arena matters in many ways. One could briefly examine the unequal factors that emerge when `location' is taken as a factor in global governance.

It is possible to argue this issue of `location' in two strands. One strand looks at the location of a state itself in specific geographic area far from the venues of global law-making processes. Perhaps nothing much can be done about this factual reality. The other strand is about the historical location of global law-making institutions and bodies at specific places. The formal institutional mechanisms are located usually in Europe or in the United States and North America. It could be very well argued that this was a historical necessity and inevitability. Since these structures have been created for over hundred years or so and naturally international institutions would be located there. Some scholars argue that this was in effect done on account of historical role played by the allied powers in the Second World War.[16]

It is necessary to ask one fundamental question i.e., has the development or codification of international law been affected on account of a geographical location of state or group of states far away from the venue of global law-making process? To what extent `location' as a factor should be regarded as important in global law-making process? It is also possible to argue that in the current context of globalization and global communication networks such issues concerning location should be regarded as irrelevant.[17]

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[15] See series of articles written on these aspects by the Indian international lawyers. Some of them could be mentioned here: R. P. Anand, 'Attitude of the Asian–African States toward Certain Problems of International Law', (1966) 15 *International and Comparative Law Quarterly* 56; M.Mushkat, 'The African Approach to Some Basic Problems of Modern International Law', (1967) 7 *Indian Journal of International Law* 335; R. Khan, 'International Law:Old and New', (1975) 15 *Indian Journal of International Law* 371.

[16] Edith Brown Weiss et al. (eds,) *The World Bank, International Financial Institutions and the Development of International Law* (Washington D.C., ASIL: Studies in Transnational Legal Policy, 1999)

[17] Also see Edith Brown Weiss, n. 6, p.23.

In my view, the impact of location as a factor on global law-making process is a complex one. In fact, the process of norm creation itself is a complex issue and it can be affected by several factors that could include the factor of `location' as well. We can look at some of the concrete examples. GATT/WTO negotiations and meetings, for example, have been taking place in different parts of the world. Many informal meetings of various groupings of WTO take place in different states. Such groupings have their own objectives and interests. However, the formal negotiations finally shift to Geneva where the WTO is located. All member states will have to travel there to formalize the agreed texts. Location is also important from the point of view of infrastructure and other related facilities. Many member states lack that kind of a facility. Almost all the specialized agencies of the United Nations are located either within Europe or Americas. Most of the treaty negotiations take place within the ambit of these organizations.

In the domestic parlance, location has been regarded as very crucial for democratic governance. At the world level, specific location of an international institution or any other entity involved in law-making could have an impact on the entire process itself. It could be argued that the factor of location could provide some kind of dominance to certain parties. This point on dominance is argued in the context of `arbitration proceedings' wherein venue of an arbitral proceeding is an important issue in terms of not only on costs, but also on the morale of the party involved. In some instances, it would decide the `applicable law' as well. Similarly, in the global law-making process, venue could be a crucial factor in the long run. Besides the cost of travelling with delegations on a regular basis to far off places, the location could also enhance the morale of the hosting country or of the countries that are located within that region. The decision to locate the United Nations Environment Programme (UNEP) in Nairobi (Kenya) is a case in point. The Climate Change negotiations, Biodiversity-related meetings and negotiations are taking place in different parts of the globe and their impact on global law-making processes needs closer evaluation. We might perhaps get a different kind of instrument with different language formulations. States that were not dominant may have their say in the negotiation. Overall it might improve and add to the democratic governance factor thereby bringing down the inequality that exists in representation and participation in the global institutional structures.

UNDERSTANDING CULTURES AND CIVILIZATIONS

The impact of cultures and civilizations on the global law-making is well-documented.[18] In the present context, it needs reassessment. The Statute of the Permanent Court of International Justice (PCIJ) and later the International Court of Justice both referred to the representation of principal legal systems and civilizations on the court.[19] Terminologically `culture' and `civilization' could be regarded as two different concepts. However, I propose to use them in my paper interchangeably. Culture is a more narrow term and it could denote practice or a living pattern that exists within a specific country within a designated area. Even within India, there are many different cultures representing different groups of population. However, they are bound by a common civilization. Civilization, on the other hand, is a broader concept representing a huge mass of people. Though Asia is a continent, perhaps it could be grouped under one civilization, dominated primarily by few countries. If one looks at it, both civilizations and cultures do not respect boundaries that exist today. It is stated that culture and civilization transcend several generations and perhaps could traced back to some thousands of years. The modern assessments and legal jargons may not entirely apply to them while we attempt to understand its range and depth.

What impact civilization and culture have on the global law-making process? As stated earlier, this issue has been widely addressed. There have been reassessments of this issue as well noting that there have been tremendous impacts. Why do certain states and populations behave in a certain way? Answers for this lay in their cultural and civilizational approaches. For example, time and again, it has been asked – why Asians, specifically Indians and Chinese prefer negotiated settlement of disputes than going to formal institutional mechanisms such as for example, judicial settlement of disputes? Why Europeans prefer more formal ways of settling disputes through binding decisions (in courts and arbitrations). According to some scholars this is a perception borne out of civilizational and cultural aspects.

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[18] Onuma, Yasuaki, "Transcivilization Perspective on Global Legal Order in the Twenty-First Century: A Way to Overcome West-Centric and Judiciary-Centric Deficits in International Legal Thoughts" in Ronald St. John Macdonald & Douglas M. Johnston (eds.)., *Towards World Constitutionalism* (Martinus Nijhoff:2005)

[19] See Article 9 of the Statute of the International Court of Justice

Even in various negotiations at the global level these civilizational and cultural perceptions of States is evident. The response of the Asian countries, particularly India, to the implementation process of the TRIPs Agreement, for example, is a case in point. During the Uruguay Round negotiations within the ambit of GATT (later WTO) many Asian countries were not keen on TRIPs Agreement. Barring some kind of minimum standard of protection, they were not ready to negotiate on this agreement. On the contrary, Europe and the United States were keen on a binding treaty within the ambit of WTO and for that they were prepared to forego some of their advantages in the form of dismantling of multifibre agreement within a specific time frame. All this now forms part of the negotiating history of the TRIPs Agreement.[20] Even then, it dominates the cultural and civilizational perceptions and landscape of certain sections of the Even countries that are located within Asia. While the West looked at TRIPs more from the perception of an individual (IPR holder, patent holder), the East looked at it more from the point of view of community.

These problems of perception within the TRIPs context became very clear when new subject matter of protection such as genetic material, traditional knowledge and biodiversity were added to the subsequent negotiating process. How to protect traditional knowledge systems effectively through an intellectual property (IP) regime? These systems already in place, being practiced by people and hence already in what has been termed as `public domain'. According to TRIPs what has been in `public domain' cannot be protected by the existing IP regimes. These knowledge systems were protected both in Asia and Africa through certain kinds of community participation and mechanisms. They were treated as community rights.[21]

With such diverse approaches and perceptions to the protection of traditional knowledge systems and other IP-related issues within Asia and Europe the implementation of the TRIPs Agreement became a point of contention. The domestic legislations of certain countries in Asia (including India) and Africa that were newly brought in to implement the TRIPs obligations clearly contravened some of the provisions of the TRIPs Agreement. Besides commercial and public health issues, Asian and African States opposed some of the provisions of the TRIPs Agreement

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[20] Hegde V.G., "Intellectual Property Rights and Asian-African States", in *Fifty Years of AALCO: Commemorative Essays in International Law*, Asian-African Legal Consultative Organization, New Delhi, 2007;

[21] Hegde V.G. "India and The International Patent System" in Bimal N. Patel (ed.), *India and International Law,* (Martinus Nijhoff:Leiden:2005), pp. 93-116;

and sought for a more liberal interpretation. This perception of the Asian countries on the extent of protection to IP-related products, particularly in India, was largely born out of its cultural and civilizational aspects.

The above example in the context of WTO and TRIPs Agreement in particular needs us to address some basic issues. The first question is – how to internalize these cultural and civilizational factors in an effective global-law making process? It is clear that States are not comfortable in implementing certain decisions when it actually affects the perceptions of large section of its population. If one looks at the available statistics within the UN and WTO system, two major international institutions, very few countries actually actively use and participate in the global law-making process. About 20 countries regularly and effectively use the WTO dispute settlement process. Nearly 40 per cent of the WTO disputes are between European Union and the United States. Rests of the cases are by about 8 countries considering the fact that the WTO has a membership of over 150 countries.[22] It is clear that nearly 80 per cent of the WTO countries do not seem to be part of the system itself. Even within United Nations, about 30 countries dominate and dominant powers, as stated above, decide the agenda for the global-law making process. It should, however, be noted that in both these institutions there have been number of regional groupings that are active. Though they meet informally on a regular basis to arrive at some consensus on important issues, it is difficult to say whether these groupings actually represent all the States. Many a times, some of these groupings are devoid of any cultural or civilizational congruence as they are essentially based on perceived national interests and objectives.

The second question needs to be addressed in the context of increasing globalization. Could one argue that with the increasing globalization the importance of civilization and culture as a factor in global decision making is diminishing? That does not seem so. New issues that are occupying the global law-making agenda relate to another complex set of issues involving ethnic identity, gender discrimination, drug trafficking, corruption and money laundering. Even the issue on international terrorism and international environmental law, specially the climate change negotiations have been raising and dealing with cultural and civilizational aspects. There is still no unanimity as to how to legally deal with some terrorist suspects. At the global level, states and their law enforcement agencies have been

[22] See generally dispute settlement gateway page of the World Trade Organization; www.wto.org

taking increasing recourse to culture and civilization as an important factor to understand the nuances of global terrorism and its complexities. With the increasing flow of information and new communication technologies the world seems to be more complex than it was ever before.

CONCLUSION

In recent years the global law-making process is entering into a nebulous phase. States find it trifle difficult to identify the legitimacy of a particular source of law. There are several legal instruments which could be termed as `soft law instruments'. The time lag that exists for turning a soft law instrument into hard law instrument is shrinking. State response to some of these global-law making process is ambivalent. This ambivalence appears on account of uncertainty that such instruments might create within the domestic legal context. For this reason, there is an increasing need to make international law more inclusive while identifying and reflecting various cultural and civilizational aspects into its formulation. This inclusiveness of international law also should take into account locational factors as well. As shown in this presentation, locational factors can provide a better understanding of the region and the people and accordingly help in the development of more inclusive international law. The exclusivity of international law and its formulation process in certain smaller groups could create unwarranted conflicts. For a balanced and democratic governance of the international institutions and the consequent law-making process undertaken by them, a viable and balanced approach should be adopted.