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## **Asia's Ambivalence About International Law & Institutions: Past, Present, and Futures**

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# Asia's Ambivalence About International Law & Institutions: Past, Present, and Futures

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## ABSTRACT

Asian states are the least likely of any regional grouping to be party to most international obligations or to have representation reflecting their number and size in international organizations. This is despite the fact that Asian states have arguably benefited the most from the security and economic dividends provided by international law and institutions. The article explores the reasons for Asia's under-participation and under-representation. Part I traces the history of Asia's engagement with international law. Part II assesses Asia's current engagement with international law and institutions, examining whether its under-participation and under-representation is in fact significant and how it might be explained. Part III considers possible future developments based on three different scenarios, referred to here as status quo, divergence, and convergence.

Keywords: International law, International organization, Asia, Regional Integration, Dispute Resolution, ASEAN, Colonialism

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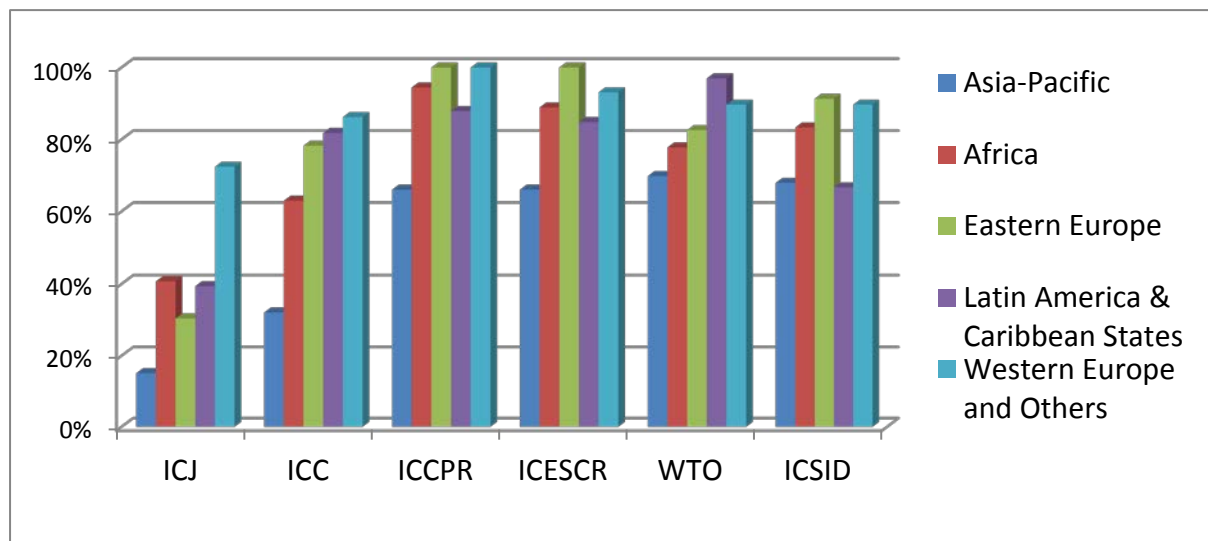
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## Introduction

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It is a paradox of the current international order that Asia — the most populous and economically dynamic region on the planet — arguably benefits most from the security and economic dividends provided by international law and institutions and yet is the wariest about embracing those rules and structures. Asian states are the least likely of any regional grouping to be party to most international obligations or to have representation reflecting their number and size in international organizations. There is no regional framework comparable to the African Union, the Organization of American States, or the European Union; in the United Nations, the Asia-Pacific Group of 53 states rarely adopts common positions on issues and discusses only candidacies for international posts. Such sub-regional groupings that exist within Asia have tended to coalesce around narrowly shared national interests rather than shared identity or aspirations.

In part this is due to the diversity of the continent. Indeed, the very concept of ‘Asia’ derives from a term used in Ancient Greece rather than any indigenous political or historic roots.<sup>1</sup> Regional cohesion is further complicated by the need to accommodate the great power interests of India, China, and Japan. But the limited nature of regional bodies is also consistent with a general wariness of delegating sovereignty. Asian countries, for example, have by far the lowest rate of acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ) and membership of the International Criminal Court (ICC); they are also least likely to have signed conventions such as the International Covenant on Civil and Political Rights (ICCPR) or the International Covenant on Economic, Social and Cultural Rights (ICESCR), or to have joined the World Trade Organization (WTO). The proportion of Asian states that are contracting parties to the International Centre for Settlement of Investment Disputes (ICSID) is also the lowest of any region — though on that they are tied with Latin America.



**Figure 1 – Percentage of states participating in certain international institutions by UN regional groupings (Dec. 2014)**

This article explores the reasons for Asia’s under-participation and under-representation in international law and institutions. Part I traces the history of Asia’s engagement with international law. The focus will be on three aspects that continue to have resonance today. First and foremost is the experience of colonialism by India and many other countries across

<sup>1</sup> For present purposes, the 53 members of the Asia-Pacific Group at the United Nations will be used unless otherwise indicated.

the continent; for centuries international law helped justify foreign rule, later establishing arbitrary standards of ‘civilization’ that were required in order to gain meaningful independence. Secondly, and more specific to China, the unequal treaties of the nineteenth century and the failure to recognize the People’s Republic of China for much of the twentieth encouraged a perception that international law was primarily an instrument of political power. Thirdly, and of particular relevance to Japan, the trials that followed the Second World War left a legacy of suspicion that international criminal law only dealt selectively with alleged misconduct — while also leaving unresolved many of the larger political challenges of that conflict with ongoing ramifications today.

Part II assesses Asia’s current engagement with international law and institutions, examining whether its under-participation and under-representation is in fact significant. As will be shown, Asia’s history offers at best a partial explanation of the current situation. The ongoing ambivalence towards international law and institutions can also be attributed to the diversity of the continent, the power disparities among its member states, and the absence of ‘push’ factors driving greater integration or organization. Finally, Part III attempts to project possible future developments based on three different scenarios. These are referred to here as status quo, divergence, and convergence. There is pressure to change the status quo, but evidence of genuine divergence is weak. More likely is an adaptation of existing legal structures to embrace the rising political and economic significance of Asia.

## **I. Past**

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### **A. India and the Legacy of Colonialism**

In February of 1788, the Irish statesman and philosopher Edmund Burke commenced impeachment proceedings against Warren Hastings for abuses during his term as the first Governor-General of India. Among other things, Hastings had overseen a vigorous expansion of British rule that advanced the interests of the East India Company in a manner that would have been completely unacceptable in Europe. The charges against Hastings included corruption, arbitrary exercise of power, and behaving in the manner of a ‘despotic

prince'.<sup>2</sup> Four days into the trial, Burke enjoined the House of Lords to show Hastings that 'in Asia, as well as in Europe, the same law of nations prevails; the same principles are continually resorted to; and the same maxims sacredly held and strenuously maintained ... Asia is enlightened in that respect as well as Europe.'<sup>3</sup> The impeachment of Hastings dragged on for seven years until his eventual acquittal by the House of Lords. It might at least have had the effect of ruining him financially, but the East India Company helpfully assisted in the final stages of the trial and later gave Hastings a pension for life.<sup>4</sup>

Burke's enthusiasm for the universality of the law of nations was atypical for his time. Far more common was the position of Jean-Jacques Rousseau: 'There is for nations, as for men, a period of youth, or, shall we say, maturity, before which they should not be made subject to laws'.<sup>5</sup> A century later, John Stuart Mill argued similarly that 'To characterize any conduct whatever towards a barbarous people as a violation of the law of nations, only shows that he who so speaks has never considered the subject.'<sup>6</sup>

For the most part, international law in that period was invoked to justify or defend empire. Indeed, as Antony Anghie has argued, the imperial project was not merely a foil for international lawyers: it played a central role in the construction of modern international law as we now understand the discipline.<sup>7</sup> The exclusion of non-European states from full participation in international law was justified variously by reference to culture, religion, and biology. Much of this history can be explained by racism or *realpolitik*. But even among *bien pensant* international lawyers, the standard of 'civilization' was invoked to exclude the peoples of Africa, Asia, the Americas, and the Pacific from the sovereignty enjoyed by their

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<sup>2</sup> 1 Edmund Burke, *The Speeches of the Right Honourable Edmund Burke on the Impeachment of Warren Hastings* (1877), vol 1, at 98.

<sup>3</sup> *Id.* at 120-21.

<sup>4</sup> See generally Patrick Turnbull, *Warren Hastings* (1975). cf. Piyush Kumar Tiwari, 'The East India Company and Criminal Justice: The Role of Orientalists', 3(4) *International Journal of Humanities and Social Science Invention* (2014) 59 (describing Hastings' efforts to develop the rule of law in India).

<sup>5</sup> Jean-Jacques Rousseau, *The Social Contract* ([1762] 1923), bk. II, ch. 8.

<sup>6</sup> J.S. Mill, 'A Few Words on Non-Intervention (reprinted from Fraser's Magazine, December 1859)', in J. S. Mill ed. *Dissertations and Discussions: Political, Philosophical, and Historical* (2nd ed. 1875) vol 3, 153,. See Jennifer Pitts, 'Boundaries of Victorian International Law', in Duncan Bell ed. *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought* (2007)67,.

<sup>7</sup> Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005).

European counterparts — and then to incorporate them into a system that had been designed by and for European interests.<sup>8</sup> Indeed, the very name of that system — Westphalian — speaks to the origins of modern international law in the settlement of a seventeenth century dispute in Europe.<sup>9</sup>

There were, to be sure, exceptions. As one nineteenth century writer wryly noted, the standard of ‘civilization’ was applied inconsistently by his contemporaries. One seemed to confine it to ‘nations which study Latin’, another to those countries with ‘fire-arms and the printing press’, while a third suggested a quantitative approach based on ‘miles of electric telegraph and the largest quantity of daily newspapers.’<sup>10</sup> Nevertheless, the dominant discourse was a European project of excluding the ‘other’, followed by a ‘civilizing mission’ intended to make the other more like the self.<sup>11</sup> After the Ottoman Empire was admitted into the Concert of Europe through the 1856 Treaty of Paris, for example, its precise legal status remained the subject of lively debate at the Institute for International Law two decades later. This included the distribution of a questionnaire inquiring of diplomats as to whether the differences of Oriental nations were so great as to preclude them entering into ‘the general community of international law’.<sup>12</sup> Within Asia, this exacerbated tensions between Japan and China as the former successfully sought to be admitted into the company of the ‘civilized’ in the course of the nineteenth century<sup>13</sup> — arguably at the expense of the latter.<sup>14</sup> Suzuki Shogo goes further to suggest that Japan’s imperialist

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<sup>8</sup> *Id.* at 310-18. For example, William Edward Hall, writing in the late nineteenth century, argued that it was ‘scarcely necessary to point out that as international law is a product of the special civilisation of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognised by countries differently civilised, such states only can be presumed to be subject to it as are inheritors of that civilisation’: William Edward Hall, *Treatise on International Law* (3rd ed., 1890), at 42. See generally Gerrit W. Gong, *The Standard of ‘Civilization’ in International Society* (1984).

<sup>9</sup> See, e.g., Leo Gross, ‘The Peace of Westphalia’, 42 *American Journal of International Law* (1948) 20.

<sup>10</sup> Hon. Henry Stanley, *The East and the West: Our Dealings with Neighbours* (1865), at 117.

<sup>11</sup> cf. Edward W. Said, *Orientalism* (1978).

<sup>12</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2001), at 132-36; Pitts, *supra* note 6, at 75.

<sup>13</sup> Hence Oppenheim could declare in 1905 that ‘In Asia only Japan is a full and real member of the Family of Nations, Persia, Korea, China, Siam and Tibet are, for some parts, only within that Family.’ 1 Lassa Francis Lawrence Oppenheim, *International Law* (1912), vol 1, at 164. cf. Gong, *supra* note 8, at 146-47.

<sup>14</sup> See Junnan Lai, ‘Sovereignty and “Civilization”: International Law and East Asia in the Nineteenth Century’, 40(3) *Modern China* (2014) 282; Eric Yong-Joong Lee, ‘Early Development of Modern International Law in East Asia — With Special Reference to China, Japan, and Korea’, 4 *Journal of the History of International Law* (2002) 42.

behaviour towards its neighbours can be understood partly because it ‘saw the adoption of coercive policies towards “uncivilized” states as an inherent part of a “civilized” state’s identity’.<sup>15</sup> That goes too far, but Japan’s acceptance by the West was clearly linked to its military prowess. As one Japanese diplomat was said to have observed in the early twentieth century to a European counterpart: ‘We show ourselves at least your equals in scientific butchery, and at once we are admitted to your council tables as civilized men.’<sup>16</sup>

In the course of the twentieth century, the civilizing mission adopted a more progressivist narrative. The Mandates System of the League of Nations sought explicitly to take up the ‘sacred trust’ of governing those who were ‘not yet able to stand by themselves under the strenuous conditions of the modern world’; ‘tutelage’ of such peoples was to be ‘entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility’.<sup>17</sup> It bears noting, of course, that the trajectory towards independence was confined to the more ‘advanced’ colonies — and only to the advanced colonies of the powers that happened to be defeated in the First World War.<sup>18</sup>

The United Nations, for its part, ultimately became a vehicle for decolonization on a global scale. Yet it is clear from the Charter that its rhetorical embrace of self-determination<sup>19</sup> was not intended to amount to a right of independence for the one-third of humanity that did not govern themselves when the document was first signed. As British Prime Minister Winston Churchill declared in a speech to Parliament during the negotiations over the Charter, ‘I have not become the King’s First Minister in order to preside over the liquidation of the British Empire.’<sup>20</sup> The compromise that was reached is reflected in distinct chapters of

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<sup>15</sup> SUZUKI Shogo, ‘Japan’s Socialization into Janus-Faced European International Society’, 11(1) *European Journal of International Relations* (2005) 137, at 139. But cf. OWADA Hisashi, ‘Asia and International Law’, 1(1) *Asian Journal of International Law* (2011) 3, at 8-9 (describing the ‘spiritual agony’ Japan faced in this period).

<sup>16</sup> B.V.A. Röling, *International Law in an Expanded World* (1960), at 27, quoting H. Roos, *Japan in den grooten Oceaan* (1928), at 33. See also M. Sornarajah, ‘Power and Justice in International Law’, 1 *Singapore Journal of International & Comparative Law* (1997) 28, at 31.

<sup>17</sup> Covenant of the League of Nations, done at Paris, 28 June 1919 (in force 10 January 1920), art. 22.

<sup>18</sup> See generally Simon Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building* (2004), at 13-18.

<sup>19</sup> UN Charter, arts. 1(2), 55.

<sup>20</sup> Martin Gilbert, *Winston S. Churchill, Volume 7: Road to Victory, 1941-1945* (1986), at 254.



the Charter: the colonies of the defeated powers and the existing League Mandates were placed under the new Trusteeship Council in Chapter XII; other non-self-governing territories were to be subjected to a more vague system of obligations in Chapter XI.<sup>21</sup> Despite such misgivings, the United Nations and international law did play an important role in the dismantling of the colonial structures, accelerating as the former colonies assumed a numerical majority in the General Assembly and the 'principle of' self-determination was replaced by a 'right to' self-determination.<sup>22</sup>

The intention here is not to attempt to provide a full history of the legacy of colonialism.<sup>23</sup> Rather it is to make two observations that continue to affect attitudes towards international law in Asia in particular.

First, the vast majority of Asian states literally did not participate in the negotiation of most of the agreements that define the modern international order. At the Hague Peace Conferences of 1899 & 1907, for example, there were only four Asian countries present (China, Iran, Japan, and Siam [Thailand]) out of 26 and 43 participants respectively.<sup>24</sup> When the Covenant of the League of Nations was signed in 1919, only four of the 27 original members were from Asia (China, Hedjaz [Saudi Arabia], Japan, and Siam [Thailand]).<sup>25</sup> At the Bretton Woods Conference in 1944, which established the World Bank and the International Monetary Fund, only five of the 44 signatories were Asian (China, India, Iran, Iraq, and the Philippine Commonwealth).<sup>26</sup> As for the United Nations itself, only eight of the 51 original

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<sup>21</sup> Chesterman, *supra* note 18, at 37-44.

<sup>22</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514 (XV) (1960).

<sup>23</sup> See, e.g., F.D. Lugard, *The Dual Mandate in British Tropical Africa* (3rd ed., 1926); David Kenneth Fieldhouse, *The Colonial Empires: A Comparative Survey from the Eighteenth Century* (1966); Sydney Smith Bell, *Colonial Administration of Great Britain* ([1859] 1970); Mark A. Burkholder (ed.) *Administrators of Empire* (1998); A.J.R. Russell-Wood (ed.) *Government and Governance of European Empires: 1450-1800* (2000).

<sup>24</sup> Final Act of the International Peace Conference, done at The Hague, 29 July 1899, at [http://www.icrc.org/Final Act of the Second Peace Conference](http://www.icrc.org/FinalActoftheSecondPeaceConference), done at The Hague, 18 October 1907, at <http://www.icrc.org>. See also Arthur Eyffinger, 'Caught Between Tradition and Modernity: East Asia at The Hague Peace Conferences', 1 *Journal of East Asia and International Law* (2008) 7.

<sup>25</sup> Covenant of the League of Nations, *supra* note 17.

<sup>26</sup> International Bank for Reconstruction and Development (World Bank) Articles of Agreement, done at Bretton Woods, NH, 22 July 1944 (in force 27 December 1945), at [http://siteresources.worldbank.org/EXTABOUTUS/Resources/IBRDArticlesOfAgreement\\_links.pdf](http://siteresources.worldbank.org/EXTABOUTUS/Resources/IBRDArticlesOfAgreement_links.pdf); Articles of Agreement of the International Monetary Fund, done at Bretton Woods, NH, 22 July 1944 (in force 27 December 1945), at <http://www.imf.org/external/pubs/ft/aa>.

members were from Asia (China, India, Iran, Iraq, Lebanon, Philippine Commonwealth, Saudi Arabia, and Syria).<sup>27</sup>

Secondly, when they became independent, Asian states were expected to embrace not only the various treaty obligations but also the structures and forms of international law.<sup>28</sup> Though Christian Tomuschat is correct to note that colonialism is now largely a relic of the past, it is surely an overstatement to conclude, therefore, that colonialism is essentially irrelevant to the contemporary international order.<sup>29</sup>

These observations are not unique to Asia, of course. Indeed, one could make a compelling case that the disenfranchisement of African states during these formative periods of international law was far greater: there were no African representatives at all at the Hague Peace Conferences, only South Africa and Liberia signed the Covenant of the League of Nations, and only four African states (South Africa, Liberia, Egypt and Ethiopia) were involved in the Bretton Woods Conference and the drafting of the UN Charter.<sup>30</sup>

Yet, as will be discussed in Part II, the situation of Asia is unique in that the states of the region have a majority of the world's population, the largest share of its landmass, and are projected to overtake Europe and North America in economic output in the coming decades. For such a region to be predominantly a 'rule-taker' is a problem that scholars have been trying to explain for some time.<sup>31</sup> In particular, there does not appear to be a comparable example of a great power (or multiple powers) rising within a normative framework not of its own making, where that normative framework has not undergone

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<sup>27</sup> Charter of the United Nations. See A.K. Brohi, 'Five Lectures on Asia and the United Nations', 102 *Collected Courses of the Hague Academy of International Law* (1961) 121, at 128.

<sup>28</sup> KO Swan Sik, 'Wang Tiewa and International Law in Asia', 4 *Journal of the History of International Law* (2002) 159. cf. Prasenjit Duara, *Sovereignty and Authenticity: Manchukuo and the East Asian Modern* (2003).

<sup>29</sup> Christian Tomuschat, 'Asia and International Law — Common Ground and Regional Diversity', 1 *Asian Journal of International Law* (2011) 217, at 221 ('In Asia, the former colonies of Hong Kong and Macao were reintegrated into China as Special Administrative Regions in 1997 and 1999 respectively. Thus, colonialism is a word of the past. It does not afflict the contemporary world').

<sup>30</sup> Cf. Gillian Triggs, 'Confucius and Consensus: International Law in the Asian Pacific', 21 *Melbourne University Law Review* (1997) 650, at 655 (arguing that Asian states are little different from other new and developing states).

<sup>31</sup> See, e.g., Jeremy A. Thomas, 'International Law in Asia: An Initial Review', 13 *Dalhousie Law Journal* (1990) 683; Ann Kent, *Beyond Compliance: China, International Organizations, and Global Security* (2007), at 1-32.

substantial change or revolution as a result of the new power's values and interests.<sup>32</sup> In addition, the current situation is unusual in that China is better understood not as a 'new' but a 'returning' great power.<sup>33</sup>

To such structural considerations, two further historical antecedents need to be highlighted as they loom large (if often unspoken) in considerations of international law: the unequal treaties that were imposed on China in the nineteenth century and the experience of war crimes trials in post-war Japan.

## **B. Unequal Treaties and China**

Though China's pre-modern embrace of a form of international law was idiosyncratic, in that it was premised on the superiority of Chinese culture,<sup>34</sup> it placed China at the heart of what was arguably the world's largest trading system of its time.<sup>35</sup> Tensions with European counterparts rose in the early nineteenth century when China expressed disinterest in purchasing European goods and insisted on diplomatic protocols that were standard in East Asia but alien to the Europeans.<sup>36</sup> China's defeat in the First Opium War (1839-1842) shattered what had arguably been one of the more durable regional regimes, referred to by some as the 'Chinese world order'.<sup>37</sup> The Treaty of Nanking (1842) ceded Hong Kong to Britain and agreed to open five ports for trade.<sup>38</sup> The Second Opium War (1856-1860) was fought to further open the Chinese market, concluding with the burning down of the

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<sup>32</sup> For an extreme version of this thesis, see George Friedman and Meredith Lebard, *The Coming War With Japan* (1991). The most notorious example is Samuel P. Huntington, 'The Clash of Civilizations?', 72(3) *Foreign Affairs* (1993) 22.

<sup>33</sup> See Phil C.W. Chan, *China, State Sovereignty, and International Legal Order* (2015), at 1.

<sup>34</sup> Phil C.W. Chan, 'China's Approaches to International Law Since the Opium War', 27 *Leiden Journal of International Law* (2014) 859, at 862; Rune Svarverud, 'Re-constructing East Asia: International Law as Inter-Cultural process in late Qing China', 12(2) *Inter-Asia Cultural Studies* (2011) 306, at 308-10.

<sup>35</sup> Kenneth Pomeranz, *The Great Divergence: China, Europe, and the Making of the Modern World Economy* (2000); ONUMA Yasuaki, *A Transcivilizational Perspective on International Law* (2010), at 305-14.

<sup>36</sup> Chan, *supra* note 34, at 863.

<sup>37</sup> John King Fairbank (ed.) *The Chinese World Order: Traditional China's Foreign Relations* (1968).

<sup>38</sup> Treaty of Nanking [Nanjing], Britain-China, done at Nanjing, 29 August 1842, at [http://www.chinaforeignrelations.net/treaty\\_nanking](http://www.chinaforeignrelations.net/treaty_nanking).

Summer Palace and the opening of permanent diplomatic representation in the Chinese capital under the Treaty of Tientsin (1858).<sup>39</sup>

These and other treaties are referred to as ‘unequal treaties’, though that term only came to be used in the 1920s.<sup>40</sup> The perceived injustice of the treaties — which today in some cases might have been void for coercion<sup>41</sup> — was both a rallying cry for nationalist sentiment within China and a leitmotif in China’s slow embrace of public international law in the early twentieth century.<sup>42</sup> International law in the Qing Dynasty came to be seen as a tool to protect and advance Chinese interests rather than a normative framework that governed international affairs as such — though arguably that was the same position taken by Western powers also.<sup>43</sup>

This view of international law being a tool was reinforced in the republican period that followed the fall of the Qing dynasty in 1912. China variously sought to invoke international law provisions to assert its control of Manchuria, Tibet, and Xinjiang, as well as to resist ongoing demands by Western powers for extraterritorial jurisdiction within its territory.<sup>44</sup> It also began to challenge the ‘unequal treaties’ imposed during the Qing period. This included an episode in 1926 in which China invoked the doctrine of *rebus sic stantibus* [fundamental change of circumstances] to argue that an 1865 treaty with Belgium should be renegotiated or terminated. Belgium proposed that the matter be referred to the Permanent Court of International Justice, a suggestion that China rejected in language that echoes its position more recently on matters such as the South China Sea: ‘[The dispute] is political in character

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<sup>39</sup> Treaty of Tientsin [Tianjin], Britain-China, done at Tianjin, 26 June 1858, at <http://www.chinaforeignrelations.net/node/144>.

<sup>40</sup> Dong Wong, *China’s Unequal Treaties: Narrating National History* (2005), at 1.

<sup>41</sup> Vienna Convention on the Law of Treaties (VCLT), done at Vienna, 23 May 1969 (in force 27 January 1980), art. 52. Frédéric Megret, ‘The Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties’, in Olivier Corten and Pierre Klein eds, *The Vienna Convention on the Law of Treaties: A Commentary* (2010)1861,.

<sup>42</sup> Wong, *supra* note 40, at 118-24; Gong, *supra* note 8, at 144.

<sup>43</sup> Chan, *supra* note 34, at 868.

<sup>44</sup> *Id.* at 871-75.

and no nation can consent to the basic principle of equality between States being made the subject of a judicial inquiry.’<sup>45</sup>

In the following two decades, most of the unequal treaties were indeed renegotiated or terminated by agreement, though this was due more to the exigencies of the Second World War than any perception that the past agreements had been unjustly imposed on China.<sup>46</sup>

(A treaty with ongoing significance is the 1914 Simla Accord, which purported to establish the McMahon Line as the border between British India and Tibet. The relevant border between India and China remains in dispute.<sup>47</sup>)

Such a perception of international law as one instrument of foreign policy among others was reinforced in the communist period of the People’s Republic of China, both as an article of ideology and due to the fact that from 1949 to 1971 it was nominally represented in the United Nations by what it viewed as the renegade province of Taiwan.<sup>48</sup> Writing in 1966, a Professor at National Taiwan University wrote that it was ‘beyond doubt’ that Communist China recognized the existence of international law, but that its conception was consistent with the socialist vision of law as an instrument of the state rather than as a check on it.<sup>49</sup> He included a quote from a mainland scholar who articulated this view in unusually clear language:

International law is one of the instruments of settling international problems. If this instrument is useful to our country, to socialist enterprise, or to the peace enterprise of the people of the world, we will use it. However, if this instrument is

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<sup>45</sup> WANG Tieya, ‘International Law in China: Historical and Contemporary Perspectives’, 221 *Recueil des cours* (1990) 195, at 348. Belgium proceeded to submit the dispute to the PCIJ, which indicated provisional measures, but ultimately withdrew the matter. *Denunciation of the Treaty of 2 November 1865 between China and Belgium (Belgium v. China)* (Application Instituting Proceedings of 25 November 1926 PCIJ Rep Series A No 8 (1926).

<sup>46</sup> William A. Callahan, ‘Nationalizing International Theory: Race, Class and the English School’, 18(4) *Global Society* (2004) 305, at 321. See also CHEN Tiqiang, ‘The People’s Republic of China and Public International Law’, 8 *Dalhousie Law Journal* (1984) 3, at 29; Lee, *supra* note 14, at 45-47. On Japan’s experience of unequal treaties, see Michael R. Auslin, *Negotiating with Imperialism: The Unequal Treaties and the Culture of Japanese Diplomacy* (2004).

<sup>47</sup> See, e.g., A.G. Noorani, *India–China Boundary Problem 1846–1947* (2011), at 168; Prabhakar Singh, ‘Sino–Indian Attitudes to International Law: Of Nations, States and Colonial Hangovers’, forthcoming *Chinese Journal of Comparative Law* (2015).

<sup>48</sup> Chan, *supra* note 34, at 875-82.

<sup>49</sup> Hungdah Chiu, ‘Communist China’s Attitude Toward International Law’, 60 *American Journal of International Law* (1966) 245, at 246-49.

disadvantageous to our country, to socialist enterprises or to peace enterprises of the people of the world, we will not use it and should create a new instrument to replace it.<sup>50</sup>

China's subsequent engagement with the United Nations and embrace of international law arguably continues to be instrumentalist with regard to both domestic and international policy objectives. Its membership of the WTO, for example, was the subject of extensive internal debate as to the impact it would have on China's economic and political system,<sup>51</sup> which at the time was styled as 'socialism with Chinese characteristics'. Again, this may not be very different from the manner in which other states contemplate entering into treaty obligations.

Interestingly, a statement in 2014 by Chinese Foreign Minister Wang Yi articulated a more principled approach to supporting the rule of law at the international level. This commitment, Wang stressed, was 'a momentous choice' that China had made based on its own experience of international law:

In the more than 100 years after the Opium War, colonialism and imperialism inflicted untold sufferings on China. For many years, China was unjustly deprived of the right by imperialist powers to equal application of international law. The Chinese people fought indomitably and tenaciously to uphold China's sovereignty, independence and territorial integrity and founded New China. China strove to build a new type of relations with other countries in accordance with the Five Principles of Peaceful Coexistence on the basis of international law. It broke isolation, blockade and military threat imposed by imperialism and hegemonism, regained its lawful seat in the United Nations, started reform and opening-up program, became fully integrated into the international system, and made remarkable achievements in development. Seeing the contrast between China's past and present, the Chinese people fully recognize how valuable sovereignty, independence and peace are. China

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<sup>50</sup> CHU Li-lu, 'Refute the Absurd Theory Concerning International Law by Ch'en T'i-ch'iang', *People's Daily*, 18 September 1957, quoted in Chiu, *supra* note 49, at 248-49.

<sup>51</sup> Jiangyu Wang, 'The Political Logic of Corporate Governance in China's State-owned Enterprises', 47 *Cornell International Law Journal* (2014) 631, at 643.

ardently hopes for the rule of law in international relations against hegemony and power politics, and rules-based equity and justice, and hopes that the humiliation and sufferings it was subjected to will not happen to others.<sup>52</sup>

This passage is suggestive of the ongoing relevance of China's historical experience of international law, often referred to as a 'century of humiliation'.<sup>53</sup> Moving forward, as Part III discusses, it is debatable whether China's turn to the international rule of law will be a reaffirmation of existing norms and principles, or if the call for the rule of law to oppose 'hegemony and power politics' and support 'equity and justice' will lead to challenges to its form and content.

### C. Post-war Japan

As discussed earlier, Japan was more successful than China at integrating into the international system in the nineteenth century.<sup>54</sup> Yet the limits of Japan's acceptance by the community of nations were made apparent when its efforts to include reference to racial equality in the preamble to the Covenant of the League of Nations were rejected at the 1919 Paris Peace Conference.<sup>55</sup> The assumption on the part of countries such as the United States, Australia, and New Zealand appears to have been that Japan planned to challenge their policies limiting immigration from East Asia.<sup>56</sup> As Martti Koskenniemi observes, this made it clear that the non-European world could never be regarded as European — something 'Turkey had always known and Japan was to find out to its bitter disappointment.'<sup>57</sup>

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<sup>52</sup> 'Full Text of Chinese FM's Signed Article on Int'l Rule of Law', *Xinhua*, 24 October 2014.

<sup>53</sup> See, e.g., Alison Adcock Kaufman, 'The "Century of Humiliation", Then and Now: Chinese Perceptions of the International Order', 25(1) *Pacific Focus* (2010) 1.

<sup>54</sup> See *supra* notes 13-16 and accompanying text.

<sup>55</sup> See, e.g., SHIMAZU Naoko, 'The Japanese Attempt to Secure Racial Equality in 1919', 1 *Japan Forum* (1989) 93.

<sup>56</sup> F.P. Walters, *A History of the League of Nations* (1952), at 63.

<sup>57</sup> Koskenniemi, *supra* note 12, at 135. cf. Hitoshi Nasu and Donald R. Rothwell, 'Re-Evaluating the Role of International Law in Territorial and Maritime Disputes in East Asia', 4 *Asian Journal of International Law* (2014) 55, at 69. Even in 1920, for example, Oppenheim observed that Turkey's 'position as a member of the Family of Nations was anomalous, because her civilisation fell short of that of the Western states. It was for that reason that the so-called Capitulations were still in force, and that other anomalies still prevailed.' Lassa Francis Lawrence Oppenheim and Ronald F. Roxburgh, *International Law* (3rd ed., 1920), at 34.

Japan's experience in the aftermath of the Second World War echoed and reinforced perceptions of its different status in international law.<sup>58</sup> The Tokyo Trial was the most prominent of these proceedings and suffered in comparisons to Nuremberg.<sup>59</sup> Much of what has been written since the Tokyo Trial is highly critical of the 'victor's justice' that tainted the proceedings — with suggestions that the Trial was a means of extracting revenge for the 'treacherous' bombing of Pearl Harbor, or expiating guilt for the use of atomic weapons in Japan.<sup>60</sup> Procedural flaws in Tokyo were also the subject of scathing criticism by Justices Pal and Röling — including inequality of arms, lack of time, inadequate translation services, and limitations on defence witnesses among others.<sup>61</sup>

More relevant for present purposes, however, was the extent to which colonialism and race played a role in Tokyo — in a way that they did not in Nuremberg. Though three Asian judges were appointed (from China, India, and the Philippines) the majority of the Tribunal came from the United States and its Western allies. No legal representative was drawn from Malaysia, Singapore, Indonesia, Indochina, or Korea. Given the national independence movements then underway in various colonies of Britain, France, the Netherlands, and the United States, it is not surprising that Japanese responsibility towards Asia was framed in a manner that emphasized atrocities rather than colonialism.<sup>62</sup>

Race also featured directly and indirectly. The Allied Powers claimed the right to speak for 'civilization' in the Tokyo Trial. Though few would question that the crimes being prosecuted would have been condemned by any civilization, the clear understanding was that

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<sup>58</sup> See Simon Chesterman, 'International Criminal Law With Asian Characteristics?', 27(2) *Columbia Journal of Asian Law* (2014) 129.

<sup>59</sup> See, e.g., 'War Crimes', *Time*, 20 May 1946, 24.

<sup>60</sup> See, e.g., Paul W. Schroeder, *The Axis Alliance and Japanese-American Relations* (1958), at 228; Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial* (1971); R.C. Hosoya et al. (eds) *The Tokyo War Crimes Trial: An International Symposium* (1986); B.V.A. Röling and Antonio Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (1993), at 81.

<sup>61</sup> Röling and Cassese, *supra* note 60, at 50-60; Sarah Finnin and Timothy L.H. McCormack, 'Tokyo's Continuing Relevance', in Yuki Tanaka, Timothy L.H. McCormack, and Gerry J. Simpson eds, *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (2011)353, at 354.

<sup>62</sup> Yuki Tanaka, Timothy L.H. McCormack, and Gerry J. Simpson, 'Editors' Preface', in Yuki Tanaka, Timothy L.H. McCormack, and Gerry J. Simpson eds, *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (2011)xxvii, at xxviii.



‘civilization’ in this context meant modern European civilization.<sup>63</sup> Writing soon after the trials, two American authors criticized Soviet efforts to use them for political purposes, stating — without apparent irony — that this was ‘incompatible with the Christian-Judaic absolutes of good and evil which were the foundation of the Tokyo and Nuernberg trials.’<sup>64</sup> Other scholars have discussed the role of race in specific trials, notably that of General Yamashita.<sup>65</sup>

The political context of the Tokyo Trial also differed from Nuremberg. The decision to protect Emperor Hirohito and keep him on the throne, for example, was intended to facilitate the occupation of Japan. To this end, he was presented as having been manipulated by Japan’s military leaders; indeed, General MacArthur cultivated his image as a ‘peace monarch’, who voluntarily led his country in the formulation of its new constitution that renounced military force. Though the short-term aim of encouraging cooperation with the occupying powers was achieved, the longer-term consequence was that the Japanese people were absolved — or viewed themselves as absolved — from the need to reflect on the colonization and oppressive rule of Taiwan and Korea, and the atrocities perpetrated there, in China, and in other Asian states.<sup>66</sup> The effects of this decision continue to be felt today, with periodic calls from China and other states for Japan to apologize repeatedly for its war-time activities, while nationalist sentiments within Japan manifest in the ritual of visiting the Yasukuni shrine to Japan’s war dead, including 14 Class A war criminals.<sup>67</sup>

As Barak Kushner and others have argued, it is not difficult to see how this foundation might lead to international law being seen as a tool for selective engagement with domestic

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<sup>63</sup> ONUMA Yasuaki, ‘Beyond Victor’s Justice’, XI *Japan Echo* (1984) 63.

<sup>64</sup> Joseph B. Keenan and Brendan F. Brown, *Crimes Against International Law* (1950), at vii.

<sup>65</sup> See, e.g., Anne-Marie Prevost, ‘Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita’, 14 *Human Rights Quarterly* (1992) 303.

<sup>66</sup> Yuki Tanaka, Timothy L.H. McCormack, and Gerry J. Simpson (eds) *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (2011), at xxix; OTOMO Yorkio, ‘The Decision Not to Prosecute the Emperor’, in Yuki Tanaka, Timothy L.H. McCormack, and Gerry J. Simpson eds, *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (2011)63,.

<sup>67</sup> FUTAMURA Madoka, ‘Japanese Societal Attitude Towards the Tokyo Trial: From a Contemporary Perspective’, in Yuki Tanaka, Timothy L.H. McCormack, and Gerry J. Simpson eds, *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (2011)35,.

political processes — pursuing some ends, such as the stabilization of post-conflict Japan, while effacing others, such as the ongoing liberation struggles in much of the region.<sup>68</sup>

#### D. History and Law

This Part has provided a brief survey of the historical experience of international law in certain parts of Asia. Clearly, a thorough treatment would require vastly more breadth and depth. For present purposes, the intention is not to encompass that experience in its entirety but to provide a snapshot of three aspects that help to explain ongoing suspicion of international law in the region. First, that international law was perceived to and did in fact legitimize the colonial project. Indeed, as Alexandrowicz argued, one can make the case that much of Asia enjoyed a ‘full legal status’ that was systematically undermined by the European states, leading to the situation in which its states were reduced to the position of supplicants seeking membership of the European order.<sup>69</sup> Secondly, that China’s experience of international law in general and the unequal treaties in particular encouraged a view of international law as instrumentalist that continues to have an impact today.<sup>70</sup> And, thirdly, that Japan’s post-war trials and those across the region reinforced the view that international law was a political tool that can and should be used selectively, when it is in one’s interest (and capacity) to do so.

That being said, it is important to emphasize that the experience of international law in Asia was far from uniformly negative — and that Asian states were not mere passive subjects in this history. Of particular note are the ‘Five Principles of Peaceful Coexistence’,<sup>71</sup> which were adopted in 1954 by China and India and still figure in the foreign policies of both

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<sup>68</sup> cf. Barak Kushner, ‘Ghosts of the Japanese Imperial Army: The “White Group” (*Baituan*) and Early Post-war Sino-Japanese Relations’, 218(suppl 8) *Past and Present* (2013) 117, at 119.

<sup>69</sup> C.H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (1967), at 10.

<sup>70</sup> Cf. Jean d’Aspremont, ‘International Law in Asia: The Limits to the Western Constitutionalist and Liberal Doctrines’, 13 *Asian Yearbook of International Law* (2007) 27 (arguing that Asian international law scholars tend to base their arguments on interests rather than values).

<sup>71</sup> Five Principles of Peaceful Coexistence (Agreement Between the Republic of India and the People’s Republic of China on Trade and Intercourse Between Tibet Region of China and India), done at Peking, 29 April 1954 (in force 3 June 1954), 299 UNTS 57, at <http://treaties.un.org/doc/publication/unts/volume%20299/v299.pdf>.

countries.<sup>72</sup> These principles are broad and hardly controversial, emphasizing (1) mutual respect for each other's territorial integrity and sovereignty, (2) mutual non-aggression, (3) mutual non-interference in each other's internal affairs, (4) equality and mutual benefit, and (5) peaceful co-existence. At the Bandung Conference of African and Asian leaders, which took place the following year, the principles were incorporated in the ten point 'Declaration on the Promotion of World Peace and Co-operation';<sup>73</sup> these in turn formed the normative core of the Non-Aligned Movement.<sup>74</sup> The principles are also enshrined in the embryonic sub-regional organizations that have slowly emerged across the continent, most notably the South Asian Association for Regional Cooperation (SAARC), the Shanghai Cooperation Organization (SCO), and the Association of Southeast Asian Nations (ASEAN).

In substantive terms, Asian states did contribute to the development of international law in the late twentieth century, notably the law of self-determination and law of the sea. Individual Asian jurists have also held leadership positions in the major courts and international organizations, including two secretaries-general of the United Nations. Yet the purpose of this Part has been to show why it is unsurprising that there is ongoing wariness about international law.<sup>75</sup> It seems plausible that this has had an influence on the low acceptance of and participation in international law and institutions highlighted at the start of this article; this is considered further in Part II. In addition, however, such concerns feed into substantive disagreements that touch on non-interference in particular, such as the 'Asian values' debates of the 1990s and more recent opposition to the Responsibility to Protect (R2P) — questions to which we will return in Part III.

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<sup>72</sup> See, e.g., Chang-Fa Lo, 'Values to Be Added to an 'Eastphalia Order' by the Emerging China', 17 *Indiana Journal of Global Legal Studies* (2010) 13, at 16-17; David P. Fidler and Sumit Ganguly, 'India and Eastphalia', 17 *Indiana Journal of Global Legal Studies* (2010) 147, at 150-61.

<sup>73</sup> Final Communiqué of the Asian-African Conference, done at Bandung, 24 April 1955, at [http://franke.uchicago.edu/Final\\_Communique\\_Bandung\\_1955.pdf](http://franke.uchicago.edu/Final_Communique_Bandung_1955.pdf).

<sup>74</sup> See generally Hans Köchler (ed.) *The Principles of Non-Alignment* (1982).

<sup>75</sup> A related argument might be made concerning the role of international law in addressing nuclear weapons testing and counter-proliferation in the Asian region.

## II. Present

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As indicated in the introduction, Asia today is underrepresented in various international regimes. But to what extent is this significant or a cause for concern? Building on the historical survey of Part I, this Part explores different measures of Asia's participation and representation before considering how those generally low rates may be explained.

### A. Participation and Representation

The percentage of states that sign treaties is a crude measure of attitudes towards international law. States from various regions are known to sign treaties with no intention of complying with their obligations, or to refrain from signing out of excessive caution as to the legal and political consequences that might follow. It does appear to be significant, however, that Asian states have consistently been the slowest to form regional institutions, the most reticent about acceding to major international treaties, the least likely to have a voice in proportion to their relative size and power, and the wariest about availing themselves of international dispute settlement procedures.

#### 1. Regional Institutions

There are no Asia-wide regional frameworks comparable to the African Union, the Organization of American States, or the European Union. Those few sub-regional organizations that have been created have tended to be intended for limited functions, or exist primarily as a structured series of meetings rather than an independent entity as such.<sup>76</sup>

The SCO, for example, created in 1996, is notionally a collective security organization but has very few concrete obligations or activities. It is perhaps better understood as a platform

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<sup>76</sup> It is also telling that Asia was the last region to have any meaningful network of international law scholars, until the Asian Society of International Law was established in 2007. See OWADA Hisashi, *supra* note 15; ONUMA Yasuaki, 'The Asian Society of International Law: Its Birth and Significance', 1 *Asian Journal of International Law* (2011) 71.

for cooperation and confidence-building.<sup>77</sup> The same could be said of SAARC, which was launched in 1985. Despite periods of ‘turbulent non-growth’, it has failed to take on a more significant regional role — in large part due to wariness that any expansion would primarily benefit India.<sup>78</sup> The overlapping organization known as the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) also exists primarily to facilitate cooperation.

Most of the other multilateral structures linking Asian countries (sometimes with external partners) are similar forums or frameworks that have minimal functions beyond the convening of a periodic conference. At the continental level, the Asia Cooperation Dialogue (ACD) has 33 members including all ASEAN and Gulf Cooperation Council (GCC) member states; as the name suggests, its primary function is an annual meeting of ministers. The various economic forums include the Asia-Pacific Economic Cooperation (APEC); the Economic Cooperation Organization (ECO); the Forum on Regional Cooperation Among Bangladesh, China, India, and Myanmar (BCIM); the Indian Ocean Rim Association (IORA); the Mekong-Ganga Cooperation (MGC); the Pacific Islands Forum (PIF); and various other less formal arrangements. The Eurasian Economic Union (EAEU) links Russia and four former Soviet states and was established on 1 January 2015.

The lack of a security forum led a think-tank, the International Institute for Strategic Studies, to launch the Shangri-La Dialogue in 2002, now an annual semi-official meeting of defence ministers in Singapore. This supplements prior intergovernmental structures such as the ASEAN Regional Forum (ARF), launched in 1994, and the subsequent launch of the East Asia Summit (EAS), which first met in 2005. Both the ARF and the EAS were outgrowths of the region’s most developed international organization: ASEAN.

For most of its history, ASEAN was broadly consistent with the other Asian entities discussed above. Its foundational document, the Bangkok Declaration, essentially stated a few shared

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<sup>77</sup> Stephen Blank, ‘Making Sense of the Shanghai Cooperation Organization’, 14(2) *Georgetown Journal of International Affairs* (2013) 39.

<sup>78</sup> Kishore M. Dash, ‘Dynamics of South Asian Regionalism’, in Mark Beeson and Richard Stubbs eds, *Routledge Handbook of Asian Regionalism* (2011)406.

goals and announced an annual meeting of foreign ministers.<sup>79</sup> In the past decade, however, ASEAN has undergone a transformation from a periodic meeting of ministers to setting ambitious goals and launching an ‘ASEAN Community’ in 2015. Building on the adoption of a Charter that entered into force in 2008 and asserts the organization’s legal personality,<sup>80</sup> it is arguably the most important Asian international organization in the continent’s history. An important tension in this transformation is the question of whether the ‘ASEAN way’ — defined by consultation and consensus, rather than enforceable obligations — is consistent with the establishment of a community governed by law.<sup>81</sup>

In addition to the willingness to be bound by international obligations generally, a further limiting factor in the case of ASEAN and the other organizations is resources. ASEAN long ago adopted the principle that each member would contribute the same funds to the budget, regardless of the size of its population or economy.<sup>82</sup> This necessarily keeps its annual budget low: in 2012 each member contributed US\$1.58 million, for a total budget of US\$15.8 million. To put this in perspective, ASEAN’s member states contributed US\$30.9 million to the United Nations in the same year — ranging from US\$25,852 for Laos to US\$8.6 million for Singapore. Even so, ASEAN is probably the best-funded Asian regional organization.<sup>83</sup>

A further aspect of these various organizations that appears to reflect a wariness of granting political independence is that secretariats — if such an entity exists at all — are extremely limited not merely in resources but in independence. Appointment processes often reflect the view that the nominal secretary-general is more akin to the chair of an ongoing meeting. Much as the presidency of the UN Security Council rotates alphabetically by state, the same

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<sup>79</sup> The ASEAN Declaration (Bangkok Declaration), Indonesia-Malaysia-Philippines-Singapore-Thailand, done at Bangkok, 8 August 1967, at <http://cil.nus.edu.sg/1967/1967-asean-declaration-signed-on-8-august-1967-by-the-foreign-ministers>. See generally Sheldon Simon, ‘ASEAN and Multilateralism: The Long, Bumpy Road to Community’, 30(2) *Contemporary Southeast Asia* (2008) 264.

<sup>80</sup> Simon Chesterman, ‘Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person’, XII *Singapore Year Book of International Law* (2008) 199.

<sup>81</sup> See Simon Chesterman, *From Community to Compliance? The Evolution of Monitoring Obligations in ASEAN* (2015).

<sup>82</sup> ASEAN Charter, art. 30(2).

<sup>83</sup> Article 9 of the SAARC Charter, for example, states that member state financial contributions towards the activities of the association are ‘voluntary’, though technical committees are also empowered to recommend apportionment of costs. Lawrence Sáez, *The South Asian Association for Regional Cooperation (SAARC): An Emerging Collaboration Architecture* (2011), at 23.

principle applies to the secretaries-general of ASEAN<sup>84</sup> and BIMSTEC,<sup>85</sup> and is the practice of SAARC<sup>86</sup> and the SCO.<sup>87</sup>

A term frequently heard in relation to Asian regional organizations is ‘variable geometry’, which indicates flexibility in the participation of different states in specific integration projects. Such an approach is hardly unique to Asia, but it is telling that even ASEAN has included in its Charter an ‘ASEAN Minus X formula’ allowing member states to opt out of economic commitments.<sup>88</sup> More telling still is the fact that in a series of areas, ASEAN agreements are *weaker* than their international equivalent. There has been much discussion of the weakness of the ASEAN Human Rights Declaration,<sup>89</sup> but this is also true in respect of international economic law: ASEAN member states have agreed to stricter obligations in their WTO or bilateral investment treaties (BITs) than they have within the context of the putative ASEAN Economic Community.<sup>90</sup>

## **2. Major International Treaties**

In addition to the treaties highlighted earlier,<sup>91</sup> Asian states are the least likely to have signed many other human rights and international humanitarian law treaties. Asian states have the lowest take-up in the ICCPR and ICESCR, but also the conventions against racism, torture, and discrimination against persons with disabilities.<sup>92</sup> Though all have signed the Geneva Conventions, less than three-quarters have signed the First Additional Protocol and

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<sup>84</sup> ASEAN Charter, art. 11(1).

<sup>85</sup> Memorandum of Association on the Establishment of the BIMSTEC Permanent Secretariat, 2014.

<sup>86</sup> B. Mohanan, *The Politics of Regionalism in South Asia* (1992), at 46.

<sup>87</sup> The last four secretaries-general have been from China (2004-2006), Kazakhstan (2007-2009), Kyrgyzstan (2010-2012), and Russia (2013-2015).

<sup>88</sup> ASEAN Charter, art. 21(2).

<sup>89</sup> See, e.g., Catherine Shanahan Renshaw, ‘The ASEAN Human Rights Declaration 2012’, 13(3) *Human Rights Law Review* (2013) 557.

<sup>90</sup> Lay Hong Tan, ‘Will ASEAN Economic Integration Progress Beyond a Free Trade Area?’, 53(4) *International and Comparative Law Quarterly* (2004) 935, at 967.

<sup>91</sup> See Figure 1 in the Introduction.

<sup>92</sup> All Asian states (and almost all states globally) have signed the Convention on the Rights of the Child; as in other regions, the vast majority are also parties to the Convention on the Elimination of All Forms of Discrimination against Women.

only two-thirds have signed the Second. (For other regions, the figures are 86 percent or higher for both.)

In the area of international economic law, the picture is slightly different. Though Asian states are least likely to have joined the WTO or be contracting parties to ICSID, there is evidence that Asian states are using these regimes. India, Japan, and China are the fifth, seventh, and ninth most frequent to appear in WTO cases as applicant states; China and India are the second and third most frequent respondents. Japan is the most frequent participant as a third party; China and India are third and fourth.<sup>93</sup>

One area in which Asia is becoming a leader is BITs. Though as a region it is the only in which less than 80 percent of states have at least one BIT in force, China is now party to the second largest number of BITs overall, with Korea and India in the top fourteen.<sup>94</sup> This apparent preference for bilateral as opposed to multilateral regimes will be discussed further in Part III.

### **3. Voice**

Perhaps the most talked about aspect of international participation — at least by Japan and India — is Asian representation on the UN Security Council. On any measure, however, Asian states are underrepresented in the leadership positions of global governance.

Asian states constitute more than 25 percent of the world's countries, occupy 30 percent of its land mass, generate almost 50 percent of global gross domestic product,<sup>95</sup> and encompass 60 percent of global population. Nevertheless, on key institutions such as the UN Security Council and the Bretton Woods institutions, Asia remains under-represented. The continent has only one-fifth of the seats on the Council, including one permanent seat. (The Western Europe and Others Group, or WEOG, has one-third of the seats — three permanent and two rotating.) The President of the World Bank is in practice appointed by

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<sup>93</sup> Data compiled from [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm) (24 April 2015).

<sup>94</sup> Data compiled from <http://investmentpolicyhub.unctad.org/IIA/liasByCountry> (24 April 2015).

<sup>95</sup> The IMF's World Economic Outlook Database (April 2015) figures for gross domestic product (GDP) based on purchasing-power-parity (PPP) have Asia-Pacific states generating 41.5% in 2013 and growing to 46.5% by 2020.



the White House while the Managing Director of the IMF has until now been chosen by its European members.<sup>96</sup>

Even where Asian states have appropriate representation, however, such as the UN General Assembly, they do not operate as a regional bloc. Unlike the African and Latin American states, for example, the Asia-Pacific Group at the United Nations never seeks to achieve common positions on policy matters and discussion is generally limited to candidacies for international posts.

Partly as a result of this lack of regional coherence, but also for reasons discussed in Part III, Asian states have tended to have less of a voice in international affairs than their number, size, and power might otherwise warrant. Individual states, notably China, are exercising growing influence, but it is hard to identify areas in which Asian states have had an impact as a group. Building on the Five Principles and the Bandung Conference discussed earlier,<sup>97</sup> the New International Economic Order was perhaps the largest project that Asian states participated in after decolonization. But its impact was negligible.<sup>98</sup> There has been some modest success with human security, which Japan in particular has championed. Nevertheless, as one Korean commentator has observed, human security runs at odds with the dominant discourse of robust sovereignty advocated by most Asian states.<sup>99</sup>

#### **4. International Dispute Settlement**

A fourth area of representation and participation worthy of note is that Asian states tend to be the wariest of international dispute settlement procedures.<sup>100</sup>

By the end of 2014, only eight Asian states had accepted compulsory jurisdiction of the International Court of Justice: Cambodia, Cyprus,<sup>101</sup> India, Japan, the Marshall Islands,

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<sup>96</sup> Ngaire Woods, 'The United States and the International Financial Institutions: Power and Influence Within the World Bank and the IMF', in Rosemary Foot, S. Neil MacFarlane, and Michael Mastanduno eds, *U.S. Hegemony and International Organizations: The United States and Multilateral Institutions* (2003)92, at 109.

<sup>97</sup> See *supra* notes 71-74 and accompanying text.

<sup>98</sup> See Antony Anghie, 'Legal Aspects of the New International Economic Order', 6(1) *Humanity* (2015) 145.

<sup>99</sup> Sung Won Kim, 'Human Security with an Asian Face?', 17 *Indiana Journal of Global Legal Studies* (2010) 83, at 102.

<sup>100</sup> This is not, of course, limited to international law. See, e.g., Randall Peerenboom (ed.) *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US* (2004).

Pakistan, the Philippines, and Timor-Leste. This amounts to 15 percent of the Asia-Pacific Group within the United Nations. By contrast 30 percent of Eastern European states, 39 percent of Latin America and Caribbean states, 41 percent of African states, and 69 percent of WEOG had signed the optional declaration.

Unsurprisingly, Asian states are also less likely to have used the Court. Only 15 of the 53 Asia-Pacific states have ever appeared before the ICJ, or 28 percent. The corresponding figures for other regions are 48 percent of Latin American states, 50 percent of African states, 57 percent of Eastern European states, and 79 percent of WEOG. Of those 15 Asian states, six first appeared before the Court in 2001 or later.<sup>102</sup>

It is interesting to note that there have been only three territorial delimitation cases brought by Asian states to the ICJ: the *Temple of Preah Vihear* case between Cambodia and Thailand, the *Pulau Ligitan & Pulau Sipadan* case between Indonesia and Malaysia, and the *Pedra Branca* case between Malaysia and Singapore. In each case, only one aspect of a larger dispute was submitted to the ICJ — the temple and specific islands. Whereas the land border between Cambodia and Thailand and the maritime boundary in the other cases might be the subject of ongoing negotiation, these aspects were not susceptible to division or negotiation, apparently encouraging the parties to submit them to third-party adjudication.<sup>103</sup>

Other disputes that have been submitted to international adjudication include the Railway Lands Arbitration between Malaysia and Singapore at the Permanent Court of Arbitration, and the Bangladesh-Myanmar Maritime Delimitation case at the International Tribunal for the Law of the Sea. The majority of Asian territorial disputes, however, remain bilateral or multilateral disputes with little sign of a resolution through third-party adjudication. Prominent examples include Jammu and Kashmir, the border between India and China, the Senkaku/Diaoyu Islands, the Liancourt Rocks (Dokdo/Takeshima), the Kuril Islands, and the

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<sup>101</sup> Cyprus is a member of the Asia Pacific Group at the United Nations, despite also being a member of the European Union.

<sup>102</sup> Indonesia and Malaysia submitted a special agreement on the Pulau Ligitan and Pulau Sipadan case to the ICJ in 1998 but oral proceedings commenced in June 2001. The other states to have appeared before the Court since 2001 are Japan, the Marshall Islands, Singapore, and Timor-Leste.

<sup>103</sup> Simon Chesterman, 'The International Court of Justice in Asia: Interpreting the *Temple of Preah Vihear* Case', 5 *Asian Journal of International Law* (2015) 1.

disputed islands and waters of the South China Sea. The South China Sea especially has been the subject of intense diplomatic and legal manoeuvring, with China articulating quasi-legal claims in the form of its infamous nine-dash line and strenuously opposing efforts by the Philippines to submit to a judicial process.<sup>104</sup>

## B. Explaining Asia's Ambivalence

Explaining the impressionistic data in the previous section runs the risk of gross generalizations. As emphasized earlier, states choose whether to participate in particular international regimes for a wide variety of reasons and entire books have been written on the attitudes of specific Asian countries to international law.

A preliminary consideration, then, is whether national political structures and rule of law institutions are the dominant factor. It may be hypothesized, for example, that authoritarian states are less likely to submit themselves to external scrutiny or binding international obligations than liberal states.<sup>105</sup> Such countries, it might be argued, are less likely to cede power to international institutions in the same way that they are wary of delegating it to powerful national ones. A preliminary study suggests that this may be a consideration but cannot fully explain the particular reluctance of Asian states to accept international obligations. Using the World Justice Project's (WJP) Rule of Law Index as a proxy for respect for the rule of law, for example, African states rate on average far lower than Asian states in terms of rule of law, with an average weighted score of 0.19. (Asian states average 0.25, Latin American states average 0.29, Eastern European states 0.43 and WEOG states 0.50.)<sup>106</sup> Yet, as we have seen, African states are far more likely to accept many international obligations and participate in international organizations. Similarly, Freedom House's 'Freedom Rating' suggests that African states are less 'free' than Asian states and yet this does not appear to have affected acceptance of international obligations.<sup>107</sup>

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<sup>104</sup> See *infra* notes 162-166.

<sup>105</sup> See, e.g., Kent, *supra* note 31, at 2.

<sup>106</sup> Data compiled from the World Justice Project's Rule of Law Index, available at <http://worldjusticeproject.org/rule-of-law-index>.

<sup>107</sup> Data compiled from Freedom House's Freedom in the World report, available at <https://freedomhouse.org/report/freedom-world/freedom-world-2015>

Within Asia, there is some interesting variation. Of the 25 countries evaluated by the WJP, thirteen are scored at 0.51 and above.<sup>108</sup> Using the examples of international treaties cited earlier, the percentage of these states accepting jurisdiction of the ICJ (3) or the ICC (5), or signing onto the ICCPR (10) or ICESCR (10), is still lower than the percentage of any of the other regional groupings as a whole. A slightly higher percentage of states graded by the WJP at 0.50 and below have signed the ICESCR (11 of 12). In the realm of international economic law, there does seem to be a correlation between rule of law and membership of the WTO and ICSID. Of the Asian states scored at 0.51 and up, all are members of the WTO and 11 of 13 (85%) contracting parties to ICSID. Those scored at 0.50 and below or not evaluated are all below 67%.<sup>109</sup>

	<b>ICJ</b>	<b>ICC</b>	<b>ICCPR</b>	<b>ICESCR</b>	<b>WTO</b>	<b>ICSID</b>
Asia-Pacific	<b>15%</b>	<b>32%</b>	<b>66%</b>	<b>66%</b>	<b>70%</b>	<b>68%</b>
<i>WJP Rule of Law &gt;0.50</i>	23%	38%	77%	77%	100%	85%
<i>WJP Rule of Law &lt;= 0.50</i>	17%	25%	83%	92%	58%	67%
<i>WJP not scored</i>	11%	32%	54%	50%	61%	61%
Africa	<b>41%</b>	<b>63%</b>	<b>94%</b>	<b>89%</b>	<b>78%</b>	<b>83%</b>
Eastern Europe	<b>30%</b>	<b>78%</b>	<b>100%</b>	<b>100%</b>	<b>83%</b>	<b>91%</b>
Latin America & Caribbean States	<b>39%</b>	<b>82%</b>	<b>88%</b>	<b>85%</b>	<b>97%</b>	<b>67%</b>
Western Europe and Others	<b>72%</b>	<b>86%</b>	<b>100%</b>	<b>93%</b>	<b>90%</b>	<b>90%</b>

**Table 1 – Percentage of states participating in certain international institutions by UN regional groupings (Dec. 2014)**

Using Freedom House’s crude ranking of ‘Free’, ‘Partly Free’, and ‘Not Free’ it might again be hypothesized that ‘Free’ countries might be more likely to accept international obligations, in particular civil and political rights restrictions. That appears to be the case with respect to global acceptance of the jurisdiction of the ICJ and ICC in particular, with 49 percent of states listed as ‘Free’ accepting the ICJ compared with 33 percent of ‘Partly Free’ and 20 percent of ‘Not Free’ states; for the ICC 85 percent of ‘Free’ states are parties to the

<sup>108</sup> Singapore, South Korea, , Japan, United Arab Emirates, Malaysia, Jordan, Mongolia, Nepal, Philippines, Indonesia, Thailand, Sri Lanka, India.

<sup>109</sup> Data compiled from the World Justice Project’s Rule of Law Index, available at <http://worldjusticeproject.org/rule-of-law-index>.

Rome Statute compared with 61 percent of ‘Partly Free’ and 25 percent of ‘Not Free’ states. Yet when one considers the various ‘Free’ countries, Asian states remain outliers in their unwillingness to sign on to international obligations.

‘Free’ states	ICJ	ICC	ICCPR	ICESCR	WTO	ICSID
Asia-Pacific (13)	31%	62%	54%	38%	62%	54%
Africa (11)	36%	91%	91%	73%	91%	82%
Eastern Europe (13)	46%	100%	100%	100%	92%	92%
Latin America & Caribbean States (22)	36%	86%	86%	82%	95%	73%
Western Europe and Others (28)	75%	89%	100%	93%	89%	89%
Global (88) <sup>110</sup>	49%	85%	88%	80%	86%	78%

**Table 2 – Percentage of states rated as ‘Free’ by Freedom House participating in certain international institutions by UN regional groupings (Dec. 2014)**

Further evaluation of political structures and acceptance of international obligations may yield more rich conclusions, but these preliminary data seem to suggest that respect for rule of law nationally does not provide a complete explanation for acceptance of the rule of law internationally: it fails to explain Asian states’ attitudes towards international law. Instead, four themes stand out that — even if they are not all unique to Asia — help in understanding current attitudes towards international law and institutions.

First, as discussed in Part I, is Asian states’ historical experience of international law. Colonialism, the unequal treaties, and the post-war experience encouraged the perception that international law is of questionable legitimacy, can be used for instrumental purposes, and is necessarily selective in its application. As indicated earlier, this might also be applied to other regions — indeed, it is broadly consistent with a realist critique of international law. But the invocation of these themes by Asian leaders is more than mere opportunism.

A second factor, and more specific to Asia, is diversity. Its identification as a continent was exogenously determined; even today its precise boundaries remain culturally or politically

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<sup>110</sup> The total of 88 includes Kiribati, which is not a member of a UN regional group.

rather than geographically determined.<sup>111</sup> This has contributed to a lack of self-identification on the part of Asian states, relative to their African, European, and Latin American counterparts. Regional coherence in turn can have normative consequences — most obviously in the case of the expanding European Union, but also evident in the attitudes towards intervention in the African Union and the elaborate human rights framework that has been developed under the auspices of the Inter-American Court of Human Rights.<sup>112</sup> Though sub-regional division is possible, East, South, Central, and West Asia do not display significantly more cohesion; the standout is perhaps ASEAN in the Southeast, though even that remains ‘thin’ compared to other regional organizations.

A third consideration is the power disparities across the continent, in particular the need to balance the great power interests of rising China and India, and of a declining Japan.<sup>113</sup> At the regional level, this reduces the attractiveness to other Asian states of organizations or norm-formation in which those powers would have dominant voice. This could be seen, for example, in the response to then-Australian Prime Minister Kevin Rudd’s attempt to launch an ‘Asia Pacific Community’ in 2008.<sup>114</sup> Smaller members prefer ASEAN-style arrangements in which sovereign equality is taken more literally (with regard to financial contributions, for example), and in which obligations are comparatively light.

A fourth explanatory factor is that the current regime broadly serves the interests of many Asian states. Lacking the normative pull of the expanding European Union, the regional self-identification of Latin America, and the donor pressures confronting many African states, there are few carrots or sticks to incentivize regional organization or accession to treaties for reasons other than explicit self-interest. An exception to this may be the steps towards economic integration in ASEAN in particular, as well as the more recent moves to create an Asian Infrastructure Investment Bank (AIIB), discussed in the next Part.

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<sup>111</sup> Teemu Ruskola, ‘Where Is Asia? When Is Asia? Theorizing Comparative Law and International Law’, 44 *University of California at Davis Law Review* (2011) 879, at 882.

<sup>112</sup> On impact of regions on norm cascades, see Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’, 52(4) *International Organization* (1998) 887, at 902-03.

<sup>113</sup> See, e.g., David Arase, ‘Non-Traditional Security in China-ASEAN Cooperation: The Institutionalization of Regional Security Cooperation and the Evolution of East Asian Regionalism’, 50(4) *Asian Survey* (2010) 808.

<sup>114</sup> See Sheryn Lee and Anthony Milner, ‘Practical vs. Identity Regionalism: Australia’s APC Initiative, a Case Study’, 20(2) *Contemporary Politics* (2014) 209.

### III. Futures

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Asia participates less and is less represented in the international system, and yet it has arguably benefited more from the stability and predictability of that system than any other region. This was described in the introduction as a paradox, though it could also be a rational response on the part of many Asian states to take the benefits of the network of institutions and obligations without submitting themselves to its forms and procedures. There are increasing signs, however, that the current situation is unsustainable. In the security sphere, it is premised on security guarantees that Western states — in particular the United States — cannot or will not continue to underwrite. Economically, the need for a greater Asian voice is not just recognized within Asia but globally. And politically, there is clear evidence that China is unwilling to continue to be a ‘rule-taker’.

The centre of gravity is clearly shifting towards Asia. This is in part a function of the decline of U.S. power. To be sure, the United States continues — and most probably will continue — to be the dominant power in the world. But the rhetoric of hegemony and empire that used to accompany that dominance is disappearing.<sup>115</sup> In its place are references to a ‘post-American world’,<sup>116</sup> with the United States relegated to the status of one power among others.

There are internal and external reasons for this decline. Internally, divisions within the U.S. political system now routinely undercut the President’s ability to conduct foreign policy from a position of strength — on display most clearly in the odd spectacle in 2015 of the White House persuading the members of the Security Council to embrace a deal on Iran’s nuclear program more easily than it could persuade members of its own Congress. Externally, the economic pull of the United States is being eclipsed by faster-growing Asian markets. In the past, had manufacturers been given a hypothetical choice between access to the U.S. market and access to China, the choice would have been clear. Now it would be a

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<sup>115</sup> See, e.g., Michael Byers and Georg Nolte (eds) *United States Hegemony and the Foundations of International Law* (2003); Michael Ignatieff, *Empire Lite: Nation Building in Bosnia, Kosovo, Afghanistan* (2003).

<sup>116</sup> Fareed Zakaria, *The Post-American World* (2008).

far more difficult calculation.<sup>117</sup> That relative economic decline has been accompanied by the collapse of its moral authority. In the wake of the September 11, 2001, attacks on New York and Washington, DC, the use of torture and the invasion of Iraq in particular severely undermined the status of the United States as ‘leader of the free world’ or the ‘indispensable nation’.<sup>118</sup> In its most recent ‘Global Trends’ report, the U.S. National Intelligence Council (NIC) itself stated that there would be no hegemon in the coming decades. Power will shift instead to networks and coalitions in a multipolar world.<sup>119</sup>

Most of that shift is occurring within Asia in general and China in particular. The economic and demographic aspects of this have been highlighted in Part II, but the military aspects are also of note. Asian defence spending overtook NATO European spending in 2012;<sup>120</sup> China’s defence spending is increasing by ten percent each year and is projected to match the U.S. as early as 2022 or at least by 2042.<sup>121</sup> The United States itself predicts that by 2030 Asia will have surpassed North American and Europe combined not only in population but also GDP, military spending, and technological investment.<sup>122</sup> China alone will probably have the largest global economy a few years earlier.<sup>123</sup>

These changes are already underway and are probably irreversible. The more interesting question is what impact, if any, such changes will have on the content of international law and the nature of its institutions. This part considers three possible futures: maintenance of the status quo, divergence in international rules and institutions, and the possibility of convergence.

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<sup>117</sup> I am grateful to Joseph Weiler for discussions on this point and the broader question of U.S. decline, which he has likened to the ‘sleepwalking’ that accompanied the march to the First World War. Cf. Christopher Clark, *The Sleepwalkers: How Europe Went to War in 1914* (2012).

<sup>118</sup> Micah Zenko, ‘The Myth of the Indispensable Nation’, *Foreign Policy*, 6 November 2014, at <http://foreignpolicy.com/2014/11/06/the-myth-of-the-indispensable-nation>.

<sup>119</sup> Global Trends 2030: Alternative Worlds (National Intelligence Council, Washington, DC, 2012), at [http://www.dni.gov/files/documents/GlobalTrends\\_2030.pdf](http://www.dni.gov/files/documents/GlobalTrends_2030.pdf), at ii.

<sup>120</sup> International Institute for Strategic Studies, *The Military Balance 2013* (2013), at 33.

<sup>121</sup> *Id.* at 256.

<sup>122</sup> Global Trends 2030, *supra* note 119, at 15-17.

<sup>123</sup> *Id.* at 15.



## A. Status quo

Implicit in the paradox that opened this article is the realization that the current situation works and that alternatives might be less desirable, or come with unpalatable transaction costs. Such is the somewhat complacent finding of the recent NIC 'Global Trends' analysis, which concluded that although emerging powers are eager to take their place at the top table of key multilateral institutions, they do not have a competing vision: 'Although ambivalent and even resentful of the US-led international order, they have benefited from it and are more interested in continuing their economic development and political consolidation than contesting U.S. leadership.'<sup>124</sup>

This is somewhat at odds with the declinist analysis elsewhere in the same report,<sup>125</sup> but is broadly consistent with shorter-term analysis of recent Chinese foreign policy in particular. Deng Xiaoping famously urged his colleagues in the 1990s to 'hide brightness and nourish obscurity' (韬光养晦). This was embraced by subsequent leaders such as Wen Jiabao,<sup>126</sup> but may not continue to restrain China's desire to play a more expansive role on the world stage.

Moving forward, there are also structural barriers to significant change such as the membership of the UN Security Council. It is possible that the economic and political interests of Asian states will keep their focus domestic rather than international.<sup>127</sup> But as economies become more enmeshed through globalization and the global aspirations of these powers rise, the distinction between domestic and international is likely to erode further and some kind of change in the international order will become more likely.

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<sup>124</sup> *Id.* at 105.

<sup>125</sup> See *supra* notes 122-123 and accompany text.

<sup>126</sup> Julia Ya Qin, 'China, India and WTO Law', in Muthucumaraswamy Sornarajah and WANG Jiangyu eds, *China, India and the International Economic Order* (2010)167, at 209.

<sup>127</sup> Kishore Mahbubani and Simon Chesterman, *Asia's Role in Global Governance* (World Economic Forum, Singapore, January 2010), at <http://ssrn.com/abstract=1541364>.

## B. Divergence

What might such change look like? This section will consider three potential inflection points that could see a substantive divergence of Asian and other interests from those that infuse the existing, predominantly Western, international order.

The first potential inflection point is the assertion that Asia offers a genuine alternative to the Westphalian model of international order premised on state sovereignty and international law. First coined by Sungwon Kim,<sup>128</sup> the term ‘Eastphalia’ is sometimes invoked for its contrast with the Western dominated legal order named after the region in the German state of North Rhine-Westphalia.<sup>129</sup>

The precise content of an ‘Eastphalian’ order can be hard to pin down. In this way it recalls the ‘Asian values’ debates of the 1990s, both in terms of the arguments put forward and the criticisms in response. The arguments include both the invocation of Confucianism and communitarianism as well as more general challenges to the universalism of ‘Western’ norms, in particular human rights, or to the contingency of those norms based on stages of economic development. The criticisms were that the diversity of Asia made it simplistic to suggest one overarching set of values, and that such ‘values’ were being used opportunistically to reject criticism of domestic policies. Indeed, upon closer inspection, it became apparent that the so-called ‘Asian values’ being articulated were primarily defined through what they were *not*, without a coherent vision of what positive norms or values they might entail.<sup>130</sup>

As Tom Ginsburg and others have observed, there is little positive evidence of a new model of regionalism arising in Asia, where most states emphasize a very *Westphalian* model of

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<sup>128</sup> Tom Ginsburg, ‘Eastphalia and Asian Regionalism’, 44 *University of California at Davis Law Review* (2011) 859, citing Kim’s unpublished 2009 doctoral thesis.

<sup>129</sup> See above note 9. This may overlook the fact that there was in fact another region in Lower Saxony named ‘Eastphalia’.

<sup>130</sup> See generally TAN Hsien-Li, *The ASEAN Intergovernmental Commission on Human Rights* (2011), at 6-8, 24-71; THIO Li-ann, ‘Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go Before I Sleep’, 2 *Yale Human Rights & Development Law Journal* (1999) 1.

sovereignty in their international affairs.<sup>131</sup> In this sense, the European Union project offers a more serious alternative vision of international order.<sup>132</sup> Others have invoked the ‘Eastphalia’ concept in terms of the potential for Asian countries to reshape international politics in a manner that better reflects Asian power, practices, and principles.<sup>133</sup> Far from an alternative model, however, this suggests instead a very conservative approach to sovereignty and non-intervention, challenging the universality of principles such as democracy, human rights, and *laissez-faire* economics as part of a political project but grounded in familiar legal concepts.<sup>134</sup>

Such an interpretation is borne out by official statements that seek to define an ‘Asian’ approach to international law. In 2011, for example, Chinese State Council member Dai Bingguo speaking at the biennial conference of the Asian Society of International Law emphasized the ‘Five Principles of Peaceful Co-existence’ and the ‘Ten Principles of the Bandung Conference’ as representing key Asian contributions to international law, which should be complemented by the ‘Asian spirit [of] harmonious co-existence, good neighbourliness, consultation, dialogue, respect for diverse civilizations, unity and cooperation’.<sup>135</sup> As Chang-Fa Lo has argued, however, the Five Principles are in essence a traditional interpretation of sovereignty —with Western rather than Eastern origins.<sup>136</sup> Rhetoric aside, they are also inconsistent with Chinese policies that embrace globalization in economic affairs and, increasingly, tolerate human rights scrutiny by international organizations — for example through acceptance of the Universal Periodic Review.<sup>137</sup>

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<sup>131</sup> Tom Ginsburg, ‘Eastphalia as the Perfection of Westphalia’, 17 *Indiana Journal of Global Legal Studies* (2010) 27; Ginsburg, *supra* note 128, at 877.

<sup>132</sup> See, e.g., Anne-Marie Slaughter and William Burke-White, ‘The Future of International Law Is Domestic (or, the European Way of Law)’, 47 *Harvard International Law Journal* (2006) 327. Cf. Sienho Yee, ‘The Role of Law in the Formation of Regional Perspectives in Human Rights and Regional Systems in the Protection of Human Rights: The European and Asian Models as Illustrations’, 8 *Singapore Year Book of International Law* (2004) 157.

<sup>133</sup> David P. Fidler, ‘Eastphalia Emerging? Asia, International Law, and Global Governance’, 17 *Indiana Journal of Global Legal Studies* (2010) 1, at 3.

<sup>134</sup> Sun Wong Kim, David P. Fidler, and Sumit Ganguly, ‘Eastphalia Rising? Asian Influence and the Fate of Human Security’, *World Policy Journal*, Summer 2009, 53.

<sup>135</sup> DAI Bingguo, ‘Asia, China and International Law’, 11 *Chinese Journal of International Law* (2012) 1, at 2.

<sup>136</sup> Lo, *supra* note 72, at 20-21.

<sup>137</sup> See *infra* note 154.

One area in which China has attempted to draw a line is on the doctrine of responsibility to protect (R2P). Although China had a commissioner on the body that drafted the first version of this doctrine, former Vice Prime Minister and Minister for Foreign Affairs Qian Qichen, it subsequently expressed significant reservations about the doctrine in general and its use in particular cases. In the 2014 statement on the international rule of law by Wang Yi discussed earlier, he cited ongoing difficulties and challenges to the rule of law:

Hegemonism, power politics and all forms of ‘new interventionism’ pose a direct challenge to basic principles of international law including respect for sovereignty and territorial integrity and non-interference in other countries’ internal affairs.<sup>138</sup>

Tellingly, this challenge to the new doctrine of R2P is grounded on a defence of ‘basic principles’ that China is seeking to uphold.

India, like China, has embraced the ‘Five Principles’ although its international profile is more muted. David Fidler and Sumit Ganguly have suggested that this is linked to the contradiction between India’s commitment to democracy internally and its stance on non-intervention internationally.<sup>139</sup> David Malone has argued that India’s ambiguous international role can instead be traced to a larger ambivalence about its place in the world — contrasting its vocal commitment to the UN Charter and aspirations to a permanent seat on its Security Council with the willingness to be, for the most part, a rule-taker in international affairs.<sup>140</sup> In any case, though India was initially an advocate for change in the context of the New International Economic Order, its disillusionment with the capacity for radical change through legal means did not inspire an alternative vision of the law as such.<sup>141</sup>

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<sup>138</sup> *Full Text of Chinese FM’s Signed Article on Int’l Rule of Law*, *supra* note 52. On the evolution of the doctrine of responsibility to protect, see Luke Glanville, *Sovereignty & the Responsibility to Protect: A New History* (2014).

<sup>139</sup> Fidler and Ganguly, *supra* note 72, at 163.

<sup>140</sup> David M. Malone, *Does the Elephant Dance?: Contemporary Indian Foreign Policy* (2011). cf. Waheguru Pal Singh Sidhu, Pratap Bhanu Mehta, and Bruce Jones, ‘A Hesitant Rule Shaper?’, in Waheguru Pal Singh Sidhu, Pratap Bhanu Mehta, and Bruce Jones eds, *Shaping the Emerging World: India and the Multilateral Order* (2013)3.

<sup>141</sup> B.S. Chimni, ‘International Law Scholarship in Post-colonial India: Coping with Dualism’, 23(1) *Leiden Journal of International Law* (2010) 23, at 42-48.

In terms of their *Weltanschauung*, then, far from offering a radical alternative to the dominant international legal order, many Asian states actively seek to defend a very traditional version of it. That may be true in general terms, but in particular regimes there is some evidence of a concerted effort to carve out a degree of deference to regional sensitivities. This suggests the second potential inflection point: a regionalization of international law. There is scope within international law for regional custom,<sup>142</sup> but this properly applies as special or particular rules vis-à-vis general rules rather than as an alternative regime as such.<sup>143</sup> In other words, treaties and customs may develop special rules but they depend on the traditional evidence of law — agreements, state practice, *opinio iuris* — rather than geography.

Nevertheless, in the area of human rights there have been some interesting attempts to provide for deference to regional concerns. The most important is also the primary legacy of the ‘Asian values’ debates. Even as states ultimately accepted the ‘universality’ of human rights, there were efforts to create space for differing interpretation and application of those rights. Prior to the adoption of the Vienna Declaration on Human Rights, Asian governments gathered to pass the Bangkok Declaration of 1993, which sought to dilute that universality by reference to national and regional influences:<sup>144</sup>

while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.<sup>145</sup>

This phrase, coined in Bangkok, was opposed by non-governmental organizations that gathered at a parallel NGO conference.<sup>146</sup> It nonetheless made its way through the

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<sup>142</sup> *Asylum Case (Colombia/Peru)* (Judgment), [1950] ICJ Rep 266 (1950).

<sup>143</sup> *Right of Passage over Indian Territory (Portugal v. India)* (Judgment), [1960] ICJ Rep 6 (1960), para. 94.

<sup>144</sup> Vitit Muntarbhorn, ‘Rule of Law and Aspects of Human Rights in Thailand: From Conceptualization to Implementation?’, in Randall Peerenboom ed. *Asian Discourses of Rule of Law : Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (2004)340, at 346.

<sup>145</sup> Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights (Bangkok Declaration), UN Doc. A/CONF.157/PC/59 (1993), para. 8.

<sup>146</sup> Muntarbhorn, *supra* note 144, at 347.

international system, though in the report of the preparatory committee for the World Conference on Human Rights a compromise saw the formulation reversed:

While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.<sup>147</sup>

That language was reproduced in the Vienna Declaration and Programme of Action.<sup>148</sup> At the request of Malaysia,<sup>149</sup> similar text was also inserted into the General Assembly resolution establishing the position of High Commissioner of Human Rights.<sup>150</sup> It has since appeared in scores of UN documents, notably including the 2005 World Summit Outcome Document.<sup>151</sup>

Similar debates arose in the context of the ASEAN Human Rights Declaration (AHRD). The text that was adopted in 2012 included the following apparent qualification on the universality of the human rights being protected:

All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realisation of human rights must be considered in the regional and national

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<sup>147</sup> World Conference on Human Rights, Report of the Preparatory Committee, Fourth Session, UN Doc. A/CONF.157/PC/98, 22 (1993).

<sup>148</sup> Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights, UN Doc. A/CONF.157/23 (25 June 1993), at <http://documents.un.org>, para 5.

<sup>149</sup> Malaysia: Proposed Amendments to Draft Resolution A/C.3/48/L.59 (Establishment of a United Nations High Commissioner for Human Rights), UN Doc. A/C.3/48/L.79, 3 (1993).

<sup>150</sup> GA Res 48/141 (1994), para. 3(b). In that resolution, the Assembly decided that the High Commissioner should be guided by the recognition that: 'while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms'.

<sup>151</sup> 2005 World Summit Outcome Document, UN Doc. A/RES/60/1 (16 September 2005), at <http://www.un.org/summit2005>, para. 121.

context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.<sup>152</sup>

Amid the criticism of this document, one puzzling aspect was that in 2012 member states of ASEAN were agreeing as between themselves to be held to a *lower* standard than that to which they had already committed themselves in Vienna in 1993,<sup>153</sup> and against which they are regularly evaluated for the Universal Periodic Review.<sup>154</sup> As we have seen, this is not unique to human rights law: a similar situation can be seen in certain international economic law agreements that establish *weaker* obligations as between ASEAN states than they already owe one another under an existing multilateral regime.<sup>155</sup>

This is an unusual form of regionalism, but is perhaps better regarded as a pluralistic approach to international norms rather than a geographical challenge to those norms as such. The same might be said of the third potential point of inflection: the creation of parallel institutions. The dearth of Asian regional organizations has already been highlighted, but the creation of the Asian Infrastructure Investment Bank (AIIB) in 2015 arguably marked a more significant challenge to the dominant order.

Since the launch of its 'go-out' policy in the late 1990s, China has come to play an increasingly important role in international development.<sup>156</sup> Though the Chinese government has emphasized that the AIIB is intended to complement rather than rival the existing international financial institutions, the combined total capital for the AIIB, the Silk Road Fund, and the China-led BRICS Development Bank is estimated to be higher than that of the World Bank.<sup>157</sup> The United States, correctly perceiving this as an effort on the part of

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<sup>152</sup> ASEAN Human Rights Declaration, done at Phnom Penh, 18 November 2012, at <http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration>, art. 7.

<sup>153</sup> Renshaw, *supra* note 89, at 568-69.

<sup>154</sup> Helen Quane, 'The Significance of an Evolving Relationship: ASEAN States and the Global Human Rights Mechanisms', 15(2) *Human Rights Law Review* (2015) 283.

<sup>155</sup> See above notes 89-90.

<sup>156</sup> See, e.g., Jonathan Holslag, 'Commerce and Prudence: Revising China's Evolving Africa Policy', 8(3) *International Relations of the Asia-Pacific* (2008) 325, at 328.

<sup>157</sup> YU Hong, The Asian Infrastructure Investment Bank to Spearhead China's 'One Belt, One Road' Initiative (East Asia Institute, Singapore, EAI Background Brief No. 1020, 29 April 2015), para 1.14. The authorized capital of the various institutions is AIIB (US\$100bn), Silk Road Fund (US\$40bn), New Development Bank (a.k.a. BRICS Development Bank US\$100bn). The World Bank's currently subscribed capital is US\$223.

China to project its economic influence across Asia, attempted to exert pressure on countries not to join the bank. In an extraordinary defeat for Washington, even staunch allies like Britain and Australia ultimately agreed to join as founding members of the AIIB. As the *Economist* noted, the United States was left looking ‘churlish and ineffectual’.<sup>158</sup> Japan remains outside the AIIB, presumably in order to preserve its strong ties to the United States and its privileged role in the Asian Development Bank.

Much as the Bretton Woods Institutions were established with an eye to the interests of their American and European founders, the AIIB essentially provides China with a veto: it holds 30 percent of the voting power and 75 percent is required for key decisions.<sup>159</sup> This includes appointing the President of the Bank, who is also required to be from the Asian region.<sup>160</sup> Interestingly, ‘Asia’ is defined for the purposes of the AIIB as encompassing the UN’s ‘Asia’ and ‘Oceania’ groupings, the key implication of which is that it includes Australia and New Zealand (which are typically treated as an appendage of Western Europe).<sup>161</sup>

It is possible that the creation of the AIIB signals a shift in the international order, but this appears to be more of a political and economic shift than a legal one. The AIIB itself is structured in a manner comparable to other institutions, notably the Asian Development Bank (ADB). Critics have warned that the AIIB may be less rigorous in its application of environmental and labour standards, but it is not clear that this would amount to an ‘Asian values’-style challenge to the legitimacy of those standards as such.

One prominent example that might have represented a genuine challenge to key tenets of the international order is China’s behaviour in the South China Sea.<sup>162</sup> Some of China’s early claims appeared to suggest a rejection of norms that have been codified in the UN Convention on the Law of the Sea (UNCLOS). After publishing its famous ‘nine-dash line’ map in 2009, it was initially unclear whether China was asserting that the entire body of

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<sup>158</sup> ‘The Infrastructure Gap’, *Economist*, 21 March 2015.

<sup>159</sup> Asian Infrastructure Investment Bank: Articles of Agreement, done at Beijing, 29 June 2015, at [http://www.aiibank.org/html/aboutus/Basic\\_Documents](http://www.aiibank.org/html/aboutus/Basic_Documents), arts. 26, 28.

<sup>160</sup> *Id.*, art. 29.

<sup>161</sup> *Id.*, art. 1(2).

<sup>162</sup> See generally S. Jayakumar, Tommy Koh, and Robert A. Beckman (eds) *The South China Sea Disputes and Law of the Sea* (2014); Stefan Talmon and JIA Bing Bing (eds) *The South China Sea Arbitration: A Chinese Perspective* (2014).



water so indicated was part of its territorial sea, or if it was merely claiming islands within the line and the associated territorial seas.<sup>163</sup> In 2013, the Philippines initiated compulsory arbitration under Annex VII of UNCLOS and China refused to participate. The following year, China commenced land reclamation projects in the area, referred to by some as the ‘great wall of sand’.

Such a series of events might have constituted outright rejection of UNCLOS and the tribunal constituted under it, as well as literally changing the landscape. But China subsequently softened its position. On the territorial claims, it now adopts a more nuanced position that has backed away from an assertion that the nine-dash line marks its territorial waters. On the arbitration, it continues not to take part but has published a ‘position paper’ that the tribunal appears to be using as a proxy for its legal position.<sup>164</sup> And on the land reclamation projects, it has not suggested that any artificial islands so created will attract more than the limited rights accorded to such features in UNCLOS.<sup>165</sup> The gradualist approach to these issues is consistent with its general strategy in the South China Sea, which has been described elsewhere as ‘salami-slicing’: taking small, incremental actions that advance core objectives without any one step being a *casus belli*.<sup>166</sup>

It remains to be seen how China would react if it perceived that its core interests were threatened. With regard to the South China Sea, China has demonstrated a tolerance and even a preference for legal ambiguity. This is broadly consistent with its position, for

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<sup>163</sup> See Robert Beckman, ‘The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea’, 107 *American Journal of International Law* (2013) 142; Ted L. McDorman, ‘Rights and Jurisdiction over Resources in the South China Sea: UNCLOS and the ‘Nine-dash Line’’, in S. Jayakumar, Tommy Koh, and Robert A. Beckman eds, *The South China Sea Disputes and Law of the Sea* (2014)144,.

<sup>164</sup> Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (Ministry of Foreign Affairs of the People’s Republic of China, Beijing, 7 December 2014), at [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml).

<sup>165</sup> There have, however, been suggestions that China is asserting sovereignty over the airspace above the artificial islands. See J. Ashley Roach, ‘China’s Shifting Sands in the Spratlys’, 19(15) *ASIL Insights* (15 July 2015).

<sup>166</sup> Bonnie Glaser, Testimony before the U.S.-China Economic and Security Review Commission (Hearing on China’s Relations with Southeast Asia, Washington, DC, 13 May 2015), at [http://www.uscc.gov/sites/default/files/Glaser\\_Written%20Testimony\\_5.13.2015%20Hearing.pdf](http://www.uscc.gov/sites/default/files/Glaser_Written%20Testimony_5.13.2015%20Hearing.pdf).

example, on the idiosyncratic status of Taiwan. In general, however, suggestions that China is seeking to radically undermine the international order seem overstated.<sup>167</sup>

### C. Convergence

A third possible scenario, then, is that there will be some kind of convergence of Western and Asian interests in the international order: maintaining the basic structural foundations of sovereign equality of states, but with Asian states gradually taking a more prominent role. Evolution, rather than revolution. In 2010 at the second BRIC summit, for example, the leaders articulated a common vision that ‘the world is undergoing major and swift changes that highlight the need for corresponding transformations in global governance in all relevant areas’. Nevertheless they went on to stress that these changes should take place within the existing framework of laws and institutions.<sup>168</sup>

This last section will briefly sketch out some potential examples of such convergence: China’s more assertive role on the UN Security Council; developments in international investment law that appear to show a realigning of Western and other interests; and the possible impact on diplomacy as Asian states take a more prominent role on the international stage. In each case, it is far too early to draw firm conclusions on the impact and significance of convergence, but the evidence of a change is growing.

#### 1. *China on the UN Security Council*

For much of the Cold War, China was a cipher on the UN Security Council. Despite taking the permanent seat previously held by Taiwan in 1971, China’s reticence on the Council bordered on non-participation. In its first decade on the Council (1971-1981), for example, China abstained on 69 of nearly 200 resolutions that the Council adopted. As is well known, the Council was frequently paralyzed during the Cold War. Of more interest, then, is the

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<sup>167</sup> Cf. James Scott and Rorden Wilkinson, ‘China Threat? Evidence from the WTO’, 47(4) *Journal of World Trade* (2013) 761.

<sup>168</sup> 2nd BRIC Summit of Heads of State and Government: Joint Statement, done at Brasilia, 15 April 2010, at <http://www.brics.utoronto.ca/docs/100415-leaders.html>. Cf. M. Sornarajah, ‘The Role of the BRICS in International Law in a Multipolar World’, in Vai Io Lo and Mary Hiscock eds, *The Rise of the BRICS in the Global Political Economy: Changing Paradigms?* (2014)288,

period 1990 onwards. Here it is striking how China's behaviour has changed over time. From 1990 to 2000, it continued to be the most likely member of the P5 to abstain, declining to support or reject 44 resolutions — about six percent of those adopted. In the period 2001 to 2014, this dropped to two percent, or 13 abstentions (while Russia abstained on 16).<sup>169</sup>

It is often noted that China has cast the fewest vetoes on the Council; this is correct at around 4 percent of those cast. In total, China has cast 9 vetoes, far fewer than France (16), Britain (29), the United States (79), and Russia (103). Yet all but one of those Chinese vetoes was cast in the past two decades. If analysis is confined to the period 2000-2014, China has cast 27 percent of vetoes: 6, compared with 11 by the United States and 5 by Russia.<sup>170</sup>

Taking stronger stands is consistent with China's greater engagement in peace and security issues more generally. In 1990, China had a total of five military observers deployed in UN peacekeeping missions (all in the UN Truce Supervision Organization in Jerusalem). In 2000, that number had grown to 43 observers and 55 civilian police. By the end of 2014, China was deploying 174 police and almost 2,000 troops — only two percent of the total deployed UN personnel, but more than all the other P5 members combined.<sup>171</sup> (Asia contributes around 40 percent of peacekeepers overall, most coming from India, Pakistan, and Bangladesh. Only Africa contributes more, making up 47 percent, though the vast majority of peacekeepers are deployed in that continent.)

Moving forward, China's influence on UN activities seems certain to increase, bolstered by Western reluctance to repeat military adventures in Afghanistan, Iraq, and Libya. Though large-scale peace operations in Africa will continue, greater Chinese involvement will mean that controversial cases such as Syria will see more limited engagement, and that situations such as Zimbabwe and Myanmar that can be characterized as 'internal' are less likely to play a significant role on the Council's agenda. There will be exceptions. Indeed, China's vote in favour of referring the situation in Libya to the International Criminal Court in resolution

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<sup>169</sup> Data compiled from voting records available at <http://www.un.org/en/sc/meetings/searchvote.asp>. P5 abstentions 1990-2000: China – 44; Russia – 23; France – 3; United States – 3; Britain – 0. P5 abstentions 2001-2014: Russia – 16; China – 13; United States – 7; France – 4; Britain – 0.

<sup>170</sup> Vetoes cast by end of 2014. Data available from the Dag Hammarskjöld Library website at <http://research.un.org/en/docs/sc/quick/veto>.

<sup>171</sup> Data compiled from UN Department of Peacekeeping, available at <http://www.un.org/en/peacekeeping/resources/statistics/contributors.shtml>.

1970 (2011) was a watershed showing that its adherence to a robust view of sovereignty is not absolute. But an increased Chinese voice on the Council could see a reining in of the ‘new interventionism’ that characterized the Council’s activities from the end of the Cold War onwards, in favour of a more traditional deference to sovereignty.

## **2. Foreign Investment Law**

A second area in which there has been an interesting realignment of interests that suggests convergence is in foreign investment law. Since the 1990s, divisions within international law on foreign investment law have grown more pronounced, pushing back against the neoliberal philosophy that had informed the regime and challenging the investor-friendly approach adopted by many arbitral tribunals. States such as India, South Africa, and Indonesia have frozen their investment treaty programs and are considering withdrawing from those treaties currently in force; several Latin American states have denounced their ICSID commitments.<sup>172</sup> Interestingly, some Western states have now expressed similar reservations at the excessive protection of foreign investors — notably Australia, which recently found itself on the receiving end of investor-state arbitration in the Philip Morris case.<sup>173</sup> In its most recent World Investment Report, the UN Conference on Trade and Development (UNCTAD) referred to the period 1990–2007 as an ‘era of proliferation’ that was now being followed by an era of ‘reorientation’.<sup>174</sup> (Similar challenges may be underway in areas such as the WTO’s Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPs), under which developing countries were meant to receive freer access to developed markets in exchange for protecting the IP rights of foreign nationals.<sup>175</sup>)

Though such developments have been heralded by some as marking the end of the Washington Consensus on economic development, suggestions that this is being replaced by a ‘Beijing Consensus’ are overstated. Indeed, assertions that the Washington Consensus would be replaced by a unitary development model miss the fundamental criticism of that

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<sup>172</sup> M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (2015), at 5, 142.

<sup>173</sup> *Philip Morris v. Australia*, UNCITRAL PCA. Case No. 2012-12 (2012) (ongoing).

<sup>174</sup> World Investment Report 2015 (UN Conference on Trade and Development (UNCTAD), Geneva, 2015), at <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1245>, at 121.

<sup>175</sup> Laurence R. Helfer, ‘Regime Shifting: The TRIPs Agreement and New Dynamics of International Lawmaking’, 29 *Yale Journal of International Law* (2004) 1.

approach which was precisely that it failed to take account — at least in its application — of individual circumstances. As Sarah Babb has argued, a true successor to the Washington Consensus would be founded on orthodox economic theory, embraced by policymakers, and enforced by transnational authorities. Given the divergent views among theorists, the transformed political environment among national actors, and the more restrained role of the international financial institutions, it seems more likely that *no* transnational policy paradigm will replace the Washington Consensus.<sup>176</sup> On the contrary, a more heterogeneous and contested set of regimes is more likely, with China and other actors playing a role in proportion to its growing political and economic influence.<sup>177</sup>

### **3. Diplomacy**

A third potential field of convergence is in the style of international diplomacy. As the political and economic clout of Asian states increases, it is possible that aspects of diplomacy and governance may start to show their influence. Comparable to the ‘ASEAN way’ described earlier,<sup>178</sup> this might include positive aspects such as respect for diversity, consensus-building preferred over conflict, pragmatic approaches over lofty principles, and gradualism rather than abrupt change. The danger is that such predilections can prevent meaningful agreement within a reasonable timeframe, or that a superficial consensus masks the true politics at work.<sup>179</sup>

There is some evidence of a more consensual approach in development policies, for example, with greater flexibility in political conditionality imposed by both donor governments and international financial institutions in development assistance.<sup>180</sup> This is not to suggest that the growing importance of China and other actors means that

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<sup>176</sup> Sarah Babb, ‘The Washington Consensus as Transnational Policy Paradigm: Its Origins, Trajectory and Likely Successor’, 20(2) *Review of International Political Economy* (2013) 268, at 291.

<sup>177</sup> Randall Peerenboom and Bojan Bugari, ‘Development After the Global Financial Crisis: The Emerging Post Washington, Post Beijing Consensus’, 19 *UCLA Journal of International & Foreign Affairs* (2015) 89; Mark Beeson and LI Fujian, ‘What Consensus? Geopolitics and Policy Paradigms in China and the United States’, 91(1) *International Affairs* (2015) 93.

<sup>178</sup> See above note 81.

<sup>179</sup> See Mahbubani and Chesterman, *Asia’s Role*, *supra* note 127.

<sup>180</sup> Nadia Molenaers, Sebastian Dellepiane, and Jorg Faust, ‘Political Conditionality and Foreign Aid’, 75 *World Development* (2015) 2.

conditionality will be dropped entirely. On the contrary, though China tends to impose fewer conditions for development assistance, it still has a clear political agenda in its lending<sup>181</sup> — though perhaps not as transparent as its Western counterparts.<sup>182</sup>

The larger impact of an expansion in the key actors of international diplomacy will not be limited to Asia, of course. (Brazil, for example, has of late played a far more significant role than in the past.) But if there is a substantive impact of the rise of Asian powers it is likely to be grounded on the ‘Five Principles of Peaceful Coexistence’ discussed earlier.<sup>183</sup> Uncontroversial at the time, these principles embody a very traditional notion of sovereignty. As a challenge to the modern international legal order this is, then, fairly modest. But as a vehicle of convergence, with Asian and other powers seeking political influence commensurate to their economic clout, Westphalian sovereignty applied equally at the global level may be both more realistic and more conducive to international cooperation — at least in areas where overlapping interests can be identified.<sup>184</sup> In others, however, particularly where principles of sovereignty and non-intervention are invoked as a shield to prevent interference in domestic policies, such developments might slow progress towards global solutions to global problems — or prevent it completely.

#### IV. Conclusion

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In June 2011, Christine Lagarde was appointed for a five-year term as Managing Director of the IMF. It was the eleventh consecutive appointment of a European to the position, matched by the twelve US citizens who have led the World Bank. Lagarde’s appointment was unusual in that it was the first in which there was a serious suggestion that a non-European might take on the position of Managing Director. Though the French Lagarde was ultimately appointed, it has become increasingly clear that such vital positions in the IFIs

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<sup>181</sup> Mikael Mattlin and Matti Nojonen, ‘Conditionality and Path Dependence in Chinese Lending’, 24(94) *Journal of Contemporary China* (2015) 701.

<sup>182</sup> Axel Dreher, Jan-Egbert Sturm, and James Raymond Vreeland, ‘Politics and IMF Conditionality’, 59(1) *Journal of Conflict Resolution* (2015) 120.

<sup>183</sup> See *supra* note 71.

<sup>184</sup> Cf. Gregory Chin, ‘The Economic Diplomacy of the Rising Powers’, in Andrew F. Cooper, Jorge Heine, and Ramesh Thakur eds, *The Oxford Handbook of Modern Diplomacy* (2013)881.

cannot remain purely in the gift of the West. In July 2015, Lagarde's deputy himself told the BBC that it was likely that her successor would come from outside Europe.<sup>185</sup>

The appointment of the twelfth Managing Director of the IMF will only be one more data point in the evolving international order. But as this paper has argued, that order is in need of change because the most populous and powerful region on the planet currently has the least stake in it. The reasons for this are partly historical, as Asian countries' experience of international law encouraged the view that its body of rules and institutions were selective and instrumental. At the same time, Asia's under-participation and under-representation are also attributable to the diversity and power dynamics of the continent, as well as the absence of push factors to bring about change.

The decline of the United States and the rise of China have altered that scenario, with growing pressure to offer China and other Asian states more of a say in global issues. To some extent, this is also being matched by Asian states playing a more prominent role in global institutions. Unlike the reactionary Asian values debates of the 1990s, this now takes the form of greater engagement and increasing levels of participation.

Not all of this will be positive. Though the likelihood of a radically different approach to global governance seems low, the traditional view of sovereignty espoused by many Asian states may slow the expansion of human rights and other norms — though it does not look set to reverse them completely. Nor will any change necessarily be coherent. As this essay has been at pains to stress, there is no one 'Asian' view of the world and greater involvement of Asian states will primarily increase pluralism in the international order. Yet the category remains a useful one as the various countries experiment with stronger regionalism, notably in the case of ASEAN, and in taking a leadership role, as in the case of China and, perhaps, India.

In the much heralded Asian century, many have argued that Asian states deserve greater representation in the institutions of global governance. That wish is clearly going to be

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<sup>185</sup> James Mackenzie, 'Next IMF Boss Likely to Come from Outside Europe — Deputy Head', *Reuters*, 25 July 2015.

fulfilled. But it merely begs the next question: once Asia has a seat at the table, what will Asia have to say?