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Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia

DIANE A. DESIERTO*

The development of international law in South and Southeast Asia exemplifies myriad ideological strands, historical origins, and significant contributions to contemporary international law doctrines' formative and codification processes. From the beginnings of South and Southeast Asian participation in the international legal order, international law discourse from these regions has been thematically *postcolonial* and substantively *development-oriented*. Postcolonialism in South and Southeast Asian conceptions of international law is an ongoing dialectical project of re-visioning international legal thought and its normative directions --- towards identifying, collocating, and applying South and Southeast Asian values and philosophical traditions alongside the Euro-American ideologies that, since the classical Post-Westphalian era, have largely infused the content of positivist international law.¹ Of increasing necessity to the intricacies of the postmodern international legal system and its institutions is how the postcolonial project of South and Southeast Asian international legal discourse focuses on areas of international law that create the most urgent

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¹ Arif Dirlik, *Postmodernity's Histories: The Past as Legacy and Project* (Rowman & Littlefield Publishers Inc., 2000) 63-89; RP Anand, *Studies in International Law and History: An Asian Perspective* (Brill Academic Publishers, Massachusetts USA 2004) 24-102; David Fidler, 'The Asian Century: Implications for International Law', (2005) 9 SYBIL 19-35; Nicholas Onuf, "Tainted by Contingency": Retelling the Story of International Law" in Richard Falk, Lester Edwin J. Ruiz, and RBJ Walker (eds), *Reframing the International: Law, Culture, Politics* (Routledge, New York, 2002). See also Barry Buzan and Richard Little, "The Idea of 'International System': Theory Meets History", (1994) *International Political Science Review*, Vol. 15, No. 3, 231-255.

development consequences: trade, investment, and the international economic order; the law of the sea and the environment; international humanitarian law, self-determination, socio-economic and cultural human rights.²

The nature and extent of the engagement with international law, however, differs for each region. South Asian international law literature reflects a longer historical engagement with the development of international law from antiquity to postcolonialism. The development of certain principles of modern international law, such as immunities, diplomatic protocol, the conclusion of treaties, maritime principles on freedom of commerce and navigation and the high seas regime, have been attributed to Asian-European interactions from the 16th to 18th centuries,³ where the most prominent Asian countries that came into contact with European powers during this period were the Mughal Empire in India, the Maratha State in India, the Kingdoms of Burma and Ceylon, Indonesian states, among others.⁴ Specifically, India's ancient civilization was a veritable source of rules on inter-state conduct, from the laws of war, the law of treaties, the right of asylum, the treatment of aliens and foreign nationals, the modes of acquiring territory, and rules on navigation and inter-state trade.⁵

At the same time during this period, positivist international law (as it was then crystallizing as a concrete ideological discipline in Europe) was being grounded on the “development of the Family of Nations based entirely on [positivists’] own 19th century ideology and doctrine which they tended to project backwards into the past as if the past had not had its own ideology and legal doctrine.”⁶ During this period, classical positivist international law would emerge as a “self-contained system...with an ideology of its own”, where international lawyers and scholars occupied a central role in taking up

² SK Agrawala (tr), TS Rama Rao and JN Saxena, *New Horizons of International Law and Developing Countries* (N.M. Tripathia Private Limited, 1983); Sienho Yee, ‘The Role of Law in the Formation of Regional Perspectives in Human Rights and Regional Systems for the Protection of Human Rights: The European and Asian Models as Illustrations’ (2004) 8 SYBIL 157-164.

³ CH Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th, and 18th Centuries)*, (Clarendon Press, Oxford, 1967).

⁴ CH Alexandrowicz, *The Afro-Asian States and International Law*, Recueil de Cours, Vol. 123 (1968), 124.

⁵ RP Anand, *Development of Modern International Law and India*, (Nomos Verlagsgesellschaft, Baden-Baden, Germany 2005) 1-5, 29-30, 39-40, 54-55, 108-109, 121-130.

⁶ Id. at note 5, at 125.

the task of codifying and legitimating the law of nations.⁷ The eventual dominance of classical positivist international law, and the ensuing power asymmetries in the international legal order, would have critical implications on the modes of legal justification articulated to exculpate the European powers from their treatment of India and other ancient Asian states during the colonization era.

Southeast Asian international legal scholarship, on the other hand, is deemed of more recent vintage, accounted for by long suppression or inhibition as a consequence of the power relations and political structures endemic to the colonization period,⁸ and, unlike the ancient Indian civilization in South Asia, is marked by the fairly recent emergence of Southeast Asian states in the postmodern international legal system.⁹ While possessing some common religio-cultural dimensions, the numerous Southeast Asian states represent a full spectrum of political, legal, and ideological diversity that veers away from the typical homogeneity of most regional groupings.¹⁰ The concept of ‘Southeast Asia’ is itself an artificial construct, made “almost by accident, from World War II, when, at the Quebec Conference in August 1943, the Western Allies decided to establish a separate South East Asia Command (SEAC), embracing Burma, Malaya, Sumatra, and Thailand.”¹¹ The pervasiveness of this diversity has made stamping a ‘Southeast Asian’ mark on international law a polemical process of apprehending and reconciling diverse bases of authority and legal orders.

Southeast Asian law has been described as an “accretion of layers of law and legal culture, as distinct from a mere progression from one

⁷ Id. at note 5, at 126. See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, United Kingdom, 2002).

⁸ For the seminal work on colonialism’s operative effects on positivist conceptions of international law, see Antony Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law’ (1999) 40 *Harv. Int’l L.J.* 1-80; Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press, 2005).

⁹ M. Sornarajah, ‘The Asian Perspective to International Law in the Age of Globalization’, (2001) 5 *SJICL* 284-313; Nicholas Tarling, *Nations and States in Southeast Asia* (Cambridge University Press, 1998), 45-111.

¹⁰ ASEAN Law Association, *ASEAN Legal Systems* (Butterworths Asia, 1995); Carmelo V. Sison and Roshan T. Jose (trs), *Constitutional and Legal Systems of the ASEAN Countries* (University of the Philippines, 1990).

¹¹ Kevin YL Tan, ‘The Making and Remaking of Constitutions in Southeast Asia: An Overview’, (2002) 6 *SJICL* 1-41.

conception of law to another,” where “...every kind of religious or secular law or source of law; every kind of dispute-resolution process; every kind of constitution and law-making process; with a few extra ones arising out of the incessant problems of legal conflicts, has been evidenced in South East Asia. Every kind of legal ‘reception’ has occurred. In most of Southeast Asia, and all of maritime Southeast Asia, many of these traditions have lived side-by-side in a kind of pluralistic abandon.”¹²

The differences in ideological development of international law in South and Southeast Asia are not coincidental, and should be understood against the broader context of pre-modern to postmodern Asian participation in the international legal order.¹³ Asian contributions to international law and membership in international institutions have been as numerous, diverse and widespread as the region’s composite states. Among many contemporary international law doctrines, Asia has proposed and/or authored concepts such as the Exclusive Economic Zone, the establishment of international machinery to govern sea-bed regimes beyond national jurisdiction, principles on decolonization and the right to self-determination, the rights of indigenous peoples and other socio-economic rights, among others.¹⁴ South and Southeast Asian states, in particular, have frequently sought international adjudication over contested territorial sovereignty and/or maritime issues, as seen most recently from the International Court of Justice’ 23 May 2008 Judgment in the *Case Concerning Sovereignty over Pedra Blanca/Pulau Batu Puteh, Middle Rocks, and South Ledge*.¹⁵

Asian participation in the international legal system also shows both vertical and horizontal legalization, as well as deepening and widening commitments, of the state and non-state actors, especially international

¹² Andrew Harding, “Comparative Law and Legal Transplantation in South East Asia: Making Sense of the ‘Nomic Din’” in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing, Oxford-Portland Oregon, 2001).

¹³ See Allah Bukhsh Karim Bukhsh Brohi (ed), *Five Lectures on Asia and the United Nations* (Recueil de Cours, Volume 102, 1968).

¹⁴ T.O. Elias, *New Horizons in International Law* (Martinus Nijhoff Publishers, 1992) 29-43.

¹⁵ *Case Concerning Sovereignty over Pedra Blanca/Pulau Batu Puteh, Middle Rocks, and South Ledge (Malaysia v. Singapore)* [2008] ICJ Rep 130; See *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)* [2002] ICJ Rep; *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* [1962] ICJ Rep 6. See also Hisashi Owada, ‘The Experience of Asia with International Adjudication’ (2005) 9 SYBIL 9-18.

organizations in the region.¹⁶ The overall pattern of these many circumstances of Asian engagement of international law would evoke critical questions on the traditional dominance of (Euro-American) canons and methods of positivist international law.¹⁷

Among several “new” theoretical (and usually constructivist¹⁸) approaches to contemporary international law, the scholarship of *Third World Approaches to International Law (TWAIL)* drew significant and widespread support from South and Southeast Asian countries early on in the postcolonial and post-independence period of the twentieth century. TWAIL is a political-ideological movement that arose from the landmark 1955 Afro-Asian Solidarity Conference held in Bandung, Indonesia.¹⁹ The Bandung conference assembled many states that had either regained sovereignty or were newly-independent,²⁰ and whose Declaration of Principles²¹ eventually became the precursor for the non-alignment and neutrality policies of many South and Southeast Asian states.²²

TWAIL advances a distinct critique of, and alternative narratives from, mainstream international legal scholarship by making various challenges to the morality of the international legal order, as when it: “1) uses

¹⁶ See Jose E. Alvarez, ‘Institutionalized Legalisation and the Asia-Pacific Region’, (2007) 5 N.Z.J. Pub. & Int’l L. 9.

¹⁷ See Richard A. Falk, ‘Is the International Legal Order Eurocentric?’ in *The New States and the International Legal Order*, Recueil de Cours, Vol. 118 (1966), 34-43.

¹⁸ See Martti Koskenniemi, ‘The Politics of International Law’ in Gerry Simpson (ed), *The Nature of International Law* (Dartmouth Publishing Company, England, 2001).

¹⁹ RP Anand, ‘Jawaharlal Nehru and International Law and Relations’ in *Studies in International Law and History: An Asian Perspective* (Brill Academic Publishers, Massachusetts USA, 2004); Final Communique of the Asian-African Conference, Bandung, 24 April 1955, available at http://www.issafrica.org/AF/RegOrg/unity_to_union/pdfs/asiaafrica/bandung55.pdf (last visited 20 October 2008).

²⁰ Richard A. Falk, *The New States and the International Legal Order*, Recueil de Cours, Volume 118 (1966), 10-25.

²¹ See George McTurnan Kahin, *The Asian-African Conference, Bandung, Indonesia, 1955* (Cornell University Press, Ithaca, New York, 1970).

²² Sisir K. Gupta, ‘Asian Nonalignment’ (November 1965) 362 *Annals of the American Academy of Political and Social Science* 44-51; Rajen Harshe, ‘India’s Non-Alignment: An Attempt at Conceptual Reconstruction’ (February 17-24, 1990) 25 *Economic and Political Weekly*, 399-405.

colonial history to frame the impact of international law on the South; 2) avoids prioritizing the universal above the local; and 3) focuses on the interrelation between international capital and non-European cultural traditions.”²³ In the context of assessing developments in contemporary international law, TWAIL raises caution and calls for resistance against re-colonization that could be facilitated by the changing shape of the postmodern international legal system: “...the meaning of the reconstitution of the relationship between State and international law is the creation of fertile conditions for the global operation of capital and the promotion, extension, and protection of internationalised property rights. A transnational ruling elite has emerged, with the ruling elite of the third world playing a junior role, which guides this process. It is seeking to create a global system of governance suited to the needs of transnational capital but to the disadvantage of third world peoples.

The entire ongoing process of redefinition of State sovereignty is being justified through the ideological apparatuses of the Northern States and international institutions [they] control.”²⁴ TWAIL attempts the critical de-contextualization of Eurocentrism as the dominant and exclusively ‘legitimate’ tradition of international law, and calls for sensitivity towards international institutions, modalities, and procedures that could possibly perpetuate re-colonization through hegemonic subjugation of the emerging states in the international legal order.²⁵

A monolithic approach to characterizing international law in South and Southeast Asia therefore does little justice to the regions’ rich diversity and complex history. At the same time, however, international legal scholars must also be mindful of excessive reliance on history that produces

²³ Andrew F. Sunter, ‘TWAIL as Naturalized Epistemological Inquiry’ (2007) 20 *Can. J. L. & Juris.* 475, at 487-488; *see* David P. Fidler, ‘Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law’ (2003) 2 *Chinese J. Int’l L.* 29.

²⁴ B.S. Chimni, ‘Third World Approaches to International Law: A Manifesto’, in Antony Anghie, Bhupinder Chimni, Karin Mickelson, and Obiora Okafor (eds), *The Third World and International Order: Law, Politics and Globalization* (Brill Academic Publishers, Leiden, the Netherlands, 2003); Makau Mutua, ‘What is TWAIL?’ (2000) 94 *Am. Soc’y Int’l L. Proc.* 31-40.

²⁵ As a theoretical platform for international legal scholarship, however, TWAIL has not yet gone beyond the level of pure critique. It has not provided concrete alternatives or viable ‘solutions’ to problems of the modern international system. *See* B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Sage Publications, Newbury Park, California, 1993).

“manipulated appearances of reality, while, in fact, alienating the observer and simplifying the links between motives, causes, stakes, and outcomes.”²⁶

The following discussion of regional developments in South and Southeast Asia proposes to begin from the initial acknowledgment that these regions’ discursive contributions to modern international law originate from separate but parallel paths --- both of which are jointly contoured along theme of *postcolonialism* and the orientation towards *development*. South and Southeast Asian regional developments in international law are presented from within this ideological dichotomy.

South Asia and International Law

Uniquely, Indian scholars point to the fundamental international law concept of universal applicability of rules as ancient India’s central contribution to the modern law of nations.²⁷ Indian perspectives on contributions to international law have been traced across four chronological periods:

1. the ancient period (up to 711 AD);
2. the middle ages (711 to 1600 AD);
3. the colonial period (1600 to 1947); and
4. the modern period (1947 onwards).²⁸

Ancient India was generally composed of small and large kingdoms, ruled by monarchs enjoying various degrees of power and prominence (the least powerful being a *Raja* or king, followed by a *Maharaja* or great king, a *Samrat* or strong emperor, to the most powerful being the *Chakravartin* or emperor who ruled the entire known world).²⁹ The profusion of kingdoms and the experience of warfare and internecine conflict in Ancient India led to the development of inter-state norms on statehood, diplomatic relations,

²⁶ Outi Korhonen, ‘The Role of History in International Law’ (2000) 94 *Am. Soc’y Int’l L. Proc.* 45-46.

²⁷ Nagendra Singh, ‘India and International Law’ in RP Anand (ed), *Asian States and the Development of Universal International Law* (Vikas Publications, Delhi, India, 1972).

²⁸ V.S. Mani, ‘An Indian Perspective on the Evolution of International Law on the Threshold of the Third Millenium’ (2000) 9 *Asian Y.B. Int’l L.* 31-77.

²⁹ RP Anand, *Development of Modern International Law and India* (Nomos Verlagsgesellschaft, Baden-Baden Germany 2005), 28-30.

treaties, religious tolerance, non-use of force, neutrality and humanitarian law.³⁰

The deeply-embedded practice of these norms of inter-state conduct in ancient India, long before the advent of Christianity in the West, challenges the prevalent view of international law as ‘mainly rooted in Christian civilizations and natural law conceptions’.³¹ Concepts such as the just war or *Dharma Yuddha*, the unjust war or *Adharma Yuddha*, the laws applicable to all belligerents at all times in the context of warfare or *Dharmasastras* (which included, among others, principles of distinction of targets, proportionality, and protection of civilians), collectively show that the application of norms based on fundamental considerations of humanity in situations of belligerency had long antedated the formal codification of the 1949 Geneva Conventions.³²

Inter-state relations in Ancient India were also organized along different tiers of statehood, sovereignty, kinship, and within a hierarchy of suzerain-vassal relations.³³ Ancient India’s trade linkages with China, Arabia, Egypt, Greece, Rome and East Africa necessitated protocols and rules on diplomatic relations and the creation of various Superintendents for Commerce, Ships, and Passports, while various Indian states furthered inter-state diplomatic relations by establishing special missions in each other’s capitals. Treaties were recognized to be of a binding character depending on the nature of the treaty and the security of its performance, a practice that arguably presaged the notion of “unequal treaties” in international law.³⁴

The use of force to settle conflicts with other states, previously an axis of state policy, was formally renounced by Emperor Asoka during the Maurya Dynasty, leading to imperial India’s policy of non-use of force and neutrality.³⁵ These policies, coupled with the spread of Ancient India’s largely Hindu and Buddhist religions, became instrumental in the pacifist establishment of colonies in Southeast Asia (the *Sri Vijaya* empire in Sumatra

³⁰ Id. at note 19.

³¹ Id.; see Onuma Yasuaki, ‘When Was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilizational Perspective’ (2000) 2 J. Hist. Int’l L. 1.

³² Id. at note 16.

³³ Id. at note 19, at 34.

³⁴ Id. at note 2; see Ingrid Detter, ‘The Problem of Unequal Treaties’ (1966) 15 Int’l & Comp. L. Q. 1069-1089.

³⁵ Id. at note 19, at 38-41.

and Java, the Kingdom of *Kambojadesa* in Cambodia, and the thirteen (13) dynasties of *Champa*) from the second century AD onwards.³⁶

Beginning with initial raids by Afghanistan's Sultan Mahmud of Ghazni in 991 AD until the consolidation of the Mughal Empire from 1526 to 1707, the surge of Muslim conquests of India during its medieval era would prove crucial for the emergence of norms on religious freedom and basic respect for religious diversity. The juxtaposition of Islam and Hindu beliefs in the ever-widening population of ancient Indian empires made harmonious inter-religion relations the immediate pragmatic concern of Indian governors.³⁷

As a result of the imperial policy mandating respect for religious diversity, Islamic rule under the Mughal Empire was, by and large, peaceable. There was continuity in the rules of inter-state conduct towards other Indian states, vassals, and ancient Asian trading partners. The Mughal emperors "respected the institutions of embassies, treaties, and laws of peace and war. They had a written code of law, applied by their judges, called *kazis*, which regulated relation between state and subjects *inter se*. Their notions of sovereignty and kingship had been inherited from their predecessors, the Hindu empires like the Guptas and the Mauryas, and the Sultanate of Delhi."³⁸

Notwithstanding any political changes introduced by the Mughal empire in medieval India, however, the European powers did not alter their settled practice of dealing with Indian heads of state as sovereigns. Various heads of state within the Indian territories functioned under suzerainty relations with the Mughal Empire, a political relationship that permitted retention of most sovereign rights and administrative prerogatives over their respective territories.

The International Court of Justice recognized this form of suzerain-vassal relationship in the *Right of Passage over Indian Territory (Portugal v. India)*,³⁹ where, following a historical examination of the nature and form of treaty-making in ancient Indian legal traditions, the Court affirmed the

³⁶ Id. at note 16, at 36-37. Id. at note 17.

³⁷ Id. at note 19. RP Anand, *Development of Modern International Law and India* (Nomos Verlagsgesellschaft, Baden-Baden Germany, 2005), 35-40.

³⁸ RP Anand, *Development of Modern International Law and India* (Nomos Verlagsgesellschaft, Baden-Baden Germany, 2005), 39.

³⁹ *Right of Passage over Indian Territory (Portugal v. India)* (Merits) [1960] ICJ Rep 6.

sovereign capacity of an Indian ruler (the Peshwa of the Maratha State, a vassal of the Mughal empire) to conclude the Treaty of Poona of 1779. Rejecting Portugal's claims of sovereignty over the disputed enclaves of Dadra, Nagar, Aveli, and surrounding territories, the narrow Court majority upheld the Peshwa's interpretation of this Treaty, which had granted to the Portuguese merely a revenue tenure, or *saranjam*, and not sovereign rights, over such territories.

The colonial era featured a conceptual 'division of sovereignty' by European public authorities (British governors of India, for example, would organize hundreds of 'Princely' or 'Native States' that were 'semi-sovereign'). Colonial rule was characterized by the "gradual acquisition of prerogatives from indigenous rulers", initially by publicly-owned state enterprises such as the English East India Company, and later on, through official imperial administrators from the European states. While the initial motivation of colonialism was mercantilist in nature, this motivation would be subsumed within the larger rhetoric of European empires: the (ostensible) responsibility to "promote civilization" and "good government" in countries that had long been subject of 'indigenous' rule.⁴⁰ In this manner, the core international law principle of respect for sovereign states degenerated into an antithetical selectivity and arbitrariness of states deemed 'deserving' of sovereignty by other, more powerful states.⁴¹ One scholar describes this colonialist notion of sovereignty as "a part of the relevant *neo-absolutist* concept prevailing in Europe at the time... [where] a metropolitan state possessed 'absolute sovereignty' over its colonies and nothing bound it in its relations with colonized peoples when it established the order and content of these relations solely at its own discretion."⁴²

The establishment and entrenchment of British colonial rule in India was patently illegal for subverting the fundamental international legal doctrine of equality of states, but was seemingly justified under international law principles that recognized the use of force or conquest as a legitimate basis for

⁴⁰ Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge University Press, United Kingdom, 2002), 76-96.

⁴¹ RP Anand, "Equality of States in an Unequal World: A Historical Perspective", in *Sovereign Equality of States*, Recueil de Cours, Vol. 197 (1986), 52-100.

⁴² Christos Theodoropoulos, *Colonialism and General International Law: The Contemporary Theory of National Sovereignty and Self-determination* (New Horizon Publishing House, Benin, Nigeria, 1988), 23. See also Lauren Benton, *Law and Colonial Cultures* (Cambridge University Press, United Kingdom, 2002), 1-30.

acquisition of territory.⁴³ The British annexation of India began innocuously with trade monopolies held by the English East India Company, which, after various historical intermediations by British officials and (forced) capitulations by Indian rulers, eventually led to the acquisition and administration of Indian territories by the English East India Company under the 1657 Cromwell Charter, and over two centuries later, to the 1858 Queen's Proclamation and Act of Parliament that formally declared British takeover of the government of India, with British Queen Victoria being formally proclaimed 'Empress of India' in 1876.

The unjust and unlawful displacement of Indian sovereigns by British imperial rulers repudiated the settled pre-colonization European practice, where, as a renowned Indian international law scholar observed, "...non-Christian states enjoyed full sovereignty and exercised the right of sending and receiving ambassadors. Such views had earlier been expressed by Jean Bodin, and were later endorsed by Hugo Grotius in his famous *Mare Liberum*, published in 1609. Nobody ever questioned the right of the Indian states to make war or peace, conclude treaties, send embassies, or exercise their sovereign jurisdiction within their territories. Grotius accepted and recognized the sovereign status of the Indian rulers although they were 'infidels', and argued that Portugal had no right over them on account of their religious beliefs. No *constitutive theory of recognition* existed before the nineteenth century...the Indian rulers acted as sovereign entities, made war and peace, concluded treaties, and exchanged embassies. The European countries participated with them without questioning their legal status."⁴⁴ The imperial design of colonialism thus exposed the failure of international law at the time to abide by its objective of attaining universal applicability to all peoples of humanist aspirations and humanitarian rules of conduct.⁴⁵

There were many ideological and conceptual consequences from the forcible imposition of European legal institutions and international law traditions on India during the colonial period. Long before European

⁴³ Id. at note 19. Id. at note 20, pp. 65-69. See *Island of Palmas case* (Netherlands v. USA), 4 April 1928, II RIAA 829-871, at 839. Full text available at http://untreaty.un.org/cod/riaa/cases/vol_II/829-871.pdf (last visited 20 October 2008).

⁴⁴ RP Anand, *Development of Modern International Law and India* (Nomos Verlagsgesellschaft, Baden-Baden Germany, 2005), 54-55.

⁴⁵ Peter Fitzpatrick, "Terminal Legality: Imperialism and the (de)composition of Law" in Diane Kirkby and Catharine Coleborne, *Law, History, Colonialism: The Reach of Empire* (Manchester University Press, United Kingdom, 2001).

colonialism made its appearance, many Asian sovereign peoples had already established and were already practicing international maritime principles such as “freedom of the seas, the rules of flag state jurisdiction on the seas, superior coastal state jurisdiction over all ships while near the coast, prohibition of piracy, the rules of charter-party, customs and tolls, permits of entry and departure, and even some rules relating to contraband.”⁴⁶

Neither of these practices, nor India’s participation in the international legal order, would be substantially altered or dissolved in the period of colonization. Instead, British India would be treated as a “separate State, with an international legal personality of its own. It was a member of the League of Nations. It became party to the Statute of the Permanent Court of Justice and the General Act on the Pacific Settlement of Disputes of 1928. It entered into treaties and ratified them. It had the dubious distinction of being the only country that ratified the 1937 Geneva Convention for the Prevention and Punishment of Terrorism, which the UK and other countries did not ratify. British India also participated in the San Francisco Conference that led to the establishment of the United Nations.”⁴⁷ India’s position from 1919 to 1947 would be that of an “anomalous international person”, exercising some powers of self-governance yet devoid of the full attributes of statehood since control of internal and external relations still remained with the British Government and its Parliament.⁴⁸

British India’s possession of limited international legal personality under British rule necessarily made the Indian normative system susceptible to the influences of classical positivist international law. British judges in several pre-independence cases in India would apply classical positivist (and necessarily Eurocentric) principles of international law as part of the Indian legal system. The result was that “...early in the history of India, the Common Law principle that international law is part of the law of the land became a part of India’s legacy.”⁴⁹ This principle, along with the concept of the rule of

⁴⁶ Id. at note 18, at 56.

⁴⁷ Pemmaraju Sreenivasa Rao, “The Indian Position on Some General Principles of International Law”, in Bimal N. Patel (ed), *India and International Law* (Martinus Nijhoff Publishers, Leiden, the Netherlands, 2005).

⁴⁸ RP Anand, *Development of Modern International Law and India*(Nomos Verlagsgesellschaft, Baden-Baden Germany, 2005), 78-84.

⁴⁹ M.S. Nawaz, *The Changing Law of Nations: An Indian Focus* (Eastern Law House, Calcutta, India, 2000), 7-9. See also S.K. Agarwala, *India’s Contribution to the Development of International Law --- the Role of Indian Courts*, in RP Anand

law, would have significant influences on the growth and direction of international law in India. Similar to the experiences of other colonial states, the infusion (through doctrines of incorporation and/or treaty transformation) of Eurocentric positivist international law norms into would have significant impacts on the present-day content and interpretation of South and Southeast Asian laws.⁵⁰

British Raj (British rule over the Indian subcontinent) would terminate in 1947 with the official Partition of the British Indian Empire (hereafter, 'Partition') into two (2) separate, self-governing, sovereign dominions: the Dominion of Pakistan declared independent on August 14, 1947 (and whose territory included the territories of present-day Pakistan and Bangladesh); and on August 15, 1947, the Union of India (later replaced by the Republic of India on January 26, 1950). The two largest provinces of the British Indian Empire, Punjab and Bengal, would be subdivided between the Dominion of Pakistan and the Union of India.⁵¹

The Partition would also impact British treatment of other South Asian states.⁵² In parallel with the termination of British Raj over ancient Indian territories, Britain would likewise recognize the independence of Ceylon (now Sri Lanka) as a sovereign Dominion on February 4, 1948. By 1972, Sri Lanka would become a full Republic.⁵³ Nepal's independence, which had long been recognized by the United Kingdom in a 1923 friendship treaty, was subsequently recognized by the new Dominion of Pakistan and the Union of India. Bhutan, which became a politically-autonomous suzerain of the United Kingdom in 1910, was given the choice of joining the Indian

(ed), *Asian States and the Development of International Law* (Vikas Publications, Delhi, India, 1972).

⁵⁰ Id. at note 9. See Iza Hussin, 'The Pursuit of Perak Regalia: Islam, Law, and the Politics of Authority in the Colonial State' (2007) 32 *Law & Soc. Inquiry* 759-784; Sally Engle Merry, 'Law and Colonialism' (1991) 25 *Law & Soc'y Rev.* 889-920.

⁵¹ See H.S. Bhatia, *Origin and Development of Legal and Political System in India* (Deep & Deep Publications, New Delhi, India, 1976); Hamid Khan, *Constitutional and Political History of Pakistan* (Oxford University Press, United Kingdom, 2001).

⁵² See Francis Robinson, *Islam, South Asia and the West* (Oxford University Press, United States, 2008); Sugata Bose and Ayesha Jalal, *Modern South Asia: History, Culture, and Political Economy* (2nd ed., Routledge, United Kingdom, 2004).

⁵³ See Francis Robinson (ed), *The Cambridge Encyclopedia of India, Pakistan, Bangladesh, Sri Lanka, Nepal, Bhutan, and the Maldives* (Cambridge University Press, United Kingdom, 1989).

Union, but opted for independence. Both the Dominion of Pakistan and the Union of India would eventually extend recognition to fellow South Asian states.

Differences on various constitutional questions, (such as the division of power between central government and the provinces, the sufficiency representation, and administrative authority) between the majority Islamic population and the largely-Hindu Bengali population within Pakistan, coupled with Indian support for the Bengali/Bangladeshi liberation movement, would provide the impetus for the secession of Bangladesh from Pakistan in December 1971. In 1972, Bangladesh would establish its own parliamentary democracy, and thereafter enter into a friendship treaty with India.⁵⁴

The terms of the Partition would not sufficiently address competing territorial claims of India and Pakistan over Kashmir, the northwestern region of the Indian subcontinent that had its own historic, religious, demographic, and political linkages with both India and Pakistan. After the United Nations mediated a ceasefire from the 1947 Indo-Pakistani War, the Security Council issued Resolution 47 recommending measures to India and Pakistan “to bring about a cessation of the fighting and to create proper conditions for a free and impartial plebiscite to decide whether the State of Jammu and Kashmir is to accede to India or Pakistan.”⁵⁵ Such a plebiscite would not be conducted, and hostilities would resume in 1965 and 1999, the unsatisfactory conclusion of which resulting in the maintenance of Pakistani control of about a third, and Indian control of about half, of the disputed territory to date.⁵⁶

Another vital international legal question arising from the Partition was the issue of succession of India and Pakistan to treaties to which British India was a party.⁵⁷ Pakistan contended that it was a co-successor of India to all such treaties, especially the 1928 General Act on the Pacific Settlement of Disputes (1928 Act), through which Pakistan would invoke the jurisdiction of

⁵⁴ Richard Sisson and Leo E. Rose, *War and Secession: Pakistan, India, and the Creation of Bangladesh* (University of California Press, California, United States, 1990).

⁵⁵ UNSC Res 47 (21 April 1948) UN Doc/S/RES/726.

⁵⁶ See Mridu Rai, *Hindu Rulers, Muslim Subjects: Islam, Rights, and the History of Kashmir* (Princeton University Press, New Jersey, United States 2004); H.S. Gururaja Rao, *Legal Aspects of the Kashmir Problem* (Minerva Press, New Delhi, India 2002); Victoria Schofield, *Kashmir in Conflict: India, Pakistan and the Unending War* (I.B. Tauris, London, 2003).

⁵⁷ *Id.* at note 46, at 35.

the International Court of Justice in disputes with India. Pakistan would cite the 1928 Act to invoke the Court's jurisdiction in two (2) cases involving disputes with India, *Trial of Pakistani Prisoners of War (Pakistan v. India)*⁵⁸ and *Aerial Incident of 10 August 1999 (Pakistan v. India)*.⁵⁹ India took the view that the 1928 Act was a political treaty that could not be transmitted automatically to successor States from the Partition. Any confusion on the succession to the 1928 Act would be eliminated in 1974, when India sent its written communication to the Secretary General of the United Nations categorically disavowing any binding effect of the 1928 Act since India's independence in 1947.⁶⁰

Notwithstanding post-independence disputes within the new states of the region, South Asia would be an active participant and a leading advocate in the decolonization process and dialogue facilitated by the United Nations, culminating with the General Assembly's landmark 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.⁶¹ In 1947, Indian Prime Minister Jawaharlal Nehru convened the Asian Relations Conference, which brought together many Asian leaders and reasserted the end of European imperialism in Asia.⁶²

India under Nehru also led the region's rejection of the (then Eurocentric) *constitutivist* position on recognition of states that had caused controversy during the colonial period, in favour of a *declaratory* position that empowered newly emergent postcolonial states.⁶³ Despite the Eurocentric genesis of classical positivist international law, however, Nehru would lay a

⁵⁸ Id. at note 46, at 36. Upon Pakistan's request, the Court discontinued proceedings after Pakistan and India reached a negotiated settlement. *Trial of Pakistani Prisoners of War (Pakistan v. India)* Order of 15 December 1973, [1973] ICJ Rep 347.

⁵⁹ Id. at note 46 at 36-37. *Aerial Incident of 10 August 1999 (Pakistan v. India)* (Jurisdiction) [2000] ICJ Rep 12.

⁶⁰ For a concise issue summary on India's succession to treaties concluded by British India, see M.K. Nawaz, *The Changing Law of Nations: An Indian Focus* (Eastern Law House Ltd., Calcutta, India, 2000), 12-18.

⁶¹ UNGA Res 1514 (XV) (14 December 1960). *Full text available at* http://www.unhchr.ch/html/menu3/b/c_coloni.htm (last visited 20 October 2008). *See also* Zoltán Szilágyi, *The United Nations' Role in the Liquidation of Colonialism* (Institute for World Economy of the Hungarian Academy of Sciences, Budapest, Hungary, 1986), 27-85.

⁶² RP Anand, *Development of Modern International Law and India* ((Nomos Verlagsgesellschaft, Baden-Baden Germany, 2005), 103-104.

⁶³ Id. at note 46, at 38-39.

policy of Indian acceptance of its norms, with the qualification that norm-creation would not be a Euro-American preserve, but rather, a broader process of development conjoined with the new realities and contingencies of international life. Nehru's *Panch Sheel* (principles of peaceful co-existence),⁶⁴ initially articulated in a 1954 treaty with China, would resonate across time to many of South and Southeast Asia's regional instruments on international law, most especially the 1976 Treaty of Amity and Cooperation of Southeast Asia that laid the foundation for the Association of Southeast Asian Nations (ASEAN) and the 1985 Charter of the South Asian Association for Regional Cooperation (SAARC).⁶⁵

South Asia, particularly India and Pakistan, would also lead reform efforts of the international economic system in the 1970s.⁶⁶ Together with other Third World countries newly emerging from colonial rule, South Asia joined in the United Nations General Assembly's Declaration for the Establishment of a New International Economic Order (NIEO Declaration),⁶⁷ which, in the wake of colonialism, ought to be founded on certain principles, including, among others:

1. sovereign equality of states, self-determination of all peoples, inadmissibility of acquisition of territories by force, territorial

⁶⁴ The five principles are: 1) mutual respect for territorial integrity and sovereignty; 2) mutual non-aggression; 3) mutual non-interference in internal affairs; 3) equality and mutual benefit; and 5) peaceful coexistence. RP Anand, *Development of Modern International Law and India* (Nomos Verlagsgesellschaft, Baden-Baden, Germany, 2005), 101-114.

⁶⁵ Id. at note 18. See Treaty of Amity and Cooperation in Southeast Asia, Indonesia, 24 February 1976 (*full text available at* <http://www.aseansec.org/1217.htm>, last visited 20 October 2008) [hereafter, TAC]; Charter of the South Asian Association for Regional Cooperation, Bangladesh, 8 December 1985 (*full text available at* <http://www.saarc-sec.org/data/docs/charter.pdf>, last visited 20 October 2008) [hereafter, SAARC Charter].

⁶⁶ Jagdish Bhagwati (ed), *The New International Economic Order: The North-South Debate* (MIT Press, Cambridge, Massachusetts, United States, 1977); T.S. Rama Rao, "The New International Economic Order and the North-South Dialogue" in S.K. Agrawala, T.S. Rama Rao, and J.N. Saxena (trs), *New Horizons of International Law and Developing Countries* (International Law Association, N.M. Tripathi Private Ltd., India, 1983); R.C. Hingorani, "New International Economic Order", in S.K. Agrawala, T.S. Rama Rao, and J.N. Saxena (trs), *New Horizons of International Law and Developing Countries* (International Law Association, N.M. Tripathi Private Ltd., India, 1983).

⁶⁷ UNGA Res 3201(S-VI) (1974) UN Doc A/RES/S-6/3201.

- integrity and non-interference in the internal affairs of other States;
2. broadest cooperation of all States members of the international community based on equity;
 3. full and effective participation on the basis of equality of all countries in solving world economic problems in the common interest of all countries;
 4. the right of every country to adopt the economic and social system that it deems most appropriate for its own development;
 5. full permanent sovereignty of every State over its natural resources and all economic activities, entitling each State to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State;
 6. the right of all States, territories and peoples under foreign occupation, alien and colonial domination or apartheid to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories, and peoples;
 7. regulation and supervision of the activities of transnational corporations;
 8. the right of the developing countries and the peoples of territories under colonial and racial domination and foreign occupation to achieve their liberation and to regain effective control over their natural resources and economic activities;
 9. extending assistance, free of any political or military conditions, to developing countries, peoples and territories which are under colonial and alien domination, foreign occupation, racial discrimination or apartheid, and all forms of neo-colonialism;
 10. just and equitable relationship between the prices of developing country exports and imports;
 11. promotion of development in the reform of the international monetary system;
 12. preferential and non-reciprocal treatment for developing countries in all fields of international economic cooperation; and
 13. developing countries' access to technology transfers and financial resources. Alongside the NIEO Declaration, South Asia also joined in the General Assembly's adoption of the North-South

Programme of Action and the Charter of Economic Rights and
Duties of States.⁶⁸

Many of the foregoing principles also underlie the nature and scope of regional cooperation in South Asia. Regional cooperation in South Asia is facilitated under the SAARC, composed of the seven South Asian states of Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka. SAARC heads of state meet annually, or as often as considered necessary by the member states.⁶⁹

Policy-making, review of progress of cooperation, decisions on new areas of cooperation, establishment of additional mechanisms deemed necessary, and decisions on other matters of general interest to SAARC are functions assumed by the SAARC Council of Ministers, composed of the Foreign Ministers of the SAARC member states, and which meets at least bi-annually.⁷⁰ Operational functions are discharged by the Standing Committee (constituted by the foreign secretaries of the SAARC member states) which is responsible for overall monitoring and coordination of SAARC cooperation programs,⁷¹ and the Technical Committees (with representatives from the SAARC member states) which are responsible for the implementation, coordination, and monitoring of programmes in their respective areas of cooperation.⁷² SAARC has since expanded its areas of cooperation to include economic and social issues, from tariff reductions and bilateral initiatives for potential free trade agreements among SAARC members, financial and monetary issues, to poverty alleviation, the environment, housing, women and children's rights, tourism, among others.⁷³

On 4 January 2004, SAARC enacted its Social Charter, which "consolidate[s] the multifarious commitments of SAARC Member States in the social sector and provide[s] a practical platform for concerted, coherent, and complementary action in determining social priorities, improving the

⁶⁸ UNGA Res 3202 (S-VI) (1974) UN Doc A/RES/S-6/3202; UNGA Res 3281 (XXIX) (1974), UN GAOR 29th Session Supp 31, 50.

⁶⁹ Article III, SAARC Charter.

⁷⁰ Article IV, SAARC Charter.

⁷¹ Article V(1), SAARC Charter.

⁷² Articles V and VI, SAARC Charter.

⁷³ Nihal Rodrigo, "SAARC as an institutional framework for cooperation in South Asia", in Ramesh Thakur and Oddny Wiggen (trs), *South Asia in the World: Problem Solving Perspectives on Security, Sustainable Development and Good Governance* (United Nations University Press, New York, United States, 2004).

structure and content of social policies and programmes, ensuring greater efficiency in the utilization of national, regional and external resources and in enhancing the equity and sustainability of social programmes and the quality of living conditions of their beneficiaries.”⁷⁴ The SAARC Social Charter sets forth comprehensive socio-economic and development commitments as binding obligations of SAARC member states, including, among others:

1. “affirm[ing] that the highest priority shall be accorded to the alleviation of poverty in South Asian Countries”;⁷⁵
2. “agree[ing] that access to basic education, adequate housing, safe drinking water and sanitation, and primary health care should be guaranteed in legislation, executive and administrative provisions, in addition to ensuring an adequate standard of living, including adequate shelter, food and clothing”;⁷⁶
3. “shar[ing] information regarding the outbreak of any communicable disease” and “agree[ing] to hold prior consultation on issues [health issues related to livelihood and trade issues which are influenced by international agreements and conventions] and to make an effort to arrive at a coordinated stand on issues that relate to the health of their population;”⁷⁷
4. various obligations to promote the status of women, prevent their discrimination and exploitation, and ensure their empowerment through literacy and education;⁷⁸
5. extensively-enumerated obligations to promote the rights and well-being of children;⁷⁹ and
6. other pressing social issues such as population stabilisation, drug de-addiction, rehabilitation and reintegration.⁸⁰

The implementation of the SAARC Social Charter is facilitated by National Coordination Committees and the SAARC Secretariat, and is mainly left to member states’ respective domestic institutional competencies to operationalize the SAARC Social Charter obligations.⁸¹

⁷⁴ Preamble, last clause, SAARC Social Charter. *Full text available at* <http://www.saarc-sec.org/main.php?id=13> (last visited 20 October 2008).

⁷⁵ Article III(1), SAARC Social Charter.

⁷⁶ Article III(4), SAARC Social Charter.

⁷⁷ Article IV(1) and IV(4), SAARC Social Charter.

⁷⁸ Article VI, SAARC Social Charter.

⁷⁹ Article VII, SAARC Social Charter.

⁸⁰ Articles VIII and IX, SAARC Social Charter.

⁸¹ Article X, SAARC Social Charter.

Since its inception in 1985, SAARC has remained an intergovernmental association and has not constituted itself as a formally-integrated regional organization.⁸² Its primary focus is on socio-economic issues, and not on political issues. The first clause of the Preamble to the SAARC Charter stresses “strict adherence to the principles of the United Nations Charter and Non-Alignment, particularly respect for the principles of sovereign equality, territorial integrity, national independence, non-use of force, and non-interference in the internal affairs of other States and the peaceful settlement of disputes,” with such principles also reiterated in Article II of the SAARC Charter.⁸³ Areas of regional cooperation include agriculture, rural development, telecommunications, meteorology, and health, with decisions at all levels in the SAARC “taken on the basis of unanimity,” and with the qualification that “[b]ilateral and contentious issues shall be excluded from the deliberations of the Association.”⁸⁴

A South Asian scholar describes these provisions “not as obstacles but as safeguards to protect the young organization from entanglement in issues extraneous to regional cooperation. The provisions have been invoked on many occasions and their applicability in different situations has been debated at length, both within as well as outside SAARC. The taboo on the discussion of bilateral issues has helped SAARC to avoid being diverted from its primary Charter objectives. Yet the spirit of the injunction has not always been heeded and, when combined with the unanimity provision, this had led to delays and postponements of ministerial and summit meetings. The unanimity provision in effect renders to each member of SAARC the power of a veto.”⁸⁵

As seen above, SAARC’s limited institutional competencies purposely do not address conflict resolution in South Asia. In the aftermath of independence, South Asia has become a theatre for intraregional conflicts and political tensions:

1. the India-Pakistan conflict on Jammu and Kashmir, which, after three wars and separate nuclear tests conducted by both states, remains at a precarious political stalemate;
2. the tenuous political situation in Nepal arising from Maoist insurgency, which, despite a peace accord reached by the

⁸² See Dr. O.P. Goel (ed), *India and SAARC Engagements* (Volumes 1-2) (Isha Books, Delhi, India, 2004).

⁸³ Preamble, first clause, SAARC Charter.

⁸⁴ Articles X(1) and X(2), SAARC Charter.

⁸⁵ Id. at note 69.

democratic government and the Maoists in November 2006 providing for the Maoists' entry into a transitional government with a view towards United Nations-monitored elections for a constituent assembly, nevertheless still resulted in the failure of the peace process, followed by Parliament's abolition of the monarchy in December 2007, and in May 28, 2008, Nepal's transformation to a federal democratic republic (Maoist Chairman Pushpa Kamal Dahal Prachanda would be elected the first Prime Minister of the Federal Democratic Republic of Nepal on August 15, 2008);

3. unresolved issues of Bhutanese refugees which are potentially destabilizing to Bhutan and Nepal;
4. separatist insurgencies in northeast India;
5. the continued separatist struggles of the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka; among other security threats posed by terrorism, drug trafficking, arms smuggling, human trafficking, and the spread of HIV/AIDS and other communicable diseases.

Due to SAARC's limited mandate, however, conflict resolution mechanisms in South Asia still depend, for the most part, on informal political consultations.⁸⁶ Relatively open and porous borders, conducive to inter-state migration and movement of refugees, have contributed to the region's vulnerability to conflicts.⁸⁷ The nuclear capabilities of the geographically-proximate and primary South Asian actors --- India and Pakistan (both of which are not parties to the Nuclear Non-Proliferation Treaty and the

⁸⁶ Niaz A. Naik, "A Security Organization for South Asia: Mechanism for Conflict Resolution in South Asia", in Ramesh Thakur and Oddny Wiggen (trs), *South Asia in the World: Problem Solving Perspectives on Security, Sustainable Development and Good Governance* (United Nations University Press, New York, United States, 2004). See also D. Suba Chandran and P.R. Chari (trs), *Armed Conflicts in South Asia 2008: Growing Violence* (Routledge, India, April 2008); Armed Conflict Database, International Institute for Strategic Studies, available at <http://www.iiss.org/> (last visited 25 October 2008); Kingsley de Silva, "Terrorism and Political Agitation in Post-colonial South Asia: Jammu-Kashmir and Sri Lanka", in Ramesh Thakur and Oddny Wiggen (trs), *South Asia in the World: Problem Solving Perspectives on Security, Sustainable Development and Good Governance* (United Nations University Press, New York, United States, 2004).

⁸⁷ Lok Raj Baral, "National Security: Inter-State Conflict in South Asia (a Nepali Perspective)", in Ramesh Thakur and Oddny Wiggen (trs), *South Asia in the World: Problem Solving Perspectives on Security, Sustainable Development and Good Governance* (United Nations University Press, New York, United States, 2004).

Comprehensive Nuclear Test Ban Treaty) --- raises the urgency for a South Asian conflict resolution mechanism or institutional system for settling bilateral and intraregional disputes.⁸⁸ Despite bilateral or intraregional differences, however, South Asia has made substantial contributions to the United Nations' own peacekeeping operations, and other international initiatives to maintain international peace and security.⁸⁹

South Asia has also made innumerable contributions to the development of the law of the sea. As described by one scholar, "...all the newly-independent South Asian states, in tune with the times, have tried to take the maximum benefit of the current turmoil in the [law of the sea] extend their national jurisdictions."⁹⁰ India's 1976 Maritime Zones Act demarcated its territorial sea to twelve nautical miles (nm); its contiguous zone limit to twenty-four nm for purposes of security, immigration, sanitation, customs, and other fiscal matters; and exclusive economic zone (EEZ) to two hundred nm. With India's central position in the Indian Ocean (having a continental coastline of about 5700 kilometers, 1200 islands and islets, and traversing many crucial international maritime routes, about 131, 800 sq.nm. of continental shelf and margin), India also added many prime maritime routes and areas to its sovereign jurisdiction. India's maritime claims would fall well-within the framework of the 1982 UN Convention on the Law of the Sea, with India gaining about 587,600 sq.nm as part of its EEZ. India is also recognized as a 'pioneer investor' in seabed exploratory activities for the recovery of polymetallic nodules from the ocean.

On the other hand, Pakistan has not yet fully demarcated its maritime boundary with India, particularly with respect to the Rann of Kutch, about 90% of which had been awarded to India by an international arbitral tribunal.

⁸⁸ See Stephen P. Cohen, "Nuclear weapons and nuclear war in South Asia: Unknowable futures", and Christophe Carle, "International security in a nuclear South Asia", both in Ramesh Thakur and Oddny Wiggen (trs), *South Asia in the World: Problem Solving Perspectives on Security, Sustainable Development and Good Governance* (United Nations University Press, New York, United States, 2004).

⁸⁹ Satish Nambiar, "South Asian Contributions to United Nations Peacekeeping Operations, with particular reference to India's participation", and Syed Fatemy Ahmed Roomy, "The United Nations and South Asia: Bangladesh's contribution to UN Peacekeeping", both in Ramesh Thakur and Oddny Wiggen (trs), *South Asia in the World: Problem Solving Perspectives on Security, Sustainable Development and Good Governance* (United Nations University Press, New York, United States, 2004).

⁹⁰ RP Anand, "South Asia and the Law of the Sea: Problems and Prospects", in RP Anand, *Studies in International Law and History: An Asian Perspective* (Brill Academic Publishers, Martinus Nijhoff Publishers, Leiden, the Netherlands, 2004).

Sri Lanka proposals for the limited expansion of its continental shelf, in view of the special characteristics of its continental margin, were admitted in the 1982 UNCLOS Convention (Sri Lanka was permitted to establish the outer edge of its continental fixed points defined by latitude and longitude, at each of which the thickness of sedimentary rock was not less than one kilometre.) Sri Lanka and India completed their boundary delimitations in 1977; however, both states claim the Palk Strait, Palk Bay, and the Gulf of Manaar as part of each state's historic waters.⁹¹

Following the enactment of its 1974 Territorial Waters and Maritime Zones Act, Bangladesh has also had serious delimitation disputes with India about their overlapping maritime boundaries. In view of Bangladesh's specific geomorphological considerations (e.g. "the estuary of Bangladesh is such that no stable water line or demarcation of landward and seaward area exists"; "the continual process of alluvian and sedimentation forms mud banks, and the area is so shallow as to be non-navigable by other than small boats"; "the navigable channels through the aforesaid banks are continuously changing their course and require soundings to establish their demarcation"), Bangladesh proposed an amendment to Article 4 of the Territorial Sea Convention to delineate baselines using the depth method for establishing baselines, instead of the 'normal baselines' or 'straight baselines' standards in the law of the sea. The amendment was not accepted, but Article 7(2) of the 1982 Convention attempted to meet the situation.⁹²

Other maritime disputes between Bangladesh and India involve the 1970 formation of a new island in the Bay of Bengal (known as New Moore Island or Purbasha in India and South Talpatty island in Bangladesh), boundaries with Andaman and Nicobar Islands, the sharing of river waters,

⁹¹ Id. at note 90. See B.R. Chauhan, "Fixation and Delimitation of Maritime Frontiers" in S.K. Agrawala, T.S. Rama Rao, and J.N. Saxena (trs), *New Horizons of International Law and Developing Countries* (International Law Association, N.M. Tripathi Private Ltd., India, 1983).

⁹² Article 7(2): "Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention."

the construction of the Farakka barrage, and the exchange of small land enclaves on the Indo-Bangladesh border, among others.⁹³

Other South Asian states have also negotiated (or are in the process of negotiating) maritime boundaries. Maldives concluded its agreements with India and Sri Lanka in 1976, but has an unusual claim based on its 1964 Constitution which defined the territory of Maldives as “the islands, air and sea surrounding and in between the islands contained within a *rectangle* formed by meridians and parallels.”⁹⁴ (The EEZ claim around the Maldives’ constitutional rectangle has not been recognized thus far.) Nepal and Bhutan, both landlocked States dependent on coastal states such as India for transit passage, are constrained to rely on Article 69 of UNCLOS to “participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the EEZs of the coastal States of the same sub-region or region.”⁹⁵

South Asia has also staunchly advocated the development of international environmental law and outer space law.⁹⁶ India actively participated in the 1972 Stockholm Conference, and thereafter enacted amendments to its Constitution as well as parliamentary legislation in order to give effect to many commitments articulated in the Stockholm Declaration

⁹³ Id. at note 90. See D.W. Wadegaonkar, “Changing Concept of the Determination of Maritime Frontiers and the Delimitation of Maritime Boundaries”, in S.K. Agrawala, T.S. Rama Rao, and J.N. Saxena (trs), *New Horizons of International Law and Developing Countries* (International Law Association, N.M. Tripathi Private Ltd., India, 1983).

⁹⁴ Id. at note 90.

⁹⁵ UNCLOS (1982), Agreement Relating to the Implementation of Part XI of the Convention, Article 69 (Right of Landlocked States). *Full text available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm (last visited 10 October 2008). See V.C. Govindaraj, “Land-Locked States and the Law of the Sea” in S.K. Agrawala, T.S. Rama Rao, and J.N. Saxena (trs), *New Horizons of International Law and Developing Countries* (International Law Association, N.M. Tripathi Private Ltd., India, 1983).

⁹⁶ See Shyami Fernando Puvimanasinghe, *Foreign Investment, Human Rights, and the Environment: A Perspective from South Asia on the Role of Public International Law for Development* (Martinus Nijhoff Publishers, Leiden, Boston, 2007); Lakshman Guruswamy, “Environment and Trade: Competing Paradigms in International Law”, in Antony Anghie and Garry Sturgess (trs), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Kluwer Law International, the Hague, Boston, 1998).

and the UN General Assembly's Resolution 2977 (XXVII) in 1972.⁹⁷ Within a broad spectrum of international environmental issues and concerns, South Asia has been particularly vocal in its support for the establishment of international cooperation for ensuring sustainable development practices and technology transfers, environmental compensation and/or financial assistance, and fundamental international environmental law principles such as the prohibition against transboundary harms, the precautionary principle, the polluter-pays principle, intergenerational equity, and sustainable development.⁹⁸

To provide a regional institutional cooperative response to problems of environmental degradation, common resource management, and joint initiatives on environment and development, South Asian states established an inter-governmental programme, the South Asian Cooperative Environment Programme (SACEP) in 1982.⁹⁹ With respect to outer space law, India's space policies, activities, and institutions demonstrate strong and continued participation in the implementation and/or further interpretive development of multilateral treaties (such as the *1967 Treaty on Principles Governing the Activities of States in the Exploration and the Use of Outer Space, including the Moon and Other Celestial Bodies*; the *1968 Agreement on the Rescue of Astronauts, Return of Astronauts, and the Return of Objects Launched into Outer Space*; the *1975 Convention on the Registration of Objects Launched into Outer Space*; and the *1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*) and resolutions of the United Nations General Assembly with normative content for regulating space activities (such as, among others, the *1982 Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting*; the *1986 Principles Relating to Remote Sensing of the Earth from Outer Space*; the *1992 Principles Relevant to the Use of Nuclear Power Sources in Outer Space*; and the *1996 Declaration on International*

⁹⁷ See A. David Ambrose, "International Environmental Law and India", in Bimal N. Patel (ed), *India and International Law* (Brill Academic Publishers, Martinus Nijhoff Publishers, the Netherlands, 2005).

⁹⁸ Id. at note 97. See Alexander J. Bolla and Ted L. McDorman (trs), *Comparative Asian Environmental Law Anthology* (Carolina Academic Press, Durham, North Carolina, United States, 1999); Mochtar Kusuma-Atmadja, Thomas A. Mensah, and Bernard H. Oxman (trs), *Sustainable Development and the Preservation of the Oceans: The Challenges of UNCLOS and Agenda 21* (Law of the Sea Institute, William S. Richardson School of Law, University of Hawaii, Honolulu, 1997).

⁹⁹ See http://www.sacep.org/html/about_overview.htm (last visited 20 October 2008).

Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States).¹⁰⁰

South Asia's multidirectional engagement of, and contributions to the development of, modern international law has inspired concomitant proposals for teaching methodologies and curricular content of international law in South Asian law schools. Concrete suggestions were advanced on how to reorient international law teaching and curriculum in the region:

1. viewing international law "sociologically, as a device of building community institutions by the development of consensus, the search for common interests and the management of conflicts --- at the same time satisfying the normal complementary legal needs of stability of expectations and the requirements of change";
2. developing interdisciplinary skills, or for international law professors to "become specialists in some aspects of international law" and encouraging specialized monographic writings and empirical studies;
3. the redistribution of the current content of international law courses to ensure exposure to aspects of international law as would "sharpen thought and analysis in traditional legal courses", and "help institutionalize awareness of relatedness of international and legal developments";¹⁰¹ and accordingly,
4. the restructuring of law degrees to reflect the proposed curricular revisions.¹⁰²

¹⁰⁰ C. Jayaraj, "The Law of Outer Space and India" in Bimal N. Patel (ed), *India and International Law* (Brill Academic Publishers, Martinus Nijhoff Publishers, the Netherlands, 2005); J.N. Singh, *Outer Space, Outer Sea, Outer Land and International Law* (Harnam, New Delhi, 1987); P.P.C. Haanappel, *The Law and Policy of Air Space and Outer Space: A Comparative Approach* (Kluwer Law International, the Hague, New York, 2003).

¹⁰¹ Upendra Baxi, "Teaching of International Law in India in 2000 A.D. – Some Non-Utopian Proposals", in .K. Agrawala, T.S. Rama Rao, and J.N. Saxena (trs), *New Horizons of International Law and Developing Countries* (International Law Association, N.M. Tripathi Private Ltd., India, 1983). See also M.K. Nawaz, "On the Ways and Means of Improving Research of International Law in India", in .K. Agrawala, T.S. Rama Rao, and J.N. Saxena (trs), *New Horizons of International Law and Developing Countries* (International Law Association, N.M. Tripathi Private Ltd., India, 1983).

¹⁰² KI Vibhute, 'International Law in India – Developing Curricula and Teaching: Some Reflections' (2001) 5 Sing. J. Int'l & Comp. L. 388-404.

Thus, while early postcolonial international law scholarship in South Asia proved valuable in “indict[ing] colonial international law for legitimizing the subjugation and oppression of Asian peoples”; “emphasiz[ing] that Asian states were not strangers to the idea of international law”; “argu[ing] that there was nothing in the cultural traditions of Asian peoples that prevented them from participating fully in the contemporary international legal process;” and advocating “reform, rather than repudiation” of international law towards its expansion, postmodern South Asian international law scholarship highlights the failure to see neo-colonial structures in international law and institutions of the international legal order, as well as the conceptual defects of inordinately relying on positivist methodology in the teaching and research of international law.¹⁰³ Measures proposed to respond to these concerns include, among others:

1. recognition that international law now seeks to “displace municipal law in regulating core aspects of sovereign economic and political space”;
2. expansion of the normative content of international law taking into account the discursive influences of non-state actors and gender;
3. scaling back on ‘overspecialization’ that leads to fragmentation and under-theorization of international law; and
4. dissecting the decision-making processes of international institutions, imposing duties on international property holders such as transnational/multinational corporations, and revealing the underlying themes of dominance and power in sustainable development and human rights discourse.

Southeast Asia and International Law

In contrast to South Asia, the ten (10) countries comprising the Southeast Asian region (Brunei Darussalam, Malaysia, Singapore, the Philippines, Indonesia, Thailand, Laos, Vietnam, Cambodia, and Myanmar) have had a relatively shorter (documented) history of regional engagement towards the development of contemporary international law. While there were about forty kingdoms, principalities, and sultanates spread across Southeast Asia in antiquity, paradigms of statehood were hardly uniform.¹⁰⁴ Neither were Southeast Asian states identifiable with homogenous or closely

¹⁰³ BS Chimni, ‘Teaching, Research, and Promotion of International Law in India: Past, Present, and Future’ (2001) 5 *Sing. J. Int’l & Comp. L.* 368-387.

¹⁰⁴ See Amry Vandenbosch, ‘Regionalism in Southeast Asia’ (1946) *The Far Eastern Quarterly*, Volume 5, No. 4, 427-438.

similar cultural polities, as had been the case in the predominantly Indo-centric South Asia.

Early modern Southeast Asian states were roughly classifiable into agrarian/mainland societies (such as those that preceded Burma, Vietnam, and Cambodia, and whose governance structures were characterized by centralized official hierarchies and semi-divine kings), and sea-based or archipelagic kingdoms (those that preceded Sumatra, Malaya, North Java, Brunei in North Borneo were governed by ‘aristocratic elites’ that controlled the trading fleet).¹⁰⁵ Modernity (if taken in its broader eclectic acceptance and not exclusively from the lens of pure Eurocentrism) was also apparent from these ‘early modern’ (pre-colonial) Southeast Asian states.¹⁰⁶

Mainland societies among the pre-colonial/ancient Southeast Asian states shared the following major structural, political, and cultural convergences:

1. some form of territorial consolidation among agrarian or sea-based polities, which made the early modern empires (such as the Burmese, Thai and Vietnamese empires in c. 1100- c.1250) “more effectively integrated both administratively and culturally than their classical antecedents”, and with such imperial consolidations “exhibit[ing] a common structure and rhythm heavily influenced by the mainland’s north-south segmentation”, since the empires “centered initially on one of the major north-south corridors, which were particularly favoured in their agricultural/geographic resources and/or in their access to maritime trade: the Irrawaddy basin of Burma, the Chaophraya basin of Thailand, and the Song-koi basin and associated coastal districts of what is now north and central Vietnam”;
2. administrative centralization from the mainland that “facilitated and accompanied territorial consolidation”;
3. political integration in these early modern empires that “both encouraged and mirrored a long-term tendency, naturally more pronounced in the central lowlands than in upland areas or in

¹⁰⁵ M.B. Hooker, *A Concise Legal History of Southeast Asia* (Oxford University Press, Oxford, New York, 1978); see also Nicholas Tarling (ed), *The Cambridge History of Southeast Asia: From early times to c. 1500* (Cambridge University Press, United Kingdom, 1999).

¹⁰⁶ Barbara Watson Andaya, “Historicising ‘Modernity’ in Southeast Asia” (1997) *Journal of the Economic and Social History of the Orient*, Volume 40, No. 4, 391-409.

- distant vassal states, towards the acceptance of centrally-defined norms”; and
4. as religious/cultic practices and styles of imperial capitals set standards for local elites, “capital cultures adhered more closely to orthodox, textually-derived religious/cultic norms,” so much so that, for example, Burmese, Thai, Lao, Shan, and Cambodian courts would move “towards more self-consciously Theravada Buddhist modes of ceremonial, literary, legal, and monastic expression.”

A similar pattern would appear from the neo-Confucian revolution in Vietnam that accelerated or initiated “a trend towards the adoption of Chinese models of ritual, scholarship, law and literature.”¹⁰⁷

On the other hand, the pattern of political and cultural integration of archipelagic/sea-based Southeast Asian societies (present-day Malaysia, Singapore, Brunei, Indonesia, and the Philippines) has been characterized by:

1. the dramatic penetration of new religious systems (Islam and Christianity) that “segment[ed] a more or less fluid Southeast Asian cultural matrix into four mutually-exclusive zones [Neo-Confucianism, orthodox Theravada Buddhism, Islam and Christianity] that endure, with various permutations, to the present”;
2. fragmented and decentralized indigenous polities whose evolution was more susceptible to the influences of maritime commerce; and
3. apart from “novel religious expressions and circumscribed movements of territorial consolidation,” other stimuli to long-term integration would be similar as those that factored in the political-cultural integration of mainland Southeast Asian societies (e.g. growing maritime trade; the legitimizing prestige of imported religious systems; the centralizing potential of firearms; and the imperative of interstate competition).¹⁰⁸

Early modern Southeast Asian law would thus emerge from the heavy normative influence and infusion of Hindu, Islamic, and Chinese legal

¹⁰⁷ See Victor Lieberman, ‘Local Integration and Eurasian Analogies: Structuring Southeast Asian History, c. 1350 – c. 1830’, (1993) *Modern Asian Studies*, Volume 27, No. 3, 475-572.

¹⁰⁸ Id. at note 105. See also Craig J. Reynolds, ‘A New Look at Old Southeast Asia’ (1995) *The Journal of Asian Studies*, Volume 54, No. 2, 419-446.

traditions.¹⁰⁹ For Burma, Siam, Champa and Khmer, Hindu law provided rules on moral and social conduct traceable to the Code of Manu which “codified law in ten categories and solved disputes through collective decision-making (*mushawara-mufakat*), a process that remains one of the most important techniques of handling administrative affairs in modern Javanese society.”¹¹⁰ Buddhist kingdoms in Burma, Thailand, and Laos drew from Buddhist texts providing ethical rules of conduct through theistically-driven conceptions of obligation, as seen in the legal traditions contained in Burma’s *Dhammathat* and Thailand’s *Dhammasattham*. Ancient societies in Indonesia, Malaysia, and southern Philippines, and Brunei were governed by Islamic law, principally through the interrelated structures of the *Koran* and the *Shariah*. Chinese legal traditions that extended to Vietnam drew from the teachings of Confucianism.¹¹¹

Forms of Southeast Asian law would include:

1. written texts (Oriental laws that were Indian-derived, Islamic, or Chinese-derived; as well as Occidental laws from English, French, Dutch, and Spanish-American laws);
2. oral law (such as the “Burmese law tales, the Minangkabau *perbilangan*”, the Malay/Javanese *wayang* and the Thai *nang talung*);
3. law in social institutions (normative systems in the Indonesian *adat*, Malaya, Ifugao, and the Bahnar code); and
4. indigenous adaptations (the attempt “to make sense of the formal system in what is still largely a peasant world by adapting forms derived from the formal state system”).

Southeast Asian law’s “striking feature” would be its legal pluralism, where “status laws have been subsumed under or absorbed into the categories and processes of the introduced municipal law so as to produce a body of hybrid rules and principles.”¹¹²

¹⁰⁹ M.B. Hooker, *Laws of Southeast Asia: Volumes 1 and 2* (Butterworth Legal Publishers, Singapore, 1986-1988).

¹¹⁰ Graham Hassall and Cheryl Saunders, *Asia-Pacific Constitutional Systems* (Cambridge University Press, United Kingdom, 2002) 14-17.

¹¹¹ See Tony Day and Craig J. Reynolds, ‘Cosmologies, Truth Regimes, and the State in Southeast Asia’ (2000) *Modern Asian Studies*, Volume 34, No. 1, 1-55.

¹¹² M.B. Hooker, *A Concise Legal History of Southeast Asia* (Clarendon Press, Oxford, 1978), 1-14, at 9: “The Southeast Asian legal world is thus a world of conflict of laws. This was not always so: in the pre-European period there was a coexistence of legal ideas which occasionally resulted in a blend of principle; conflict was not inevitable. Even in the case of formally exclusive systems, such as Islamic

Relatively recent histories on Southeast Asian encounters with modernity take up the themes of:

1. the “reconstruction of Southeast Asian historical time through its history and biography”;
2. a deeper interrogation of “the dynamic interplay of colonial and local knowledge; the inventions of tradition, and the contested modernity within each”; and
3. the recognition that the “rediscovery of colonial history is also a re-examination of the nation.”¹¹³

These themes explain how the complex process of entrenchment of Euro-American colonial powers (France, Portugal, the United Kingdom, the Netherlands, Spain, and the United States) from the seventeenth (17th) to the nineteenth (19th) centuries would bear pervasive effects on Southeast Asian legal structures: “[i]n each colony, doctrines evolved to govern the new mix of Western and traditional law, and by the end of the colonial era, the forty states in Southeast Asia had shrunk to approximately ten.”¹¹⁴

Colonial authorities tended to delegate (some) administrative powers to the “co-opted local rulers”, transforming legal frameworks towards unequal relationships: “[m]atters of personal status were generally left in the realm of customary law, although individual rights and freedoms were considerably restrained by legal regimes designed to control and monitor rather than liberate and foster. Different laws applied to the indigenous population and the Europeans, and the unequal nature of these relationships planted the seeds of aspirations towards autonomy, nationalism and independence.”¹¹⁵

law, accommodations did take place.” See Richard A. Gard, ‘Ideological Problems in Southeast Asia’ (1953) *Philosophy East and West*, Volume 2, No. 4, 292-307.

¹¹³ T.N. Harper, ‘Asian Values and Southeast Asian Histories’ (1997) *The Historical Journal*, Volume 40, No. 2, 507-517. See also G. Carter Bentley, ‘Indigenous States of Southeast Asia’ (1986) *Annual Review of Anthropology*, Volume 15, 275-305.

¹¹⁴ Id. at note 106, at 19-21. Portuguese colonial enclaves were in Goa, Diu, Daman, Calicut, Colombo, Malacca, Macau, Java, the Moluccas, and Timor, with a lease relationship with China covering Macau; British colonies in Penang, Singapore, the Malay states, British Borneo and Burma, with a lease relationship with China covering Hong Kong; French holdings were Laos and Vietnam as regions of Indochina; and Spain held the Philippines until their cession of the territory to the United States in 1898.

¹¹⁵ Id. at note 106, at 27.

The common ‘hybridity’ of Southeast Asian legal systems (e.g. Euro-American legal conceptions existing alongside indigenous normative systems stretching back to ancient Hindu, Islamic, and Chinese legal traditions), and the consequent diversity of their ideological bases, would presage Southeast Asia’s transformation into a critical theatre for Cold War tensions.¹¹⁶ While newly-independent Southeast Asian states such as Indonesia would join South Asian countries (such as India) in strongly advocating the 1955 Bandung Conference’s Declaration of Principles, Southeast Asian states differed in the political basis and vision for implementing the Bandung principles. A scholar starkly describes how ten years after the Bandung Conference, Southeast Asia was on the precipice of open intra-regional hostilities:

Indonesia, under President Sukarno and Foreign Minister Subandrio, was outwardly very powerful, especially within the Non-Aligned Group, and was flirting with the Socialist countries. The PKI (Partai Komunis Indonesia) was the largest Communist party in the world outside of the USSR. An axis was formed linking together Pyong Yang (North Korea), Peking (China), Hanoi (North Vietnam), Phnom Penh (Cambodia), and Jakarta (Indonesia). At this juncture, the United Kingdom...decided to create Malaysia by adding the territories of Sarawak and Sabah to the Federation of Malaya. Malaysia was born as an extension of an existing state. Sukarno was not pleased with Greater Malaysia. As if to add insult to injury, the United Nations not only recognized Malaysia as successor State to the Malay Federation but also the new State was elected member to the Security Council. Subandrio adopted the policy of *Konfrontasi* or ‘Confrontation Against Malaysia’. Before the latter took its seat in the Security Council, Indonesia withdrew from the United Nations altogether and intensified her ‘Confrontation’ policy, opposing Malaysia’s admission to the Asian-African Conference in Algeria. Paratroopers were dropped inside Malaysian territory in Sarawak and Malacca, and there were sporadic disturbances in Singapore. xxx The Philippines also protested against the addition of Sabah to Malaysia as it had a long-standing claim traceable to the Sultanate of Sulu. The discord between the Philippines and Malaysia disrupted the progress of the ASA [Association of Southeast Asia] which during this critical period continued to subsist in a state of suspended animation.”¹¹⁷

¹¹⁶ See Paul Kelemen, ‘Southeast Asia Between the Superpowers’ (1981) *Economic and Political Weekly*, Volume 16, No. 37, 1503-1508;

¹¹⁷ Sompong Sucharitkul, ‘ASEAN Society, A Dynamic Experiment for Southeast Asian Regional Cooperation’ (1991) 1 *Asian Y.B. Int’l L.* 113-148, at 121.

Initial attempts at regional organization in Southeast Asia thus proved short-lived and ineffectual in resolving the security tensions arising from the *Konfrontasi* as well as related separatism issues within the region.¹¹⁸ The Southeast Asia Treaty Organization (SEATO), formed in 1954 under the influence of the United States (with the participation of Australia, Britain, France, New Zealand, Pakistan, the Philippines, Thailand, and the United States), was “more accurately described as part of the worldwide US-led system of anti-Communist military alliances, or security arrangements, than as a true Southeast Asian regional arrangement.” The Asian and Pacific Council (ASPAC), organized at the initiative of South Korea’s President Park Chung-hee in 1966, only had four Southeast Asian states as its members (Malaysia, the Philippines, South Vietnam, and Thailand), but it collapsed after seven years due to contradictory and/or conflicting objectives of being “non-military, non-ideological, and not anti-Communist” while resolved to “preserve their integrity and sovereignty in the face of external threats.”

From 1959-1961, then Prime Minister of Malaya Tunku Abdul Rahman would spearhead the creation of the Association of Southeast Asia (ASA) (composed only of then Malaya, the Philippines and Thailand), but this organization would suffer from hostilities between the Philippines and Malaya over the latter’s formation of the Federation of Malaysia, which included Philippine claims to Sabah. A similar fate would befall the Malaysia-Philippines-Indonesia Association (MAPHILINDO), established in 1963, but would become wholly ineffective upon the refusal of Indonesia and the Philippines to recognize the new Federation of Malaysia, and Indonesia’s subsequent guerrilla war against Malaysia (the *Konfrontasi*) that lasted until 1967.¹¹⁹

The regional political landscape would irrevocably change with the formation of the Association of Southeast Asian Nations (ASEAN). Indonesia, Malaysia, the Philippines, Singapore, and Thailand formed ASEAN through constitutive instruments such as the 1967 ASEAN (Bangkok) Declaration and the 1976 Treaty of Amity and Cooperation (TAC)

See Nicholas Tarling, *Regionalism in Southeast Asia: To Foster the Political Will* (Routledge, United Kingdom, 2006).

¹¹⁸ See David Brown, ‘From Peripheral Communities to Ethnic Nations: Separatism in Southeast Asia’ (1988) *Pacific Affairs*, Volume 61, No. 1, 51-77; Vincent K. Pollard, ‘ASA and ASEAN, 1961-1967: Southeast Asian Regionalism’ (1970) *Asian Survey*, Volume 10, No.3, 244-255.

¹¹⁹ Norman D. Palmer, *The New Regionalism in Asia and the Pacific* (Lexington Books, Canada, United States, 1991), 59-74.

in Southeast Asia.¹²⁰ Since 1967, ASEAN expanded its current membership to ten, including Brunei Darussalam, Vietnam, Laos, Myanmar, and Cambodia. Under the terms of the Bangkok Declaration, ASEAN was constituted as simply an “association for regional cooperation”, with the following core developmental and security objectives:

1. “accelerate economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of Southeast Asian Nations”;
2. “promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter”;
3. “promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields”;
4. “provide assistance to each other in the form of training and research facilities in the educational, professional, technical, and administrative spheres”;
5. “collaborate more effectively for the greater utilization of their agriculture and industries, the expansion of their trade, including the study of the problems of international commodity trade, the improvement of their transportation and communications facilities and the raising of the living standards of their peoples”;
6. “promote Southeast Asian studies”; and
7. “maintain close and beneficial cooperation with existing international and regional organizations with similar aims and purposes, and explore all avenues for even closer cooperation among themselves.”

To achieve these cooperative aims, the TAC strictly enjoins ASEAN member States to observe the fundamental principles of mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of the respective member states; freedom from external interference, subversion, or coercion; renunciation of the threat or use of force; and peaceful settlement of disputes.¹²¹

¹²⁰ See Treaty of Amity and Cooperation in Southeast Asia [hereafter, TAC], Indonesia, 24 February 1976 (*full text at* <http://www.aseansec.org/1217.htm> last visited 20 August 2008); ASEAN Declaration, Bangkok, Thailand, 8 August 1967 (*full text at* <http://www.aseansec.org/1212/htm> last visited 20 August 2008).

¹²¹ TAC, Articles 1 and 2.

As a regional organization, ASEAN's largest success to date has been the containment and/or prevention of intra-regional conflicts among its member States --- success largely attributed to its cooperative orientation (the "ASEAN Way") through processes of consultation, negotiation, and consensus (*mushawara* and *mufakat*). In the early years since its formation, ASEAN was "strictly a sub-regional organization of the free-market non-communist states of the region --- Indonesia, Malaysia, Singapore, the Philippines, and Thailand, with the addition of Brunei in 1984. The Communist Indochina states were excluded and contested ASEAN's right to shape regional order in a way that was manifest over the Cambodian issue. Second, ASEAN security perspectives were based upon Cold War realities that for Thailand, the Philippines, and Singapore included a reliance upon a US military presence in the region.

The nonaligned countries of ASEAN, Indonesia and Malaysia, formulated a basis for decoupling the region from superpower rivalry: the Zone of Peace, Freedom and Neutrality (ZOPFAN) or the Kuala Lumpur Declaration of November 1971.¹²² As a regional cooperation, ASEAN has operated under a highly decentralized structure, establishing key institutions for its various fields of cooperation.¹²³ As initially envisioned by ASEAN's founding members, ASEAN has promoted constructive political dialogue over the last four decades that has prevented the escalation of political tensions into armed conflict between ASEAN countries. In 1994, ASEAN established the ASEAN Regional Forum (ARF), which facilitates cooperation on political and security matters through confidence-building, "preventive diplomacy," and constructive dialogue with ASEAN political partners.¹²⁴ (Participants to the ARF include Australia, Brunei Darussalam, Cambodia, Canada, China, European Union, India, Indonesia, Japan, Democratic Republic of Korea, Republic of Korea (ROK), Lao PDR, Malaysia, Mongolia, Myanmar, New

¹²² Leszek Buszynski, 'Southeast Asia in the post-Cold War Era: Regionalism and Security' (1992) *Asian Survey*, Volume 32, No. 9, 830-847. See Nicholas Tarling, *Regionalism in Southeast Asia: To Foster the Political Will* (Routledge, United Kingdom, 2006).

¹²³ See Paul J. Davidson, *ASEAN: The Evolving legal Framework for Economic Cooperation* (Times Academic Press, Singapore, 2002); ASEAN Law Association, *ASEAN Legal Systems* (Butterworths Asia, 1995); Alan Khee-jin Tan, 'Recent Institutional Developments on the Environment in Southeast Asia – A Report Card on the Region' (2002) *Sing. J. Int'l & Comp. L.* 6, 891-908.

¹²⁴ See ARF overview at <http://www.aseanregionalforum.org/AboutUs/tabid/57/Default.aspx> (last visited 20 August 2007).

Zealand, Pakistan, Papua New Guinea, the Philippines, the Russian Federation, Singapore, Thailand, the United States, and Viet Nam.)

Issues foremost on the ARF's agenda are nuclear non-proliferation,¹²⁵ counter-terrorism, territorial disputes,¹²⁶ and transnational crime.¹²⁷ Finally, consistent with the "ASEAN Vision 2020" (which articulates member States' long-term objectives for the ASEAN)¹²⁸ regional cooperation is facilitated through three "communities:" the ASEAN Security Community, ASEAN Economic Community (which provides the venue for cooperation and dialogue in relation to the ASEAN Free Trade Area),¹²⁹ and the ASEAN Socio-Cultural Community.

After over forty years as an association for regional cooperation, ASEAN is poised to move towards greater regional integration, this time as a formal international organization with the ability to make decisions binding and enforceable upon all ASEAN member States. On November 20, 2007, all ten (10) ASEAN countries signed the Singapore Declaration on the ASEAN Charter, stating their resolve to "complete ratification by all Member Countries as soon as possible in order to bring the ASEAN Charter into force".¹³⁰

The signing of the Singapore Declaration followed swiftly after the ASEAN countries issued the 13 January 2007 Cebu Declaration on the

¹²⁵ See Zone of Peace, Freedom, and Neutrality Declaration, Kuala Lumpur, 27 November 1971.

Full text at: <http://www.aseansec.org/1215.htm> (last visited 18 August 2007); Treaty on the Southeast Asia Nuclear Weapon-Free Zone, Bangkok, Thailand, 15 December 1995. Full text at: <http://www.aseansec.org/2082.htm> (last visited 18 August 2007).

¹²⁶ See Declaration on the Conduct of Parties in the South China Sea, Phnom Penh, Cambodia, 4 November 2002.

¹²⁷ See *overview of ARF history and developments at* <http://www.aseansec.org/92.htm> (last visited 18 August 2007).

¹²⁸ Full text at: <http://www.aseansec.org/1814.htm> (last visited 18 August 2007).

¹²⁹ See Hanoi Plan of Action, Hanoi, Vietnam, 15 December 1988. Full text at: <http://www.aseansec.org/687.htm> (last visited 18 August 2007); Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area, Singapore, 28 January 1992. Full text at: <http://www.aseansec.org/1164.htm> (last visited 18 August 2007); Protocol to Amend the Framework Agreement on Enhancing ASEAN Economic Cooperation, Thailand, 15 December 1995. Full text at: <http://www.aseansec.org/2083.htm> (last visited 18 August 2007).

¹³⁰ Singapore Declaration on the ASEAN Charter, 20 November 2007.

Blueprint of the ASEAN Charter, noting that “ASEAN has matured into a regional organisation and is expanding its role as an integrated regional economy and a dynamic force in maintaining regional peace and stability as envisaged in the Declaration of ASEAN Concord II (Bali Concord II) and its plans of action, roadmaps, and the ASEAN Vision 2020 which envisions ASEAN as a concert of Southeast Asian nations, outward-looking, living in peace, stability and prosperity, bonded together in partnership in dynamic development and in a community of caring societies.”¹³¹ The move from regional cooperation to integration appears to have been largely motivated by Southeast Asia’s economic development over the last forty years within the framework of ASEAN cooperation.

As of April 2008, total ASEAN population stands at over 575 million, with an annual population growth of almost 2%. Overall GDP for the ASEAN region is now about US \$1.3 trillion per annum, under a 6.5% growth rate per annum. Total annual inter-ASEAN trade is at over US \$354 billion per annum, with a 14.7% growth rate in nominal value of total trade. Total annual ASEAN trade with non-ASEAN countries (including other regional economic groupings) is nearly US\$ 1.1 trillion per annum, accounting for 74.9% of ASEAN countries’ total trade volumes.¹³² To date, seven (7) out of the ten (10) ASEAN countries have completed their respective domestic ratification processes on the ASEAN Charter: Singapore, Brunei Darussalam, Malaysia, Laos, Vietnam, and Cambodia. The ASEAN Charter will enter into force on the thirtieth day following the date of deposit of the tenth instrument of ratification with the ASEAN Secretary-General.¹³³

At the time of its creation, ASEAN’s international legal personality was thus “relative” or “subjective”,¹³⁴ being attributable to the express recognition of its member States under the framework of the TAC and the Bangkok Declaration. ASEAN actions under its cooperative framework are generally undertaken through a consensus-building process, which has subjected ASEAN to international observers’ criticisms of organizational impotence against human rights violations of ASEAN member countries, most recently Myanmar. Against these criticisms, however, ASEAN has stood by its policy of ‘constructive engagement’ and ‘preventive diplomacy’

¹³¹ Cebu Declaration on the Blueprint of the ASEAN Charter, 13 January 2007.

¹³² Latest macroeconomic indicators from <http://www.aseansec.org> (last visited 28 May 2008).

¹³³ ASEAN Charter, Chapter XIII, Article 47(4).

¹³⁴ CASANOVAS, ORIOL. *UNITY AND PLURALISM IN PUBLIC INTERNATIONAL LAW*. (Martinus Nijhoff Publishers, 2001), at pp. 124-125.

to encourage members to embrace democratic principles and widen democratic spaces.¹³⁵

The signing and ongoing ratification process of the ASEAN Charter institutionalizes ASEAN's Vision 2020. In 1997, ASEAN member countries anchored ASEAN Vision 2020 on two (2) platforms: 1) closer economic integration with the free flow of goods, capital, services, and investments among ASEAN countries; and 2) an increasingly unified ASEAN identity under institutions that promote ASEAN regional political, social, and security interests towards compliance with the international legal order.¹³⁶ Pursuant to this vision, ASEAN leaders resolved in 2003 to facilitate creation of the ASEAN Community through three "pillar communities": the ASEAN Security Community, ASEAN Economic Community (which provides the venue for cooperation and dialogue in relation to the ASEAN Free Trade Area),¹³⁷ and the ASEAN Socio-Cultural Community.

The ASEAN Charter, however, marks a distinct culmination of the forty-year cooperative relationship between the ASEAN member countries. As stressed by Philippine Ambassador Rosario Manalo, the Chairperson of the High-Level Task Group that drafted the ASEAN Charter, ASEAN would be transformed from a regional cooperation to a "rules-based organization with legal personality", which could "sue and be sued".¹³⁸ Briefly, the important features of the ASEAN Charter are the following:

- Conferral of Legal Personality on ASEAN;¹³⁹

¹³⁵ "ASEAN to Pursue Constructive Engagement With Myanmar after Power Struggle", October 25, 2004, at <http://www.aseansec.org/afp/78.htm> (last visited 28 May 2008).

¹³⁶ Full text at: <http://www.aseansec.org/1814.htm> (last visited 18 August 2007).

¹³⁷ Hanoi Plan of Action, Hanoi, Vietnam, 15 December 1988. Full text at: <http://www.aseansec.org/687.htm> (last visited 18 August 2007); Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area, Singapore, 28 January 1992. Full text at: <http://www.aseansec.org/1164.htm> (last visited 18 August 2007); Protocol to Amend the Framework Agreement on Enhancing ASEAN Economic Cooperation, Thailand, 15 December 1995. Full text at: <http://www.aseansec.org/2083.htm> (last visited 18 August 2007).

¹³⁸ "Draft ASEAN Charter calls for human rights body, upholds noninterference policy", The Associated Press, November 8, 2007, at <http://www.iht.com/articles/ap/2007/11/09/asia/AS-GEN-ASEAN-Charter.php> (last visited 28 May 2008).

¹³⁹ ASEAN Charter, Chapter II, Article 3.

- Expansion of Organizational Purposes to include Strengthening Democracy, Promoting Rule of Law, and Protection of Human Rights and Fundamental Freedoms;¹⁴⁰
- General Obligation of ASEAN member States to abide by Organizational Principles such as “adherence to the rule of law, good governance, the principles of democracy and constitutional government”, as well as “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice”;¹⁴¹
- General Obligation of ASEAN member States to abide by Organizational Principles that affirm adherence to rules of the international legal order, such as “the United Nations Charter and international law, including international humanitarian law”, the principle of non-intervention, and all multilateral trade rules, emphasizing “respect for the different cultures, languages, and religions of peoples of the ASEAN” given their “common values in the spirit of unity in diversity”;¹⁴²
- Organizational structure and institutions with the following key powers and functions:
 1. ASEAN Summit¹⁴³ (composed of the Heads of State of the Member States), which functions as the “supreme policy-making body of ASEAN”, with powers to “deliberate, provide policy guidance and take decisions on key issues pertaining to the realization of ASEAN objectives”, including “taking appropriate actions” in “emergency situations”. While decision-making remains primarily based on consultation and consensus, if consensus cannot be achieved, the ASEAN Summit may “decide how a specific decision can be made”. The ASEAN Summit shall also decide over serious breaches of the ASEAN Charter.
 2. ASEAN Coordinating Council¹⁴⁴ (composed of Foreign Ministers of the Member States), which coordinates the implementation of agreements and decisions of the ASEAN Summit.

¹⁴⁰ ASEAN Charter, Chapter I, Article 1(7).

¹⁴¹ ASEAN Charter, Chapter 1, Articles 2(2h) and 2(2i).

¹⁴² ASEAN Charter, Chapter 1, Articles 2(2j), 2(2k), 2(2l), 2(2m), 2(2n).

¹⁴³ ASEAN Charter, Chapter IV, Article 7, and Chapter VII, Article 20.

¹⁴⁴ ASEAN Charter, Chapter IV, Article 8.

3. ASEAN Community Councils¹⁴⁵ (composed of the ASEAN Political –Security Community Council, ASEAN Economic Community Council, and ASEAN Socio-Cultural Community Council), which continues the work of the ASEAN pillar communities and submits recommendations and reports to the ASEAN Summit for decision.
 4. ASEAN Sectoral Ministerial Bodies, the ASEAN Secretary-General, the ASEAN Secretariat, Committee of Permanent Representatives, National Secretariats, and the ASEAN Foundation,¹⁴⁶ which collectively coordinate report gathering throughout ASEAN’s operational functions, for formulation of recommendations for ASEAN policy making.
 5. ASEAN Human Rights Body,¹⁴⁷ an institution established in ‘conformity with the purposes and principles of the ASEAN Charter relating to the protection and promotion of human rights’, and whose terms of reference are still to be determined at the next ASEAN Foreign Ministers Meeting.
- Specific Obligations of ASEAN Member States to “take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of the Charter and to comply with all obligations of membership”, and to peacefully resolve and settle disputes pursuant to the ASEAN dispute settlement mechanisms, without prejudice to future recourse to dispute settlement mechanisms to which ASEAN Member States are parties.¹⁴⁸

The passage of the ASEAN Charter (and its ongoing ratification process) signals three important developments for the integration of the Southeast Asian region:

1. a region-wide commitment to international law, or the rules of the international public order;
2. institutional and Member-State accountability as a platform for compliance; and
3. respect for political pluralism under a common conception of shared values.

¹⁴⁵ ASEAN Charter, Chapter IV, Article 9.

¹⁴⁶ ASEAN Charter, Chapter IV, Articles 10, 11, 12, 13, 15.

¹⁴⁷ ASEAN Charter, Chapter IV, Article 14.

¹⁴⁸ ASEAN Charter, Chapter III, Article 5(2), Chapter VIII, Articles 23-28.

When all ASEAN member countries signed the ASEAN Charter without qualification, they likewise undertook not to take any action that would ‘defeat the object and purposes’ of the Charter.¹⁴⁹ ASEAN Member States whose ratification of the ASEAN Charter remains pending (e.g. the Philippines, Myanmar, Thailand, Indonesia) should therefore be seen as just as bound as other Member States who have ratified the Charter (e.g. Singapore, Brunei, Malaysia, Laos, Vietnam, Cambodia) to observe the key ASEAN Organizational Purposes of ‘strengthening democracy, promoting rule of law, and protecting human rights and fundamental freedoms’, along with the United Nations Charter, international law, international humanitarian law.

This region-wide commitment builds on a forty-year history of independent practice and/or *opinio juris* on universal human rights norms by Southeast Asian states. The majority, if not all of its member States, have in recent years either signed, ratified, or acceded to the fundamental treaties and conventions codifying the ‘core’ human rights norms on civil and political rights and the jus cogens prohibitions against torture, crimes against humanity, slavery, genocide, racial discrimination, and other egregious human rights violations.¹⁵⁰ Vietnam, Cambodia, Laos, and the Philippines, have already ratified the Apartheid Convention. All ASEAN member States have ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). Cambodia, Indonesia, Laos, the Philippines, Thailand, and Vietnam have all ratified the Convention on the Elimination of Racial Discrimination (CERD). Cambodia, Laos, Malaysia, Myanmar, the Philippines, Singapore, and Vietnam have likewise ratified the Genocide Convention. The ICCPR has been ratified by Cambodia, Indonesia, Laos, the Philippines, Thailand, and Vietnam.

In the last decade, the Torture Convention has been ratified by Indonesia and the Philippines. The strong cultural relativist positions of some ASEAN Member States (such as Singapore and Malaysia in 1993 during the Vienna Conference on Human Rights) could thus be deemed to have been rendered obsolete by the ASEAN Member States’ own practice (albeit imperfect), treaty ratification record, and the passage of the ASEAN Charter. Indeed, even the Vienna Declaration which explicitly rejected

¹⁴⁹ Vienna Convention on the Law of Treaties, Article 18(1).

¹⁵⁰ See <http://www.unhcr.org> (last visited 18 August 2007) for the status of ASEAN member states’ signatures, ratifications, accessions to the ‘core’ human rights treaties on civil and political rights.

cultural exceptionalism to observance of human rights, was passed with the affirmative votes of the very same Asian states that registered cultural relativist objections.¹⁵¹ The same degree of commitment extends to abiding by multilateral trading rules.

Prior to the passage of the ASEAN Charter, ASEAN Member States had to conduct their own national review, analysis, and monitoring to ascertain compliance with the rules of origin and the Common Effective Preferential Tariff (CEPT) scheme, with no legally binding authority to resolve disputes among ASEAN members.¹⁵² ASEAN members have agreed to uniformly impose zero tariffs on generally all imports between ASEAN members by 2010 (2015 for Cambodia, Laos, Myanmar, and Vietnam). With the signing of the ASEAN Charter, all Member States have assumed the obligation not to defeat its purposes, one of which is adherence to multilateral trading rules. This implies that ASEAN Member States' national implementation of the ASEAN Free Trade Area rules (pending entry into force of the ASEAN Charter and the activation of its institutions of governance) should still strictly comply with all multilateral trading rules. There should be little doubt that ASEAN and its Member States are bound and committed to the rules of international public order. Exceptionalist positions have been substantially eroded with the signing (and impending entry into force) of the ASEAN Charter.

The crux of international criticism against ASEAN prior to the passage of the ASEAN Charter was its organizational 'ineffectiveness' due to the consensus-requirement for decision-making. ASEAN's "silences" and "omissions" in recognition and enforcement of international human rights norms on civil and political rights have been attributed to the difficulty of achieving a consensus, and ASEAN's strong emphasis on the fundamental

¹⁵¹ See Vienna Declaration and Programme of Action, 5, U.N. Doc. A/CONF.157/23. Full text at: <http://www.ohchr.org/english/law/vienna.htm> (last visited 23 August 2007); UNESCO Universal Declaration on Cultural Diversity, Articles 2, 4, and 5.

¹⁵² Under the CEPT scheme, the ASEAN Free Trade Area does not apply a common external tariff on imported goods. ASEAN members can apply a tariff rate of 0 to 5 percent on goods originating within ASEAN, while they can impose tariffs based on their **national** schedules for goods entering outside of ASEAN. Exclusions from the CEPT scheme are optional upon ASEAN members for temporary exclusions, sensitive agricultural products, and some general exceptions. See <http://www.aseansec.org> (last visited 28 May 2008).

principles of sovereignty and non-interference.¹⁵³ The ASEAN Charter departs from ASEAN's present voluntarist model of international personality by expressly conferring ASEAN with "legal personality" as an "inter-governmental organization",¹⁵⁴ and enjoying functional immunities and privileges "necessary for the fulfilment of [the] purposes"¹⁵⁵ of the organization.

The hortatory provisions in the Preamble of the ASEAN Charter widen ASEAN's orientation from political-economic cooperation towards "adherence to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms".¹⁵⁶ Thus, while the ASEAN Charter affirms the fundamental principles in the TAC, the Bangkok Declaration, and other treaties, declarations, agreements, and international instruments annexed to the Charter, the ASEAN Charter introduces a novel clause by making "respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice",¹⁵⁷ and "adherence to the rule of law, good governance, the principles of democracy and constitutional government"¹⁵⁸ key principles to govern the conduct of ASEAN and its member States.

In relation to these broader purposes and principles of conduct, member States are expressly obligated to "take all necessary measures to effectively comply with all obligations, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of membership."¹⁵⁹ Most importantly, the ASEAN Charter appears to dilute the consensus requirement in decision-making. While the Charter states that "[a]s a basic principle, decision-making in ASEAN shall be based on consultation and consensus",¹⁶⁰ the failure to achieve a consensus will vest the ASEAN Summit with the

¹⁵³ Thio, Li-ann. "Implementing Human Rights in ASEAN Countries: 'Promises to Keep and Miles to Go Before I Sleep'", 2 *Yale Hum. Rts. & Dev. L.J.* 1 (1999).

¹⁵⁴ ASEAN Charter, Chapter II (Legal Personality), Article 3.

¹⁵⁵ ASEAN Charter, Chapter VI, Article 17. Chapter VI, Article 19(2) also provides that "the conditions of immunities and privileges of the Permanent Representatives and officials on ASEAN duties shall be governed by the 1961 Vienna Convention on Diplomatic Relations or in accordance with the national law of the ASEAN State concerned."

¹⁵⁶ Preamble to the ASEAN Charter, Seventh Clause.

¹⁵⁷ ASEAN Charter, Chapter I, Article 2 (Principles), Section 2(i).

¹⁵⁸ ASEAN Charter, Chapter I, Article 2 (Principles), Section 2(h).

¹⁵⁹ ASEAN Charter, Chapter III (Membership), Article 5(2).

¹⁶⁰ ASEAN Charter, Chapter VII (Decision-Making), Article 20(1).

authority to “decide how a specific decision can be made”, a mechanism by which the ASEAN Summit can opt out of the consensus requirement on a case to case basis.¹⁶¹

It would appear, therefore, that the “new” ASEAN contemplated in the ASEAN Charter bears an “objective” legal personality since the organization’s existence arises from the satisfaction of international legal requirements for ‘organizationhood’:

1. the possession of the organization’s own “distinct will” apart from that of its members, evidenced by the organization’s power to take binding decisions upon the entire membership through the vote of a mere majority of its members;
2. the presence of organs bearing special tasks, defining the position of members in relation to the Organization; and
3. the grant of legal capacity, privileges, and immunities to the Organization in the territory of each of its member States.¹⁶²

ASEAN’s acquisition of an “objective” legal personality under the ASEAN Charter (in addition to its “relative” or “subjective” legal personality conferred by its membership under the present framework of the TAC and the Bangkok Declaration) has implications for its responsibility as an international organization, and for the ‘residuary’ responsibility of its member States, to third parties. If ASEAN under the ASEAN Charter were to be viewed as a “distinct legal entity from its member-states”, it would be difficult to attribute responsibility *per se* to its Member States for acts ascribed to or authored by ASEAN. However, if Member States’ residuary responsibility to third parties is to be affirmed even under the ‘new’ ASEAN, the process will likely take the shape of either: 1) “**secondary member-state responsibility**”, where the third party must first present its claim to ASEAN, and recourse to the Member States would be had only if ASEAN is in default in providing an adequate remedy; or 2) “**indirect responsibility**”, where Member States are deemed *a priori* responsible to the organization to meet its obligations towards third parties.¹⁶³

¹⁶¹ ASEAN Charter, Chapter VII, Article 20(2).

¹⁶² KLABBERS, JAN. AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW. (Cambridge University Press, 2002), at pp. 54-57. *See also* Reparation of Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949, p. 178-179, and 185.

¹⁶³ KLABBERS, at pp. 311-312.

In any event, while institutional change does not guarantee international compliance, what is deeply significant for the Southeast Asian region is its Member-States commitment to accountability. After over forty (40) years of (generally) informal and non-binding cooperative measures and voluntarist actions and initiatives by ASEAN member-States, the commitment to institutional and membership accountability under the ASEAN Charter is still a positive step towards achieving regional compliance with international law.