

10-1-1990

## International Law in Asia: An Initial Review

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### Recommended Citation

Jeremy Thomas, "International Law in Asia: An Initial Review" (1990) 13:2 Dal LJ 683.

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### I. *Introduction*

It is now a little over half a century since the first of the states of Asia to be granted their independence in the aftermath of the Second World War became sovereign and independent of their former colonial masters. In that period there have been very substantial changes in international law. The number of the family of nations has more than tripled and international organisations and even individuals are now subject to the application of international law. Space law, human rights and the law of the environment have appeared, the law of the sea has been transformed, disarmament has reappeared as a serious subject, the use of force banned, in theory at least, and a new international legal order declared and these are only some of the most obvious developments.

At the time the states of Asia attained independence it was doubted whether their cultural outlook made them receptive to the fulfillment of the norms of international law let alone its development and embellishment. Henkin, for instance, in 1965, stated in respect of newly independent states that they had “as yet no tradition of law observance and that there were few pressures for law observance from opposition parties, or from a critical press, or an enlightened public”.<sup>1</sup>

Fifty years on it is perhaps an appropriate time to review whether the states of Asia have been able to play a role in the post-war development of international law, to consider how the considerable labours of Asian scholars have led us to revise our understanding of the Asian contribution to the formulation of international law and how the modern contribution compares with Asia’s historic contribution. Such a review may help us identify a region of the world from which we may expect new ideas and concepts to refresh and unify an increasingly fragmented discipline and may be particularly timely at the beginning of a decade which has been designated by the United Nations as the decade of international law and which ends with as portentous an occasion as the beginning of the third millennium. It is the intent of this writer to commence such a review in the hope that others better equipped and with larger canvas may complete it.

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1. Henkin, “International Law and the Behaviour of Nations” (1965), 114 *Hague Recueil* 181-2.

However, before commencing it is worth advising the reader of the definition of Asia used in this article. Northwards for our purposes Asia stretches as far as Mongolia, China and Afghanistan and eastwards it includes Pakistan. To the south it extends to the traditional states of South East Asia and to the west it embraces Japan and Taiwan. The Asian elements of Soviet Russia have been excluded as they lack a separate geopolitical existence and Iran has also been excluded because that nation, for the purposes of international law, has stronger links with the Middle East. Some readers' knowledgeable in the scholarly discussions of geographers and historians as to the definition of Asia may find this definition somewhat capricious, but for a lawyer it has the advantages of clarity and certainty.

## II. *International Law in Asia in Ancient Times*

### (i) *Introduction*

Phenomena very much akin to those of contemporary international law can be traced throughout antiquity. Perhaps the oldest of these, as Nussbaum noted, is a treaty dated about the year 3100 B.C. between two Mesopotamian cities whereby their common boundary was established.<sup>2</sup> By the year 1200 B.C. the legal nature solemnity and form of treaties was sufficiently well established in the consciousness of the Middle East that Yahweh, in the terms recorded in the book of Deuteronomy, cast his covenant with his people Israel in the form of a Near Eastern treaty.<sup>3</sup>

During the Dual Monarchy, after Solomon, treaties were being used for commercial purposes in addition to the traditional purposes of alliance in war and to terminate wars and Jehoshaphat, King of Judea, entered into a treaty with Ahaziah, King of Israel, to construct a fleet of trading ships for trading purposes.<sup>4</sup> Five hundred years on in the year 218 B.C., the Roman historian Livy recalls for us the legal arguments of the Roman envoys before the Carthaginian Senate in respect of whether a treaty was binding on a state when negotiated on its behalf, but without its full authority at the advent of the Second Punic War.<sup>5</sup>

In Asia the labours of various Asian scholars, particularly those of India, of which perhaps Chacko, Anand and most of all, Nagendra Singh, are the most significant, have established that the phenomena of contemporary international law also appeared in Asia from the earliest recorded times. These scholars, particularly the latter, have also sought to

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2. Nussbaum, *A Concise History of the Law of Nations* (1958) p. 2.

3. See Thompson, *Deuteronomy* (1974) pp. 17-21 and the works there referred to.

4. 2 *Chronicles* 20: 35-37.

5. Livy, *The War with Hannibal*, Radice (ed.) (1965), p. 41.

rebut the traditional view of the historic development of international law which has focused on the alleged development of the state. This view is that though phenomena akin to contemporary international law appeared prior to the sixteenth and seventeenth centuries, the international legal system in its present form appeared around the year 1638 with the Treaty of Westphalia and the establishment of the sovereign state in Europe<sup>6</sup>. The corollary of this view is that as the sovereign state did not appear in Asia until the mid twentieth century, Asia was excluded from any part of the foundation of modern international law.

The labours of these Asian scholars have demonstrated that seventeenth century Europe was not the first time and place in history that the world had seen the emergence of a series of sovereign states with sufficient contact to develop something that looks akin to international law. Singh affirms that in India “as early as the Vedic period (4000-1000 B.C.) there were in existence separate political units sufficiently independent of each other, each possessing an organ capable of conducting intercourse with the others; and such units existed in sufficient numbers to foster the growth of interstate law”.<sup>7</sup>

The question for us is what impact this early Asian interstate law has on the development of contemporary international law?

## (ii) *The Phenomena of International Law in Asia*

In India the most significant ancient period for the development of international law arose after Alexander the Great's invasion left behind a great number of Greek city states on the borders or inside India. Three areas of the practice of international law have, in particular, been identified. First, these states in their relations with each other and surrounding states gave rise to substantial diplomatic practice and the personage of a diplomat appears to have been considered inviolable. Second, treaties were also entered into, and on the authority of Kautilya, the ancient East's equivalent of Machiavelli, it appears that treaties were regarded as binding between the parties and the equivalent of the *pacta sunt servanda* principle was recognised.<sup>8</sup> Third, Judge Singh also suggests, on the basis of various texts describing mythical events, that ancient India had developed limits on the circumstance in which war could be waged and had “highly developed system of laws and rules of war based on

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6. See particularly Gross, The Peace of Westphalia 1648-1948 in *International Law and Organization* (1968) Falk (ed.) pp. 45-67.

7. Singh, “History of the Law of Nations Regional Developments: South and South East Asia” (1984), 7*Encyclopedia of Public Int. Law* 238.

8. Chacko, “International Law in India” (1960), 1 *Indian J. Int. Law* 591-2.

considerations of humanity and chivalry” and that “the distinct contribution of this period (1900-1000 B.C.) was the formulation of the laws of war”.<sup>9</sup> However, as Nussbaum noted, it seems unlikely that mythical events were taken as prescriptive for future conduct and latter practice seems to suggest that humanitarianism was no more prevalent in the ancient East than it was elsewhere.<sup>10</sup>

Outside India the prevailing political circumstances and moral outlook did not assist the development of international law. In China, for instance, the states of which it was comprised were always treated as subordinate to the ruling Emperor and would only obtain independence of action at times when the central power was weak and in disarray as in the Ch'un Chiu period of the Chou dynasty (722-481 B.C.). In this period sophisticated codes of practice developed between the entities comprising China relating to multi-party conferences (including a disarmament conference) and treaties and the establishment of rules pertaining to embassies. However, even in these circumstances, as one commentator notes, the Emperor's “nominal rank was still recognised by the feudal lords to some extent as a source of control . . . a hierarchical relationship based on higher and lower status” still remained.<sup>11</sup>

In respect of those states which lay outside her boundaries the Chinese view that such states were barbarians meant that they could never be “treated as independent states” with which relations based upon law could develop. At different times, *inter alia*, Japan, Korea, Vietnam and Burma were all tributary to China. Nevertheless, on occasion, when absolutely necessary, China was willing to make treaties with the “barbarians” such as the peace treaty of the year 200 B.C. with the Huns.<sup>12</sup> However, such treaties merely seem to indicate the well nigh universality of the phenomena of international law throughout history and as professor Chen notes, these isolated practices, principles and rules never developed into a legal system.<sup>13</sup>

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9. Singh, *The Distinguishing Characteristics of the Concept of the Law of Nations as it developed in Ancient India in Liber Amicorum for Lord Wilberforce* (1987), Brownlie & Bos (eds.) p. 92 & 103.

10. *Supra*, note 2 p. 4.

11. Iriye, “The Principles of International Law in the Light of Confucian Doctrine” (1967), 120 *Hague Recueil*, 7.

12. Miyazaki, “History of the Law of Nations Regional Developments: Far East” (1984), 7 *Encyclopedia of Public Int. Law* 216.

13. Chen, “The People's Republic of China and Public International Law” (1984), 8 *Dalhousie L.J.* 3.

(iii) *The Impact of the Ancient Practice of International Law in Asia on Contemporary International Law*

It is very difficult to show that the phenomena of international law that emerged in ancient Asia had any significant impact on the development of modern international law. Although there is a “degree of similarity between several of the ancient Indian state principles and usages of modern international law”<sup>14</sup> jurists in only a few instances have suggested that ancient Asian practice has had real impact on the formulation of contemporary international law.

Although phenomena of international law have appeared throughout history it is to the sixteenth and seventeenth centuries in Europe that the origins of contemporary international law have been, it is submitted correctly, traced. However, the reason for this is not so much because the period witnessed the appearance of the sovereign state, as is traditionally thought because sovereign states as we have seen had long existed in the Middle East, the Mediterranean world<sup>15</sup> and in Asia, but for reasons connected with the development of commerce, politics (including the further development of the state), religion, communications and the intellectual development of mankind in Europe.

Perhaps the first person to realise that the middle centuries of the second millennium after Christ had seen the emergence of a fundamentally different international legal system in Europe was Martens writing in the latter part of the eighteenth century. In his view, on many points of international law, “no information can be obtained by going further than the time of Henry the Great, or the Treaty of Westphalia or even the Beginning of the Present Century”. Emphasising the long term importance of the introduction of Christianity “and of the hierarchical system” the contemporary underlying reasons that he thought had given rise to such marked developments in international law were the discovery of America and of passage to the East Indies, the growth in permanent embassies (unlike modern commentators he did not emphasise the importance of the Treaty of Westphalia because in his view sovereign states had for long existed).<sup>16</sup> To this list we might also add, in an era when all legal systems suffer from a surfeit of paper, the perfection of the printing press.

One further factor for the development of international law in the sixteenth and seventeenth centuries which Martens did not mention was

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14. *Supra*, note 8 p. 185.

15. See Ago, “The First Communities in the Mediterranean World” (1982), 53 *British Yearbook Int. Law* 213.

16. Martens, *Law of Nations* (1795) p. 6.

the intellectual achievement of Europe embodied in the development of the theory and doctrine of international law. This commenced under the pen of the Spanish jurists such as Vitoria and later, the protestant jurists such as Gentili and Grotius. Their works were important because they were of a codificatory nature of the existing practices of international law, bringing together for the first time the full plethora of rules, practices and precedents of states ancient and modern. Appearing at the time when growing interstate intercourse required legal guidance these works provided in a tangible and accessible form precepts of international law and were ensured recognition by reason of the prestige attaching to the author's name. It may be possible to trace the practices of international law back long before the publicists,<sup>17</sup> but they presented these previously isolated practices in a form capable of systematic development and which development, with the benefit of the printing press, has continued since as the religious, political and commercial forces that Martens noted have generally continued to operate.

As we look through the works of Grotius and his predecessors such as Gentili and even later writers such as Bynkershoek and Vattel, their methodology shows how little they were influenced by Asian practice. The publicists were strongly influenced by Christianity and were natural lawyers. They believed that God, as a God of order, had laid down rules for the conduct of states just as he had for individuals and that these could be found from biblical precedents and the best practices of the ancients. There was a right course of conduct and a wrong one, and ultimately, for the monarch, to whom many of these works were addressed, judgement before God. The relativism of the East was missing.

The great storehouses for these writers from which principles to guide the practice of states could be elaborated were history, theology, philosophy and law. Whether it was ancient history, or biblical history and theology or Roman law or the Mosaic law, it was from these sources that the doctrines of international law were crafted and in light of which the practices of states were judged. For instance, Gentili, when seeking to establish the legality under the law of nations of treaties with states of differing religions pointed, *inter alia*, to the Treaty of Friendship between Solomon and Hiram of Tyre and one between Solomon's father David and the King of the Ammonites found in the Bible.<sup>18</sup> However, when these writers went to ancient history to establish or test a point of law they went to Greek or Roman history and in the case of biblical history,

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17. For the contribution of central and eastern Europe see Lachs, *The Teacher and International Law* (1982).

18. Gentili, *De Jure Belli Liri Tres* (1612) p. 658.

to the practices primarily of the Jews and of Semitic peoples and not to the practices of Asia.

This is not to say that ancient Asian practice was never referred to by the early publicists of international law. Indeed commentators have noted the reference by Grotius' to Alexander the Great's adoption of Indian practices relating to the laws of war, but such references are very isolated in the literature of international law and would appear to have been derived from classical European sources rather than Asian. Grotius, for instance, was well aware of Plutarch's analysis of Alexander's Indian Campaign and probably also of that of Arrian.<sup>19</sup> The lack of recourse of the publicists to Asian texts should not surprise us for the early writers of international law could only produce their work from the sources then available and histories of Asia even in Asia were either unavailable or unwritten. As has been noted "prior to the British historiographers were mostly Muslims"<sup>20</sup> whose works were anecdotal and inevitably not known in Europe. The works that survived the centuries were of an intellectual and literary nature and even today when the writing of the Asian history has become a major growth industry in countries such as India the material to create an authentic history is lacking and Asian scholars have relied heavily on the activities of the Hindu gods in ancient legends and myths to illustrate Asian practices.<sup>21</sup>

It is indeed in Asia's approach to history that we find perhaps the principle reason for her failure to contribute to the development of modern international law in the sixteenth and seventeenth centuries. The great religions of Asia, Buddhism, Confucianism and particularly Hinduism did not rely on history as an essential part of their validity. The thoughts and doctrines of Confucius and the Buddha are independent of their lives and had they not existed the ideas they articulated would not diminish and the origins of Hinduism are lost deep in time. As religions they are very unlike Christianity, which is rooted in history, being the history of God calling a people to himself, first from the Jews and then the Gentiles and finding the completion of this process in the life, death and resurrection of Jesus Christ. Although it is fashionable in the last century and a half to doubt the historicity of Jesus of Nazareth it was not at the time when the scholastics wrote, when Gentili fled Italy from the Inquisition and Grotius joined Jacob Arminius in his dispute with the successors to Calvin. For them the treaty practices of Solomon and the people of Israel during the Exodus were authentic. The legendary and

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19. See Sandifer, "Reading Grotius in the year 1940" (1940), 34 *Am. J. Int. Law* 459.

20. Spear, *A History of India* (1965) Vol. 2 p. 11.

21. *Supra*, note 8, p. 185.



mythical nature of the sources that would have been available in Asia would not have had a strong appeal to men with the mind set of Grotius or Vitoria even had they known of them.

The one principle though that Indian scholars have emphasised as representing the unique contribution of ancient India to international law is the "universality of its application, irrespective of limitations of religion, civilisation or political character". Further, it is submitted that Christendom, the cradle of modern international law, by the principle that "nothing of a binding nature could govern the relations of a Christian state with a non Christian State, did lasting damage to the correct concept of international law, which recognises political entities irrespective of their religious beliefs."<sup>22</sup>

Such an analysis, however, to this writer, seems to considerably overstate the case. Although it may be true that Indian society has not been marked by the division of society into religious or national groups, although recent disturbances suggest that this may not necessarily be so, the human failure manifested in nearly all societies by the need to discriminate against other peoples and religions was met in Hindu society by a different form of discrimination, the caste system. For instance, upon the conquest of India, around 800 B.C. by the Aryans, society was divided vertically and the native Dasas were treated as beyond the social pale. "This vertical division of society made it easier in later centuries to accept new ethnic groups" as Dr. Thapar has noted. "Each new group to arrive in India took on the characteristics of a separate sub-caste and was thereby assimilated into the larger caste system."<sup>23</sup> It thus appears that the universality of the East appears to be quite different from the universality which has come to prevail in international law with its emphasis on equality and independence.

Further, to this writer, it seems that international law derived its emphasis upon universality from its Christian heritage. Vitoria, as we will see, maintained that differences in religion and the extension of empire were not just causes for war.<sup>24</sup> Such plain speaking was to offend both Pope and Emperor. Grotius and Selden, as we shall also shortly see also both made use of the practices of non Christian peoples to support their views so long as such peoples had obtained a minimal level of civilisation. Although it is true there were debates over the legality of entering into

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22. *Supra*, note 7, p. 239.

23. Thapar, *A History of India* (1966) Vol. 1 p. 38-39. Others have noted that Hindu law is based on inequality, see Bozman cited in Cassese, "The Concept of Law Upheld by Western Societies and Developing Countries", [1983] *Hague Recueil Colloquy* 323.

24. *Supra*, note 18 p. 200, however, a just cause of war was to terminate cannibalism.

treaties with the Turk in the works of the early fathers of international law, the discussion is not in the context of whether Christian states can rely upon the beliefs of the other party to regard the treaty as non-binding, but whether entering into the treaty *per se* is a breach of international law committed by Christian states against the other members. At a time when Turkey fully embraced the concept of Jihad against the West and the necessity of success at the battle of Lepanto was still well within living memory, such a view is understandable. It also seems that notwithstanding this threat, treaties of a commercial nature, even with the Turk, were considered binding.<sup>25</sup> It appears only with the coming of positivism in the latter half of the nineteenth century did international law surrender universalism.

### III. *The contribution of Asia to International Law 1600 - 1914*

#### (i) *Introduction*

An assessment of the contribution of Asian states to international law in the period from the beginning of the seventeenth century to the First World War requires answers to two principal questions. First, at this time, were the states of Asia members of the family of nations? Second, if the former can be answered in the affirmative what special doctrines or practices did they contribute to international law?

#### (ii) *Position of Asian States in the Family of Nations*

The question of whether the states of Asia were members of the family of nations at the beginning of the seventeenth century is a matter on which views differ.

The traditional and most popular view is that international law is the creation of the Christian mind in Europe. In the words of the learned Oppenheim "there is no doubt that the Law of Nations is a product of Christian civilisation. It originally arose between states of Christendom only, and for hundreds of years was confined to these states".<sup>26</sup> However, he went on to note that the family of nations was, at the beginning of the twentieth century, embracing non European and non-Christian states as such states attained to the level of civilisation enjoyed by the Christian states of Europe.

According to Oppenheim in his classification of the members of the family of nations in 1905, "in Asia only Japan is a full and real member of the Family of Nations, Persia, Korea, China, Siam and Tibet are, for

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25. *Ibid.*, p. 658.

26. Oppenheim, *International Law*, (1905), 1st ed. p. 30.

some parts, only within the Family". Further, Japan could not long trace its ancestry in the family of nations and "some years ago" Oppenheim tells us "one might have doubted whether Japan was a full and real member of that family" but "through marvellous efforts Japan has become not only a modern state but an influential power".<sup>27</sup> At the same time, according to Oppenheim there were seventy two European States who were members of the family of nations and twenty one in America.

The states of Asia were excluded from the family of nations not on grounds of race or religion but civilisation. It was, however, confidently assumed that "with the progress of civilisation" the non European states "will become sooner or later International Persons in the full sense of the term".<sup>28</sup> Indeed, in the next half century, as we shall see, successive editors of Oppenheim would dedicate a substantial portion of the text book to noting and setting forth the extent of the progress of that civilisation as new states were admitted to the family of nations.

The text books noted the difficulty of defining the exact amount of civilisation necessary for a state to be considered a member of the family of nations. For instance Lawrence, writing in his text book of 1895, seems to have no doubt that China was a full member of the family of nations.<sup>29</sup> The essence of an uncivilised state was one that was unwilling or unable to fulfil its international treaty commitments or protect the lives of foreign citizens and their property. Accordingly, uncivilised states were subject to capitulations by civilised states whereby the latter were granted jurisdiction over their own nationals and their property resident in an uncivilised state.<sup>30</sup>

Admission to the family of nations required not only the establishment of Western forms of civilisation, but recognition by the existing members that the requisite standard of civilisation had been attained. Such recognition could be given formally by treaty, as in the case of Turkey to Clause 7 of the Treaty of Paris 1856. Alternatively, it could be given by an agreement to withdraw the capitulations. For instance, the admission of Japan seems to have been less formal and rested on her adoption of Western practices which, in 1894, led to the Aoki-Kimberly Treaty whereby the United Kingdom renounced its extraterritorial rights in Japan and similar treaties were shortly thereafter entered into by Japan with other Western Powers.

Therefore in one view, at the beginning of the twentieth century, it was not thought that the states of Asia were longstanding members of the

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27. *Ibid.*, p. 33.

28. *Ibid.*, p. 149.

29. Lawrence, *The Principles of International Law* (1895) p. 58.

30. Westlake, *Chapters on the Principles of International Law* (1894) p.102.

Family of Nations. Only Japan, of the Asian states, had a clear place in the Family of Nations and she was a new, if precocious, member. China, Siam and Korea, who was soon to lose her independence, were seen as international progeny of somewhat dubious parentage. In the course of time it was expected that such states and other Asian peoples would gain a place in the Family of Nations upon the attainment of a level of civilisation which was sufficient to guarantee the fulfilment of international obligations and the recognition of such by the members of the Family of Nations. Such a time had not yet, however, arrived.

A different view of the extent to which non European states were members of the Family of Nations in the seventeenth and eighteenth centuries was reached by the Polish born jurist Professor Alexandrowicz. Alexandrowicz argued that in the early years of Asian-European contact the parties regulated their relations on the basis of international law and concluded his seminal work "An Introduction to the History of the Law of Nations in the East Indies" with the words that "when European states first sailed to the East Indies (meaning here India, Ceylon, Burma, Siam and the Indonesian islands) a confrontation of two worlds took place on a footing of equality and the ensuing commercial and political transactions, far from being in a legal vacuum, were governed by the law of nations as adjusted to local inter-state custom".<sup>31</sup>

In his analysis Professor Alexandrowicz pointed out that the jurists of the day, Grotius and Freitas, in their dispute over a nation's rights over the high seas<sup>32</sup> and their rights to occupy East Indian lands, both accepted that the states of Asia were protected by international law and any interference with their territory or rights required legal justification. Both jurists accepted that the Portugese had no legal right to occupy East Indian lands based on rights of discovery or occupation or prescription because both agreed that none of these doctrines were applicable where a land was already occupied, regardless of who the occupier was and where it lay. Where the two differ is that Freitas argued that Papal donation and the spread of Christianity justified European occupation. However, it is only on this one limited ground that Portugal was permitted, in Freitas's view, to intervene in the affairs of Asian states. There was no general right to use force in Asia at ones' discretion because international law applied to regulate the use of force.

The differences between the postulates common to Grotius and Freitas and those of the early twentieth century writers are clearly brought out by

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31. Alexandrowicz, *An Introduction to the History of Law of Nations in the East Indies* (1967) p. 224.

32. See Grotius, *Mare Liberus* (1608) and Freitas, *De Justo Imperio Lusitandrum Asiatico* (1625).

an examination of Oppenheim. Writing of, *inter alia*, China, Korea and Siam he notes that “though for certain parts they are recognised as international persons they remain, as yet, outside the Circle of the Family of Nations, especially with regard to war and they are, for those parts, treated by Christian powers according to discretion”,<sup>33</sup> which discretion for Oppenheim meant annexation.

In addition, to fortify his argument that political and commercial transactions took place under the law of nations in the East Indies Professor Alexandrowicz points to a substantial number of treaties that were entered into during the sixteenth to eighteenth centuries between European and Asian states. Treaties of alliance were entered into, such as that in 1547, between the King of Portugal and the leading Hindu Kingdom of the period, Vijayanagar, against Muslim Bijapur. Others dealt with the transfer of territory, such as the treaty of 1779 between Portugal and the Marathas, the validity of which the International Court of Justice has considered and a great number of treaties were entered into of a commercial nature.

The explanation suggested by Professor Alexandrowicz for the establishment of the view that international law in the seventeenth century was confined to Europe is “the replacement of the natural law ideology by positivism”<sup>34</sup> in the early nineteenth century. According to him the emphasis at this time on the practice of European states “meant the reduction of non European state entities which had enjoyed a full legal status within the pre-nineteenth century Family of Nations to the position of candidates for admission to its membership or for recognition by the founder members of the European community of States”.<sup>35</sup> This view seems to be reflected by the literature for, by the late eighteenth and early nineteenth centuries, writers were referring to both international law and “the European and American Code of international law”.<sup>36</sup> With the development of the weight of European practice it appears that what former generations took to be European or American international law became recognised as international law and the doctrines and concepts that had been known as “international law” disappeared from the literature.

The attack of Professor Alexandrowicz on the traditional view of the European exclusivity of the early members of the Family of Nations has

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33. *Supra*, note 26 p. 149.

34. *Supra*, note 31 p. 9.

35. *Ibid.*, note p. 10.

36. Kent, *Commentary on International Law* (1866) Abdy (ed.) p. 11; Martens, *Law of Nations* (1795) p. 4.

been met by Gong. Gong's thesis is that "there never was a primordial, universal Family of Nations" but that only "paradoxically" through the elaboration of the civilisation standard did the Family of Nations become "universal for the first time".<sup>37</sup> Gong rests his thesis on the argument that the states of China, Siam and Japan were closed to Europe in the seventeenth century and that it was the application of the civilisation standard in the nineteenth century that brought them into the international legal system whereby the Family of Nations became truly international. Gong's thesis applied to international law, rather than to the development of a truly international political system where it belongs, results in a very inaccurate assessment of the participation of Asian states in international law. Gong does not deny the universalism of Grotius and others but suggests that their views were "based more on the conceptions of European theorists, than on the realities of sustained contact among the members of the world".<sup>38</sup>

Although he is right to emphasise the degree of contact between European and Asian states for the purpose of ascertaining whether they formed an international system (his definition of an international legal system is, after all, "when two or more states have sufficient contact between them and have sufficient contact on one another's decisions to cause them to behave — at least in some measure — as parts of a whole") the need for contact between all European and Asian states is not necessary for the establishment that, as a matter of legal doctrine, international law did acknowledge Asian states if such relations as did exist were predicted on the equality of nations. There is no reason to suggest that had China, Japan and Siam been more accessible to Europeans international law would have applied precepts other than those it applied in the East Indies. Indeed Gong does not attempt to refute the solid body of interstate practice the Alexandrowicz adduces to illustrate the universalism of seventeenth century international law.

Further, Gong fails to note that seventeenth century international lawyers made use of the concept of civilisation in a different way to their nineteenth century brethren to identify the nations whose practices were to be relied upon for establishing the doctrines of international law. Selden, for instance, in his classic work *Mare Clausum* affirms the right of nations to appropriate the seas by the "natural permissive law derived out of the customs and constitutions of the more civilised and more noble nations both ancient and modern". He then carries out an encyclopedic

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37. Gong, *The Standard of Civilisation in International Society* (1984) pp. 44-45.

38. *Ibid.*, p. 3.

survey “of the more civilised and more noble nations of the past and present age and of such whose customs we are best acquainted with”.<sup>39</sup> The practices of such “civilised nations includes Egypt, Syria and Persia in addition to European ones. Although Selden makes no reference to the practices of Asian states this may be because they were not ones he was “best acquainted with” or more likely that as the sovereignty over the seas was unknown in Asia her practice was more conveniently ignored. It is clear though that by reference to the practices of Middle Eastern nations, for Selden, civilisation did not mean exclusively the civilisation of Europe, as it did for nineteenth century international lawyers and that further, there was a residue category of nations whose practices (because of the paucity of their civilization) could not constitute precedents of international law. It was this residue category which later writers would expand to exclude Asian states from the Family of Nations.

It should not surprise us that European nations of the period were willing to apply legal standards and to enter into relations with Asian states on the grounds of equality. The environment in which these states grew was fundamentally legalistic in which the great day when God would judge the living and the dead was vitally alive. If God was to judge all peoples on the same terms what right had Europe to treat these peoples as unfit for intercourse? Thus, when European nations first met in the Americas one of the first things the King of Spain was to do was to ask scholars, such as Vitoria, how relations with the natives were to be conducted.

Similarly, when Europe went to Asia it was generally willing to treat it with equality. The difference between South America and Asia however was that the great biblical testimony of St. Paul that “all have sinned and fallen short of the glory of God”<sup>40</sup> was proved true, as principles gave way to greed more quickly in South America than Asia due to the restraint imposed on human passions by the latter's more developed military and economic prowess. It was not until the mid-nineteenth century that European military ascendancy in Asia was complete and until that time Asia remained part of the Family of Nations.

### (iii) *The Contribution of Asian States to International Law*

Significant contributions by Asian states to the corpus of international law are hard to discern in the period running from 1600 to 1914, with perhaps one or two isolated exceptions.

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39. Selden, *Mare Clausaum* (1952) p. 42.

40. *Romans* 3:23.

Although Europeans considered the law of nations applicable to Asian states, such states at a philosophical level were not equipped to make a lasting contribution to the development of international law at the time. The undergirding philosophical base of the international law of the era, although towards the end of the era it was to diminish, was the law of nature which had its derivation in the monotheism of Judea-Christianity and its belief that God was the maker of heaven and earth and of all mankind and that God, whose revealed nature did not change, would have created an orderly world, the laws of which would be universal and discoverable. Such a postulate, as Professor Ito, has noted in the context of nineteenth century Japan was not one which Asian states could naturally identify with and develop.<sup>41</sup> Although Europeans might consider that international law was applicable to all states, the notion that there was a universal law binding on all states was foreign in large parts of Asia where Japan under the Shogunate was closed to the West and where the Universal Monarchy of China looked upon "all outside states as vassals or barbarians".<sup>42</sup>

Further, the chief instruments by which the doctrines of international law were propagated were European. The role of the publicist in the development of international law should not be minimised and Grotius, Bynkershoek, Wolff, Pufendorf and Vattel, to name but only a few of the most prominent publicists, along with their colleagues, were all European. It was their belief, in the possibility that the totality of international relations could be rendered subject to law that laid the foundations of the present day international legal system and the belief in its systematic development in accordance with the development of society. It is, as we have seen, also striking that the sources and precedents that these writers used in compiling their works were almost drawn exclusively from European or Middle Eastern sources.

Perhaps just as significant for the contribution of Asia to the international law of the latter half of the nineteenth century was its failure to participate fully in the great second wave of industrialisation that swept over Europe in the middle decades of the century. By 1850 the long struggle from a rural to an industrial society was complete in Western Europe and as Cipolla has remarked "the past was not only past it was dead".<sup>43</sup> In Western Europe a new world had appeared, a world sustained by industrial production, which utilised mechanical power in vast quantities, which systematically applied science to help solve its

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41. Ito, "One Hundred Years of International Law Studies in Japan," [1969] *Japanese Yearbook Int. Law* 22.

42. Panikkar, *Asia and Western Domination* (1953) p. 126.

43. Cipolla, *The Emergence of Industrial Societies* (1973) p. 9.



problems which needed and created a well developed system of communications and which thrived upon the factory system, capital and urbanisation.

This new world made new demands on its international law. Its problems and concerns were not parochial, but worldwide and to meet these demands there emerged in the 1860's the "multipartite, law making, open and organisational treaties," as well as the new type of international "conferences" which Professor Nussbaum believes led to the sixth decade of the nineteenth century seeing "the birth of a new era of international law".<sup>44</sup> Amongst the most important of these treaties were the Geneva Convention of 1864 for the protection of the wounded, the International Convention on International Freight Traffic of 1890, the International Sanitary Convention of 1903, the Cobden Treaty of 1860 for trade and those creating the Universal Telegraphic Union of 1865, the General Postal Union in 1874 and the International Office of Public Health of 1907. These conventions although often ratified at latter dates by the states of Asia all took place without their central involvement and the states of Asia were therefore little able to contribute to the formulation of the new procedures for the creation of international law that were appearing.

This irreversible trend in Western Europe to industrialisation after 1850 also gave rise to greatly increased military might and the ability and confidence to subject very distant nations to the will of the metropolitan state. This confidence in turn, in the righteousness in what states did, gave rise to legal positivism which, as we have seen, did much to encourage the disinheritance by international law of its earlier progeny. From the 1860's onwards there was a great scramble by the European states to obtain as colonies the territories of Asia. In 1884 the French annexed Indo China and in 1893 followed that up with the annexation of Laos while the annexation of Burma was completed in 1886 by the British. Throughout this period there was a nibbling at the edges of China.

If there were strong reasons militating against a contribution by Asia to international law between 1600 and 1914 what contributions were there?

Perhaps the first we might mention is in the context of the law of the sea. It appears that the doctrine of the freedom of the seas was applied in the Indian Ocean at the time of the inception of international law and Alexandrowicz suggests that "Grotius either conceived or perfected his doctrine of the freedom of the sea under the influence of maritime

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44. *Supra*, note 2 p. 202.

traditions prevailing in the East".<sup>45</sup> Indeed Anand submits that "the freedom of the seas not only existed long before Grotius was ever heard of or before Europe appeared as a formidable force on the international stage, but was actually being practised without any question in the sixteenth century by Asian countries".<sup>46</sup>

However, although it may be true that Asian states did not seek to control the seas, as even Anand admits, the freedom of the seas as a doctrine of law, rather than usage had to await the appearance of Grotius. Though Grotius may have been influenced by the practices of the nations surrounding the area of his interest the authorities that he cites are almost exclusively classical or biblical or European. Indeed, the foundation argument of Grotius for the freedom of the seas is that "specific and unimpeachable axiom of the Law of Nations, called a primary rule or first principle, the spirit of which is self evident or immutable, to wit; Every nation is free to travel to every other nation, and to trade with it".<sup>47</sup> Such a principle, may to the mind of the modern international lawyer imbued as it is with concepts of state sovereignty be inconceivable as a fundamental and overriding rule of law but in the seventeenth century it was this rule by extrapolation upon which was to be based the main argument for the freedom of the seas.

Another area of Asian involvement was the law of neutrality. In 1864 Prussia seized three Danish ships carrying Chinese goods and upon arguing that she was a neutral, China received compensation in accordance with the law of the times. An incident which attracted much greater attention from international lawyers and which again involved the law of neutrality occurred during the Sino-Japanese war of 1894-5 when the Japanese sank the Kowshing, a British ship carrying Chinese soldiers. This created quite a stir in the western press, but the action was held to be justified in international law and Westlake argued, in writing, firmly in the favour of the Japanese. Although neither of these matters were of major significance to the law of neutrality they were all part of the incidents and events which went to constitute the fabric of the law.

The most significant contribution however to the future development of international law was the example provided by Japan of the possibility of membership to the Family of Nations when membership required close blood ties to Europe. In the 40 odd years that separated the arrival of Commodore Perry's celebrated Black Ships off the coast of Japan and her victory over China in 1895, Japan moved from being a state almost

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45. *Supra*, note 31 p. 229.

46. Anand, *Development of the Law of the Sea* (1983) p. 226.

47. Grotius, *Mare Liberum* (1608) p. 7.

unknown to European civilisation to the only full Asian member of the Family of Nations, only the second state with a non European or non Christian heritage and unlike Turkey she was not historically well known in Europe and perhaps most strikingly, she had done so by reason of her own “marvellous efforts” and thus, by example emphasised the scope for the future extension of membership of the Family of Nations to all states. Furthermore, Japan had become “one of the Great Powers that lead the Family of Nations”.

The emergence of Japan as a member of the Family of Nations was the result of a definite decision by her leadership to develop Japan politically and economically along Western lines in order, partly at least, to fulfil the standards inherent in the civilisation test for membership of the Family of Nations. Representative political institutions were established, the legal system reformed and modern industries established. Having commenced these developments Japan set about the definite strategy of negotiating with the Great Powers for the removal of the capitulations which nineteenth century wisdom regarded as the symbol of an inferior or at best different civilisation. In 1894 Japan by the Aoki-Kimberly Treaty with Great Britain after 25 years of trying succeeded in obtaining the agreement of a Great Power to the lifting of its extraterritorial rights and this treaty was to be the precedent for the future revision of her unequal treaties with the Great Powers.

Nevertheless, although the methods by which Japan became a member of the Family of Nations was an example to other non European states such as Siam, it was an example which other states, excluded from the Family of Nations, found difficult to emulate. Japan did not campaign for any radical restructuring of the Family of Nations to widen its membership, but seems to have been content to adopt its existing precepts and in many ways was a model member.

The latter half of the nineteenth century saw great strides forward beginning with the Geneva Conventions in the legal controls on the use of force by states once a war had broken out. These rules were applied most rigorously by the Japanese in their wars with China in 1895 and Russia in 1905 to the considerable commendation of the commentators. F. E. Smith and Sibley, for instance, wrote of her conduct in the war of 1905 that “Throughout the war her attitude has been one of intelligent correctness “giving nothing away” in the current phrase but taking no liberties with accepted international practice”<sup>48</sup>. In addition, Japan attended both the International Peace Conferences of 1899 and 1907 at

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48. Smith & Sibley, *International Law as Interpreted During the Russo Japanese War* (1905) p. 8.

the Hague and signed and ratified all the Conventions that resulted, but she rejected the suggestion to settle disputes by means of compulsory arbitration although it appears that the combination of Germany and Austria-Hungary were the primary protagonists in resistance to this concept.<sup>49</sup> Nevertheless, Japan was the defendant in the *Japanese House Tax Arbitration Case*, the third case to come before the Permanent Court of Arbitration in which Great Britain, France and Germany alleged that a tax imposed on buildings in Japan was in breach of the treaties whereby their extra territorial rights had been terminated. The Court found against Japan and as a consequence she refrained “for many years from referring international disputes to arbitration”.<sup>50</sup>

In many other ways Japan appeared the conservative. By a treaty of 1876 she imposed an unequal treaty on Korea by which means she obtained extraterritorial rights and as with similar rights obtained by the Great Powers in similar situations this proved to be the precursor to the complete annexation of Korea in 1910. Accordingly, Korea, although a participant of the First Hague Peace Conference, was not to participate in the Second Peace Conference. In respect of the limit to the territorial sea Japan upheld the traditional three mile limit and generally allied her interest with those of the traditional maritime states.

International law was the first European legal system introduced to Japan<sup>51</sup>. As early as 1862 Amane Nishi was despatched to the University of Leyden to study, *inter alia*, international law under Professor Vissering. In the years that followed interest in international law grew rapidly and as early as 1897 the “Association of International Law of Japan” was founded and in 1902 it began publishing a monthly periodical which between 1912 and 1940 was the only international law journal published in the Orient recognised by the Carnegie Endowment. The opinions of Japanese jurists in respect of international law also, as Professor Ito has noted, tended to reflect the prevailing world views, “especially those of European academic circles”.<sup>52</sup>

In these early years the Japanese were naturally concerned with establishing what existing international law was and many of the standard treatises of the day were translated such as Woolsey’s “Introduction to the Study of International Law” and Kent’s “Commentaries on International Law”. However, undoubtedly the most

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49. Higgins, *The Peace Conferences* (1909) p. 84.

50. Miyazaki, “Japanese House Tax Arbitration Case” (1981), 2 *Encyclopedia of Public Int. Law* 155.

51. Otsuka, “Japan’s Early Encounter with the Concept of the Law of Nations” (1969), 13 *The Japanese Yearbook Int. Law* 43.

52. *Supra*, note 41 p. 31.

influential work of the period was Wheaton's "Elements of International Law" which was first translated into Chinese in 1864 and in 1865 was reprinted in Japan. Wheaton's work was the subject of a series of commentaries and it has been said that "the translations of the treatises of other scholars were published for the better understanding of Wheaton".<sup>53</sup> Perhaps the first native author of real significance was Dr. Sakue Takahashi whose works on international law during the Chino-Japanese war attracted a wider audience and in particular the attention of Westlake and Holland<sup>54</sup>.

#### IV. *International Law in Asia 1914-1939*

##### (i) *Introduction*

The First World War was, despite its title, primarily a European war. It started in Europe, its main antagonists were European, its great battles were fought there, and all the main fronts, with the exception of the Middle East were located in its geographical confines. Outside Europe, wherever significant combat took place, the combatants were European or financed or armed by Europeans, with the exception of Japan who limited her role to seizing the isolated German possessions in the Pacific. Although, symbolically for the future, at the request of the hard pressed British Admiralty the Japanese despatched a squadron of her excellent navy to the Mediterranean for escort duties. Thus it was that the great changes in international law, which can be traced back to the war years, continued greatly to reflect European developments and initiatives.

Nevertheless, the First World War by its end had drastically altered the distribution of power in the world and its aftermath provided a definite opportunity for the states of Asia to assert themselves on the world stage for a number of reasons. First, it delivered a severe blow to the moral confidence that Europeans had in their civilisation and accordingly in the justice of judging nations in accordance with whether they subscribed to a form of civilisation identical or compatible with the West. As Dr. Spear has noted in the context of India "here were the Western mentors of the East engaged in a fratricidal struggle and accusing each other of atrocities which they had taught Indians to believe were confined in modern times to their own country."<sup>55</sup>

Second, the Western Allies had incurred a moral debt to many Asian states and their own colonial possessions. For instance both China and

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53. *Ibid.*, p. 21.

54. See Takahashi, *Cases on International Law During the Chino-Japanese War* (1899).

55. *Supra*, note 20 p. 182.

Siam had fought against Germany and the Austro-Hungarian Empire in a conflict from which they might have stayed apart and India had raised over 1,200,000 men for the services of the United Kingdom.

Third, the appearance of Soviet Russia and its advocacy of old principles applied to new circumstances, such as the principles of territorial inviolability, non-intervention and non-aggression and its proclamation of principles, such as the right to self determination and the invalidity of unequal treaties and treaties subject to a fundamental change of circumstances, brought into being for the first time a traditional Great Power whose interests, at least ostensibly, were not identifiable with the continuation of the traditional norms of international law.

Fourth, America emerged as the creditor of Europe and ultimate arbiter of the victorious Western Alliance and in doing so, along with the appearance of Soviet Russia, shifted the world balance of power away from Europe. This was particularly important because America, unlike Europe, had no important colonies to preserve in Asia and accordingly, as President Wilson's famous Fourteen Points was to show, she was sympathetic to the aspirations of colonial territories for self determination.

However, as we will see, the outworkings of these new factors did not lead to as full a participation in the Family of Nations as might have been expected and the war and interwar years may, perhaps, be seen as a transitional period for Asia.

#### (ii) *Membership of Asian States in the Family of Nations*

The post war years saw a gentle increase in the Asian members of the Family of Nations. Japan remained as the one Asian Great Power, but by 1928 the edition of Oppenheim's textbook of that year acknowledged in its classification of the number and standing of the states of the world that in Asia both China and Siam were full members of the international community and that there was no longer any doubt about their membership. Further, Afghanistan had been added to their number as was Nepal by the date of the next edition of the work in 1937. In addition, Mongolia and Tibet were recognised as half sovereign states and in a footnote it was stated that they were "nominally . . . regarded as being under the protection of China, but that the former or part of it has some connection with the Russian Union of Socialist Republics".<sup>56</sup> This, though, was perhaps a conservative view, at least as regards Tibet, for as

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56. Oppenheim, *International Law* (1928) 4th ed. p. 233.

a recent commentator notes “there is overwhelming evidence that Tibet had become an independent state by this time”.<sup>57</sup>

These new additions to the Family of Nations were the result of the lessening in the influence of the Western concept of civilisation in international law in the face of the inconsistencies in its use that were beginning to appear. International lawyers of the time regarded that the rules of war had been shattered in “indiscriminate shootings, outrages and burnings in Belgium”. The cause in one word was German “rightfulness”.<sup>58</sup> If Germany, an allegedly “civilised” state could act in such a way how could a distinction on grounds of civilisation be made with the states of Asia, many of whom had fought on the side of civilisation? The question was not one that contemporaries found easy to answer.

It was not that the capitulations ceased to exist, but that they ceased to be a symbol of a state’s level of civilisation and of proof that it was not a full member of the Family of Nations. From the nineteen twenties it was clear that China and Siam were members of the international community and yet extraterritorial rights over those states remained, save for those of Germany and the Austro-Hungarian Empire whose rights were abolished after the First World war. Extraterritorial rights were only finally removed in the case of Siam in 1939 and China in 1943 in recognition of the latter’s contribution to the Allied war effort in the Second World War.

It is true that civilisation as the means of membership to the Family of Nations can still be found in the textbooks of the period. Indeed, almost as a final flourish the concept of civilisation as a concept of international law was put to use in new fields. Article 38 of the Statute of the Permanent Court of International Justice referred to the “general principles of law recognised by civilised states” as a source of international law to which the Court was to give effect and the mandate system described the tutelage of the “advanced nations” as a “sacred trust of civilisation”. However, the implication of the expression “civilisation” had changed.

The principle of self determination does not yet seem to have had substantial effect to increase the membership of Asian states to the family of nations. As Brownlie has noted, “the diplomacy of the years 1918 to 1924 in Europe evidenced reluctance on the part of many states to accept the principle as prescriptive for future conduct”.<sup>59</sup> Although in Eastern

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57. Fawcett, “General Course on Public International Law” (1971), 132(1) *Hague Recueil*, 433.

58. Lawrence, *The Society of Nations* (1918) p. 7.

59. Brownlie, “An Essay on the History of the Principle of Self Determination” *Grotian Society Papers*, (1968) Alexandrowicz (ed.) p. 95.

Europe the principle was given effect, of the territories subject to the League of Nations mandate, only Iraq became independent and the Western allies appeared otherwise reluctant to grant independence to their colonies.

However, if an Asian state was seeking independence from a non European master difficult questions of self determination were not raised and it was likely to receive outside recognition. For instance, the overthrow of the Manchu Emperor in China in 1912 had the effect of releasing Tibet and Mongolia from the control of China, as the latter's rights were based on the personal bond between the Dalai Lama and the Manchu Emperors. In the treaty that established Tibet's independence Tibet was to receive powerful support from Great Britain. For somewhat similar reasons Nepal obtained its independence from China. Although Nepal was "not active in many phases of international relations" she was recognised by M.O. Hudson in a survey in the year 1935 as a potential member of the League of Nations, but for her own reasons, she did not take up membership.<sup>60</sup> Turbulent Afghanistan obtained control over her external affairs as an outcome of the negotiations with Great Britain after the Third Afghan War.<sup>61</sup>

Japan, the Asian state most able to champion self determination as a principle of international law, was a subject of suspicion to other Asian states. Her occupation of Korea and her unwillingness to terminate her extraterritorial rights in China and the sourness of her relations with that state during the nineteen twenties, which would end in Japanese aggression in the early nineteen thirties, undermined any credibility that she might have as the liberator of Asia from European colonial masters. Although certain nationalistic Japanese visionaries might call for Japan to "lift the virtuous banner of an Asian League and take the leadership in a world federation" and visionaries with leanings towards communism might describe her war in China "as a progressive one for the peoples of Asia". Such declarations did not stir the imagination of the other peoples of Asia.<sup>62</sup>

### (iii) *The League of Nations*

Undoubtedly the greatest development for international law in the inter war years was the establishment of the League of Nations. In 1914 few, if any world statesmen were seeking to achieve global peace through the medium of an international organisation. However, as the hope of a

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60. Hudson, "Members of the League of Nations" (1935), 16 *British Yearbook Int. Law* 130.

61. Sykes, *A History of Afghanistan* (1940) Vol. 2 p. 283-294.

62. Beasley, *Japanese Imperialism 1894-1945* (1987) p. 178-179.



speedy conclusion to the war died in the winter mud of France in 1914 the plans for a new international order took form. In June 1915 the British League of Nations organisation was founded and the following month a similar organisation was founded at Philadelphia in the United States. When, in January 1918, President Wilson enumerated his famous fourteen points, the establishment of the League was inevitable, whatever the final outcome of the war.

In the creation of the Covenant of the League of Nations, Asian states had a presence without ever taking a leading role. The committee which drafted the Covenant of the League of Nations was made up of nineteen members, of which two were Japanese (Baron Makino and Viscount Chinda), as befitting her role as a major power and one Chinese (Wellington Koo). Perhaps the major contribution for the future of international law, made by the Japanese, was the suggestion that the preamble should endorse the equality of nations and the just treatment of their nationals.<sup>63</sup> The suggestion was firmly rejected by the British and the United States, but the idea upon which the suggestion was based would appear again.

The other noteworthy fact, in the context of the creation of the League of Nations for Asia, was the signature of the Covenant of the League, by the Maharaja of Bikanis, to establish membership of the League by India. In many ways this event marked the beginning of the surrender by the Western powers of their colonial empires. As Pollock noted at the time with great foresight, “for the future history of Indian constitutional development it will be a capital fact”.<sup>64</sup>

During the existence of the League of Nations five Asian states became members at different times out of the 63 nations who, in total, were to join. The Asian members of the League were Japan, China, Siam, India and Afghanistan. All these states with the exception of Afghanistan were founder members, the latter not becoming a member until 1934.

The Asian members of the League played a part in the running of the League commensurate with their numbers and power and Japan, who was a permanent member of the Council, was particularly involved. Walters, perhaps the most competent historian of the League, records that until the time of the notice of her withdrawal Japan played “a zealous scrupulous part in this work” and that “her delegates had set a standard of courtesy, industry and thoroughness which no others surpassed and few equalled” which through “their courage and good sense, helped the Council through difficult discussions, their patience for

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63. Walters, *A History of the League of Nations* (1950) p. 63.

64. Pollock, *The League of Nations* (1920) p. 82.

example, in reconciling the division between the Germans and Poles over minority questions had been the admiration of all”<sup>65</sup>

Unfortunately, the most remembered contribution of Japan to the League was her notice of withdrawal from it in March 1933 in response to the League’s reaction to her involvement in the affairs of China. In 1931 Japan invaded Manchuria and when the League passed a resolution requiring her to withdraw her forces and to negotiate a settlement of her disputes with China under the auspices of the League she announced her withdrawal from the League. This act and the incapacity of the League to effectively respond underlined the League’s inability to fulfil its purpose of promoting world peace and set a precedent that Germany, Italy and Soviet Russia would later all exploit. Her withdrawal also created a small body of literature that dealt with the legal technicalities of withdrawing from the League and international organisations generally.

(iv) *The Permanent Court of International Justice*

The other great achievement in the inter war years for international law, besides the establishment of the League of Nations, was the establishment of the Permanent Court of International Justice in which achievement, principally through Japan, Asia could claim a part. Adatci was the Japanese representative to the ten men drafting Committee set up to draft the Statute of the Court and he forcefully ensured that the voice of Asia was heard. When discussing the drafting of Article 9 of the Statute, which was to stipulate that the members of the Court should represent all the principal civilisations, he was the sole Asian voice emphasising that “all different kinds of civilisation must be taken into account, among them the civilisation of the Far East, of which Japan was perhaps the principal representative.”<sup>66</sup>

Adatci was to make a particular contribution to the Court in proposing the appointment of ad hoc judges whenever a litigant state did not have a representative on the Court and was a strong supporter of the view that judges should distant themselves from national influences upon appointment. Indeed, so connected with the establishment of the Permanent Court was Adatci that he enjoyed the distinction of becoming President of the Court in 1931 immediately upon his election as a Judge, a feat which M.O. Hudson attributed to his “being prominently identified with the Statue of the Court”.<sup>67</sup>

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65. *Supra*, note 63 p. 496.

66. Hudson, *The Permanent Court of International Justice (1934)* p. 135.

67. *Ibid.*, p. 251.

In these years the few independent states of Asia were not active in bringing cases before the Court although Japan did participate with certain Western powers in bringing the *Wimbledon*<sup>68</sup> and *Interpretation of the Memmel Convention* cases.<sup>69</sup> In one case an Asian state was a defendant and that was the case brought by Belgium against China after China had declared the Sino-Belgium treaty of Friendship Commerce and Navigation (1865) terminated by reason of the application of the *rebus sic stantibus* doctrine. After the grant of interim measures by the Court to Belgium the case was settled by the parties.<sup>70</sup>

(v) *Developments Outside the League of Nations and the Court*

It was also the Japanese invasion of Manchuria that was to be responsible for her involvement in two of the most significant doctrinal developments of the inter war years. The first was the Stimson doctrine. The second the prohibition of aggression in international law.

In response to the Japanese military operations in Manchuria, Stimson, the American Secretary of State, sent on the 7th January 1932, a note to the Japanese and Chinese governments in which it was stated that the American Government “cannot admit the legality of any situation de facto nor does it intend to recognise any treaty or agreement entered into between these governments or agents thereof which may impair the treaty rights of the United States . . . and . . . it does not intend to recognise any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris 27 1928”. This declaration was to be the first attempt at practical enforcement of Article 10 of the Covenant of the League of Nations which prohibited the acquisition of title to territory by force and was to widen the proscription set out therein in the non-recognition of treaty rights of third parties arising out of or in connection with the use of force. On 11th March 1932, in respect of the ongoing military operations of Japan in Manchuria the Assembly of the League adopted a resolution which declared “that it is incumbent upon the members of the League of Nations not to recognise any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris”. Although in 1932 the obligation not to recognise territory acquired by an illegal use of force may not have been

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68. PCIJ Series A (1923) No. 1.

69. PCIJ Series A (1926) No. 8, (1928) Nos. 14, 16 and (1929) Nos. 18/19.

70. See Katte, “Denunciation of Treaty of 1865 between China and Belgium (Orders)” (1981), 2 *Encyclopedia of Public Int. Law* 75-76.

binding on all states these declarations, the responses by states thereto, and subsequent state practice suggests that it now is.<sup>71</sup>

Japan's military operations in Manchuria also exposed a strong deficiency of the existing prohibition on such matters in international law. The Covenant of the League prohibited "resort to war" by states and provided that any state having resort to war without first of all complying with the procedural limitations set out in the Covenant would be the subject of objections by other states. These provisions of the Covenant had been intended to eliminate war, but the interpretation given to the meaning of "war" by China, Japan and other states, was that a state of war existed only when the protagonists declared war and not when military activities and war objectively occurred. Thus by the simple expedient of neither protagonist declaring war on the other the consequences under international law of the existence of the state of war were avoided. Such practices led to the drafting and adoption of Article 2(4) of the Charter of the United Nations which embodies the contemporary prohibition on the use of force in international law. It is very widely drafted so that states are required to refrain "in their international relations from the threat or use of force against the territorial integrity or political independence of any state".

A doctrine to which many Asian states contributed is the doctrine of "unequal treaties" and the somewhat similar doctrine of "unjust treaties". Broadly this doctrine holds that a treaty which grants one state rights against another and which does not give the latter reciprocal rights is void. The doctrine was employed particularly by Japan and China in the context of the treaties whereby extraterritorial rights had been granted to European states particularly where the Asian state entered into the treaty under the threat of force. Under the Communist regime in China the doctrine of unequal treaties has been extended so that "treaties concluded under former regimes which are incompatible with the new social system ... are void ab initio".<sup>72</sup> Although the doctrine has had considerable political usage its lack of precision, particularly in its most recent extended form, means that it has rarely found supporters outside certain Asian countries<sup>73</sup> and as the historical forces which gave rise to it dissipate it is unlikely to find a place in the text books of international law.<sup>74</sup>

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71. Brownlie, *International Law and the Use of Force by States* (1963), pp. 410-423.

72. *Supra*, note 13 p. 29.

73. Keeton, "The Revision Clause in Certain Chinese Treaties" (1929), 10 *British Yearbook Int. Law* 110.

74. On Chinese treaty practice generally see Chiu, *The People's Republic of China and the Law of Treaties* (1972), p. 119.

## V. *International Law in Asia 1939-1990*

### (i) *Introduction*

The Second World War finally undermined the great twin bastions of colonialism, European moral superiority and European military strength. For the second time in twenty years Europe had engaged in internecine war, which discredited what remained of her claim to a superior civilisation and throughout the Far East the armies and navies of Europe had suffered initial disaster at the hands of an Asiatic Power. The British capitulation at Singapore to the Japanese, for instance, being her most resounding military debacle for centuries. At the same time the United States of America and Russia, both antagonistic to colonialism, had unquestionably replaced Europe as the worlds great centres of military might and many European nations had incurred a moral debt to their former colonies for their aid during the war. Nevertheless, at the time the European powers did not believe that the Second World War would prove to be terminal for colonialism. As Churchill angrily announced to Roosevelt in November 1942 in the deliberations of how the post war world was to be restructured "I have not become the King's First Minister to preside over the liquidation of the British Empire".<sup>75</sup>

### (ii) *Asia — Full Membership of the Family of Nations*

Despite the intention of the European powers independence came quickly after the end of the Second World War for most of the states of Asia and for a variety of reasons. Nationalism, stirred up by the Japanese against the European powers, the moral claims of Asian states to independence through their contribution to the war effort of their respective metropolitan power and the existence of an ancient civilisation at a time when Europeans questioned the intrinsic merit of their own led to the road to independence.

Accordingly, by the time of the eighth and final edition of Oppenheim in 1954 there were to be listed no less than twelve states from Asia who could claim to be a member of the Family of Nations.<sup>76</sup> The new states which had formerly been colonial territories and which obtained their independence immediately after the Second World War were the Phillipines (1946), India (1947), Pakistan (1947), Sri Lanka (1948), Burma (1948), North and South Korea (1948), which alone had been subject to an Asiatic master and these states were to be followed in the

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75. Roberts, *Europe 1880-1945* p. 46.

76. Oppenheim, *International Law* (1954) 8th ed. p. 257.

years to come by Laos (1954), Cambodia (1954), Vietnam (1954), Malaya (1957), Singapore (1965) and most recently by Brunei (1984). Today only Hong Kong, shortly to be returned to China, and Macao remain subject to non Asian States.

At the same time not only did the breakdown of colonialism lead to the creation of new members of the Family of Nations, but internal division along political and religious lines of the new states has led to a further multiplication of the actors from Asia on the international legal scene. On political grounds, in 1948, Korea was split into two states North Korea and South Korea, a fate that Vietnam was also to experience for a time. In China the Communist revolution was to lead to the creation of Taiwan as a sovereign state as the home of the Nationalists. In 1971 difficulties (religious) in Pakistan led to the creation of Bangladesh.

Further, the inherent instability of the region led to changes in the numbers of independent sovereign states in Asia. Tibet, for instance, was absorbed into China in 1950, while earlier, in 1946, after a plebscite, Mongolia was recognised by China as an independent state.

The creation of this powerful cluster of states soon after the end of the Second World War has great potential significance for the development of international law. The states of Asia with their very different religious, cultural and legal backgrounds present a considerable stimulus for change to the principles of international law, as writers of the time noted, not always favourable.<sup>77</sup> Accordingly, the remainder of this article will briefly consider what impact the states of Asia have had on international law in the last forty years.

### (iii) *Asian States and the United Nations*

The forum provided by United Nations has been the means through which the states of Asia have been most able to articulate their views on international law and through the means of resolutions of the General Assembly give effect to them. The resolutions of the General Assembly on the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), Permanent Sovereignty over National Resources (1962), the Declaration of Principles Governing the Seabed and Ocean Floor (1970), the Declaration on Friendly Relations and Cooperation Among States (1970), the Declaration of a New

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77. This literature is referred to and considered from an Asian perspective in Anand, "Role of the New Asian-African Countries in the Present International Legal Order" (1962), 56 *Am. J. Int. Law* 382 and Anand, "*Asian-African States and International Law*" (1966), 15 *I.C.L.Q.* 73.

International Economic Order (1974) and the Charter of Economic Rights and Duties of States (1974) were all passed with the firm support of all Asian states, save in respect of certain by Japan and all are documents of the first importance for contemporary international law. In 1966, looking perceptively to the future, Anand foresaw that the third world states were to be “the great champions of the new international order based upon the principle of the United Nations Charter”. However, in the early post war years Asia was to view the United Nations less positively.

The Charter of the United Nations was drafted without significant contributions from Asian states. Japan who had, as a great power, influenced directly the terms of the Covenant of the League of Nations, as a defeated power was not present at San Francisco and when the victorious allies met there in 1945 Asia was represented only by British India, the Phillipines, Afghanistan and Nationalist China out of the fifty odd participants. Thus, as one Asian commentator noted, Asian views did not find “adequate or appropriate expression in the provisions of the Charter”<sup>78</sup> and the failure of Article 73 to condemn colonialism in a clear cut fashion was considered to be particularly illustrative of this inadequacy. Nevertheless, the Charter was to depart from the unanimity principle which had applied in the Assembly of the League for the passing of resolutions of the General Assembly and this development together with the deadlock caused by the great power veto in the Security Council, was to give the General Assembly potential for law making purposes which has facilitated Asian involvement in the making of international law.

However, though Asian states had generally quickly obtained their independence in 1945, for the decade following 1945 they were unable to significantly influence the United Nations. There were two principal reasons for this lack of influence. First, the cold war was at its height and there was little scope for third world nations to shape international events when the world was divided up into two great and hostile camps. Second, membership of the United Nations had become subject to the cold war and the effect was to prevent many of the newly independent Asian states joining the United Nations as the Great Powers strove for a majority or to keep their majority in the General Assembly. Until December 1955 only Indonesia, Burma, Thailand and Pakistan had been allowed to join the United Nations from Asia in addition to the original members and only in that month did a further 16 states as part of the so

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78. Brohi, “Five Lectures on Asia and the United Nations” (1961), 102 *Hague Recueil* 128.

called “package deal” become members. Of these 16 new states four more were Asian being Ceylon, Nepal, Laos and Cambodia. If one considers that it was not until the following year that Russia refrained from exercising its veto to permit Japan to join the United Nations and that the Peoples Republic of China was still outside and seeking to establish its own rival organisation, Asia’s lack of success in using the United Nations as a tool for the elaboration of its own norms of international law in comparison with later decades is not difficult to understand.

Nevertheless, in these early years of the United Nations, even if the Asian states were numerically unable to achieve definite changes in international law, they were able to raise the issue of colonialism consistently and by their own experience, including the use of force by national liberation movements, provided the basis for later developments. In the early 1950’s, for instance, the states of Asia were amongst those who tried to place for debate before the Council and General Assembly, the issues of decolonisation in Morocco, Algiers, Tunisia and other areas of North Africa and sought to expand the range of information to be supplied by colonial powers to the Secretary General pursuant to Article 73(e) of the Charter.

From the 1960’s onwards, in conjunction with the newly independent states in other parts of the world, Asian states were able to play their role in passing the important resolutions of the General Assembly which we have already noted. First, the declaration on the Granting Independence to Colonial Countries and Peoples was passed which began “the accelerated development of the right to self determination within the organs of the United Nations and beyond”.<sup>79</sup> This development through to the Declaration on Friendly Relations and Cooperation Among States and other legally constitutive acts led to the principle of self determination evolving in the space of forty years from “a principle of political thought to a right in international law”.<sup>80</sup> Nevertheless, the difficulty identified by Syatauw in 1961 of how to reconcile the aspirations of minority groups with the principles of self determination has not been met by the states of Asia.<sup>81</sup>

In the economic field as members of what became known as the Group of 77, the states of Asia were able to contribute to the revision of

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79. Wilson, *International Law and the Use of Force by National Liberation Movements* (1988) p. 69.

80. *Ibid.*, p. 78.

81. Syatauw, *Some Newly Established Asian States and the Development of International Law* (1961) p. 235.



the laws on the expropriation of foreign assets, the establishment of UNCTAD and the Declaration of a new International Economic Order by their voting numbers. In these developments certain Asian states played substantial roles, such as the Phillipines and India in seeking to implement the Declaration of the New International Economic Order. However, it is important not to over emphasise the global Asian contribution to international law in this respect, apart from individual states and not only because of the doubt and difficulty associated with the legal status of the New International Legal Order.

First, perhaps the most vociferous of the third world nations in support of the New Order are from South America or North Africa or the Middle East. Second, China refused an invitation to join the Group of 77 and adopted, unhelpfully, what one commentator has called a "passive and supportive posture" rather than be directly involved.<sup>82</sup> Third, although the population of Asia is very large the number of countries it comprises is comparatively small and within the Group of 77 at the 31st of December 1977, after the principal measures creating the new economic order had been passed, only 19 of the 115 members of the Group were from Asia. Little attempt seems to have been made to seek to introduce or consider the merits of weighted voting in international organisations by Asia. The feeling persists that in the United Nations Asia has not achieved as much as she might.

In respect of the legal significance to be given to resolutions of the General Assembly, there appears to be no universal Asian view, but the emphasis is towards their legal efficacy, but more recently they have been viewed by China as "a kind of legal form of agreement between member states".<sup>83</sup> Wang Tieya, perhaps China's leading international lawyer, has suggested that although the resolutions of the General Assembly are not legally binding they may if they "creatively clarify new principles of international law" give rise to a form of estoppel.<sup>84</sup> Anand of India has been willing to attach greater legal efficacy to resolutions of the General Assembly although the exact legal mechanics are a little unclear. In Anand's view resolutions of the General Assembly act by "the collective legitimation of certain claims, actions and policies" and "have a force which is much more than recommendatory".<sup>85</sup> Jewa, writing in Malaya,

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82. Kim, *China, The United Nations and the World Order* (1979) p. 333.

83. See China Daily Oct. 25 1985 p. 4 cited in Yuan, "China's Challenge to Traditional International Law" (1987), 10 *Dalhousie L.J.* 9.

84. Wang, *The Third World and International Law in the Structure and Process of International Law* (1983) Macdonald & Johnson (eds.) p. 964.

85. Anand, *International Law and the Developing Countries* (1987) p. 134-5.

in his affirmation of the right of the majority to create international law would appear to be of the same view.<sup>86</sup>

(iv) *The Law of Peaceful Co-existence and the Pancha Shila*

In 1961 Syatauw, in his analysis of the contribution of Asia to international law, identified the law of peaceful co-existence as one such area.<sup>87</sup> Although the law of peaceful co-existence in origin was very much a product of the Soviet Union in an era when the inevitable conflict between East and West decreed by Marxism was postponed because of the mutual assurance of destruction by nuclear weapons, in Asia a distinctive slant was given to the doctrine.

In Asia the doctrine became known as the Pancha Shila and it was the premiers of China and India who first gave the doctrine formulation in 1954 in the context of a treaty concerned with Tibet. The Five Principles of Peaceful Co-existence are: — 1. Mutual respect for territorial integrity and sovereignty; 2. Non aggression; 3. Non interference in each other's internal affairs; 4. Equality and mutual benefit; and 5. Peaceful co-existence.

The doctrine quickly gained popularity in Asia, perhaps reaching its culmination at the Bandung Conference in 1955 and by 1963 Professor Brownlie was able to produce an impressive list of countries who subscribed to its tenets.<sup>88</sup> The doctrine was particularly important because its conception coincided with a time when many states were outside the United Nations and for these states it offered an equivalent to the Charter in setting out basic ground rules for international relations. Brownlie, for instance, considered that it was probable that “they now rank with and supplement the United Nations Charter and the Kellogg-Briand Pact”.<sup>89</sup>

In recent years however with the entrance of nearly all states into the United Nations, and the substitution of the law of co-operation for that of co-existence as the aspiratory basis for relations between states, the doctrine of peaceful co-existence has declined considerably in importance. Nevertheless, the doctrine was one of the forces that gave rise to the United Nations General Assembly on the Declaration on Friendly Relations and Cooperation (1970).

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86. Jewa, “The Third World and International Law” (1977), 4 *Journal of Malaysian and Comparative Law* 245.

87. *Supra*, note 81 p. 234, The others were (1) the process of transition of colonies to independent states (2) self determination and (3) neutralism.

88. *Supra*, note 71 p. 123-126.

89. *Ibid.*, p. 119.

(v) *Asia and the International Court of Justice*

Traditionally, the states of Asia, along with the other members of the Third World have been suspicious of the International Court of Justice in particular and judicial settlement in general. As professor Wang notes, this suspicion is based on both the cultural bias of the Court as an embodiment of Western thinking and its composition, its procedure and the substantive law it applies.<sup>90</sup> It is important though to note that this suspicion is deeper in certain parts of Asia than others and as the composition of the court changes and more fully reflects the place of Asia in the legal systems of the world it may be dispelled.

Historically the objection to the Court on the basis of its failure to reflect fairly the role of Asian states in the international legal order is difficult to rebut. Excluding the judges of the Court sitting at the 31st July 1989, of its 55 previous members only 7<sup>91</sup> had come from Asia although some of these, such as judge Tanka, have made particularly distinguished contributions to its judgements.<sup>92</sup> However, today three,<sup>93</sup> or one fifth of the Court's members, are drawn from Asia and in light of recent campaigns it is difficult to foresee an election in which candidates from China, Japan and India will not be elected, guaranteeing Asia a bed rock representation.

Notwithstanding the composition of the Court, certain Asian states have been willing at least to try its services. India, for instance, has appeared in three cases before the Court and Pakistan two, but by 1986 only 4 of the 55 cases to come before the Court had involved Asian states.<sup>94</sup> Similarly, it is the states of India and Pakistan and also the Phillipines and to a lesser extent Thailand and Ceylon who have been willing to enter into treaties, with a clause providing for reference to the Court of all disputes arising out of the treaty and its application. The proportion of states in Asia accepting the compulsory jurisdiction of the Court under Article 36(2) of its Statute seems generally to be in accord with other areas of the world although certain states such as India have made substantial reservations.

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90. *Supra*, note 84 p. 973.

91. Being Bengzon (Phillipines), Mo (China), Sir Bengal Rau (India), Tanka (Japan), Koo (China), Sir Muhammad Zafrulla Khan (Pakistan) and Singh (India).

92. Jenks, "Ideal and Idealism in International Law" (1972), 16 *Japanese Annual Int. Law* 2 and also Hussein, *Dissenting and Separate Opinions at the World Court* (1984).

93. Oda, (Japan), Ni (China), Pathak (India).

94. Right of Passage over Indian Territory (*Portugal v. India*), Temple of Preah Vihear (*Cambodia v. Thailand*), Appeal relating to the Jurisdiction of the ICAO Council (*India v. Pakistan*) and Trial of Pakistani Prisoners of War (*Pakistan v. India*).

Perhaps the fiercest Asian state critic of the International Court of Justice is the Communist Government of the Peoples Republic of China. The Nationalist Government had been willing to enter into treaties with provision for recourse to the Court in the event of a dispute. However the Peoples Republic has firmly denounced these provisions and in the multilateral treaties that it has ratified it has made reservations against clauses providing for disputes arising under such treaties to be referred to the Court. Instead in treaties with non communist states China has developed the provision that disputes shall be settled by “peaceful negotiation”, while treaties with communist states normally have no dispute settlement procedure probably because disputes with ideological neighbours do not occur.<sup>95</sup>

The Chinese attitude to the legal process is one of some ambivalence. Although not recognising that decisions of the Court are binding on it or creative of international law, the Chinese have adopted a pragmatic approach to the decisions of judicial tribunals which has been characterised as one of “pick and choose”. That is China “picks what serves its own interests”, affirming the wisdom of the pronouncements of the Court when those views coincide with its own, but otherwise rejects them. However, this robust view of the decisions of the Court may be softening in light of the election of Professor Ni Zhengyu to the Court as is revealed in the recent writings of certain Chinese publicists.<sup>96</sup>

(vi) *Asia and the Law of the Sea*

The interests of all the states of Asia have not often been mutually compatible in the development of the sea. For instance, technologically advanced Japan does not have the same interests in deepsea bed mining and the Area as defined by the Third United Nations Conference on the Law of the Sea (UNCLOS III) as the Asian members of the Group of 77 and the interests of the archipelagic states such as Indonesia and the Phillipines have not always coincided with the interests of land locked Laos and states bordering on enclosed or semi enclosed seas such as Malaysia, Thailand, Singapore, Brunei, Cambodia and Vietnam. Yet not withstanding these differences certain Asian states particularly the archipelagic states have made very substantial contributions to the development of the law of the sea.

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95. Matsudaira, “Peaceful Settlement of International Disputes and the People’s Republic of China” (1971), 15 *Japanese Annual Int. Law* 54.

96. Chiu, “Chinese Attitudes Toward International Law in the Post-Moa Era 1978-1987” (1987), 21 *International Lawyer*, 1144.

Perhaps the most striking contribution of Asian states to the law of the sea is the concept of the special rights of archipelagic states over the surrounding waters set out in Part IV of The Law of the Sea Convention. The idea that archipelagic states should have sovereignty over the waters lying within straight baselines drawn from one outer most point to another in an island chain was affirmed by the Phillipines in a Note Verbale of 7th March 1955 to the Secretary General of the United Nations and the view was reinforced by a communique of 13th December 1957 of Indonesia.<sup>97</sup> The concept was raised again at the Geneva Conventions on the Law of the Sea (1958), but the great maritime powers were against it. As one sympathetic reviewer of the time noted the most that had been achieved by raising the concept at the Geneva Conferences was that one or two minor maritime powers demonstrated “at least some understanding” of the position.<sup>98</sup> The achievement of the Phillipines and Indonesia in establishing the archipelagic states concept as a doctrine of not only the Law of the Sea Treaty, but also customary international law in the face of the opposition of the maritime powers is a considerable achievement and perhaps the most clear cut example of a concept of international law bearing an almost exclusive Asian hallmark.

Contributions to the law of the sea have also been made by the states of Asia in other areas. Indonesia, Malaysia and Singapore in their concern to regulate the Malacca straits contributed to Part III of the Law of the Sea Treaty on straits used for international navigation and Malaysia also contributed to the provisions in the Treaty on marine pollution. Further many of the leading personalities of the UNCLOS III have come from Asia. Tommy Koh from Singapore was the second chairman of the Conference succeeding Amersinghe of Sri Lanka. Indeed UNCLOS III has been a stage, as we will see, where many of the jurists of Asia have been able to display their abilities to the community of international lawyers assisting in the establishment of Asian scholars as among the corpus of the leading scholars of international law.

Generally the states of Asia provided a substantial part of the votes in favour of extending the sovereignty of coastal states over adjacent waters without being at the very forefront of the movement, save in connection with archipelagic waters. For instance Indonesia claimed a 12 mile

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97. See Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South East Asia* (1987) p. 153. See also O’Connell *The International Law of the Sea* (1982), pp. 236-258 for the standing of the archipelagic state doctrine in international law prior to its development by the Phillipines.

98. *Supra*, note 81 p. 199.

territorial sea in 1957 following the lead of certain South American states and during the nineteen sixties most of the other coastal states of South East Asia also claimed a twelve mile territorial sea at a time when the maritime powers were still trying to uphold the three mile rule. Somewhat similarly once the concept of the Exclusive Economic Zone (EEZ) had been formulated by certain African states, the states of Asia thereafter made declarations in respect of their own EEZ's, although Japan at least thought this a negative development.

The recent developments in the law of the sea also gives opportunity to the states of Asia to make further contributions to international law in application of these new developments. The declaration of territorial seas, continental shelves and EEZ's, particularly in the South China Sea, means that considerable legal skills and the application of legal principle will be needed to settle the various boundaries. In 1988 reviewers of ocean boundaries in South East Asia noted that seventeen bilateral ocean boundary agreements had been entered into, but of these fourteen involved the state of Indonesia two of which provided for interesting transboundary arrangements. In North East Asia the same reviewers found only two bilateral agreements had been entered into.<sup>99</sup> Considerable scope thus remains for the states of Asia to make a real contribution to ocean boundary delimitations, but it is interesting that it appears that it is the provisions of the Law of the Sea Treaty concerning compulsory dispute settlement that render that treaty unacceptable to China.<sup>100</sup>

### (vii) *Asia and International Organisations*

In 1958 Fifield noted the obstacles towards achieving regional unity in South East Asia. In his view "racial and religious, linguistic and cultural diversity characterizes the people. Geographic barriers add to the problems of communication and transportation. Old animosities have lingered among the peoples of the area".<sup>101</sup> Today these problems still remain and if we magnify the region he was referring to so as to include the entire Asian continent we might add the difficulties arising out of a clash of political philosophies, disputes over territorial boundaries and rivalry for regional supremacy.

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99. Rhee & McAulay, *Ocean Boundary Issues in Ocean Boundary Making* (1988) Johnston & Sautners (eds.) p. 74.

100. Yuan, *The New Convention on the Law of the Sea from the Chinese Perspective in Consensus and Confrontation: The United Nations and the Law of the Sea Convention* (1984) van Dyke (ed.) p. 207-208.

101. Fifield, *The Diplomacy of South East Asia 1945-1958* (1958), p. 451.

Notwithstanding these difficulties efforts have been made to establish regional organisations, particularly by India. In 1947, for instance, she convened the Asian Relations Conference in New Delhi, the final resolution of which was to agree to establish an Asian Relations Organisation and in 1955 she was one of the powers that sponsored the Asian African Conference at Bandung. One of its purposes was to encourage co-operation between the states attending. Nevertheless, a truly regional organisation has failed to emerge in Asia and this failure has, as some commentators have noted,<sup>102</sup> reduced the prospect of solving the regions many territorial disputes by depriving the protagonists of a forum for the peaceful settlement of their disputes and the exertion of diplomatic pressure.

A potentially more fruitful means by which some of the states of Asia may contribute to the law of international organisations is the establishment by the states of Indonesia, Malaysia, Phillipines, Singapore and Thailand of The Association of South East Asian States (ASEAN) of which Brunei is now also a member. ASEAN is a subregional organisation founded in 1967 for the purpose, *inter alia*, of the acceleration of economic growth, social progress and the cultural development of the region, mutual collaboration, promotion of peace and common training and research in education, the professions, technology and administration. However it must be said that ASEAN has not been an unqualified success as one well placed reviewer of its first ten years noted candidly "its words are not equalled by action, its agreements and announcements are not immediately followed by implementation. Except for a very few resolutions, commitments and directive have yet to be matched by accomplishments".<sup>103</sup> Subsequent practice indicates that ASEAN has a long way to go before it achieves that degree of integration achieved by the European Economic Community.<sup>104</sup>

If a regional government forum has not emerged the states of Asia have since independence increasingly joined and participated in many of the existing and post war international organisations both governmental and non-governmental. Further, they have benefited by the greater representation given to the personnel of third world countries in the Secretariat of the United Nations and other international organisations.<sup>105</sup> In their participation, however, in international organisations, a clear

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102. Day, (ed.) *Border and Territorial Disputes* (1982) p. 235.

103. Tolentino, "Challenge to ASEAN" (1977), 6 *Phillipine Yearbook Int. Law* 112.

104. Shearer, "Association of South East Asia Nations" (1983), 6 *Encyclopedia of Public Int. Law* 27.

105. Peterson, *The General Assembly in World Politics* (1986) p. 470.

division has emerged between those countries having communist forms of government and those not.

The Asian states with communist governments such as China, North Korea and Vietnam have been less willing to join international organisations than communist forms of government in other parts of the world. China for instance during the early 1960's was a member, but of one or two intergovernmental organisations. Nevertheless, if involvement in international organisations is to some degree an indication of a region's ability to direct the development of international law, however crude, it is fair to note that even states such as India and Japan who have wholeheartedly entered into the work of the international organisations still remain less involved than the traditional leading members of the Family of Nations.

(viii) *Asia and the Literature of International Law*

Since the Second World War there has been a considerable increase in publications by Asian scholars particularly those from India. For instance one book reviewer in 1966 noted that there was already twelve text books on international law offering an overview of the subject and he was reviewing two new contributions.<sup>106</sup> Nevertheless the labours of all Asian nations in the field of international law have not been equal. Chinese international lawyers for instance suffered severely during the cultural revolution and well nigh all their work in the field of international law ceased. A generation of lawyers was lost and only since 1980 and the establishment of the Chinese Society of International Law in that year has work commenced again. There are however early signs that with a changing political climate events may not lead to the lasting advancement of international law in China and Chinese legal scholars also face the challenge of defending Marxist-Leninist legal thought in international law when it has been renounced by the Soviet Union its leading protagonist.

The opportunity for Asian scholars to have their works published has been increased by the establishment of a number of periodicals devoted to international law in a variety of Asian countries. These include the *Indian Journal of International Law* (1960), the *Japanese Annual of International Law* (1957), the *Chinese Year Book of International Law and Affairs* based in Taiwan (known as the *Annals of the Chinese Society of International Law* between 1964-1981), a journal since 1982 from the Peoples Republic of China in Chinese and the *Phillipine Yearbook of*

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106. Bains, (1966), 6 *Indian Journal of Int. Law* 263-4.



International Law (1966) with its apparent commitment to the new international economic legal order. There have also been established in Asia journals of comparative law which carry articles of interest to international lawyers and journals concerned with international affairs such as the Indian Yearbook of International Affairs (1952).

From their publications a number of Asian jurists have established considerable reputations in the field of international law. Of these perhaps the most well known are Nagendra Singh principally in international law for his work on the history of international law in India and disarmament, Anand for his publications on the law of the sea and the new international legal order, Choo ho Park and Oda both also principally for their work on the law of the sea, Amerasingh for *inter alia* his massive work on the international civil service and his contribution as chairman to UNCLOS III and Wang Tieya.

In addition the Asian Legal Consultative Committee was established in 1957 consisting of Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria to deal with specific and general problems of international law and to permit a common exchange of views. This Committee was transformed into the Asian African Legal Consultative Committee in 1958. Although the work carried out by the Committee has been extensive as one friendly observer has noted "its activities and contribution need to be publicized widely or paid more attention than has been the case so far"<sup>107</sup> and a lack of publicity outside their own countries, for whatever reason, has limited the impact of much of the work of Asian jurists on international law.

## VI. Conclusion

We have seen that through history as in other regions of the world Asia has brought into being rules and practices that look familiar to international lawyers. However, in Asia as in other areas of the world these practices were never systemised or elaborated into a theory which later generations could develop. It was in sixteenth and seventeenth century Europe that some creative spark was to ignite which fueled by the developments in travel, commerce, political sovereignty and printing would issue in the present international legal system. The claims of recent Indian jurists appear over high.

Although at its commencement international law did apply to all nations including the ancient states of Asia, the practices of such states by

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107. Sarin, "The Asian African States and the development of International Law," [1983] *Hague Recueil Colloquy* 132.

reason of geography, theology and historical outlook were either in the wider world unknown or unsuitable for the development of international law. Accordingly as the centuries passed and inter state practice within Europe progressed under economic and commercial pressures, political alliances and technical developments, European international law grew up which by the magnitude of its practice and the rise of juridical positivism thrust aside and substituted itself for the international law of the founding fathers. Asia was not a subject of this transformed legal system.

From the late nineteenth century onwards Asia began to re-establish its membership in the Family of Nations. First Japan was admitted and China, Siam and Tibet were allowed to play a part in the great Hague Peace Conferences that marked the beginning of this century although doubt still hung over their status. Then First World War and finally the Second World War upset the moral superiority of the colonial powers. In the late nineteen forties and nineteen fifties most of the states of Asia obtained their independence.

Today there are over twenty three independent Asian states and it is through the United Nations that these states have chosen to principally exercise their law making capacity. The states of Asia have contributed significantly to the law of decolonization, and the weight of their combined vote (Japan excluded) has been felt in the Declaration of a New International Economic Order, Declaration of Permanent Sovereignty over National Resources, the Law of the Sea and the Declaration on Friendly Relations and Co-operation. Further, their involvement in international organisations and in the provision of members to the International Court of Justice, the possibility of additional contributions is suggested.

Nevertheless, although it has only been possible in a paper of this length to focus on a few topics the feeling persists that Asia with over 50 per cent of the world's population concentrated in about 15 per cent of the earth's land surface is yet to make her real contribution to international law. Although it is true that certain areas of international law by reason of wealth and resources are more appropriate for the great powers, such as the law of space, the initiation of concepts and their wholehearted advocacy by Asian states in respect of matters relevant to Asia has not been marked.

For example legal procedures for the settlement of boundary disputes of which in Asia there are at least fourteen,<sup>108</sup> some of very considerable

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108. *Supra*, note 102 pp. 234-331.

importance, have been little advanced and with a population of over two billion, voting systems based on population and human rights might have received more attention. In that area of perhaps her greatest interest the economic sphere, the major innovations appear to come from elsewhere. The common heritage principle derives from Malta on the European fringe and the working out of the law of expropriation of foreign national assets has principally been in the Middle East. Neither have new ventures in international organisation flourished in Asia. Only in the development of the archipelagic state concept is there a doctrine that Asia can claim as her own.

For the author this lack of a distinctive contribution by Asia to international law is one of some regret. With such antiquity of civilisation, diversity and richness of culture I came to the preparation of this article expecting to discover a rich deposit of new ideas and concerns for the better development of international law. Other regions of the world such as South America, also late comers to the modern system of international law, have made their particular contribution, but Asia appears yet to take up the challenge. It remains to be seen whether in the next millenium the challenge will be met and the richness of traditions and perspectives of Asia will be reflected in the Asian contribution to the international legal order.