
Asia's Ambivalence about International Law and Institutions: Past, Present and Futures

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Abstract

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

It is a paradox of the current international order that Asia – the most populous and economically dynamic region on the planet – arguably benefits most from the security and economic dividends provided by international law and institutions and, yet, is the wariest about embracing those rules and structures. Asian states are the least likely of any regional grouping to be party to most international obligations or to have representation reflecting their number and size in international organizations. There is no regional framework comparable to the African Union, the Organization of American

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States, or the European Union (EU); in the United Nations (UN), the Asia-Pacific Group of 53 states rarely adopts common positions on issues and discusses only candidacies for international posts. Such sub-regional groupings that exist within Asia have tended to coalesce around narrowly shared national interests rather than a shared identity or aspirations.

In part, this is due to the diversity of the continent. Indeed, the very concept of 'Asia' derives from a term used in Ancient Greece rather than any indigenous political or historic roots.¹ Regional cohesion is further complicated by the need to accommodate the great power interests of China, India and Japan. However, the limited nature of regional bodies is also consistent with a general wariness of delegating sovereignty. Asian countries, for example, have by far the lowest rate of acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ) and of membership of the International Criminal Court (ICC); they are also least likely to have signed conventions such as the International Covenant on Civil and Political Rights (ICCPR) or the International Covenant on Economic, Social and Cultural Rights (ICESCR) or to have joined the World Trade Organization (WTO).² The proportion of Asian states that are contracting parties to the International Centre for Settlement of Investment Disputes (ICSID) is also the lowest of any region – though on that they are tied with Latin America.

This article explores the reasons for Asia's under-participation and under-representation in international law and institutions. The first part traces the history of Asia's engagement with international law. The focus will be on three aspects that continue to have resonance today. First and foremost is the experience of colonialism by India and many other countries across the continent; for centuries, international law helped justify foreign rule, later establishing arbitrary standards of 'civilization' that were required in order to gain meaningful independence. Second, and more specific to China, the unequal treaties of the 19th century and the failure to recognize the People's Republic of China for much of the 20th century encouraged a perception that international law was primarily an instrument of political power – a view on display most recently in relation to the South China Sea. Third, and of particular relevance to Japan, the trials that followed World War II left a legacy of suspicion that international criminal law only dealt selectively with alleged misconduct, while also leaving unresolved many of the larger political challenges of that conflict, with ongoing ramifications today.

The second part of the article assesses Asia's current engagement with international law and institutions, examining whether its under-participation and under-representation is in fact significant. As will be shown, Asia's history offers at best a partial explanation of the current situation. The ongoing ambivalence towards international law and institutions can also be attributed to the diversity of the continent, the power disparities among its member states and the absence of 'push' factors driving greater

¹ For the purposes of this article, the 53 members of the Asia-Pacific Group at the United Nations (UN) will be used unless otherwise indicated.

² International Covenant on Civil and Political Rights 1966, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3.

integration or organization. Finally, the third part attempts to project possible future developments based on three different scenarios. These are referred to here as status quo, divergence and convergence. There is pressure to change the status quo, but evidence of genuine divergence is weak. More likely is an adaptation of existing legal structures to embrace the rising political and economic significance of Asia.

1 Past

A *India and the Legacy of Colonialism*

In February 1788, the Irish statesman and philosopher Edmund Burke commenced impeachment proceedings against Warren Hastings for abuses during his term as the first Governor-General of India. Among other things, Hastings had overseen a vigorous expansion of British rule that advanced the interests of the East India Company in a manner that would have been completely unacceptable in Europe. The charges against Hastings included corruption, arbitrary exercise of power and behaving in the manner of a 'despotic prince'.³ Four days into the trial, Burke enjoined the House of Lords to show Hastings that 'in Asia, as well as in Europe, the same law of nations prevails; the same principles are continually resorted to; and the same maxims sacredly held and strenuously maintained ... Asia is enlightened in that respect as well as Europe'.⁴ The impeachment of Hastings dragged on for seven years until his eventual acquittal by the House of Lords. It might at least have had the effect of ruining him financially, but the East India Company helpfully assisted in the final stages of the trial and later gave Hastings a pension for life.⁵

Burke's enthusiasm for the universality of the law of nations was atypical for his time. Far more common was the position of Jean-Jacques Rousseau: 'There is for nations, as for men, a period of youth, or, shall we say, maturity, before which they should not be made subject to laws.'⁶ A century later, John Stuart Mill argued similarly that '[t]o characterize any conduct whatever towards a barbarous people as a violation of the law of nations, only shows that he who so speaks has never considered the subject'.⁷ For the most part, international law in that period was invoked to justify or defend empire. Indeed, as Antony Anghie has argued, the imperial project was not merely a foil for international lawyers; it also played a central role in the construction of modern international law as we now understand the discipline.⁸ The exclusion of non-European states from full participation in international law was justified variously by reference to culture, religion and biology. Much of this history can be explained by

³ E. Burke, *The Speeches of the Right Honourable Edmund Burke on the Impeachment of Warren Hastings* (1877), vol. 1, at 98.

⁴ *Ibid.*, at 120–121.

⁵ See generally P. Turnbull, *Warren Hastings* (1975).

⁶ J.-J. Rousseau, *The Social Contract* (1923 [1762]), bk 2, ch. 8.

⁷ Mill, 'A Few Words on Non-Intervention (reprinted from *Fraser's Magazine*, December 1859)', in J.S. Mill (ed.), *Dissertations and Discussions: Political, Philosophical and Historical* (2nd edn, 1875), vol. 3, 153.

⁸ A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005).

racism or *realpolitik*. But even among *bien pensant* international lawyers, the standard of ‘civilization’ was invoked to exclude the peoples of Africa, Asia, the Americas and the Pacific from the sovereignty enjoyed by their European counterparts – and then to incorporate them into a system that had been designed by and for European interests.⁹ Indeed, the very name of that system – Westphalian – speaks to the origins of modern international law in the settlement of a 17th-century dispute in Europe.¹⁰

There were, to be sure, exceptions. As a 19th-century writer wryly noted, the standard of ‘civilization’ was applied inconsistently by his contemporaries. One seemed to confine it to ‘nations which study Latin’, another to those countries with ‘fire-arms and the printing press’, while a third suggested a quantitative approach based on ‘miles of electric telegraph and the largest quantity of daily newspapers’.¹¹ Nevertheless, the dominant discourse was a European project of excluding the ‘other’, followed by a ‘civilizing mission’ intended to make the other more like the self.¹² After the Ottoman Empire was admitted into the Concert of Europe through the 1856 Treaty of Paris, for example, its precise legal status remained the subject of lively debate at the Institute for International Law for more than two decades. This included the distribution of a questionnaire inquiring of diplomats as to whether the differences of Oriental nations were so great as to preclude them entering into ‘the general community of international law’.¹³

Within Asia, this attitude exacerbated tensions between Japan and China as the former successfully sought to be admitted into the company of the ‘civilized’ in the course of the 19th century,¹⁴ arguably at the expense of the latter.¹⁵ Suzuki Shogo goes further to suggest that Japan’s imperialist behaviour towards its neighbours can be understood partly because it ‘saw the adoption of coercive policies towards “uncivilized” states as an inherent part of a “civilized” state’s identity’.¹⁶ That goes too far, but Japan’s acceptance by the West was clearly linked to its military prowess. As one Japanese diplomat was said to have observed in the early 20th century to a European counterpart: ‘We show ourselves at least your equals in scientific butchery, and at once we are admitted to your council tables as civilized men.’¹⁷

⁹ *Ibid.*, at 310–318. See generally G.W. Gong, *The Standard of ‘Civilization’ in International Society* (1984).

¹⁰ See, e.g., Gross, ‘The Peace of Westphalia’, 42 *American Journal of International Law (AJIL)* (1948) 20.

¹¹ H. Stanley, *The East and the West: Our Dealings with Neighbours* (1865), at 117.

¹² Cf. E.W. Said, *Orientalism* (1978).

¹³ M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001), at 132–136; Pitts, ‘Boundaries of Victorian International Law’, in D. Bell (ed.), *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought* (2007) 67, at 75.

¹⁴ Hence, Oppenheim could declare in 1905 that ‘[i]n Asia only Japan is a full and real member of the Family of Nations, Persia, Korea, China, Siam and Tibet are, for some parts, only within that Family’. L.F.L. Oppenheim, *International Law* (1912), vol. 1, at 164.

¹⁵ See Lai, ‘Sovereignty and “Civilization”: International Law and East Asia in the Nineteenth Century’, 40(3) *Modern China* (2014) 282; Lee, ‘Early Development of Modern International Law in East Asia: With Special Reference to China, Japan and Korea’, 4 *Journal of the History of International Law* (2002) 42.

¹⁶ Suzuki, ‘Japan’s Socialization into Janus-Faced European International Society’, 11(1) *European Journal of International Relations* (2005) 137, at 139. But cf. Owada, ‘Asia and International Law’, 1(1) *Asian Journal of International Law (Asian JIL)* (2011) 3, at 8–9 (describing the ‘spiritual agony’ Japan faced in this period).

¹⁷ B.V.A. Röling, *International Law in an Expanded World* (1960), at 27, quoting H. Roos, *Japan in den grooten Oceaan* (1928), at 33.

In the course of the 20th century, the civilizing mission adopted a more progressivist narrative. The mandates system of the League of Nations sought explicitly to take up the 'sacred trust' of governing those who were 'not yet able to stand by themselves under the strenuous conditions of the modern world'; 'tutelage' of such peoples was to be 'entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility'.¹⁸ It bears noting, of course, that the trajectory towards independence was confined to the more 'advanced' colonies – and only to those advanced colonies of powers that happened to be defeated in World War I.¹⁹

The UN, for its part, ultimately became a vehicle for decolonization on a global scale. Yet it is clear from the Charter that its rhetorical embrace of self-determination was not intended to amount to a right of independence for the one-third of humanity that did not govern themselves when the document was signed.²⁰ As British Prime Minister Winston Churchill declared in a speech to Parliament during the negotiations over the Charter, 'I have not become the King's First Minister in order to preside over the liquidation of the British Empire.'²¹ The compromise that was reached is reflected in distinct chapters of the Charter: the colonies of the defeated powers and the existing League mandates were placed under the new Trusteeship Council in Chapter XII, while other non-self-governing territories were to be subjected to a more vague system of obligations in Chapter XI.²² Despite such misgivings, the UN and international law did play an important role in the dismantling of the colonial structures, accelerating as the former colonies assumed a numerical majority in the UN General Assembly and the 'principle of' self-determination was replaced by a 'right to' self-determination.²³

The intention here is not to attempt to provide a full history of the legacy of colonialism. Rather it is to make two observations that continue to affect attitudes towards international law in Asia in particular. First, the vast majority of Asian states literally did not participate in the negotiation of most of the agreements that define the modern international order. At the Hague Peace Conferences of 1899 and 1907, for example, there were only four Asian countries present (China, Iran, Japan and Siam [Thailand]) out of 26 and 43 participants respectively.²⁴ When the Covenant of the League of Nations was signed in 1919, only four of the 27 original members were from Asia (China, Hedjaz [Saudi Arabia], Japan and Siam [Thailand]).²⁵ At the Bretton Woods Conference in 1944, which established the World Bank and the International

¹⁸ Covenant of the League of Nations 1920, 225 Parry 195, Art. 22.

¹⁹ See generally S. Chesterman, *You, The People: The United Nations, Transitional Administration and State-Building* (2004), at 13–18.

²⁰ UN Charter, Arts. 1(2), 55.

²¹ M. Gilbert, *Winston S. Churchill, Volume 7: Road to Victory, 1941–1945* (1986), at 254.

²² Chesterman, *supra* note 19, at 37–44.

²³ Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514 (XV), 14 December 1960.

²⁴ Final Act of the International Peace Conference, 29 July 1899; Final Act of the Second Peace Conference, 18 October 1907.

²⁵ Covenant of the League of Nations, *supra* note 18.

Monetary Fund, only five of the 44 signatories were Asian (China, India, Iran, Iraq and the Philippine Commonwealth).²⁶ As for the UN itself, only eight of the 51 original members were from Asia (China, India, Iran, Iraq, Lebanon, Philippine Commonwealth, Saudi Arabia and Syria).²⁷

Second, when they became independent, Asian states were expected to embrace not only the various treaty obligations but also the structures and forms of international law.²⁸ Although Christian Tomuschat is correct to note that colonialism is now largely a relic of the past, it is surely an overstatement to conclude, therefore, that colonialism is essentially irrelevant to the contemporary international order.²⁹ These observations are not unique to Asia, of course. Indeed, one could make a compelling case that the disenfranchisement of African states during these formative periods of international law was far greater. There were no African representatives at all at the Hague Peace Conferences, only South Africa and Liberia signed the Covenant of the League of Nations, and only four African states (South Africa, Liberia, Egypt and Ethiopia) were involved in the Bretton Woods Conference and the drafting of the UN Charter.³⁰

Yet, as will be discussed in the second part of this article, the situation of Asia is unique in that the states of the region have a majority of the world's population, the largest share of its landmass and are projected to overtake Europe and North America in economic output in the coming decades. For such a region to be predominantly a 'rule taker' is a problem that scholars have been trying to explain for some time.³¹ In particular, there does not appear to be a comparable example of a great power (or multiple powers) rising within a normative framework not of its own making, where that normative framework has not undergone substantial change or revolution as a result of the new power's values and interests.³² In addition, the current situation is unusual in that China is better understood not as a 'new', but, rather, as a 'returning' great power.³³ To such structural considerations, two further historical antecedents need to be highlighted as they loom large (if often unspoken) in considerations

²⁶ International Bank for Reconstruction and Development (World Bank) Articles of Agreement, 22 July 1944 (in force 27 December 1945); Articles of Agreement of the International Monetary Fund, 22 July 1944 (in force 27 December 1945).

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

²⁸ Ko, 'Wang Tiewa and International Law in Asia', 4 *Journal of the History of International Law* (2002) 159.

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

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

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

³² For an extreme version of this thesis, see G. Friedman and M. Lebard, *The Coming War with Japan* (1991). The most notorious example is Huntington, 'The Clash of Civilizations?', 72(3) *Foreign Affairs* (1993) 22.

³³ See P.C.W. Chan, *China, State Sovereignty and International Legal Order* (2015), at 1.

of international law: the unequal treaties that were imposed on China in the 19th century and the experience of war crimes trials in post-war Japan.

B *Unequal Treaties and China*

Although China's pre-modern embrace of a form of international law was idiosyncratic, in that it was premised on the superiority of Chinese culture,³⁴ it placed China at the heart of what was arguably the world's largest trading system of its time.³⁵ Tensions with European counterparts rose in the early 19th century when China expressed disinterest in purchasing European goods and insisted on diplomatic protocols that were standard in East Asia but alien to the Europeans.³⁶ China's defeat in the First Opium War (1839–1842) shattered what had arguably been one of the more durable regional regimes, referred to by some as the 'Chinese world order'.³⁷ The Treaty of Nanking (1842) ceded Hong Kong to Britain and agreed to open five ports for trade.³⁸ The Second Opium War (1856–1860) was fought to further open the Chinese market, concluding with the burning down of the Summer Palace and the opening of permanent diplomatic representation in the Chinese capital under the Treaty of Tientsin (1858).³⁹

These and other treaties are referred to as 'unequal treaties', though that term only came to be used in the 1920s.⁴⁰ The perceived injustice of the treaties, which today might have been void for coercion,⁴¹ was both a rallying cry for nationalist sentiment within China and a leitmotif in China's slow embrace of public international law in the early 20th century.⁴² International law in the Qing Dynasty came to be seen as a tool to protect and advance Chinese interests rather than a normative framework that governed international affairs as such, though arguably that was also the same position taken by Western powers.⁴³

This view of international law as a tool was reinforced in the republican period that followed the fall of the Qing dynasty in 1912. China variously sought to invoke international law provisions to assert its control of Manchuria, Tibet and Xinjiang as well as to resist ongoing demands by Western powers for extraterritorial jurisdiction within its territory.⁴⁴ It also began to challenge the 'unequal treaties' imposed during the Qing period. This included an episode in 1926 in which China invoked the doctrine

³⁴ Chan, 'China's Approaches to International Law since the Opium War', 27 *Leiden Journal of International Law* (2014) 859, at 862; Svarverud, 'Re-constructing East Asia: International Law as Inter-Cultural Process in late Qing China', 12(2) *Inter-Asia Cultural Studies* (2011) 306, at 308–310.

³⁵ K. Pomeranz, *The Great Divergence: China, Europe and the Making of the Modern World Economy* (2000); Y. Onuma, *A Transcivilizational Perspective on International Law* (2010), at 305–314.

³⁶ Chan, *supra* note 34, at 863.

³⁷ J. King Fairbank (ed.), *The Chinese World Order: Traditional China's Foreign Relations* (1968).

³⁸ Treaty of Nanking [Nanjing], Britain-China, done at Nanjing, 29 August 1842.

³⁹ Treaty of Tientsin [Tianjin], Britain-China, done at Tianjin, 26 June 1858.

⁴⁰ D. Wong, *China's Unequal Treaties: Narrating National History* (2005), at 1.

⁴¹ Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, Art. 52.

⁴² Wong, *supra* note 40, at 118–124; Gong, *supra* note 9, at 144.

⁴³ Chan, *supra* note 34, at 868.

⁴⁴ *Ibid.*, at 871–875.

of *rebus sic stantibus* [fundamental change of circumstances] to argue that an 1865 treaty with Belgium should be renegotiated or terminated. Belgium proposed that the matter be referred to the Permanent Court of International Justice, a suggestion that China rejected in language that echoes its position more recently on matters such as the South China Sea: '[The dispute] is political in character and no nation can consent to the basic principle of equality between States being made the subject of a judicial inquiry.'⁴⁵

In the following two decades, most of the unequal treaties were indeed renegotiated or terminated by agreement, although this was due more to the exigencies of World War II than any perception that the past agreements had been unjustly imposed on China.⁴⁶ (A treaty with ongoing significance is the 1914 Simla Accord, which purported to establish the McMahon Line as the border between British India and Tibet. The relevant border between India and China remains in dispute.⁴⁷) Such a perception of international law as one instrument of foreign policy among others was reinforced in the communist period of the People's Republic of China, both as an article of ideology and due to the fact that from 1949 to 1971 it was nominally represented in the UN by what it viewed as the renegade province of Taiwan.⁴⁸ Writing in 1966, a professor at National Taiwan University wrote that it was 'beyond doubt' that Communist China recognized the existence of international law but that its conception was consistent with the socialist vision of law as an instrument of the state rather than as a check on it.⁴⁹ He included a quote from a mainland scholar who articulated this view in unusually clear language:

International law is one of the instruments of settling international problems. If this instrument is useful to our country, to socialist enterprise, or to the peace enterprise of the people of the world, we will use it. However, if this instrument is disadvantageous to our country, to socialist enterprises or to peace enterprises of the people of the world, we will not use it and should create a new instrument to replace it.⁵⁰

China's subsequent engagement with the UN and embrace of international law arguably continues to be instrumentalist with regard to both domestic and international policy objectives. Its entry into the WTO, for example, was the subject of extensive internal debate as to the impact it would have on China's economic and political system,⁵¹ which at the time was styled as 'socialism with Chinese characteristics'.

⁴⁵ T. Wang, 'International Law in China: Historical and Contemporary Perspectives', 221 *Recueil des cours* (1990) 195, at 348. Belgium proceeded to submit the dispute to the Permanent Court of International Justice (PCIJ), which indicated provisional measures, but ultimately withdrew the matter. *Denunciation of the Treaty of 2 November 1865 between China and Belgium (Belgium v. China)*, 1926 PCIJ Series A, No. 8.

⁴⁶ Callahan, 'Nationalizing International Theory: Race, Class and the English School', 18(4) *Global Society* (2004) 305, at 321. On Japan's experience of unequal treaties, see M.R. Auslin, *Negotiating with Imperialism: The Unequal Treaties and the Culture of Japanese Diplomacy* (2004).

⁴⁷ See, e.g., A.G. Noorani, *India–China Boundary Problem 1846–1947* (2011), at 168; Singh, 'Sino–Indian Attitudes to International Law: Of Nations, States and Colonial Hangovers', 3(2) *Chinese Journal of Comparative Law* (2015) 348.

⁴⁸ Chan, *supra* note 34, at 875–882.

⁴⁹ Chiu, 'Communist China's Attitude toward International Law', 60 *AJIL* (1966) 245, at 246–249.

⁵⁰ L. Chu, 'Refute the Absurd Theory Concerning International Law by Ch'en T'i-ch'iang', *People's Daily* (18 September 1957), quoted in Chiu, *supra* note 49, at 248–249.

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

Again, this may not be very different from the manner in which other states contemplate entering into treaty obligations. Interestingly, a statement in 2014 by Chinese Foreign Minister Wang Yi articulated a more principled approach to supporting the rule of law at the international level. This commitment, Wang stressed, was 'a momentous choice' that China had made based on its own experience of international law:

In the more than 100 years after the Opium War, colonialism and imperialism inflicted untold sufferings on China. For many years, China was unjustly deprived of the right by imperialist powers to equal application of international law. The Chinese people fought indomitably and tenaciously to uphold China's sovereignty, independence and territorial integrity and founded New China. China strove to build a new type of relations with other countries in accordance with the Five Principles of Peaceful Coexistence on the basis of international law. It broke isolation, blockade and military threat imposed by imperialism and hegemonism, regained its lawful seat in the United Nations, started reform and opening-up program, became fully integrated into the international system, and made remarkable achievements in development. Seeing the contrast between China's past and present, the Chinese people fully recognize how valuable sovereignty, independence and peace are. China ardently hopes for the rule of law in international relations against hegemony and power politics, and rules-based equity and justice, and hopes that the humiliation and sufferings it was subjected to will not happen to others.⁵²

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

C Post-War Japan

As discussed earlier, Japan was more successful than China at integrating into the international system in the 19th century.⁵⁴ This was consistent with the Japanese project of incorporating international law into its foreign policy following the Meiji Restoration.⁵⁵ Yet the limits of Japan's acceptance by the community of nations were made apparent when its efforts to include reference to racial equality in the preamble to the Covenant of the League of Nations were rejected at the 1919 Paris Peace Conference.⁵⁶ The assumption on the part of countries such as the United States, Australia and New Zealand appears to have been that Japan planned to challenge their policies limiting immigration from East Asia.⁵⁷ As Martti Koskenniemi observes, this made it clear that the non-European world could never be regarded as

⁵² 'Full Text of Chinese FM's Signed Article on Int'l Rule of Law', *Xinhua* (24 October 2014).

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

⁵⁴ See *supra* notes 14–17 and accompanying text.

⁵⁵ Yanagihara, 'Japan', in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (2012) 475.

⁵⁶ See, e.g., Shimazu, 'The Japanese Attempt to Secure Racial Equality in 1919', 1 *Japan Forum* (1989) 93.

⁵⁷ E.P. Walters, *A History of the League of Nations* (1952), at 63.

European, something ‘Turkey had always known and Japan was to find out to its bitter disappointment’.⁵⁸

Japan’s experience in the aftermath of World War II echoed and reinforced perceptions of its different status in international law.⁵⁹ The International Military Tribunal for the Far East (Tokyo Trial) was the most prominent of these proceedings and suffered in comparison to Nuremberg.⁶⁰ Much of what has been written since the Tokyo Trial is highly critical of the ‘victor’s justice’ that tainted the proceedings, with suggestions that the trial was a means of extracting revenge for the ‘treacherous’ bombing of Pearl Harbor or expiating guilt for the use of atomic weapons in Japan.⁶¹ Procedural flaws in Tokyo were also the subject of scathing criticism by Justices Radhabinod Pal and Bert Röling, including inequality of arms, lack of time, inadequate translation services and limitations on defence witnesses, among others.⁶²

More relevant for present purposes, however, was the extent to which colonialism and race played a role in Tokyo in a way that they did not in Nuremberg. Although three Asian judges were appointed (from China, India and the Philippines), the majority of the tribunal came from the USA and its Western allies. No legal representative was drawn from Malaysia, Singapore, Indonesia, Indochina or Korea. Given the national independence movements then underway in various colonies of Britain, France, the Netherlands and the USA, it is not surprising that Japanese responsibility towards Asia was framed in a manner that emphasized atrocities rather than colonialism.⁶³

Race also featured directly and indirectly. The Allied powers claimed the right to speak for ‘civilization’ in the Tokyo Trial. Although few would question that the crimes being prosecuted would have been condemned by any civilization, the clear understanding was that ‘civilization’ in this context meant modern European civilization.⁶⁴ Writing soon after the trials, two American authors criticized Soviet efforts to use them for political purposes, stating – without apparent irony – that this was ‘incompatible with the Christian-Judaic absolutes of good and evil which were the foundation of the Tokyo and Nuernberg trials’.⁶⁵ Other scholars have discussed the role of race in specific trials, notably that of General Tomoyiki Yamashita.⁶⁶

The political context of the Tokyo Trial also differed from Nuremberg. The decision to protect Emperor Hirohito and keep him on the throne, for example, was intended to facilitate the occupation of Japan. To this end, he was presented as having been

⁵⁸ Koskeniemi, *supra* note 13, at 135.

⁵⁹ This section draws upon material discussed in greater depth in Chesterman, ‘International Criminal Law with Asian Characteristics?’, 27(2) *Columbia Journal of Asian Law* (2014) 129.

⁶⁰ See, e.g., ‘War Crimes’, *Time* (20 May 1946), at 24.

⁶¹ See, e.g., P.W. Schroeder, *The Axis Alliance and Japanese-American Relations* (1958), at 228; R.H. Minear, *Victors’ Justice: The Tokyo War Crimes Trial* (1971).

⁶² B.V.A. Röling and A. Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (1993), at 50–60.

⁶³ Tanaka, McCormack and Simpson, ‘Editors’ Preface’, in Y. Tanaka, T.L.H. McCormack and G.J. Simpson (eds), *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (2011) xxvii, at xxviii.

⁶⁴ Onuma, ‘Beyond Victor’s Justice’, 11 *Japan Echo* (1984) 63.

⁶⁵ J.B. Keenan and B.F. Brown, *Crimes against International Law* (1950), at vii.

⁶⁶ See, e.g., Prevost, ‘Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita’, 14 *Human Rights Quarterly* (1992) 303.

manipulated by Japan's military leaders; indeed, General Douglas MacArthur cultivated his image as a 'peace monarch', who voluntarily led his country in the formulation of its new constitution that renounced military force. Though the short-term aim of encouraging cooperation with the occupying powers was achieved, the longer-term consequence was that the Japanese people were absolved – or viewed themselves as being absolved – from the need to reflect on the colonization and oppressive rule of Taiwan and Korea, and the atrocities perpetrated there, in China and in other Asian states.⁶⁷ The effects of this decision continue to be felt today, with periodic calls from China and other states for Japan to apologize repeatedly for its wartime activities, while nationalist sentiments within Japan manifest in the ritual of visiting the Yasukuni shrine to Japan's war dead, including 14 Class A war criminals.⁶⁸

The significance of the Tokyo Trial to Japan's modern approach to international law should not be overstated. Nevertheless, as Barak Kushner and others have argued, it is not difficult to see how it encouraged a view that international law was a tool for selective engagement with domestic political processes, pursuing some ends, such as the stabilization of post-conflict Japan, while effacing others, such as the ongoing liberation struggles in much of the region.⁶⁹

D History and Law

This part of the article has provided a brief survey of the historical experience of international law in certain parts of Asia. Clearly, a thorough treatment would require vastly more breadth and depth. For present purposes, the intention is not to encompass this experience in its entirety but, rather, to provide a snapshot of three aspects that help to explain the ongoing suspicion of international law in the region. First, international law was perceived to, and did in fact, legitimize the colonial project. Indeed, as Charles Alexandrowicz has argued, one can make the case that much of Asia enjoyed a 'full legal status' that was systematically undermined by the European states, leading to the situation in which Asian states were reduced to the position of supplicants seeking membership in the European order.⁷⁰ Second, China's experience of international law in general, and the unequal treaties in particular, encouraged a view of international law as being instrumentalist that continues to have an impact today.⁷¹ And, third, Japan's post-war trials and those across the region reinforced the view that international law was a political tool that can and should be used selectively, when it is in one's interest (and capacity) to do so.

⁶⁷ Otomo, 'The Decision Not to Prosecute the Emperor', in Tanaka, McCormack and Simpson, *supra* note 63, 63.

⁶⁸ Futamura, 'Japanese Societal Attitude towards the Tokyo Trial: From a Contemporary Perspective', in Tanaka, McCormack and Simpson, *supra* note 63, 35.

⁶⁹ Cf. Kushner, 'Ghosts of the Japanese Imperial Army: The "White Group" (*Baituan*) and Early Post-war Sino-Japanese Relations', 218 (suppl 8) *Past and Present* (2013) 117, at 119.

⁷⁰ C.H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (1967), at 10.

⁷¹ Cf. d'Aspremont, 'International Law in Asia: The Limits to the Western Constitutionalist and Liberal Doctrines', 13 *Asian Yearbook of International Law* (2007) 27 (arguing that Asian international law scholars tend to base their arguments on interests rather than values).

That being said, it is important to emphasize that the experience of international law in Asia was far from uniformly negative and that Asian states were not simply passive subjects in this history. Of particular note are the Five Principles of Peaceful Coexistence,⁷² which were adopted in 1954 by China and India and still figure in the foreign policies of both countries.⁷³ These principles are broad and hardly controversial, emphasizing (i) mutual respect for each other's territorial integrity and sovereignty; (ii) mutual non-aggression; (iii) mutual non-interference in each other's internal affairs; (iv) equality and mutual benefit; and (v) peaceful co-existence. At the Bandung Conference of African and Asian leaders, which took place the following year, the principles were incorporated in the ten-point Declaration on the Promotion of World Peace and Co-operation,⁷⁴ and these in turn formed the normative core of the Non-Aligned Movement.⁷⁵ The principles are also enshrined in the embryonic sub-regional organizations that have slowly emerged across the continent, most notably the South Asian Association for Regional Cooperation (SAARC), the Shanghai Cooperation Organization (SCO) and the Association of Southeast Asian Nations (ASEAN).

In substantive terms, Asian states did contribute to the development of international law in the late 20th century, notably the law of self-determination and the law of the sea. Individual Asian jurists have also held leadership positions in the major courts and international organizations, including two UN secretaries-general. Yet the purpose of this part of the article has been to show why it is not surprising that there is ongoing wariness about international law.⁷⁶ It seems plausible that this has had an influence on the low acceptance of, and participation in, international law and institutions highlighted at the start of this article. In addition, however, such concerns have fed into substantive disagreements that touch on non-interference, in particular, such as the 'Asian values' debates of the 1990s and the more recent opposition to the responsibility to protect (R2P) – questions to which we will return in the third part of the article.

2 Present

As indicated in the introduction, Asia today is under-represented in various international regimes. However, to what extent is this significant or a cause for concern? Building on the historical survey in the first part of this article, this part will explore the different measures of Asia's participation and representation before considering how these generally low rates may be explained.

⁷² Agreement between the Republic of India and the People's Republic of China on Trade and Intercourse between Tibet Region of China and India (Five Principles of Peaceful Coexistence) 1954, 299 UNTS 57.

⁷³ See, e.g., Lo, 'Values to Be Added to an "Eastphalia Order" by the Emerging China', 17 *Indiana Journal of Global Legal Studies (IJGLS)* (2010) 13, at 16–17.

⁷⁴ Final Communiqué of the Asian-African Conference, 24 April 1955.

⁷⁵ See generally H. Köchler (ed.), *The Principles of Non-Alignment* (1982).

⁷⁶ A related argument might be made concerning the role of international law in addressing nuclear weapons testing and counter-proliferation in the Asian region.

A Participation and Representation

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

1 Regional Institutions

There is no Asia-wide regional framework comparable to the African Union, the Organization of American States or the EU. Those few sub-regional organizations that have been created have generally been intended for limited functions or have existed primarily as a structured series of meetings rather than an independent entity as such.⁷⁷ The SCO, for example, created in 1996, is notionally a collective security organization, but it has very few concrete obligations or activities. It is perhaps better understood as a platform for cooperation and confidence building.⁷⁸ The same could be said of SAARC, which was launched in 1985. Despite periods of 'turbulent non-growth', it has failed to take on a more significant regional role, largely due to the wariness that any expansion would primarily benefit India.⁷⁹ The overlapping organization known as the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) also exists primarily to facilitate cooperation.

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

⁷⁷ It is also telling that Asia was the last region to have any meaningful network of international law scholars until the Asian Society of International Law was established in 2007. See Owada, *supra* note 16; Onuma Yasuaki, 'The Asian Society of International Law: Its Birth and Significance', 1 *Asian JIL* (2011) 71.

⁷⁸ Blank, 'Making Sense of the Shanghai Cooperation Organization', 14(2) *Georgetown Journal of International Affairs* (2013) 39.

⁷⁹ Dash, 'Dynamics of South Asian Regionalism', in M. Beeson and R. Stubbs (eds), *Routledge Handbook of Asian Regionalism* (2011) 406.

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

For most of its history, ASEAN was broadly consistent with the other Asian entities discussed above. Its foundational document, the Bangkok Declaration, essentially states a few shared goals and announces an annual meeting of foreign ministers.⁸⁰ In the past decade, however, ASEAN has undergone a transformation from a periodic meeting of ministers to setting ambitious goals and launching an 'ASEAN Community' in 2015. Building on the adoption of a Charter that entered into force in 2008 and asserts the organization's legal personality,⁸¹ it is the most important Asian international organization. A central tension in this transformation has been the question of whether the 'ASEAN way', which is defined by consultation and consensus rather than enforceable obligations, is consistent with the establishment of a community governed by law.⁸²

In addition to the willingness to be bound by international obligations generally, a further limiting factor in the case of ASEAN and the other organizations is resources. ASEAN long ago adopted the principle that each member would contribute the same funds to the budget, regardless of the size of its population or economy.⁸³ This necessarily keeps its annual budget low. In 2012, each member contributed US \$1.58 million, for a total budget of US \$15.8 million. To put this in perspective, ASEAN's member states contributed US \$30.9 million to the UN in the same year, ranging from US \$25,852 for Laos to US \$8.6 million for Singapore. Even so, ASEAN is probably the best-funded Asian regional organization.⁸⁴

A further aspect of these various organizations that appears to reflect a wariness of granting political independence is that secretariats – if such an entity exists at all – are extremely limited not merely in resources but also in independence. Appointment processes often reflect the view that the nominal secretary-general is more akin to

⁸⁰ ASEAN Declaration (Bangkok Declaration) 1967, 6 ILM 1233 (1967) (Indonesia, Malaysia, Philippines, Singapore and Thailand). See generally Simon, 'ASEAN and Multilateralism: The Long, Bumpy Road to Community', 30(2) *Contemporary Southeast Asia* (2008) 264.

⁸¹ Chesterman, 'Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person', 12 *Singapore Year Book of International Law (SYBIL)* (2008) 199. Charter of the Association of Southeast Asian Nations (ASEAN Charter) 2007, available at www.eisil.org/index.php?sid=4&id=2363&t=link_details&cat=628 (last visited 15 July 2016).

⁸² See S. Chesterman, *From Community to Compliance? The Evolution of Monitoring Obligations in ASEAN* (2015).

⁸³ ASEAN Charter, *supra* note 81, Art. 30(2).

⁸⁴ Charter of the South Asian Association for Regional Cooperation 1985, 4 *AsYIL* 473, Art. 9, e.g., states that member state financial contributions towards the activities of the association are 'voluntary', though technical committees are also empowered to recommend apportionment of costs. L. Sáez, *The South Asian Association for Regional Cooperation (SAARC): An Emerging Collaboration Architecture* (2011), at 23.

the chair of an ongoing meeting. Much as the presidency of the UN Security Council rotates alphabetically by state, the same principle applies to the secretaries-general of ASEAN⁸⁵ and BIMSTEC⁸⁶ and is the practice of the SAARC⁸⁷ and the SCO.⁸⁸

A term frequently heard in relation to Asian regional organizations is 'variable geometry', which indicates flexibility in the participation of different states in specific integration projects. Such an approach is hardly unique to Asia, but it is telling that even ASEAN has included in its Charter an 'ASEAN Minus X formula', allowing member states to opt out of economic commitments.⁸⁹ More telling still is the fact that in a series of areas, ASEAN agreements are weaker than their international equivalent. There has been much discussion of the weakness of the ASEAN Human Rights Declaration,⁹⁰ but this is also true in respect of international economic law: ASEAN member states have agreed to stricter obligations in their WTO or bilateral investment treaties (BITs) than they have within the context of the nascent ASEAN economic community.⁹¹

2 Major International Treaties

In addition to the treaties highlighted earlier,⁹² Asian states are the least likely to have signed many other human rights and international humanitarian law treaties. Asian states have the lowest take-up of the ICCPR and ICESCR as well as of the conventions against racism, torture and discrimination against persons with disabilities.⁹³ Although all have signed the Geneva Conventions, less than three quarters have signed the First Additional Protocol, and only two thirds have signed the Second Additional Protocol (for other regions, the figures are 86 per cent or higher for both).⁹⁴

In the area of international economic law, the picture is slightly different. Although Asian states are least likely to have joined the WTO or to be contracting parties to ICSID,⁹⁵ there is evidence that Asian states are using these regimes. India, Japan and

⁸⁵ ASEAN Charter, art. 11(1).

⁸⁶ Memorandum of Association on the Establishment of the BIMSTEC Permanent Secretariat, 2014.

⁸⁷ B. Mohanan, *The Politics of Regionalism in South Asia* (1992), at 46.

⁸⁸ The last four secretaries-general have been from China (2004–2006), Kazakhstan (2007–2009), Kyrgyzstan (2010–2012) and Russia (2013–2015).

⁸⁹ ASEAN Charter, *supra* note 81, Art. 21(2).

⁹⁰ See, e.g., Renshaw, 'The ASEAN Human Rights Declaration 2012', 13(3) *Human Rights Law Review (HRLR)* (2013) 557.

⁹¹ Tan, 'Will ASEAN Economic Integration Progress Beyond a Free Trade Area?', 53(4) *International and Comparative Law Quarterly* (2004) 935, at 967.

⁹² See *supra* note 2 and accompanying text.

⁹³ All Asian states (and almost all states globally) have signed the Convention on the Rights of the Child 1989, 1577 UNTS 3; as in other regions, the vast majority are also parties to the Convention on the Elimination of All Forms of Discrimination against Women 1979, 1249 UNTS 13.

⁹⁴ Geneva Conventions 1949, 1125 UNTS 3. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3, Arts 1(4), 96(3); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts 1977, 1125 UNTS 609.

⁹⁵ See [Figure 1](#) in this article. The same appears to be true in the area of international tax agreements. See Stewart, 'International Tax, the G20 and the Asia Pacific: From Competition to Cooperation?', 1(3) *Asia and the Pacific Policy Studies* (2014) 484, at 489–492.

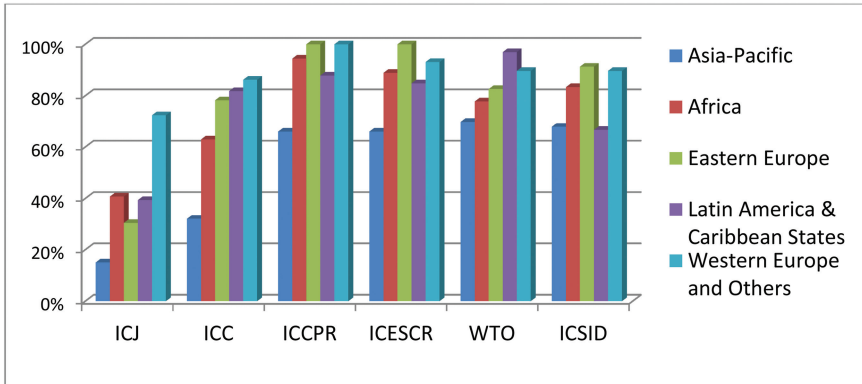


Figure 1: *Percentage of States Participating in Certain International Institutions by UN Regional Groupings (December 2014)*

China are the fifth, seventh and ninth most frequent to appear in WTO cases as applicant states; China and India are the second and third most frequent respondents. Japan is the most frequent participant as a third party; China and India are third and fourth.⁹⁶ Nevertheless, a study of the WTO dispute settlement system has concluded that Asian states overall initiate fewer disputes relative to their share of global trade, when compared with the USA, the EU, Brazil and Mexico.⁹⁷

One area in which Asia is becoming a leader is BITs. Although as a region it is the only in which less than 80 per cent of states have at least one BIT in force, China is now party to the second largest number of BITs overall, with Korea and India in the top fourteen.⁹⁸ This apparent preference for bilateral, as opposed to multilateral, regimes will be discussed further in the third part of this article.

3 Voice

Perhaps the most talked about aspect of international participation, at least by Japan and India, is Asian representation on the UN Security Council. On any measure, however, Asian states are under-represented in the leadership positions of global governance. Asian states constitute more than 25 per cent of the world's countries, occupy 30 per cent of its land mass, generate almost 50 per cent of global gross domestic product (GDP)⁹⁹ and encompass 60 per cent of global population. Nevertheless, on

⁹⁶ Data compiled from www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited 24 April 2015).

⁹⁷ Ewing-Chow, Goh and Patil, 'Are Asian WTO Members Using the WTO DSU "Effectively"?', 16(3) *Journal of International Economic Law* (2013) 669.

⁹⁸ Data compiled from <http://investmentpolicyhub.unctad.org/IIA/IiasByCountry> (last visited 24 April 2015). See also Chaisse, 'The Shifting Tectonics of International Investment Law: Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia-Pacific Region', 47 *George Washington International Law Review* (2015) 563.

⁹⁹ The IMF's World Economic Outlook Database (April 2015) figures for gross domestic product (GDP) based on purchasing-power-parity have Asia-Pacific states generating 41.5% in 2013 and growing to 46.5% by 2020.

key institutions such as the UN Security Council and the Bretton Woods institutions, Asia remains under-represented. The continent has only one fifth of the seats on the UN Security Council, including one permanent seat. (The Western Europe and Others Group (WEOG) has one third of the seats – three permanent and two rotating.) The president of the World Bank, in practice, is appointed by the White House, while the managing director of the International Monetary Fund (IMF) has until now been chosen by its European members.¹⁰⁰ Even where Asian states have appropriate representation, however, such as the UN General Assembly, they do not operate as a regional bloc. Unlike the African and Latin American states, for example, the Asia-Pacific Group at the United Nations never seeks to achieve common positions on policy matters and discussion is generally limited to candidacies for international posts.

Partly as a result of this lack of regional coherence, but also for reasons discussed in the third part of this article, Asian states have tended to have less of a voice in international affairs than their number, size and power might otherwise warrant. Individual states, notably China, are exercising growing influence, but it is hard to identify areas in which Asian states have had an impact as a group. Building on the Five Principles and the Bandung Conference discussed earlier,¹⁰¹ the New International Economic Order was perhaps the largest project that Asian states participated in after decolonization. Yet its impact was negligible.¹⁰² There has been some modest success with human security, which Japan, in particular, has championed. Nevertheless, as one Korean commentator has observed, human security runs at odds with the dominant discourse of robust sovereignty advocated by most Asian states.¹⁰³

4 *International Dispute Settlement*

A fourth area of representation and participation worthy of note is the fact that Asian states tend to be the wariest of international dispute settlement procedures.¹⁰⁴ Only eight Asian states have accepted compulsory jurisdiction of the ICJ – Cambodia, Cyprus,¹⁰⁵ India, Japan, the Marshall Islands, Pakistan, the Philippines and Timor-Leste – which amounts to 15 per cent of the Asia-Pacific Group within the UN. By contrast, 30 per cent of Eastern European states, 39 per cent of Latin America and Caribbean states, 41 per cent of African states, and 69 per cent of WEOG had signed the optional declaration. Unsurprisingly, Asian states are also less likely to have used

¹⁰⁰ Woods, 'The United States and the International Financial Institutions: Power and Influence within the World Bank and the IMF', in R. Foot, S.N. MacFarlane and M. Mastanduno (eds), *U.S. Hegemony and International Organizations: The United States and Multilateral Institutions* (2003) 92, at 109.

¹⁰¹ See *supra* notes 72–75 and accompanying text.

¹⁰² See Anghie, 'Legal Aspects of the New International Economic Order', 6(1) *Humanity* (2015) 145.

¹⁰³ Kim, 'Human Security with an Asian Face?', 17 *IJGLS* (2010) 83, at 102.

¹⁰⁴ Speaking in 2013, ICJ President Peter Tomka contrasted the trust that African states had placed in his court with the comparative 'restraint' of Asian states. P. Tomka, Speech to the Asian-African Legal Consultative Organization, 30 October 2013. This is not, of course, limited to international law. See, e.g., R. Peerenboom (ed.), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US* (2004).

¹⁰⁵ Cyprus is a member of the Asia Pacific Group at the United Nations, despite also being a member of the European Union.

the Court. Only 15 of the 53 Asia-Pacific states have ever appeared before the ICJ, which equates to 28 per cent. The corresponding figures for other regions are 48 per cent of Latin American states, 50 per cent of African states, 57 per cent of Eastern European states and 79 per cent of WEOG. Of those 15 Asian states, six first appeared before the Court in 2001 or later.¹⁰⁶

It is interesting to note that there have been only three territorial delimitation cases brought by Asian states to the ICJ: *Temple of Preah Vihear (Cambodia v. Thailand)*, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* and *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*.¹⁰⁷ In each case, only one aspect of a larger dispute was submitted to the ICJ – the temple and specific islands. Whereas the land border between Cambodia and Thailand and the maritime boundary in the other cases might be the subject of ongoing negotiation, these aspects were not susceptible to division or negotiation, apparently encouraging the parties to submit them to third-party adjudication.¹⁰⁸

Other disputes that have been submitted to international adjudication include the railway lands arbitration between Malaysia and Singapore at the Permanent Court of Arbitration and the Bangladesh-Myanmar maritime delimitation case at the International Tribunal for the Law of the Sea.¹⁰⁹ The majority of Asian territorial disputes, however, remain bilateral or multilateral disputes with little sign of a resolution through third party adjudication. Prominent examples include Jammu and Kashmir, the border between India and China, the Senkaku/Diaoyu Islands, the Liancourt Rocks (Dokdo/Takeshima), the Kuril Islands and the disputed islands and waters of the South China Sea. The South China Sea especially has been the subject of intense diplomatic and legal manoeuvring, with China articulating quasi-legal claims in the form of its infamous nine-dash line and strenuously opposing efforts by the Philippines to submit the dispute to a judicial process.¹¹⁰

B Explaining Asia's Ambivalence

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

¹⁰⁶ Indonesia and Malaysia submitted a special agreement on the Pulau Ligitan and Pulau Sipadan case to the ICJ in 1998, but oral proceedings commenced in June 2001. The other states to have appeared before the Court since 2001 are Japan, the Marshall Islands, Singapore and Timor-Leste.

¹⁰⁷ *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment, 15 June 1962, ICJ Reports (1962) 6; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, 17 December 2002, ICJ Reports (2002) 625; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, 23 May 2008, ICJ Reports (2008) 12.

¹⁰⁸ Chesterman, 'The International Court of Justice in Asia: Interpreting the *Temple of Preah Vihear Case*', 5 *Asian JIL* (2015) 1.

¹⁰⁹ PCA, *Railway Land Arbitration (Malaysia v. Singapore)*, Final Award, 30 October 2014, PCA Case no. 2012-01; ITLOS, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 14 March 2012, ITLOS Case no. 16.

¹¹⁰ See *infra* notes 169–176.

consideration, then, is whether national political structures and rule of law institutions are the dominant factor. It may be hypothesized, for example, that authoritarian states are less likely to submit themselves to external scrutiny or binding international obligations than liberal states.¹¹¹ Such countries, it might be argued, are less likely to cede power to international institutions in the same way that they are wary of delegating it to powerful national ones. A preliminary study suggests that this may be a consideration but cannot fully explain the particular reluctance of Asian states to accept international obligations.

Using the World Justice Project's (WJP) Rule of Law Index as a proxy for respect for the rule of law, for example, African states rate on average far lower than Asian states in terms of rule of law, with an average weighted score of 0.19. (Asian states average 0.25, Latin American states average 0.29, Eastern European states 0.43 and WEOG states 0.50.)¹¹² Yet, as we have seen, African states are far more likely to accept many international obligations and participate in international organizations. Similarly, Freedom House's 'Freedom Rating' suggests that African states are less 'free' than Asian states, and yet this does not appear to have affected the acceptance of international obligations.¹¹³

Within Asia, there is some interesting variation as shown in Table 1. Of the 25 countries evaluated by the WJP, 13 score 0.51 and above.¹¹⁴ Using the examples of international treaties cited earlier, the percentage of those states accepting jurisdiction of the ICJ (3) or the ICC (5), or signing onto the ICCPR (10) or the ICESCR (10), is still lower than the percentage of any of the other regional groupings as a whole. A slightly higher percentage of states graded by the WJP at 0.50 and below have

Table 1: Percentage of States Participating in Certain International Institutions by UN Regional Groupings (December 2014)

	ICJ (%)	ICC (%)	ICCPR (%)	ICESCR (%)	WTO (%)	ICSID (%)
Asia-Pacific	15	32	66	66	70	68
<i>WJP rule of law > 0.50</i>	23	38	77	77	100	85
<i>WJP rule of law ≤ 0.50</i>	17	25	83	92	58	67
<i>WJP not scored</i>	11	32	54	50	61	61
Africa	41	63	94	89	78	83
Eastern Europe	30	78	100	100	83	91
Latin America and Caribbean states	39	82	88	85	97	67
Western Europe and others	72	86	100	93	90	90

¹¹¹ See, e.g., Kent, *supra* note 31, at 2.

¹¹² Data compiled from the World Justice Project's Rule of Law Index, available at <http://worldjusticeproject.org/rule-of-law-index> (last visited 20 August 2016).

¹¹³ Data compiled from Freedom House's Freedom in the World report, available at <https://freedomhouse.org/report/freedom-world/freedom-world-2015> (last visited 20 August 2016).

¹¹⁴ Singapore, South Korea, Japan, United Arab Emirates, Malaysia, Jordan, Mongolia, Nepal, Philippines, Indonesia, Thailand, Sri Lanka and India.

signed the ICESCR (11 of 12). In the realm of international economic law, there does seem to be a correlation between rule of law and membership of the WTO and ICSID. Of the Asian states that scored 0.51 and above, all are members of the WTO and 11 of the 13 states (85 per cent) are members of ICSID. The proportion of those states that scored 0.50 and below or that were not evaluated is below 67 per cent.¹¹⁵

Using Freedom House's crude ranking of 'free', 'partly free' and 'not free', it might again be hypothesized that 'free' countries are more likely to accept international obligations, in particular civil and political rights restrictions. This appears to be the case with respect to the global acceptance of the jurisdiction of the ICJ and ICC, in particular, with 49 per cent of states listed as 'free' accepting the ICJ compared with 33 per cent of 'partly free' and 20 per cent of 'not free' states. For the ICC, 85 per cent of 'free' states are parties to the Rome Statute compared with 61 per cent of 'partly free' and 25 per cent of 'not free' states.¹¹⁶ Yet when one considers the various 'Free' countries, as shown in [Table 2](#), Asian states remain outliers in their unwillingness to sign on to international obligations.

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

The first theme, as discussed in the first part of this article, is Asian states' historical experience of international law. Colonialism, the unequal treaties and the post-war experience encouraged the perception that international law is of questionable legitimacy, can be used for instrumental purposes and is necessarily selective in its application. As indicated earlier, this might also be applied to other regions. Indeed, it

Table 2: Percentage of States Rated as 'Free' by Freedom House Participating in Certain International Institutions by UN Regional Groupings (December 2014)

'Free' states	ICJ (%)	ICC (%)	ICCPR (%)	ICESCR (%)	WTO (%)	ICSID (%)
Asia-Pacific (13)	31	62	54	38	62	54
Africa (11)	36	91	91	73	91	82
Eastern Europe (13)	46	100	100	100	92	92
Latin America and Caribbean states (22)	36	86	86	82	95	73
Western Europe and others (28)	75	89	100	93	89	89
Global (88) ¹¹⁷	49	85	88	80	86	78

¹¹⁵ Data compiled from the World Justice Project's Rule of Law Index, available at <http://worldjusticeproject.org/rule-of-law-index> (last visited 20 August 2016).

¹¹⁶ Rome Statute on the International Criminal Court (Rome Statute) 1998, 2187 UNTS 90.

¹¹⁷ The total of 88 includes Kiribati, which is not a member of a UN regional group.

is broadly consistent with a realist critique of international law. However, the invocation of these themes by Asian leaders is more than mere opportunism.

A second factor, which is more specific to Asia, is diversity. Its identification as a continent was exogenously determined; even today, its precise boundaries remain culturally or politically, rather than geographically, determined.¹¹⁸ This has contributed to a lack of self-identification on the part of Asian states, relative to their African, European and Latin American counterparts. Regional coherence, in turn, can have normative consequences, not only obvious in the case of the expanding EU but also evident in the attitudes towards intervention in the African Union and the elaborate human rights framework that has been developed under the auspices of the Inter-American Court of Human Rights.¹¹⁹ Although sub-regional division is possible, east, south, central and west Asia do not display significantly more cohesion; the stand-out is perhaps ASEAN in the southeast, though even that remains 'thin' compared to other regional organizations.

A third consideration is the power disparities across the continent, in particular the need to balance the great power interests of rising China and India and of a declining Japan.¹²⁰ At the regional level, this reduces the attractiveness to other Asian states of organizations or norm formation in which those powers would have dominant voice. This can be seen, for example, in the response to then Australian Prime Minister Kevin Rudd's attempt to launch an 'Asia Pacific Community' in 2008.¹²¹ Smaller members prefer ASEAN-style arrangements in which sovereign equality is taken more literally (with regard to financial contributions, for example) and in which obligations are comparatively light.

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

3 Futures

Asia participates less, and is less represented, in the international system, and yet it has arguably benefited more from the stability and predictability of that system than

¹¹⁸ Ruskola, 'Where Is Asia? When Is Asia? Theorizing Comparative Law and International Law', 44 *University of California at Davis Law Review (UCDLR)* (2011) 879, at 882.

¹¹⁹ On the impact of regions on norm cascades, see Finnemore and Sikkink, 'International Norm Dynamics and Political Change', 52(4) *International Organization* (1998) 887, at 902–903.

¹²⁰ See, e.g., Arase, 'Non-Traditional Security in China-ASEAN Cooperation: The Institutionalization of Regional Security Cooperation and the Evolution of East Asian Regionalism', 50(4) *Asian Survey* (2010) 808.

¹²¹ See Lee and Milner, 'Practical vs. Identity Regionalism: Australia's APC Initiative, a Case Study', 20(2) *Contemporary Politics* (2014) 209.

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

The centre of gravity is clearly shifting towards Asia. This is in part a function of the decline of US power. To be sure, the USA remains – and most probably will continue to be – the dominant power in the world. But the rhetoric of hegemony and empire that used to accompany this dominance is disappearing.¹²² In its place are references to a ‘post-American world’,¹²³ with the USA relegated to the status of one power among others. There are internal and external reasons for this decline. Internally, divisions within the US political system now routinely undercut the president’s ability to conduct foreign policy from a position of strength, most clearly on display in the odd spectacle of the White House in 2015 persuading the members of the UN Security Council to embrace a deal on Iran’s nuclear programme more easily than it could persuade members of its own Congress. Externally, the economic pull of the USA is being eclipsed by faster-growing Asian markets. In the past, had manufacturers been given a hypothetical choice between access to the US market and access to China, the choice would have been clear. Now it would be a far more difficult calculation.¹²⁴ That relative economic decline has been accompanied by the collapse of its moral authority. In the wake of the 11 September 2001 attacks on New York and Washington, DC, the use of torture and the invasion of Iraq severely undermined the status of the USA as ‘leader of the free world’ or the ‘indispensable nation’.¹²⁵ In its most recent ‘Global Trends’ report, the US National Intelligence Council (NIC) itself stated that there would be no hegemon in the coming decades. Power will shift instead to networks and coalitions in a multipolar world.¹²⁶

Most of this shift is occurring within Asia, in general, and China, in particular. The economic and demographic aspects of this have been highlighted in the second part of this article, but the military aspects are also of note. Asian defence spending overtook European spending within the North Atlantic Treaty Organization in 2012;¹²⁷ China’s defence spending is increasing by 10 per cent each year and is projected to match the

¹²² See, e.g., M. Byers and G. Nolte (eds), *United States Hegemony and the Foundations of International Law* (2003); M. Ignatieff, *Empire Lite: Nation Building in Bosnia, Kosovo, Afghanistan* (2003).

¹²³ F. Zakaria, *The Post-American World* (2008).

¹²⁴ I am grateful to Joseph Weiler for discussions on this point and the broader question of US decline, which he has likened to the ‘sleepwalking’ that accompanied the march to World War I. Cf. C. Clark, *The Sleepwalkers: How Europe Went to War in 1914* (2012).

¹²⁵ M. Zenko, ‘The Myth of the Indispensable Nation’, *Foreign Policy* (6 November 2014).

¹²⁶ National Intelligence Council, *Global Trends 2030: Alternative Worlds* (2012), at ii.

¹²⁷ International Institute for Strategic Studies, *The Military Balance 2013* (2013), at 33.

USA's by as early as 2022 or at least by 2042.¹²⁸ The USA itself predicts that by 2030 Asia will have surpassed North American and Europe combined not only in population but also in GDP, military spending and technological investment.¹²⁹ China alone will probably have the largest global economy a few years earlier.¹³⁰ These changes are already underway and probably irreversible. The more interesting question is what impact, if any, such changes will have on the content of international law and the nature of its institutions. This part considers three possible futures: maintenance of the status quo, divergence in international rules and institutions and the possibility of convergence.

A *Status quo*

Implicit in the paradox that opened this article is the realization that the current situation works and that alternatives might be less desirable or come with unpalatable transaction costs. Such is the somewhat complacent finding of the recent NIC 'Global Trends' analysis, which concluded that emerging powers are eager to take their place at the top table of key multilateral institutions but do not have a competing vision: 'Although ambivalent and even resentful of the US-led international order, they have benefited from it and are more interested in continuing their economic development and political consolidation than contesting US leadership.'¹³¹

This is somewhat at odds with the declinist analysis explained elsewhere in the same report,¹³² but it is broadly consistent with shorter-term analysis of recent Chinese foreign policy in particular. Deng Xiaoping famously urged his colleagues in the 1990s to 'hide brightness and nourish obscurity' (韬光养晦). This was embraced by subsequent leaders such as Wen Jiabao,¹³³ but it may not continue to restrain China's desire to play a more expansive role on the world stage. Moving forward, there are also structural barriers to significant change in bodies like the UN Security Council. It is also possible that the economic and political interests of Asian states will keep their focus domestic rather than international.¹³⁴ However, as economies become more enmeshed through globalization and the global aspirations of these powers rise, the distinction between domestic and international is likely to erode further, with some kind of change in the international order becoming more likely.

B *Divergence*

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

¹²⁸ *Ibid.*, at 256.

¹²⁹ National Intelligence Council, *supra* note 126, at 15–17.

¹³⁰ *Ibid.*, at 15.

¹³¹ *Ibid.*, at 105.

¹³² See *supra* notes 129–130 and accompanying text.

¹³³ Ya Qin, 'China, India and WTO Law', in M. Sornarajah and J. Wang (eds), *China, India and the International Economic Order* (2010) 167, at 209.

¹³⁴ K. Mahbubani and S. Chesterman, *Asia's Role in Global Governance* (January 2010).

1 Eastphalia

The first potential inflection point is the assertion that Asia offers a genuine alternative to the Westphalian model of international order premised on state sovereignty and international law. Coined by Sungwon Kim,¹³⁵ the term ‘Eastphalia’ is sometimes invoked for its contrast with the Western-dominated legal order named after the region in the German state of North Rhine-Westphalia.¹³⁶ The precise content of an ‘Eastphalian’ order can be hard to pin down. In this way, it recalls the ‘Asian values’ debates of the 1990s, both in terms of the arguments put forward and the criticisms in response. The arguments include both the invocation of Confucianism and communitarianism as well as more general challenges to the universalism of ‘Western’ norms – in particular, human rights – or to the contingency of those norms based on stages of economic development. The criticisms were that the diversity of Asia made it simplistic to suggest one overarching set of values and that such ‘values’ were being used opportunistically to reject criticism of domestic policies. Indeed, upon closer inspection, it became apparent that the so-called ‘Asian values’ being articulated were primarily defined through what they were *not*, without a coherent vision of what positive norms or values they might entail.¹³⁷

As Tom Ginsburg and others have observed, there is little positive evidence of a new model of regionalism arising in Asia, where most states emphasize a very Westphalian model of sovereignty in their international affairs.¹³⁸ In this sense, the EU project offers a more serious alternative vision of international order.¹³⁹ Others have invoked the ‘Eastphalia’ concept in terms of the potential for Asian countries to reshape international politics in a manner that better reflects Asian power, practices and principles.¹⁴⁰ Far from an alternative model, however, this suggests instead a very conservative approach to sovereignty and non-intervention, challenging the universality of principles such as democracy, human rights and *laissez-faire* economics as part of a political project but grounded in familiar legal concepts.¹⁴¹

Such an interpretation is borne out by official statements that seek to define an ‘Asian’ approach to international law. In 2011, for example, Chinese State Council

¹³⁵ Ginsburg, ‘Eastphalia and Asian Regionalism’, 44 *UCDLR* (2011) 859, citing Kim’s unpublished 2009 doctoral thesis.

¹³⁶ See *supra* note 10. This may overlook the fact that there was in fact another region in Lower Saxony named ‘Eastphalia’.

¹³⁷ See generally H.-L. Tan, *The ASEAN Intergovernmental Commission on Human Rights* (2011), at 6–8, 24–71; Thio, ‘Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go Before I Sleep’, 2 *Yale Human Rights and Development Law Journal* (1999) 1.

¹³⁸ Ginsburg, ‘Eastphalia as the Perfection of Westphalia’, 17 *IJGLS* (2010) 27; Ginsburg, *supra* note 135, at 877.

¹³⁹ See, e.g., Slaughter and Burke-White, ‘The Future of International Law Is Domestic (or, the European Way of Law)’, 47 *Harvard International Law Journal* (2006) 327. Cf. Yee, ‘The Role of Law in the Formation of Regional Perspectives in Human Rights and Regional Systems in the Protection of Human Rights: The European and Asian Models as Illustrations’, 8 *SYBIL* (2004) 157.

¹⁴⁰ Fidler, ‘Eastphalia Emerging? Asia, International Law and Global Governance’, 17 *IJGLS* (2010) 1, at 3.

¹⁴¹ Kim, Fidler and Ganguly, ‘Eastphalia Rising? Asian Influence and the Fate of Human Security’, *World Policy Journal* (Summer 2009) 53.

member Dai Bingguo, speaking at the biennial conference of the Asian Society of International Law, emphasized the Five Principles of Peaceful Co-existence and the Ten Principles of the Bandung Conference as representing key Asian contributions to international law, which should be complemented by the 'Asian spirit [of] harmonious co-existence, good neighbourliness, consultation, dialogue, respect for diverse civilizations, unity and cooperation'.¹⁴² As Chang-Fa Lo has argued, however, the Five Principles are, in essence, a traditional interpretation of sovereignty, with Western rather than Eastern origins.¹⁴³ Rhetoric aside, they are also inconsistent with Chinese policies that embrace globalization in economic affairs and, increasingly, tolerate human rights scrutiny by international organizations – for example, through acceptance of the Universal Periodic Review.¹⁴⁴

One area in which China has attempted to draw a line is on the doctrine of R2P. Although China had a commissioner on the body that drafted the first version of this doctrine, former Vice Prime Minister and Minister for Foreign Affairs Qian Qichen, it subsequently expressed significant reservations about the doctrine in general and its use in particular cases. In the 2014 statement on the international rule of law by Wang Yi, discussed earlier in this article, he cites ongoing difficulties and challenges to the rule of law: 'Hegemonism, power politics and all forms of "new interventionism" pose a direct challenge to basic principles of international law including respect for sovereignty and territorial integrity and non-interference in other countries' internal affairs.'¹⁴⁵ Tellingly, this challenge to the new doctrine of R2P is grounded on a defence of 'basic principles' that China is seeking to uphold.

India, like China, has embraced the Five Principles, although its international profile is more muted. David Fidler and Sumit Ganguly have suggested that this is linked to the contradiction between India's commitment to democracy internally and its stance on non-intervention internationally.¹⁴⁶ David Malone has argued that India's ambiguous international role can instead be traced to a larger ambivalence about its place in the world, contrasting its vocal commitment to the UN Charter and aspirations to a permanent seat on its UN Security Council with the willingness to be, for the most part, a rule taker in international affairs.¹⁴⁷ In any case, although India was initially an advocate for change in the context of the New International Economic Order, its disillusionment with the capacity for radical change to be effected through legal means did not inspire an alternative vision of the law as such.¹⁴⁸

¹⁴² Dai, 'Asia, China and International Law', 11 *Chinese Journal of International Law* (2012) 1, at 2.

¹⁴³ Lo, *supra* note 73, at 20–21.

¹⁴⁴ See *infra* note 161.

¹⁴⁵ 'Full Text of Chinese FM's Signed Article', *supra* note 52. On the evolution of the doctrine of responsibility to protect, see L. Glanville, *Sovereignty and the Responsibility to Protect: A New History* (2014).

¹⁴⁶ Fidler and Ganguly, 'India and Eastphalia', 17 *IJGLS* (2010) 147, at 163.

¹⁴⁷ D.M. Malone, *Does the Elephant Dance?: Contemporary Indian Foreign Policy* (2011). Cf. Sidhu *et al.*, 'A Hesitant Rule Shaper?', in W.P.S. Sidhu, P.B. Mehta and B. Jones (eds), *Shaping the Emerging World: India and the Multilateral Order* (2013) 3.

¹⁴⁸ Chimni, 'International Law Scholarship in Post-colonial India: Coping with Dualism', 23(1) *Leiden Journal of International Law* (2010) 23, at 42–48.

2 Regionalization

In terms of their *Weltanschauung*, then, many Asian states, far from offering a radical alternative to the dominant international legal order, actively seek to defend a very traditional version of it. That may be true in general terms but, in particular regimes, there is some evidence of a concerted effort to carve out a degree of deference to regional sensitivities. This suggests the second potential inflection point: a regionalization of international law. There is scope within international law for regional custom,¹⁴⁹ but this properly applies as special or particular rules *vis-à-vis* general rules rather than as an alternative regime as such.¹⁵⁰ In other words, treaties and customs may develop special rules, but they depend on the traditional evidence of law – agreements, state practice and *opinio iuris* – rather than geography.

Nevertheless, in the area of human rights there have been some interesting attempts to provide for deference to regional concerns. The most important is also the primary legacy of the ‘Asian values’ debates. Even as states ultimately accepted the ‘universality’ of human rights, there were efforts to create space for differing interpretation and application of those rights. Prior to the adoption of the Vienna Declaration on Human Rights, Asian governments gathered to pass the Bangkok Declaration of 1993, which sought to dilute this universality by reference to national and regional influences:¹⁵¹

[W]hile human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.¹⁵²

This phrase, coined in Bangkok, was opposed by non-governmental organizations (NGOs) that gathered at a parallel NGO conference.¹⁵³ It nonetheless made its way through the international system, though in the report of the preparatory committee for the World Conference on Human Rights a compromise saw the formulation reversed:

While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.¹⁵⁴

¹⁴⁹ *Asylum Case (Colombia/Peru)*, Judgment, 20 November 1950, ICJ Reports (1950) 266.

¹⁵⁰ *Right of Passage over Indian Territory (Portugal v. India)*, Judgment, 12 April 1960, ICJ Reports (1960) 6, para. 94.

¹⁵¹ Muntarbhorn, ‘Rule of Law and Aspects of Human Rights in Thailand: From Conceptualization to Implementation?’, in R. Peerenboom (ed.), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (2004) 340, at 346.

¹⁵² Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights (Bangkok Declaration), UN Doc. A/CONF.157/PC/59 (1993), para. 8.

¹⁵³ Muntarbhorn, *supra* note 151, at 347.

¹⁵⁴ World Conference on Human Rights, Report of the Preparatory Committee, Fourth Session, UN Doc. A/CONF.157/PC/98 (1993), at 22.

Such language was reproduced in the Vienna Declaration and Programme of Action.¹⁵⁵ At the request of Malaysia,¹⁵⁶ similar text was also inserted into the UN General Assembly's resolution establishing the position of high commissioner of human rights.¹⁵⁷ It has since appeared in scores of UN documents, notably including the 2005 World Summit Outcome Document.¹⁵⁸

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

All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.¹⁵⁹

Amid the criticism of this document, one puzzling aspect was that in 2012 member states of ASEAN were agreeing between themselves to be held to a *lower* standard than that to which they had already committed themselves in Vienna in 1993¹⁶⁰ and against which they are regularly evaluated for the Universal Periodic Review.¹⁶¹ As we have seen, this is not unique to human rights law. A similar situation can be seen in certain international economic law agreements that establish weaker obligations between ASEAN states than they already owe one another under an existing multilateral regime.¹⁶² This is an unusual form of regionalism, but it is perhaps better regarded as a pluralistic approach to international norms rather than a geographical challenge to those norms as such. The same might be said of the third potential point of inflection: the creation of parallel regimes.

3 Parallel Regimes

The dearth of Asian regional organizations has been highlighted earlier in this article. A possible counter-example is the creation of the AIIB in 2015. Since the launch of its 'go-out' policy in the late 1990s, China has come to play an increasingly important

¹⁵⁵ Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights, UN Doc. A/CONF.157/23 (1993), para. 5.

¹⁵⁶ Malaysia: Proposed Amendments to Draft Resolution A/C.3/48/L.59 (Establishment of a United Nations High Commissioner for Human Rights), UN Doc. A/C.3/48/L.79 (1993), at 3.

¹⁵⁷ GA Res. 48/141, 7 January 1994, para. 3(b). In this resolution, the General Assembly decided that the high commissioner should be guided by the recognition that, 'while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms'.

¹⁵⁸ 2005 World Summit Outcome Document, UN Doc. A/RES/60/1 (2005), para. 121.

¹⁵⁹ ASEAN Human Rights Declaration, 18 November 2012, art. 7.

¹⁶⁰ Renshaw, *supra* note 90, at 568–569.

¹⁶¹ Quane, 'The Significance of an Evolving Relationship: ASEAN States and the Global Human Rights Mechanisms', 15(2) *HRLR* (2015) 283.

¹⁶² See *supra* notes 90–91.

role in international development.¹⁶³ Although the Chinese government has emphasized that the AIIB is intended to complement, rather than rival, the existing international financial institutions, the combined total capital for the AIIB, the Silk Road Fund and the China-led Development Bank for Brazil, Russia, India, China and South Africa (BRICS) could be greater than that of the World Bank.¹⁶⁴ The USA, correctly perceiving this as an effort on the part of China to project its economic influence across Asia, attempted to exert pressure on countries not to join the bank. In an extraordinary defeat for Washington, even staunch allies like Britain and Australia, as well as Singapore and South Korea, ultimately agreed to join as founding members of the AIIB. As the *Economist* noted, the USA was left looking ‘churlish and ineffectual’.¹⁶⁵ Japan remains outside the AIIB, presumably in order to preserve its strong ties to the USA and its privileged role in the Asian Development Bank (ADB).

Much as the Bretton Woods institutions were established with an eye to the interests of their American and European founders, the AIIB essentially provides China with a veto: it holds 30 per cent of the voting power, 75 per cent being the threshold for key decisions.¹⁶⁶ Such decisions include appointing the president of the Bank, who is also required to be from the Asian region.¹⁶⁷ Interestingly, ‘Asia’ is defined for the purposes of the AIIB as encompassing the UN’s ‘Asia’ and ‘Oceania’ groupings, the key implication of which is that it includes Australia and New Zealand (which are typically treated as appendages of Western Europe).¹⁶⁸ It is possible that the creation of the AIIB signals a shift in the international order, but this appears to be more of a political and economic shift than a legal one. The AIIB itself is structured in a manner comparable to other institutions, notably the ADB. Critics have warned that the AIIB may be less rigorous in its application of environmental and labour standards, but it is not clear that this would amount to an ‘Asian values’-style challenge to the legitimacy of these standards as such.

Another prominent example that might have represented a genuine effort to opt out of the international order and establish a parallel regime could be seen in China’s behaviour in the South China Sea.¹⁶⁹ Some of China’s early claims appeared to suggest a rejection of norms that have been codified in the UN Convention on the Law of the Sea (UNCLOS).¹⁷⁰ After publishing its famous ‘nine-dash line’ map in 2009, it was initially unclear whether China was asserting that the entire body of water so indicated was part of its territorial sea or if it was merely claiming islands within the line and

¹⁶³ See, e.g., Holslag, ‘Commerce and Prudence: Revising China’s Evolving Africa Policy’, 8(3) *International Relations of the Asia-Pacific* (2008) 325, at 328.

¹⁶⁴ H. Yu, *The Asian Infrastructure Investment Bank to Spearhead China’s ‘One Belt, One Road’ Initiative*, IEAI Background Brief no. 1020, 29 April 2015, para. 1.14. The authorized capital of the various institutions is AIIB (US \$100 billion), Silk Road Fund (US \$40 billion), New Development Bank (a.k.a., BRICS Development Bank US \$100 billion). The World Bank’s currently subscribed capital is US \$223 billion.

¹⁶⁵ ‘The Infrastructure Gap’, *Economist* (21 March 2015).

¹⁶⁶ Asian Infrastructure Investment Bank: Articles of Agreement, 29 June 2015, Arts 26, 28.

¹⁶⁷ *Ibid.*, Art. 29.

¹⁶⁸ *Ibid.*, Art. 1(2).

¹⁶⁹ See generally S. Jayakumar, T. Koh and R.A. Beckman (eds), *The South China Sea Disputes and Law of the Sea* (2014); S. Talmon and B.B. Jia (eds), *The South China Sea Arbitration: A Chinese Perspective* (2014).

¹⁷⁰ Convention on the Law of the Sea 1982, 1833 UNTS 3.

the associated territorial seas.¹⁷¹ In 2013, the Philippines initiated compulsory arbitration under Annex VII of UNCLOS and China refused to participate. The following year, China commenced land reclamation projects in the area, referred to by some as the 'great wall of sand'.

Such a series of events might have constituted outright rejection of UNCLOS and the tribunal constituted under it as well as literally changing the landscape. However, China subsequently softened its position. On the territorial claims, it began to adopt a more nuanced position that backed away from the assertion that the nine-dash line marked its territorial waters. On the arbitration, it refused to take part but published a 'position paper' that the tribunal used as a proxy for its legal position.¹⁷² And on the land reclamation projects, it has not suggested that any artificial islands so created will attract more than the limited rights accorded to such features in UNCLOS.¹⁷³ The gradualist approach to these issues is consistent with its general strategy in the South China Sea, which has been described elsewhere as 'salami-slicing': taking small, incremental actions that advance core objectives without any one step being a *casus belli*.¹⁷⁴

It remains to be seen how China will react if it perceives that its core interests are threatened. With regard to the South China Sea, China bluntly rejected the decision of the arbitral tribunal released in July 2016, but its strongly worded statements noticeably did not make reference to the nine-dash line, nor does it seem likely to withdraw from UNCLOS given the ongoing benefits it enjoys from the deep seabed regime.¹⁷⁵ In this way, China continues to demonstrate a tolerance and even a preference for legal ambiguity with regard to what, precisely, it is claiming in the South China Sea. This is broadly consistent with its position, for example, on the idiosyncratic status of Taiwan. In general, then, suggestions that China is seeking to radically undermine the international order seem overstated.¹⁷⁶

C Convergence

A third possible scenario, then, is that there will be some kind of convergence of Western and Asian interests in the international order, maintaining the basic structural foundations of sovereign equality of states but with Asian states gradually taking a more prominent role. In 2010 at the second BRIC summit, for example, the

¹⁷¹ See Beckman, 'The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea', 107 *AJIL* (2013) 142; McDorman, 'Rights and Jurisdiction over Resources in the South China Sea: UNCLOS and the "Nine-dash Line"', in Jayakumar, Koh and Beckman, *supra* note 169, 144.

¹⁷² Ministry of Foreign Affairs of the People's Republic of China, Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, 7 December 2014.

¹⁷³ There have been suggestions, however, that China is asserting sovereignty over the airspace above the artificial islands. See Roach, 'China's Shifting Sands in the Spratlys', 19(15) *ASIL Insights* (2015), available at www.asil.org/insights/volume/19/issue/15/chinas-shifting-sands-spratlys (last visited 20 August 2016).

¹⁷⁴ B. Glaser, Testimony before the U.S.-China Economic and Security Review Commission, Hearing on China's Relations with Southeast Asia, Washington, DC, 13 May 2015.

¹⁷⁵ PCA, *Philippines v. China*, Award, 12 July 2016, PCA Case no. 2013-19.

¹⁷⁶ Cf. Scott and Wilkinson, 'China Threat? Evidence from the WTO', 47(4) *Journal of World Trade* (2013) 761.

leaders articulated a common vision that ‘the world is undergoing major and swift changes that highlight the need for corresponding transformations in global governance in all relevant areas’. Nevertheless, they went on to stress that these changes should take place within the existing framework of laws and institutions.¹⁷⁷ This last section will briefly sketch out some potential examples of such convergence: China’s more assertive role on the UN Security Council; developments in international investment law that appear to show a realigning of Western and other interests; and the possible impact on diplomacy as Asian states take a more prominent role on the international stage. In each case, it is far too early to draw firm conclusions on the impact and significance of convergence, but the evidence of a change is growing.

1 *China on the UN Security Council*

For much of the Cold War, China was a cipher on the UN Security Council. Despite taking the permanent seat previously held by Taiwan in 1971, China’s reticence on the Council bordered on non-participation. In its first decade on the Council (1971–1981), for example, China abstained on 69 of nearly 200 resolutions that the Council adopted. As is well known, the Council was frequently paralysed during the Cold War. Of more interest, then, is the period 1990 onwards. Here, it is striking how China’s behaviour has changed over time. From 1990 to 2000, it continued to be the most likely member of the Permanent Five to abstain, declining to support or reject 44 resolutions – about 6 per cent of those adopted. In the period 2001 to 2014, this dropped to 2 per cent or 13 abstentions (while Russia abstained on 16).¹⁷⁸

It is often noted that China has cast the fewest vetoes on the UN Security Council, which is correct at around 4 per cent of those cast. In total, China has cast nine vetoes, far fewer than France (16), Britain (29), the USA (79) and Russia (103). Yet all but one of those Chinese vetoes was cast in the past two decades. If analysis is confined to the period 2000–2014, China has cast 27 per cent of vetoes: six, compared with 11 by the USA and five by Russia.¹⁷⁹

Taking stronger stands is consistent with China’s greater engagement in peace and security issues more generally. In 1990, China had a total of five military observers deployed in UN peacekeeping missions (all in the UN Truce Supervision Organization in Jerusalem). In 2000, this number had grown to 43 observers and 55 civilian police. By the end of 2014, China was deploying 174 police and almost 2,000 troops – only 2 per cent of the total deployed UN personnel, but more than all the other Permanent

¹⁷⁷ Second BRIC Summit of Heads of State and Government: Joint Statement, 15 April 2010. Cf. Sornarajah, ‘The Role of the BRICS in International Law in a Multipolar World’, in V.I. Lo and M. Hiscock (eds), *The Rise of the BRICS in the Global Political Economy: Changing Paradigms?* (2014) 288.

¹⁷⁸ Data compiled from voting records available at www.un.org/en/sc/meetings/searchvote.asp (last visited 20 August 2016). Ministry of Foreign Affairs of the People’s Republic of China: P5 abstentions 1990–2000: China – 44; Russia – 23; France – 3; USA – 3; Britain – 0. P5 abstentions 2001–2014: Russia – 16; China – 13; USA – 7; France – 4; Britain – 0.

¹⁷⁹ Vetoes cast by end of 2014. Data available from the Dag Hammarskjöld Library website at <http://research.un.org/en/docs/sc/quick/veto> (last visited 20 August 2016).

Five members combined.¹⁸⁰ (Asia contributes around 40 per cent of peacekeepers overall, most coming from India, Pakistan and Bangladesh. Only Africa contributes more, making up 47 per cent, although the vast majority of peacekeepers are deployed in that continent.)

Moving forward, China's influence on UN activities seems certain to increase, bolstered by Western reluctance to repeat military adventures in Afghanistan, Iraq and Libya. Though large-scale peace operations in Africa will continue, greater Chinese involvement will mean that controversial cases such as Syria will see more limited engagement and that situations such as Zimbabwe and Myanmar, which can be characterized as 'internal', are less likely to play a significant role on the Security Council's agenda. There will be exceptions. Indeed, China's vote in favour of referring the situation in Libya to the ICC in Resolution 1970 (2011) was a watershed showing that its adherence to a robust view of sovereignty is not absolute. However, an increased Chinese voice on the Security Council could see a reining in of the 'new interventionism' that characterized the Council's activities from the end of the Cold War onwards in favour of a more traditional deference to sovereignty.

2 Foreign Investment Law

A second area in which there has been an interesting realignment of interests that suggests convergence is in foreign investment law. Since the 1990s, divisions within international law on foreign investment law have grown more pronounced, pushing back against the neo-liberal philosophy that had informed the regime and challenging the investor-friendly approach adopted by many arbitral tribunals. States such as India, South Africa and Indonesia have frozen their investment treaty programmes and are considering withdrawing from those treaties currently in force; several Latin American states have denounced their ICSID commitments.¹⁸¹ Interestingly, some Western states have now expressed similar reservations at the excessive protection of foreign investors, notably Australia, which recently found itself on the receiving end of investor–state arbitration in the *Philip Morris* case.¹⁸² In its most recent World Investment Report, the UN Conference on Trade and Development referred to the period 1990–2007 as an 'era of proliferation' that was now being followed by an era of 'reorientation'.¹⁸³ (Similar challenges may be underway in areas such as the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights, under which developing countries are meant to receive freer access to developed markets in exchange for protecting the intellectual property rights of foreign nationals.¹⁸⁴)

¹⁸⁰ Data compiled from UN Department of Peacekeeping, available at www.un.org/en/peacekeeping/resources/statistics/contributors.shtml (last visited 20 August 2016).

¹⁸¹ M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (2015), at 5, 142.

¹⁸² PCA, *Philip Morris v. Australia*, Award on Jurisdiction and Admissibility (UNCITRAL), 17 December 2015, PCA Case no. 2012-12.

¹⁸³ UN Conference on Trade and Development, *World Investment Report 2015* (2015), at 121.

¹⁸⁴ Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Lawmaking', 29 *Yale Journal of International Law* (2004) 1. Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, 1869 UNTS 299.

Although such developments have been heralded by some as marking the end of the Washington Consensus on economic development, suggestions that this is being replaced by a ‘Beijing Consensus’ are overstated. Indeed, assertions that the Washington Consensus would be replaced by a unitary development model miss the fundamental criticism of that approach, which was precisely that it failed to take account – at least in its application – of individual circumstances. As Sarah Babb has argued, a true successor to the Washington Consensus would be founded on orthodox economic theory, embraced by policymakers and enforced by transnational authorities. Given the divergent views among theorists, the transformed political environment among national actors and the more restrained role of the international financial institutions, it seems more likely that *no* transnational policy paradigm will replace the Washington Consensus.¹⁸⁵ On the contrary, a more heterogeneous and contested set of regimes is more likely, with China and other actors playing a role in proportion to their growing political and economic influence.¹⁸⁶

3 Diplomacy

A third potential field of convergence is in the style of international diplomacy. As the political and economic clout of Asian states increases, it is possible that aspects of diplomacy and governance may start to show their influence. Comparable to the ‘ASEAN way’ described earlier,¹⁸⁷ this might include positive aspects such as respect for diversity, consensus-building being preferred over conflict, pragmatic approaches over lofty principles and gradualism rather than abrupt change. The danger is that such predilections can prevent meaningful agreement within a reasonable timeframe or that a superficial consensus masks the true politics at work.¹⁸⁸

There is some evidence of a more consensual approach in development policies, for example, with greater flexibility in political conditionality imposed by both donor governments and international financial institutions in development assistance.¹⁸⁹ This is not to suggest that the growing importance of China and other actors means that conditionality will be dropped entirely. On the contrary, although China tends to impose fewer conditions for development assistance, it still has a clear political agenda in its lending,¹⁹⁰ though perhaps not as transparent as its Western counterparts.¹⁹¹

¹⁸⁵ Babb, ‘The Washington Consensus as Transnational Policy Paradigm: Its Origins, Trajectory and Likely Successor’, 20(2) *Review of International Political Economy* (2013) 268, at 291.

¹⁸⁶ Peerenboom and Bugari, ‘Development after the Global Financial Crisis: The Emerging Post Washington, Post Beijing Consensus’, 19 *UCLA Journal of International and Foreign Affairs* (2015) 89; Beeson and Li, ‘What Consensus? Geopolitics and Policy Paradigms in China and the United States’, 91(1) *International Affairs* (2015) 93.

¹⁸⁷ See *supra* note 82.

¹⁸⁸ See Mahbubani and Chesterman, *supra* note 134.

¹⁸⁹ Molenaers, Dellepiane and Faustc, ‘Political Conditionality and Foreign Aid’, 75 *World Development* (2015) 2.

¹⁹⁰ Mattlin and Nojonen, ‘Conditionality and Path Dependence in Chinese Lending’, 24(94) *Journal of Contemporary China* (2015) 701.

¹⁹¹ Dreher, Sturm and Raymond Vreeland, ‘Politics and IMF Conditionality’, 59(1) *Journal of Conflict Resolution* (2015) 120.

The larger impact of an expansion in the key actors of international diplomacy will not be limited to Asia, of course. (Brazil, for example, has of late played a far more significant role than in the past.) But if there is a substantive impact of the rise of Asian powers, it is likely to be grounded on the Five Principles of Peaceful Coexistence discussed earlier.¹⁹² Uncontroversial at the time, these principles embody a very traditional notion of sovereignty. As a challenge to the modern international legal order, then, this is fairly modest. However, as a vehicle of convergence, with Asian and other powers seeking political influence commensurate to their economic clout, Westphalian sovereignty applied equally at the global level may be both more realistic and more conducive to international cooperation, at least in areas where overlapping interests can be identified.¹⁹³ In others, however, particularly where principles of sovereignty and non-intervention are invoked as a shield to prevent interference in domestic policies, such developments might slow progress towards global solutions to global problems or prevent it completely.

4 Conclusion

In June 2011, Christine Lagarde was appointed for a five-year term as managing director of the IMF. It was the eleventh consecutive appointment of a European to the position, matched by the 12 US citizens who have led the World Bank. Lagarde's appointment was unusual in that it was the first in which there was a serious suggestion that a non-European might take on the position of managing director. Although the French Lagarde took the position, it has become increasingly clear that such key roles in the international financial institutions cannot remain purely in the gift of the West. In July 2015, Lagarde's deputy himself told the British Broadcasting Corporation that it was likely that her successor would come from outside Europe.¹⁹⁴

The appointment of the 12th managing director of the IMF will only be one more data point in the evolving international order. However, as this article has argued, that order is in need of change because the most populous and powerful region on the planet currently has the least stake in it. The reasons for this are partly historical, as Asian countries' experience of international law encouraged the view that its body of rules and institutions were selective and instrumental. At the same time, Asia's under-participation and under-representation are also attributable to the diversity and power dynamics of the continent as well as the absence of push factors to bring about change.

The decline of the USA and the rise of China have altered this scenario, with growing pressure to offer China and other Asian states more of a say in global issues. To some extent, it is also being matched by Asian states playing a more prominent role in global institutions. Unlike the reactionary Asian values debates of the 1990s, this

¹⁹² See *supra* note 72.

¹⁹³ Cf. Chin, 'The Economic Diplomacy of the Rising Powers', in A.F. Cooper, J. Heine and R. Thakur (eds), *The Oxford Handbook of Modern Diplomacy* (2013) 881.

¹⁹⁴ J. Mackenzie, 'Next IMF Boss Likely to Come from Outside Europe – Deputy Head', *Reuters* (25 July 2015).

now takes the form of greater engagement and increasing levels of participation. In January 2016, as this article was being finalized, the Singapore Academy of Law convened a major conference on Legal Convergence in an Asian Century. Building on the launch of the ASEAN economic community, the conference also created a new institute to promote convergence. Revealingly, the language of ‘convergence’ was chosen as opposed to ‘harmonization’, a concept linked to supranational entities like the EU. The new institute, a counterpart to the American Law Institute and the European Law Institute, was named the Asian *Business Law Institute*. Consistent with the findings in this article, these two strategic choices reflected an understanding of the ongoing wariness of top-down approaches that challenge sovereignty as well as the relative acceptability of changes that promote commercial activity, as opposed to, say, human rights protections.¹⁹⁵

In the much-heralded Asian century, many have argued that Asian states deserve greater representation in the institutions of global governance. That wish is clearly going to be fulfilled. Assumptions that the status quo can continue indefinitely are overly optimistic. Yet suggestions that Asian states will abandon the structures of international order are also overblown. More likely is a larger convergence, an adaptation of existing structures and norms to the new reality – evolution rather than revolution.

Not all of this will be positive. Though the chances of a radically different approach to global governance seem remote, the traditional view of sovereignty espoused by many Asian states may slow the expansion of human rights and other norms, although it does not look set to reverse them completely. Nor will any change necessarily be coherent. As this article has been at pains to stress, there is no one ‘Asian’ view of the world. Greater involvement of Asian states will primarily increase pluralism in the international order.

And so the category remains a useful one, as the various countries experiment with stronger regionalism, as seen in ASEAN and its various extensions, and in taking a leadership role, most prominently in the case of China. But it would be misleading in the extreme to assume that ‘Asia’, when it is properly represented in the institutions of global governance, will have anything specific to say.

¹⁹⁵ Information about the institute and the conference is available at <http://abli.asia> (last visited 20 August 2016). Disclosure: the author was a member of the organizing committee for the conference and is a vice president of the Singapore Academy of Law.